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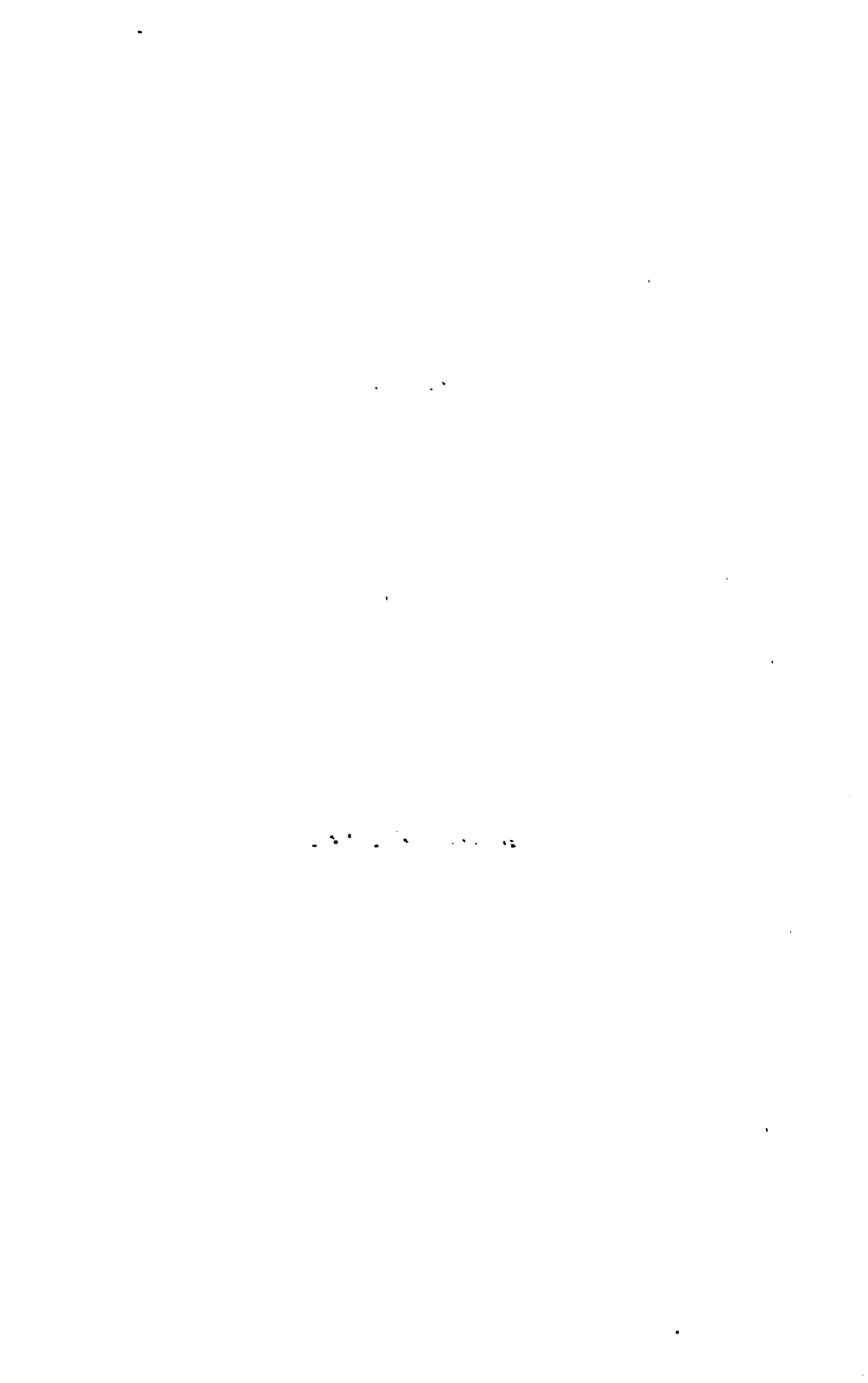
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# LAWYERS REPORTS

## ANNOTATED

### NEW SERIES.

#### WASHINGTON SUPREME COURT.

N. GAVAZZA, Respt.,

v.

W. H. PLUMMER, Appt.

(53 Wash. 14, 101 Pac. 370.)

#### Contract — Liability — description.

One is personally bound by a contract

*Note. — Personal liability of one who signs a contract by adding words indicating representative capacity, to his signature.*

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reciting that I (the person), treasurer of a certain corporation, do hereby agree, and signed with his name, "Treas."

(April 29, 1909.)

**A** PPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiff's favor in an action brought to recover a sum alleged to be

#### III.—continued.

- b. Simple agreement in body of contract.

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#### (1) Notes.

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- (a) Ordinary contracts, 20.
- (b) Bills and notes.

#### (1) Notes.

a. Liability of one who signs as maker, 20.

b. Liability of one who signs as indorser, 32.

due under a contract to redeem certain stock upon request. Affirmed.

The facts are stated in the opinion.

Messrs. **Plummer & McDermont** and **Gallagher & Thayer**, for appellant:

If persons promise in an official capacity and sign their names with the addition of a designation as such, the promise is restrictive, and not binding upon the signers personally.

*Blanchard v. Kaull*, 44 Cal. 440; *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49; *Barlow v. Congregational Soc.* 8 Allen, 460; *Sanborn v. Neal*, 4 Minn. 126, Gil. 83, 77 Am. Dec. 502; *McDonough v. Templeman*, 1 Harr. & J. 156, 2 Am. Dec.

510; *Hopkins v. Mehaffy*, 11 Serg. & R. 126; *Aggs v. Nicholson*, 1 Hurlst. & N. 165, 25 L. J. Exch. N. S. 348, 4 Week. Rep. 776; *Lindus v. Melrose*, 3 Hurlst. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. N. S. 326, 6 Week. Rep. 441; *Hills v. Bannister*, 8 Cow. 31; *Dutton v. Marsh*, L. R. 6 Q. B. 361, 40 L. J. Q. B. N. S. 175, 24 L. T. N. S. 470, 19 Week. Rep. 754, 4 Eng. Rul. Cas. 278; *Haight v. Sahler*, 30 Barb. 218; *Dubois v. Delaware & H. Canal Co.* 4 Wend. 285; *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *Fullam v. West Brookfield*, 9 Allen, 1; *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330;

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### I. Introduction.

#### a. In general.

The question discussed in this note, as indicated in the title, is confined to the per-

Lawrence v. Taylor, 5 Hill, 107; Evans v. Wells, 22 Wend. 324; Osborne v. High Shoals Min. & Mfg. Co. 50 N. C. (5 Jones, L.) 177; Magill v. Hinsdale, 6 Conn. 404a, 16 Am. Dec. 70; Chouteau v. Allen, 70 Mo. 290; McClure v. Herring, 70 Mo. 18, 35 Am. Rep. 404; Martin v. Almond, 25 Mo. 313.

Mr. G. W. Sommer, for respondent:

In order to exempt an agent from liability upon an instrument executed, within the scope of his agency, he must not only name his principal, but he must express, by some form of words, that the writing is the act of the principal, though done by the hand of the agent.

sonal liability of one who signs an instrument by adding a word or words indicating representative capacity to his signature. The cases included, therefore, have been confined in general to actions against such signers. Some actions against the purported principal in which the form of execution receives special attention have been included as bearing upon the liability of the signer in such cases, but the liability of the purported principal is beyond the scope of the note.

As the form of words in which contracts may be made and executed is almost infinitely varied, such question is whether the person signing professes and intends to bind himself and adds the name of another to indicate the capacity or trust in which he acts or the person for whose account his promise is made, or whether the words referring to a principal are intended to indicate that he does a mere ministerial act in giving effect and authenticity to the act, promise, and contract of another. Bradlee v. Boston Glass Manufactory, 16 Pick. 347.

A signing in which the name of the principal is followed by the name of the agent separated by the word "by" or "per" is uniformly regarded as a proper method of executing the agency so as to impose no personal liability upon the agent, and cases in which such form of signature appears have been excluded from this note.

See note to Tiger v. Button Land Co. 41 L.R.A.(N.S.) 805, as to form of execution of deed by attorney in fact or agent.

The following notes will also be found useful in connection with the questions arising on this subject:

Note to Rich v. Sowles, 15 L.R.A. 850, as to the effect of the qualifying words "as executor" and "as administrator."

Note to Matthews v. Dubuque Mattress Co. 19 L.R.A. 676, as to the personal liability of officers of a corporation on note made for the corporation.

As to the liability of principal on negotiable paper executed by an agent, see note to New York L. Ins. Co. v. Martindale, 21 L.R.A.(N.S.) 1045.

As to the personal liability to the other contracting party of one who, without authority, assumes to contract as agent for

Fullam v. West Brookfield, 9 Allen, 1; Tippetts v. Walker, 4 Mass. 595; Simonds v. Heard, 23 Pick. 120, 34 Am. Dec. 41; Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175; Chamberlain v. Pacific Wool-Growing Co. 54 Cal. 107; Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529; Hills v. Bannister, 8 Cow. 31; Barker v. Mechanic F. Ins. Co. 3 Wend. 94, 20 Am. Dec. 664; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Morell v. Coddington, 4 Allen, 403; Haverhill Mut. F. Ins. Co. v. Newhall, 1 Allen, 130; Hall v. Jameson, 151 Cal. 606, 12 L.R.A.(N.S.) 1190, 121 Am. St. Rep. 137, 91 Pac. 518; Heffner v. Brownell, 70 Iowa, 591, 31 N. W. 947; Rich v. Sowles, 64 Vt. 408, 15 L.R.A. 850,

another, see note to Haupt v. Vint, 34 L.R.A.(N.S.) 518.

The determination of the liability of the alleged agent depends upon the construction of a written contract, and in accordance with the rule applicable to such contracts generally, that the intent of the parties as derived from the instrument determines the construction, the weight of authority is that the intention of the parties as thus derived from the instrument determines the liability of such signer. Savings Bank v. Central Market Co. 122 Cal. 28, 54 Pac. 273; Tannatt v. Rocky Mountain Nat. Bank, 1 Colo. 278, 9 Am. Rep. 156, compare with Hager v. Rice, *infra*; Hovey v. Magill, 2 Conn. 680; Johnson v. Smith, 21 Conn. 627; Hewitt v. Wheeler, 22 Conn. 557; Creswell v. Holden, 3 MacArth. 579; Partridge v. Hollinshead, 105 Ga. 278, 30 S. E. 787; King v. Handy, 2 Ill. App. 212; Williams v. Miami Powder Co. 36 Ill. App. 107; Hatley v. Pike, 162 Ill. 241, 53 Am. St. Rep. 304, 44 N. E. 441; Reed v. Fleming, 209 Ill. 390, 70 N. E. 667 (in absence of any evidence); Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; Pearce v. Welborn, 42 Ind. 331; Hays v. Crutcher, 54 Ind. 260; Hayes v. Matthews, 63 Ind. 412, 30 Am. Rep. 226; Hayes v. Brubaker, 65 Ind. 27; Armstrong v. Kirkpatrick, 79 Ind. 527; Williams v. Second Nat. Bank, 83 Ind. 237; Avery v. Dougherty, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123; Wing v. Glick, 56 Iowa, 473, 41 Am. Rep. 118, 9 N. W. 384; Hunter v. Miller, 6 B. Mon. 612; Carson v. Lucas, 13 B. Mon. 213; Taylor v. Williams, 17 B. Mon. 489; Church v. Graham, cited in 1 Met. (Ky.) 80; Whitney v. Sudduth, 4 Met. (Ky.) 296; Offutt v. Ayres, 7 T. B. Mon. 356; Owings v. Grubb, 6 J. J. Marsh. 31; Trask v. Roberts, 1 B. Mon. 201; Lewis v. Harris, 4 Met. (Ky.) 353; Yowell v. Dodd, 3 Bush, 581, 96 Am. Dec. 256; Caphart v. Dodd, 3 Bush, 584, 96 Am. Dec. 258; Burbank v. Posey, 7 Bush, 372; Bailey v. Thomas, 10 Ky. L. Rep. 543; Brondrup v. Tureman, 12 Ky. L. Rep. 477; Warford v. Temple, 24 Ky. L. Rep. 2268, 73 S. W. 1023; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521 (statutory); Rogers v. March, 33 Me. 106; Sturdivant v. Hull, 59 Me. 172, 8 Am. Rep. 409; Winship v. Smith, 61 Me.

23 Atl. 723; *McCandless v. Belle Plaine Canning Co.* 78 Iowa, 161, 4 L.R.A. 396, 16 Am. St. Rep. 429, 42 N. W. 635; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320.

**Morris, J.**, delivered the opinion of the court:

The only question involved in this appeal is: Can the appellant be held to a personal liability upon the following contract:

Spokane, Wash., May 3, 1906.

I, W. H. Plummer, treasurer of the Spokane Showcase & Cabinet Company, do hereby agree with Mr. N. Gavazza that, in consideration of his subscription for five hundred (500) shares of the capital stock of the Spo-

kane Showcase & Cabinet Company, I will, upon demand, accept a return of his stock and refund to him the money he has paid therefor, as follows: Two hundred and fifty dollars (\$250) within one year, and two hundred and fifty dollars (\$250) within eighteen (18) months after he shall exercise his option to return said stock. Notice of which shall be mailed in writing delivered to me.

W. H. Plummer, Treas.

Upon both principle and authority there can be only one answer to this question, and that is that he can. "It is too well settled to need any reference to authorities to show that an agent may, by the form of the promise and manner of his signature, fix

118; *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 77; *Purinton v. Security L. Ins. & Annuity Co.* 72 Me. 22 (sealed instrument); *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *De Bebian v. Gola*, 64 Md. 262, 21 Atl. 275; *Tippets v. Walker*, 4 Mass. 595; *Mann v. Chandler*, 9 Mass. 335; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Bal-lou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Rice v. Gove*, 22 Pick. 158, 33 Am. Dec. 724; *Jefts v. York*, 4 Cush. 372, 50 Am. Dec. 791; *Seaver v. Coburn*, 10 Cush. 324; *Fiske v. Eldridge*, 12 Gray, 474; *Haverhill Mut. F. Ins. Co. v. Newhall*, 1 Allen, 130; *Ellis v. Pulsifer*, 4 Allen, 165; *Draper v. Massachusetts Steam Heating Co.* 5 Allen, 338; *Slawson v. Loring*, 5 Allen, 340, 81 Am. Dec. 750; *Barlow v. Congregational Soc.* 8 Allen, 460; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360; *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49; *Goodenough v. Thayer*, 132 Mass. 152; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Farmers' & M. Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457. See *Keidan v. Winegar*, infra; *Bingham v. Stewart*, 13 Minn. 106, Gil. 96 (in absence of evidence); *Pershing v. Swenson*, 58 Minn. 310, 59 N. W. 1084 (sealed instrument); *Grubbs v. Wiley*, 9 Smedes & M. 29 (sealed instrument); *McGee v. Larramore*, 50 Mo. 425, compare with *McClellan v. Reynolds*, 49 Mo. 312, infra; *Klostermann v. Loos*, 58 Mo. 290 (*dictum*); *Blakely v. Bennecke*, 59 Mo. 193; *Webster v. Switzer*, 15 Mo. App. 346; *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 959; *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512; *Gillig v. Lake Bigler Road Co.* 2 Nev. 214; *Dow v. Moore*, 47 N. H. 419; *Reeve v. First Nat. Bank*, 54 N. J. L. 208, 16 L.R.A. 143, 33 Am. St. Rep. 675, 23 Atl. 853; *Moss v. Livingston*, 4 N. Y. 209, 2 Mor. Min. Rep. 119 (in absence of evidence); *Randall v. Snyder*, 1 Lans. 163; *Horton v. Garrison*, 23 Barb. 176; *Campbell v. Porter*, 46 App. Div. 628, 61 N. Y. Supp. 712; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908 (when in hands of bona fide holder); *Merchants' Nat. Bank v. Clark*, 139 N. Y. 42 L.R.A. (N.S.)

314, 36 Am. St. Rep. 710, 34 N. E. 910 (when in hands of bona fide holder); *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038 (when in hands of bona fide holder); *Hicks v. Kenan*, 139 N. C. 337, 51 S. E. 941; *Collins v. Buckeye State Ins. Co.* 17 Ohio St. 215, 93 Am. Dec. 612; *Ohio Nat. Bank v. Cook*, 38 Ohio St. 442; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 583; *Aungst v. Creque*, 72 Ohio St. 551, 74 N. E. 1073; *Second Nat. Bank v. Wilcox*, 1 Ohio C. D. 511; *Barnhisel v. Commercial Nat. Bank*, 14 Ohio C. C. 124, 7 Ohio C. D. 533; *Eells v. Shea*, 20 Ohio C. C. 527, 11 Ohio C. D. 304; *Keokuk Falls Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484; *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664; *Wright v. Weakly*, 2 Watts, 89 (sealed instrument); *De Roy v. Richards*, 8 Pa. Super. Ct. 119 (bona fide holder); *Chatham Nat. Bank v. Gardner*, 31 Pa. Super. Ct. 135 (bona fide holder); *Anthony v. Comstock*, 1 R. I. 454; *Fash v. Ross*, 2 Hill, L. 294; *Taylor v. McLean*, 1 McMull. L. 352; *Robertson v. Pope*, 1 Rich. L. 501, 44 Am. Dec. 257; *Ligon v. Irvine*, 1 Rich. L. 502; *Wilson v. Fite*, — Tenn. —, 46 S. W. 1056; *Eckhart v. Reidel*, 16 Tex. 62; *Marx v. Luling Co-op. Asso.* 17 Tex. Civ. App. 417, 43 S. W. 596; *Early v. Wilkinson*, 9 Gratt. 68; *Liebscher v. Kraus*, 74 Wis. 387, 5 L.R.A. 496, 17 Am. St. Rep. 171, 43 N. W. 166; *Post v. Pearson*, 108 U. S. 418, 27 L. ed. 774, 2 Sup. Ct. Rep. 799, affirming 2 Dak. 220, 9 N. W. 684; *Falk v. Moehs*, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319; *Mahony v. Kekule*, 14 C. B. 390, 2 C. L. R. 343, 23 L. J. C. P. N. S. 54, 18 Jur. 313, 2 Week. Rep. 155; *Armour v. Gates*, 8 U. C. C. P. 548; *Lennard v. Robinson*, 5 El. & Bl. 125, 3 C. L. R. 1363, 24 L. J. Q. B. N. S. 275, 1 Jur. N. S. 853; *Mare v. Charles*, 5 El. & Bl. 978, 25 L. J. Q. B. N. S. 119, 2 Jur. N. S. 234, 4 Week. Rep. 267, 2 Mor. Min. Rep. 124; *Deslandes v. Gregory*, 2 El. & Bl. 610, affirming 2 El. & Bl. 602, 30 L. J. Q. B. N. S. 36, 6 Jur. N. S. 51, 2 L. T. N. S. 634, 8 Week. Rep. 585; *Bottomley v. Fisher*, 1 Hurlst. & C. 211, 31 L. J. Exch. N. S. 417, 8 Jur. N. S. 895, 6 L. T. N. S. 688, 10

upon himself a personal liability." Haverhill Mut. F. Ins. Co. v. Newhall, 1 Allen, 130. The appellant has brought himself within this rule. The words of his undertaking, "I will, upon demand, accept a return of his stock and refund to him the money he has paid," would seem to indicate, irrespective of the application of the rule, that it was his purpose and intention to become personally bound, at least to lead respondent to infer (as respondent testified) that the obligation was personal. The addition of "Treas." to his signature neither adds to nor detracts from that obligation. It is simply, as the courts say, *descriptio personæ*. If it is desired to escape personal liability in the contract of an agent or other representative, the intention so to

do must be expressed in clear and explicit language; otherwise, a personal obligation arises. Conner v. Clark, 12 Cal. 163, 73 Am. Dec. 529. And this is so even though he is known to be an agent, and acts avowedly as such. Hobson v. Hassett, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320; citing Story, Parsons, and numerous other cases. In the case of Barker v. Mechanic F. Ins. Co. 3 Wend. 94, 20 Am. Dec. 664, a note reading, "I, John Franklin, president of the Mechanic Fire Insurance Company, promise to pay," etc., was held to be the note of John Franklin. The court says: "He describes himself as president of the company, but . . . he should have contracted in their name, or at least in their behalf." So here appellant describes him-

Week. Rep. 669; Price v. Taylor, 5 Hurlst. & N. 540, 29 L. J. Exch. N. S. 331, 6 Jur. N. S. 402, 2 L. T. N. S. 221, 8 Week. Rep. 419; Allan v. Miller, 22 L. T. N. S. 825; Jones v. Jackson, 22 L. T. N. S. 828; Wilson v. Zulueta, 14 Q. B. 405, 19 L. J. Q. B. N. S. 49, 14 Jur. 366; Green v. Kopke, 18 C. B. 549, 25 L. J. C. P. N. S. 297, 2 Jur. N. S. 1049, 4 Week. Rep. 598 (one judge states intention is to be derived from instrument and surrounding circumstances).

Where the instrument is ambiguous, parol evidence as to the intention of the parties may be introduced. Bean v. Pioneer Min. Co. 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86; Hager v. Rice, 4 Colo. 90, 34 Am. Rep. 58; La Salle Nat. Bank v. Tolu Rock & Rye Co. 14 Ill. App. 141; Second Nat. Bank v. Midland Steel Co. 155 Ind. 581, 52 L.R.A. 307, 58 N. E. 833; Swarts v. Cohen, 11 Ind. App. 20, 38 N. E. 536; Western Wheeled Scraper Co. v. Stickleman, 122 Iowa, 396, 98 N. W. 139; Haile v. Peirce, 32 Md. 327, 3 Am. Rep. 139; Lafin & R. Powder Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472, 2 Mor. Min. Rep. 167; Keidan v. Winegar, 95 Mich. 430, 20 L.R.A. 705, 54 N. W. 901; Fitch v. Lawton, 6 How. (Miss.) 371; Davis v. Henderson, 25 Miss. 549, 59 Am. Dec. 229; Hardy v. Pilcher, 57 Miss. 18, 34 Am. Rep. 432; Martin v. Smith, 65 Miss. 1, 3 So. 33; Smith v. Alexander, 31 Mo. 193; McClellan v. Reynolds, 49 Mo. 312, compare with McGee v. Larramore, 50 Mo. 425; Washington Mut. F. Ins. Co. v. St. Mary's Seminary, 52 Mo. 480 (against principal); Klostermann v. Loos, 58 Mo. 290; Turner v. Thomas, 10 Mo. App. 342; Gerber v. Stuart, 1 Mont. 172, 2 Mor. Min. Rep. 152; Kean v. Davis, 21 N. J. L. 683, 47 Am. Dec. 182; Simanton v. Vliet, 61 N. J. L. 595, 40 Atl. 595; Schaefer v. Bidwell, 9 Nev. 209, 1 Mor. Min. Rep. 409; James v. Citizens' Bank, 9 Okla. 546, 60 Pac. 290; Guthrie v. Imbrie, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664; Miller v. Way, 5 S. D. 468, 59 N. W. 467; Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152; Metcalf v. Williams, 104 U. S. 93, 26 L. ed. 665; Case Mfg. Co. v. Soxman, 138 U. S. 431, 34 L. ed. 1019, 11 Sup. Ct. Rep. 360; Society of Shakers v. Wat-42 L.R.A. (N.S.)

son, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 730 (against principal).

In Kline v. Bank of Tescott, 50 Kan. 91, 18 L.R.A. 533, 34 Am. St. Rep. 107, 31 Pac. 688, the real intention of the parties was allowed to be shown in an action on a promissory note, where it was not claimed that the plaintiff was a bona fide holder, and from the opinion it is not apparent that the evidence was admitted on the ground of ambiguity. However, in the subsequent Kansas case of Benham v. Smith, 53 Kan. 495, 36 Pac. 997, parol evidence was admitted in an action between the original parties on a note on the ground of ambiguity, and the earlier Kansas case is cited as authority.

The case of Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152, supra, is referred to in the opinion of Marx v. Luling Co-op. Asso. 17 Tex. Civ. App. 417, 43 S. W. 596, as having allowed the intention of the parties to be shown by parol evidence on account of ambiguity in the contract. The opinion in the Traynham Case does not make the ground of the admission of such evidence clear.

In Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941, and Roberts v. Burton, 14 Vt. 195, the court considered extrinsic facts, but no question apparently was raised as to the right to do so. Likewise in Crandall v. Rollins, 83 App. Div. 618, 82 N. Y. Supp. 317.

The real intent of the parties was allowed to be shown in an action on a duebill in Owings v. Grubb, 6 J. J. Marsh. 31, on the theory that it may be shown by parol evidence that the contract was never delivered as the obligation of the signer. This case was approved in Webb v. Burke, 5 B. Mon. 51, an action between the original parties on a promissory note. There was also an ambiguity in the latter case, and the court rests its decision on this ground partly.

In the case of ordinary contracts and negotiable instruments, where there is no claim as to the holder being a bona fide holder, other courts generally allow the intention of the parties to be shown by parol evidence. Megowan v. Peterson, 173

self as "treasurer" of the company, but he does not contract in the name of, or in behalf of, the company. The contract is in the name of, and on behalf of, himself.

The judgment is affirmed.

Rudkin, C. J., and Crow, Gose, Chadwick, Parker, and Mount, JJ., concur.

Petition for rehearing denied.

## IOWA SUPREME COURT.

FRED F. PEASE

v.

GLOBE REALTY COMPANY et al., Appts.

(141 Iowa, 482, 119 N. W. 975.)

Specific performance — partial failure of title.

1. Enforcement cannot be had of a note

N. Y. 1, 65 N. E. 738; Brockway v. Allen, 17 Wend. 40 (*dictum*); Hood v. Hallenbeck, 7 Hun, 362; Moore v. McClure, 8 Hun, 557. See Kline v. Bank of Tescott, 50 Kan. 91, 18 L.R.A. 533, 34 Am. St. Rep. 107, 31 Pac. 688; Hoopes v. Beale, 90 Pa. 82 (where, but for oral stipulations, the instrument would not have been executed); Wilmoth v. Hensel, 151 Pa. 200, 31 Am. St. Rep. 738, 25 Atl. 86 (merely decided that it was a jury question); Forcey v. Caldwell, 6 Sadler (Pa.) 550, 9 Atl. 466; Williams v. Hipple, 17 Pa. Super. Ct. 81, (*dictum*, absence of proof of bona fide character of holder). See also DeRoy v. Richards and Chatham Nat. Bank v. Gardner *supra*.

In Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738, the court states that parol evidence is always admissible to show the consideration as between the immediate parties; and this rule is not changed by the negotiable instruments law.

It is indicated in Wanner v. Emanuel's Church, 174 Pa. 466, 34 Atl. 188, that the admission of such evidence is on the ground of ambiguity.

The court took into consideration extraneous facts in determining liability in Ulam v. Boyd, 87 Pa. 477 (that signers had no principal); Sharpe v. Bellis, 61 Pa. 71, 100 Am. Dec. 618 (knowledge of holders of a draft that indorser was president of corporation); Campbell v. Baker, 2 Watts, 83 (relation of the parties).

Other cases hold that the intention of the parties to a contract may be shown by parol evidence, and in case of a negotiable instrument a like rule is applied in the absence of the claim of a bona fide holder, without stating any clear ground on which such evidence is admissible. Deering v. Thom, 29 Minn. 120, 12 N. W. 350; Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116.

But in these cases where the defense is that the signer contracted in a representative capacity, he must first prove the existence of the capacity. Pratt v. Beaupre, 113 Minn. 187, Gil. 177; Peterson v. Homan, 44 Minn. 166, 20 Am. St. Rep. 564, 46 N. W. 303; Brunswick-Balke Collender Co. v. Boutell, 45 Minn. 21, 47 N. W. 261.

There is language in Souhegan Nat. Bank v. Boardman, *supra*, that would indicate that the ground for the admission of such evidence in these cases is that the contract is ambiguous.

In order to introduce parol evidence as to the actual intention of the parties, it must be given under a sworn plea. Lazarus 42 L.R.A. (N.S.)

v. Shearer, 2 Ala. 718; Drake v. Flewellen, 33 Ala. 106.

In the absence of evidence of the actual intention, the intention as derived from the instrument will govern. Bingham v. Stewart, 13 Minn. 106, Gil. 96.

Where the signer of such an instrument has introduced evidence that it was not intended to be his personal obligation, the other contracting party may oppose this by evidence to the contrary. Barclay v. Pursley, 110 Pa. 13, 20 Atl. 411.

As to the admissibility of extrinsic evidence to show who is liable as the maker of a note, see note to Keidan v. Winegar, 20 L.R.A. 705.

### b. General rules as to liability.

The most general rules for determining the liability are here stated, but subdivisions II. and III. *infra*, should be consulted for a complete discussion of the liability under the various forms of contracts and signatures.

As to the manner of determining the liability of the signer in such cases, the rules laid down by the cases are not greatly in conflict. Also, as to the liability itself, the great weight of authority is to the effect that the mere addition of the word "agent," or other word indicating representative capacity, in signing an agreement containing no other indication of agency, is not sufficient to relieve the signer of personal liability. III. a and b, *infra*, and cases there cited.

On the other hand, it is quite well established that where the agreement contained in the body of the contract is that of the principal, the signature by one who adds a word indicating representative capacity to his signature does not make the contract his own. III. c, *infra* and cases there cited. As to the various forms of contracts that are not so clearly the obligations of the agents or those of the principal as the above mentioned, there is a wide diversity of opinion, and the reader is referred to subdivision II. and III., as to the views of the courts on the various forms.

This confusion in some measure arises from the fact that the courts have in some instances placed undue emphasis upon particular phrases in the contract being construed and afterwards a contract containing a like phrase is before the court for construction, and the phrase emphasized in the earlier decision is taken as indicat-

given for the purchase price of realty, "subject to the clearing of the title" to lots which were held by tax deed, although the grantor had a good title, if an action to quiet the title failed as to one of the lots.

**Corporation — contract — official liability.**

2. The president of a corporation is not made personally liable on a note executed on behalf of the corporation, by signing its name, by himself president.

ing a particular intention, when in fact the contract as a whole, or even another part thereof, may make it clear that the parties intended a different construction.

The fact that the whole instrument must be looked to in arriving at the intention of the parties, and that the form in which the contract is worded is not material, has been recognized by the courts. *Rogers v. March*, 33 Me. 106; *Winship v. Smith*, 61 Me. 118; *Purinton v. Security L. Ins & Annuity Co.* 72 Me. 22; *Hicks v. Kenan*, 139 N. C. 337, 51 S. E. 941; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240.

In holding the signer personally liable on such contracts, the courts have given various reasons for their decisions. One very frequently advanced is that where there is a nondisclosure of the principal, the agent is bound. *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320; *San Bernardino Nat. Bank v. Anderson*, — Cal. —, 32 Pac. 168; *Savings Bank v. Central Market Co.* 122 Cal. 28, 54 Pac. 273; *Bedell v. Scarlett*, 75 Ga. 56; *Saul v. Southern Seating & Cabinet Co.* 6 Ga. App. 843, 65 S. E. 1065; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Wing v. Glick*, 56 Iowa, 473, 41 Am. Rep. 118, 9 N. W. 384; *Winsor v. Griggs*, 5 Cush. 210; *Slawson v. Loring*, 5 Allen, 340, 81 Am. Dec. 750; *Bartlett v. Hawley*, 120 Mass. 92; *Rollins v. Phelps*, 5 Minn. 463, Gil. 373; *Blakely v. Bennecke*, 59 Mo. 193; *Savage v. Rix*, 9 N. H. 263; *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558 (against principal); *Bush v. Cole*, 28 N. Y. 269, 84 Am. Dec. 343 (agent was without authority); *Bolles v. Walton*, 2 E. D. Smith, 164; *Ohio Nat. Bank v. Cook*, 38 Ohio St. 442; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423; *Reid v. McChesney*, 8 U. C. C. P. 50; *Humfrey v. Dale*, 7 El. & Bl. 266; *Hutchinson v. Tatham*, L. R. 8 C. P. 482, 42 L. J. C. P. N. S. 260, 29 L. T. N. S. 103, 22 Week. Rep. 18.

According to a custom referred to in *Hutchinson v. Tatham*, L. R. 8 C. P. 482, 42 L. J. C. P. N. S. 260, 29 L. T. N. S. 103, 22 Week. Rep. 18, nondisclosure of the principal in a charter party rendered the broker personally liable, and in that case evidence of such custom was admitted.

Another reason given for holding the signer of an instrument in such form 42 L.R.A. (N.S.)

**Appeal — record — recitals.**

3. An allegation of the petition as to the character in which a person signed a promissory note will control a mere recital of the record as to the exhibit purporting to set out the note.

(March 9, 1909.)

**A PPEAL by defendants from a judgment of the District Court for Polk County**

liable personally is that where there are no apt words to bind the alleged principal, or where there are apt words to make the contract the personal contract of the agent, such agent is personally liable. *Faw v. Meals*, 65 Ga. 711; *Partridge v. Hollinshead*, 105 Ga. 278, 30 S. E. 787; *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175; *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Mead v. Altgeld*, 136 Ill. 298, 26 N. E. 388; *Haines v. Nance*, 52 Ill. App. 406; *Tenbrook v. Ellars*, 71 Ill. App. 328; *McClure v. Bennett*, 1 Blackf. 189, 12 Am. Dec. 223; *Mears v. Graham*, 8 Blackf. 144; *infra*; *Crum v. Boyd*, 9 Ind. 289, *infra*; *Prather v. Ross*, 17 Ind. 495 (sealed contract); *Hobbs v. Cowden*, 20 Ind. 310; *Kendall v. Morton*, 21 Ind. 205; *Hays v. Crutcher*, 54 Ind. 260; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Hayes v. Burbaker*, 65 Ind. 27; *Williams v. Second Nat. Bank*, 83 Ind. 237; *McClellan v. Robe*, 93 Ind. 298; *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391; *American Ins. Co. v. Stratton*, 59 Iowa, 696, 13 N. W. 763; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 77; *Ross v. Brown*, 74 Me. 352; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11; *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918; *Copeland v. Hewett*, 96 Me. 525, 53 Atl. 36; *Fiske v. Eldridge*, 12 Gray, 474; *Haverhill Mut. F. Ins. Co. v. Newhall*, 1 Allen, 130; *Brown v. Bradlee*, 156 Mass. 28, 15 L.R.A. 509, 32 Am. St. Rep. 430, 30 N. E. 85; *Landyskowski v. Lark*, 108 Mich. 500, 66 N. W. 371; *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Webster v. Switzer*, 15 Mo. App. 346; *Savage v. Rix*, 9 N. H. 263; *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280 (sealed instrument); *Hills v. Bannister*, 8 Cow. 31; *Barker v. Mechanics' F. Ins. Co.* 3 Wend. 94, 20 Am. Dec. 664; *Moss v. Livingston*, 4 N. Y. 209, 2 Mor. Min. Rep. 119; *DeWitt v. Walton*, 9 N. Y. 571 (against principal); *Orchard v. Binninger*, 51 N. Y. 652; *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038; *Collins v. Buckeye State Ins. Co.* 17 Ohio St. 215, 93 Am. Dec. 612; *Keokuk Falls Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484; *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664; *Ulam v. Boyd*, 87 Pa. 477; *Anthony v. Comstock*, 1 R. I. 454; *Fash v. Ross*, 2 Hill. L. 294; *Marx v. Luling Co-op. Asso.* 17 Tex. Civ. App. 417, 43 S. W. 596; *Rand v. Hale*, 3

in plaintiff's favor in an action brought to recover a balance alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Clark & Byers and Evans & Evans for appellants.

Messrs. Spurrier, Mills, & Perry for appellee.

McClain, J., delivered the opinion of the court:

The instrument sued on was in form a promissory note for \$200, to which was added the following clause: "Subject to the clearing of title to lots in Hyde park for which this is given as part purchase price." It appears that all the lots included in the

purchase, for part payment of which the note was given, were in Hyde park addition to the city of Des Moines, and were held by the grantor under tax deeds. It also appears that an action to quiet title was brought, in which title to all the lots save one was quieted in the defendant Globe Realty Company, the grantee of the lots.

It is contended for appellee that defendants' grantor had good title by tax deed to this lot, as well as to the others; but it is to be noticed that the condition in the note was not that the grantor had good title, but in effect that the title should be cleared, and it appears that the parties considered this provision to require that some action be brought to quiet the title.

W. Va. 495, 100 Am. Dec. 761; Thomas v. Bishop, 2 Strange, 955.

The court in Barlow v. Congregational Soc. 8 Allen, 460, after reviewing the cases on this question, says: "But wherever it appears upon the face of a simple contract made by the agent of one named therein, and whom he can legally bind thereby, that he acts as agent and intends to bind his principal, the law will give effect to the intention in whatever form expressed."

The court in Harkins v. Edwards, 1 Iowa, 426, approves of a rule laid down in an earlier decision in that jurisdiction, where the contract was signed individually, to the effect that where the name of the principal and the relation of agency are stated in the writing, and the agent is authorized, the principal alone is bound, unless the intention is clearly expressed to bind the agent personally; and continuing farther, the court says the question of liability does not turn generally upon the form of signature, but upon the fact whether the relation of principal and agent is fairly disclosed upon the face of the paper.

The court in Haight v. Sahler, 30 Barb. 218, states the rule to be that when the relation of principal and agent is known to exist, and the fact that the agent is acting solely for the benefit of such principal is apparent, the agent will not be bound unless the credit is given to him expressly and exclusively, and it is clearly his intention to bind himself personally.

The court in Macdonald v. Bond, 195 Ill. 122, 62 N. E. 881, states that if the contract clearly showed that it was made by the parties as agents, they would not be personally liable, it clearly appearing that their principal, though not disclosed by the writing, was understood by the parties. The court then refers to a conflict in testimony as to whether the matters in dispute pertained exclusively to the business of the company, as though the determination of this question determined the question of intention of the parties as to who should be bound and, this fact being settled adversely to the appellants, and holds that they are bound thereby.

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The rule is laid down in Roney v. Winter, 37 Ala. 277, that if the name of the principal appears in the instrument, and it is evident from the writing as a whole that the intention was that the principal, and not the agent, was the person to be bound, the principal alone will be bound if the agent had authority to make the agreement, although the instrument is signed by the agent's name only, the court stating that the rigid rule of the common law, which requires that a deed executed by an attorney for a principal must be made and executed in the name of the principal in order to operate as his deed, does not apply to instruments not under seal.

Where the question of agency in making the contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case, the contract must be in the name of the principal, must be under seal, and must purport to be his deed, and not the deed of the agent covenanting for him. In the latter cases, the question is always one of intent, and the court, being untrammelled by any other consideration, is bound to give it effect, as the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose, that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal, or with the name of the principal by the agent, or otherwise. Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

The rule that the intention of the parties governs has been applied to sealed instruments. Thus, one court states that where, "from the nature and terms of the instrument, it appears that the party is an agent, and that he means to bind his principal and to act for him, and not on his own account, the law will give the paper that intendment to carry out the actual meaning of the parties, however inartificial the language may be; . . . and there



While a tax title is no doubt presumptively goods, as a tax deed is prima facie evidence that all the requirements of the statute have been complied with, and is conclusive evidence that the tax for which the property had been sold was properly assessed, and that the property was duly sold, and further that all the officers performed their duty with reference to the levy and enforcement of the tax and the execution of the deed (Code, § 1444), it is well settled that a tax deed may be attacked for insufficiency of the notice given by the holder of the certificate of sale of the expiration of the period of redemption. *Young v. Iowa Toolers' Protective Assn.* 106 Iowa, 447, 76 N. W. 822; *Grimes v. Ellyson*, 130 Iowa, 286,

105 N. W. 418. At the time the conveyance was made the five-year limitation on an action to question the validity of the tax deeds had not run, and the condition of the note evidently contemplated some proceeding by which those who would be entitled on any ground to attack the validity of the sale would be cut off from doing so. Breach of the condition was pleaded by the defendants, and the failure of plaintiff to show the performance of the condition as to one of the lots should have been held by the trial court to be sufficient to defeat plaintiff's action.

For another reason the judgment as against defendant Still was erroneous. As against him the petition alleges no cause

is no difference on this point whether the instrument be a deed or an unsealed contract." *Abrams v. Musgrove*, 12 Pa. 292. The action in this case was against the principal, and the court was passing upon the competency of the signer as a witness.

In *Hopkins v. Mehaffy*, 11 Serg. & R. 126, contract under seal purporting to be by a corporation, and signed and sealed by the president individually, but containing after the signatures of the parties the words, "signed by the president in behalf of the president and manager of the Manchester Turnpike Road, . . . in presence of" a witness, was held to impose no personal liability upon the president, the court stating that the other contracting party never treated on the basis of the defendant being personally answerable, and to permit him to maintain the action would permit him to have what was not in the contemplation of either party.

#### c. Rule as to public agents.

A distinction has sometimes been made in the case of public agents, and they are stated not to be personally liable on a contract signed with a word indicating representative capacity, in the absence of a clearly expressed intention so to become liable.

Thus, the court in *Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139, quoting from § 302 of Story on Agency, says: "But a very different rule in general prevails in regard to public agents, for, in the ordinary course of things, an agent contracting in behalf of the government or of the public is not personally bound by such a contract, even though he would be by the terms of the contract if it were an agency of a private nature. The reason of the distinction is that it is not to be presumed either that the public agent means to bind himself personally in acting as a functionary of the government, or that the party dealing with him in his public character means to rely upon his individual responsibility." This distinction was adhered to in *Fox v. Drake*, 8 Cow. 191.

In *Murray v. Carothers*, 1 Met. (Ky.) 71, 12 L.R.A. (N.S.)

the court states that the rule with regard to the liability of persons acting as agents for and in behalf of the government or the public is materially different from that which applies to cases of mere private agency, and that in general an agent contracting for the government is not personally bound by such a contract, even though he would be by the terms of the contract in a mere private agency.

An examination of the cases under the various forms of contract in subdivisions II. and III. infra, shows that this distinction has not always been observed, especially with reference to negotiable instruments, and public agents have been held liable under the same rules that have been applied to mere private agents.

The distinction has been expressly repudiated in *dicta* in *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70, and *Rathbon v. Budlong*, 15 Johns. 1.

In *Rathbon v. Budlong*, supra, the court states that there is no difference between the agent of an individual and the agent of the government as to their liability, but in each case the question is to whom was the credit given.

As to the general question of liability of public officers on contracts made by them for the public, see note to *Brown v. Bradley*, 15 L.R.A. 509.

#### d. Effect of negotiable instruments law.

The negotiable instruments law provides that where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of his principal or in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him as agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. This does not, as between the original parties and those having notice of the facts relied upon as constituting a defense, change the rule that the consideration and the conditions under which a note is given may be shown. *Megowan v. Peterson*, 173 N. Y. 1, 65 N.

of action. The instrument sued upon is described as executed by "the defendant Globe Realty Company by its secretary, J. J. Coull, and president, S. S. Still." If Still signed for the company as its president, and not in his individual capacity, the Globe Globe Realty Company was bound by the instrument. The description of the instrument in the exhibit thereof attached to the petition might perhaps be considered to indicate that Still signed as a maker, de-

scribing himself as president of the company; but the allegation of the petition must control a mere recital of the record as to the exhibit, and judgment should not have been rendered against the defendant Still.

For the reasons pointed out, the judgment is reversed.

Evans, C. J., took no part.

E. 738. In this case a note reading, "I promise to pay," and signed by one who added the word "trustee" to his signature, was held to be the personal obligation of the signer.

So a note containing at the head the name of a company, reading "we promise to pay," and signed by one who adds to his signature the word "president," and at the left of the instrument by another who adds the abbreviation "Secy.," was, under this provision of the negotiable instruments law, held to be the personal obligation of the signers. *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

On the contrary, under this same provision of the law, in *Chatham Nat. Bank v. Gardner*, 31 Pa. Super. Ct. 135, a note reading "we promise to pay," and signed by one who adds to his signature the word "treasurer," and at the left of the instrument by another who adds to his signature the word "secretary," was held to "conclusively indicate that these persons did not make and execute the paper in their individual capacity."

***e. Effect of bringing action against, or treating obligation as that of, principal.***

By bringing an action against the principal, the holder of a note is not thereafter precluded from bringing an action against the signers, who affixed to their signatures the abbreviations "Prest." and "Treas." respectively. *First Nat. Bank v. Wallis*, 84 Hun, 376, 32 N. Y. Supp. 382.

The fact that a holder of a draft drawn by a corporation on its treasurer, and indorsed by him as "H. P. D., Treas." has sued the company as drawer of the draft, does not thereafter prevent the maintenance of an action against the treasurer individually as indorser thereof. *Eells v. Shea*, 20 Ohio C. C. 527, 11 Ohio C. D. 304.

So, where an action has been brought against the principal on a note reading "we promise to pay," etc., and signed "D. P. L., Treas'r. H. G. L. Co.," in the absence of a showing that the defendant changed his position or he took some action on account of such suit that would render it injurious to him to permit the suit to be maintained against him, the bringing of a suit against the principal does not create an estoppel. *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11.

In *Aimen v. Hardin*, 60 Ind. 119, the court 42 L.R.A. (N.S.)

refers to the rule that in a doubtful case the interpretation put by the parties upon their contract will prevail, and continues: "We need not decide whether the plaintiff would be absolutely estopped to claim that the note was the obligation of the individuals who executed it as directors, she having sued upon it as the obligation of the company, and recovered judgment; but we think it clear that, under the circumstances, the note should be regarded as the obligation of the company, and not of the individuals who signed it."

Where, upon the introduction of parol evidence, it appears that the obligee of the agreement treated the alleged principal as the obligor, there is no liability on the part of the agent. *Anderson v. English*, 105 App. Div. 400, 94 N. Y. Supp. 200. See also *Johnson v. Smith*, 21 Conn. 627, *infra*, III. a, 3 (b).

***1. Effect of claim of bona fide holder.***

In the cases last mentioned, in subdivision a, above, parol evidence is regarded as changing the ostensible liability as fixed by the instrument. When a negotiable instrument is in the hands of a bona fide holder, this ostensible liability cannot thus be changed. *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 514, 36 Am. St. Rep. 710, 34 N. E. 910; *First Nat. Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038.

Reference is made to other cases cited in subdivision a, *supra*, as to the manner of determining liability in cases involving bona fide holders; and also to the sections devoted to bills and notes under subdivision III. *infra*.

The action in *Hood v. Hallenbeck*, 7 Hun, 362, was on a promissory note reading "we promise to pay," and signed by a number of persons who added to their signatures the words "trustees of" a named church, and having the corporate seal of such church affixed, and was brought by a holder other than the payee; but no claim was made as to his being a bona fide holder. The court states that he stands in no better position with reference to the admissibility of parol evidence than the payee, inasmuch as the note on its face discloses the fact that the defense that the signers are not individually liable exists, or that proof to establish the liability is admissible.

But where there is sufficient evidence of

agency on the instrument so as to render it ambiguous, the fact that it may be in the hands of a bona fide holder does not prevent the introduction of evidence as to the real intention of the parties. Thus, it was urged in *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229, that the bill not disclosing on its face the name of the agent's principal, and having passed into the hands of a third party, no other evidence could be admitted for this purpose. In answer to this argument, the court states: "If it were necessary that the bill itself should unequivocally disclose the name of the principal in order to exonerate the agent, this position would probably be correct. But this is not required. It will be sufficient if enough appears upon the face of the transaction to put a prudent man, before taking the bill, upon inquiry. . . . The defendant, in drawing and indorsing the bill, attached to his name the word 'agent.' It was moreover to be charged to the drawee's own agency at Natchez. These facts appearing upon the bill itself, if not conclusive evidence that the defendant was acting in a representative capacity, were at least sufficient to put a prudent man, taking the bill from the drawee, upon inquiry."

The court in *Miers v. Coates*, 57 Ill. App. 216, states that if the notes when held by the payee were not the obligations of the officers of the corporation, the assignment of them tends in no way to make them such; and this defense is as available against a suit by an assignee before maturity as against a suit by the payee.

## II. Sealed instruments.

### a. Signatures in which the name of the principal is not disclosed.

The fact that one added the word "agent" to his name in signing a contract under seal does not relieve him from personal liability, where there is nothing to show or suggest that he acted as agent for anyone in executing the contract other than the word written after his name, and where, after the execution of the contract, there was a modification of the same, which he signed omitting the word "agent." *Magruder v. Belt*, 12 App. D. C. 161.

An agreement under seal entered into by a committee of citizens, in which they are designated as a committee and thereafter referred to as party of the first part, in which the party of the first part agrees to pay or cause to be paid to the other contracting party certain sums of money, and which is signed by the members of the committee with the addition of the word "committee" to their signatures, and which is sealed by the members of the committee individually, is the personal obligation of such signers. *Ulam v. Boyd*, 87 Pa. 477. The court in this case states that there is here no principal to be bound.

An agreement entered into by a committee appointed by the directors of a turnpike company, in which the members of 42 L.R.A. (N.S.)

the committee are named and described as a committee of the directors, and to which agreement they affix their own seals, is the personal obligation of such members. *Tip-pets v. Walker*, 4 Mass. 595. It does not appear what, if any, words indicating representative capacity were added to the signatures in this case.

An agreement between the general agents and a local agent of an insurance company, to submit to arbitration matters in dispute between them not pertaining exclusively to the business of the company, in which such company is not named or in anyway referred to, but, on the other hand, the mutual covenant and agreement is between "C. A. MacDonald & Co., General Agents," and Edward L. Bond (the local agent), is the personal obligation of such general agents, and the fact that the words "general agent" follow the firm name in the caption of the agreement and the signature thereto does not necessarily show that they intended to contract merely as agents. *MacDonald v. Bond*, 195 Ill. 122, 62 N. E. 881, affirming 96 Ill. App. 116. It is not clear that the words "general agents" followed the signature. In one part of the opinion it is so stated, while from another part no such addition seems to have been made.

In *Re Miley*, 187 Fed. 177, the court says of a contract under seal in which the one party is described as J. M., Agent, that the word "agent" following the name of the party, without further disclosure for whom he was agent, may be held to be surplusage or a word of description.

Agreement in which name of principal is disclosed.

A charter party purporting to be entered into between the master of the vessel and "M. P. . . . Agent for J. C. and M. S. of the second part," and signed "M. P., Agent (L. S.)," imposes a personal liability upon such agent, since he is named in the covenant as party of the second part, and has duly executed the instrument by affixing his own seal; and his intention is immaterial, as is also the fact that he had authority to bind his principal. *Platt v. Cathell*, 3 Denio, 604.

The rule is laid down in *Prather v. Ross*, 17 Ind. 495, that, in order to bind the principal and make it his contract the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in it; and within this rule a contract reading "I, G. W. Cochran, Land Agent of the Ohio & Mississippi Railroad Company, agree to pay," etc., and signed "G. W. Cochran (seal), Land Agent," is the personal obligation of such agent, although the note was given in consideration of land purchased for the railroad company.

A contract for the repair of a parish church entered into with certain persons, "churchwardens of the said parish," and certain other persons, "overseers of the poor

of the said parish," of the third part, in which, after various covenants entered into by the contractor which were described as being entered into with the said several persons parties thereto of the third part. their successors and assigns, churchwardens and overseers, "they, the said several persons parties thereto of the third part, churchwardens and overseers of the poor of the parish of St. Botolph, . . . for themselves and for their successors, churchwardens and overseers of the said parish, and their assigns, did hereby covenant and promise . . . that they, the said churchwardens and overseers of the poor, their successors or assigns, should well and truly pay," etc., and which contained a proviso that nothing in the contract contained shall extend to, or be deemed, adjudged, or construed, or taken to be, covenants of or obligations upon the said several persons parties of the third part, or in any wise personally to affect them, was held, in *Furnivall v. Coombes*, 5 Mann. & G. 736, to bind the parties of the third part personally. The court states that the covenants contained in the agreement were binding on the parties personally, and the proviso, being inconsistent with such covenants as they thought to enter into in this case, was of no effect. The signature to this agreement does not appear.

In *Stewart v. Katz*, 30 Md. 334, an attachment bond stating in the obligatory part "that we, Henry H. Rice, Agent of Alex'r T. Stewart, etc., are held, etc., . . . to which payment we bind ourselves, our heirs, executors, and administrators firmly by these presents," and containing in the attesting clause the following language: "In witness whereof, we have hereunto set our hands and seals," and signed "Henry H. Rice, Ag't (Seal)," was held to import a personal responsibility on the part of said Rice so as to render the bond sufficient to sustain the attachment proceedings in which it was given.

On the contrary, a contract under seal entered into by a committee of a religious corporation, in which the agreement is stated to be between the contractor and "J. P. S., R. R., & A. O. L., Building Committee, appointed by the trustees of the Wayne County Collegiate Institute," and in which they are named throughout in the same form, and which is signed and sealed by the members of the committee, who add, following their signatures, the words "Building Committee," was held to impose no personal obligation upon the members of the committee, where they were fully authorized to make the contract and did not intend to incur any personal liability thereon. *Haight v. Sahler*, 30 Barb. 218. In this case the seal was held unnecessary, and the principal liable as upon a simple contract, thereby relieving the agents from liability.

#### Agreement on behalf of the principal.

An agent who enters into an agreement for and on the part or behalf of his principal,

in consideration of a conveyance of land, that he will, "for himself, his heirs, executors, etc., on the part and behalf of" his principal, covenant with the plaintiff that his principal, his heirs, etc., should pay to the plaintiff the purchase money for the real property, is personally liable upon such agreement, since he covenants for himself, and not in the name of his principal, and puts his own seal to the agreement. *Appleton v. Binks*, 5 East, 148.

In *Henderson v. Martin*, 19 Ark. 477, 70 Am. Dec. 606, an action on a sealed instrument reciting that "we, the undersigned committee, on the part of the L. R. L. & Mfg. Co., have this day sold [certain property]. . . . The above property we bind ourselves to deliver," etc., and containing apt or obligatory words to charge and hold the agents personally, and no such words to charge and hold the principal, and there being no evidence of agency except that which appeared on the face of the contract, the contract, which was signed by three persons, who added the word "committee" to their signatures and sealed individually, was held to be the personal contract of the members of the committee.

In *Sheridan v. Pease*, 93 Ill. App. 219, an action against Sheridan on a replevin bond reading: "We, James J. Sheridan, Agent for and in behalf of Standard Brass Works, Principal, and Paul Blatchford as surety," and signed "James J. Sheridan, Agt. (Seal), Paul Blatchford (Seal)," objection was made on the ground that it appeared from the bond offered in evidence that it was executed by Sheridan as agent, and therefore there was a variance between the declaration and the proof, which was fatal to recovery. The court states that the recital in the bond that Sheridan is an agent, and that it is for and on behalf of the Standard Brass Works that he executes the bond, does not operate to make it any the less his bond, and treats these recitals as descriptive only.

#### Agreement by the principal.

An agreement under seal entered into by "the Hadley Falls Co. by their agent, of the first part," in which the covenants are all by the party of the first part and the agent is nowhere named, imposes no personal obligation on such agent, although he signed the contract "John Chase, Agent (Seal)," since there are no apt words to bind him personally, and whether or not the agent had authority is immaterial. *Abbey v. Chase*, 6 Cush. 54.

Where an agreement between certain creditors and their debtor was signed on behalf of one of the creditors, "W. R. K., representing Atlantic National Bank," such signer not having any claim that was intended to be settled by the agreement, he is not personally bound thereby. *Hicks v. Kenan*, 139 N. C. 337, 51 S. E. 941. The court regards this contract on the face, apart from the fact that the signer had no individual claim, as not binding upon him personally.

A contract entered into by the Rochester Boot & Shoe Company, by N. N., president, party of the second part, in which the covenants are all by the party of the second part, and the testimonium clause is "witness the hand and seal of the parties hereto," etc., and signed "N. N., Pres't, (Seal)," is not the personal obligation of the president, since he is nowhere named or described as a party to the instrument, and it contains no words which bind him. *Neufeld v. Beidler*, 37 Ill. App. 34.

So, an appeal bond given in an action in which an insurance company is a party, and reciting "that the Appleton Mut. F. Ins. Co., by William Pulsifer, Pres't of said company, as principal, . . . as sureties, are held and firmly bound, . . . to which payment well and truly to be made we do bind ourselves, our heirs, executors, and administrators," and signed "Wm. Pulsifer, Pres't (Seal)," and also signed by the sureties, imposes no personal obligation on such Pulsifer. *Ellis v. Pulsifer*, 4 Allen, 165.

In *Lee v. Methodist Episcopal Church*, 52 Barb. 116, an action to foreclose a mortgage on church property, the trustees executed a mortgage in which, in describing themselves as parties of the first part, there was added to their names the words, "Trustees of the Methodist E. church," and in which the property mortgaged was described as premises conveyed to the trustees of the said Methodist E. church by the mortgagee, and, in the bond accompanying the mortgage, they added to the names of the mortgagors the words, "Trustees of the Methodist E. church," etc., and bound themselves and their successors in office jointly and severally to pay, both bond and mortgage being executed with a common private seal, and the word "trustees" being added to the signatures. Parol evidence was held admissible to explain the intent of the parties in this case as to who was intended to be bound.

#### Public officers and agents.

An agreement entered into by certain commissioners, in which the names of such commissioners are followed by the designation, "commissioners appointed by the county court of Breckinridge to let out and to contract and superintend the building of a new bridge," etc., and throughout the remaining part of which agreement the commissioners are referred to as party of the first part, and which is signed by the commissioners, who affixed a seal common to all their signatures, and added the word "commissioners," purports to be made in behalf of the government or public, and is not the prima facie obligation of such commissioners. *Murray v. Carothers*, 1 Met. (Ky.) 71. Examining the contract in this case farther, the court states that it appears on the face thereof that it was made by the commissioners as public agents for the construction of a public work, in pur-

suance of an order of court, and signed by them as commissioners; that it was not executed for any debt they owed, nor for a matter about which they were more interested than any other citizens of the county, nor was the credit given to them personally, but that it was given to the county court for whom they were acting.

Where a municipal corporation committee has shown that it had authority to bind its principal, and that the party with whom it contracted has a remedy against the corporation, the members of the committee are not individually liable on the contract, where they describe themselves as a committee, and sign the same and affix their individual seal to the agreement. It does not clearly appear from the report of this case that the members of the committee affixed to their signatures any word indicating representative capacity. *Randall v. Van Vetchen*, 19 Johns. 60, 10 Am. Dec. 193. It is stated in *Haight v. Sahler*, supra, that this case was not decided upon the ground that the defendants were public agents, but that they were agents of a corporation just as liable to be sued as any private corporation.

In *Unwin v. Wolsley*, 1 T. R. 674, a charter party entered into by "Captain W., Commander of his Majesty's ship M., and senior officer of his Majesty's ships and vessels at St. Helena," on account of his Majesty, was held to impose no personal obligation upon the captain. It does not appear how the contract was signed and sealed in this case. The court states that the express allegation in the beginning of the charter party that the captain made the contract on account of his Majesty, and another in the subsequent part "that the government should be answerable for £1500 in a certain event," make it perfectly clear that the captain meant only to contract as the servant of the government, and not to bind himself personally.

It is stated in *Congressional Twp. No. 11 v. Weir*, 9 Ind. 224, in an action against the principal, that a promissory note reading "the trustees . . . promise to pay, etc.," and signed by the trustees, who add to their signatures the words, "township trustees (seal)," is the individual note of the signers. This is on the ground, however, that the contract was beyond the authority of the agents.

It does not appear how the contract was signed in *Potts v. Henderson*, 2 Ind. 327. The action was on a sealed contract to build a bridge, wherein certain persons, describing themselves as commissioners appointed to superintend the building of the bridge, agreed to pay the contractors therefor. These persons were held individually liable on the theory that there was no authority for their entering into such a contract, the county commissioners being the only persons authorized thus to contract. The contract in this case was also regarded as having been made by these persons in their own names.

**b. Signatures in which the name of the principal is disclosed.**

**1. In general.**

Where a contractor made a bid to do the work of certain city improvements as "A. G. A., Manager for the West Duluth Industrial & Improvement Co.," and, upon the acceptance of the bid, entered into a contract in which he was described in the same manner, and a bond was executed as required by law in which he was described as "A. G. A., Manager for the West Duluth Industrial Construction & Improvement Co." as principal, and in which he signed as "A. G. A. (Seal), Manager West Duluth Ind. Const. & Imp. Co.," such bond was held to be the personal obligation of the signer. *Pershing v. Severson*, 58 Minn. 310, 59 N. W. 1084.

An agreement between "F. & B., . . . Superintendent of New England Agency for the F. L. Ins. Co.," in which it is provided that the business is to be transacted for the company, and the agent is to receive instructions and make his reports to the company and receive compensation therefrom, which is signed "J. W. F., Supt. N. E., Agen. (L. S.)," was held, in *Purinton v. Security L. Ins. & Annuity Co.* 72 Me. 22, to be the obligation of the company.

It does not appear in *Carroll v. Bowen*, 113 Md. 150, 77 Atl. 128, how the contract was signed by the members of a building committee of a church. The contract was under seal, and in the course of the opinion the court says that the alleged agency of the appellees as disclosed in the fourth plea would not release them of liability under the sealed agreement; therefore it did not constitute a bar to the action.

See *Pearson v. Post*, 2 Dak. 220, 9 N. W. 684, affirmed in 108 U. S. 418, 27 L. ed. 774, 2 Sup. Ct. Rep. 799, III. c, 2 (a).

**2. Name of principal preceded by word "of."**

In *Rantin v. Robertson*, 2 Strobb. L. 366, the court is of the opinion that an agent incurred a personal responsibility on a contract in which he is named as "A. R., Agent of W. A. A.," and which he signed and sealed as "A. R. (L. S.), Agent of W. A. A."

A promissory note reading: "We, the Trustees of the First Presbyterian Congregation in the town of Madison, Indiana, do bind ourselves and our successors in office to pay, etc.," and signed and sealed by such persons, who added to their signatures the words, "Trustees of the First Presbyterian Congregation in Madison," is the personal obligation of such signers, the word "trustees," etc., being treated as *descriptio personarum*, and the fact that the signers bound themselves and their successors in office being held as of no effect in view of the method of executing the note. The note was given for materials furnished and labor performed in erecting a meeting house for the congregation. *McClure v. Bennett*, 1 Blackf. 189, 12 Am. Dec. 223. 42 L.R.A. (N.S.)

An agreement under seal in which the trustees of a church contracted as trustees of the Baptist Society of the town of Litchfield, and acknowledged themselves bound in a certain sum on condition that they, "as trustees of the Baptist Society of the town of Litchfield," pay a certain sum, and which was signed and sealed "J. B., P. L., and J. P., trustees of the Baptist Society of the town of Litchfield," is the personal obligation of the signers, since the corporation has not contracted either in its corporate name or by its seal. *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280.

Where the agreement contained in the body of the contract was that of the principal, as in *Hancock v. Yunker*, 83 Ill. 208, where the signers of a lease, added to their signatures the words, "Trustees of the Chicago Literary Association," they were held not liable on such lease, since it contained no apt words to charge them, but did purport to be the contract of the Literary Association, a *de facto* corporation, and recited at its conclusion that the Chicago Literary Association signed through its trustees. The entire instrument was stated expressly to exclude the idea of an intentional personal liability, and is such as is appropriate and ordinarily used to express corporate liability. No mention is made of the fact that all the seals that appear in the instrument were affixed immediately after the names of the individual signers and no seal appears after the name of the association.

On a contract in which the agreeing part reads: "W. A. A. by his attorney, A. R.," and which is signed "A. R. (L. S.), Agent of W. A. A.," there is no personal liability incurred by the agent. *Rantin v. Robertson*, supra.

See *Froelich v. Froelich Trading Co.* 120 N. C. 39, 26 S. E. 647, "Executors," *infra*.

**Public officers.**

So an injunction bond given in an action by the trustees of a town, reciting that the corporation, the "trustees of the town of Westchester," are held and firmly bound, imposes no personal obligation upon the president of the board of trustees, who signed and sealed the same, and added to his signature the words, "President of the Board of Trustees," the court stating that there is nothing indicative of an intention to bind him personally, and his signature is not that of an agent, nor does he presume to act as the agent of the trustees, but that he was one of them himself and their presiding officer, and what he did was done in that capacity and under a resolution of the board of trustees, and not as their agent. *Episcopal Church v. Varian*, 28 Barb. 644.

**3. Name of principal preceded by word "for."**

In *Martin v. Dortch*, 1 Stew. (Ala.) 479, a principal was held bound on a promise to pay a sum of money under seal, which was signed by an agent for such principal, al-

though the instrument was written in the first person singular and signed and sealed "D. H. (Seal) for J. H., T. R., J. W." There was no dispute in this case over the intent of the parties. The principal objected to his liability on the ground that the agent had no authority, and also that the instrument was not in such form as to bind him. The first question was decided against the principal, as was also the second, the court stating on the second that the form of the instrument was immaterial. Where the intention to bind the principal is disputed, a contract in this form will be regarded as the contract of the agent. See subsequent cases of *Skinner v. Gunn* and *Dawson v. Cotton*.

A contract reciting that "I, I. H., . . . have . . . sold . . . which negro I warrant to be sound," etc., and signed by the agent as "Att'y for L. L.," with a seal following the attorney's name, was held in an action against the principal, in *Skinner v. Gunn*, 9 Port (Ala.) 305, not to attempt to bind the principal, but to be a mere personal agreement on the part of the agent.

It is stated in *Dawson v. Cotton*, 26 Ala. 591, that a promissory note reading "I promise to pay," and signed by an agent who is designated as "Agent for C. C.," and sealed with a seal following the name of the agent, is the obligation of the agent himself, and not of the principal. This case relies upon *Skinner v. Gunn*, supra, a case in which the principal was held not bound because there was no intent to bind him. The court states that *Skinner v. Gunn* overrules *Martin v. Dortch*, supra, but an examination of the latter case shows that it passed on the form of signature, while *Skinner v. Gunn* was decided on intention alone.

A note under seal reading "I promise to pay," etc., and reciting that it is part payment of a certain tract of land for which a bond had been given bearing even date with the note, signed "H. F. L. (Seal) for C. C., Prest. of the C. M. & C. Co.," and given in part payment of the purchase price of the tract of land, the bond for the conveyance of which containing an agreement on the part of the vendor to make title to "C. C., Prest. of the C. M. & C. Co.," imposes a personal liability upon H. F. L. *Bryson v. Lucas*, 84 N. C. 680, 37 Am. Rep. 634.

In *Kennerly v. Weed*, 1 Mo. 672, a note under seal reading, "I promise to pay," and signed "P. L. (Seal) for F. R. & G. H. K.," was held not to be the obligation of the principal.

So, in *Dean v. Roesler*, 1 Hilt. 420, an informal agreement of lease reading "I have let and rented," and signed "G. B. (L. S.), Agent for D. R.," was held not to bind the principal.

On the contrary, in *Wright v. Weakly*, 2 Watts, 89, a note under seal reading, "We, or either of us, promise to pay," etc., and signed "for I. D. (L. S.), W. W. (L. S.)," was held to impose no personal obligation upon W. W., and parol evidence was held incompetent to vary the effect of the deed.

In *Wilks v. Back*, 2 East, 143, 6 Revised 42 L.R.A. (N.S.)

Rep. 409, 8 Eng. Rul. Cas. 634, an agreement to submit to an award, signed "for J. B., M. W. (L. S.)," was held to have been executed in such form as to bind J. B.

#### Agreement in which principal is disclosed in body of contract.

This question seems not to have been fairly presented in *Lutz v. Linthicum*, 8 Pet. 165, 8 L. ed. 904, but the court, in deciding that case, states that a lease in which one of the parties is described as "J. L. . . . Agent for J. M.," and throughout the balance of which he is described as "J. L., Agent of the aforesaid," which is signed and sealed "J. L., Agent for J. M. (L. S.)," is the personal obligation of such agent.

It is stated in *Home Library Asso. v. Witherow*, 50 Ill. App. 117, an action against the principal, that a contract entered into by "E. Y. Loomis, Southern Manager for the Home Library Asso.," in which such manager appointed a district manager and contracted with him with reference to the salary and details of the work, and which he signed "E. Y. Loomis (Seal), Agent for the Home Library Association," is the personal contract of Loomis, and his description of himself as "Southern Manager" and agent is merely *descriptio personae*.

It is stated in *Peck v. Gardner*, 9 Hun, 704, that a contract purporting to be executed between A. G. L., Agent of J. M. G. and J. W., and another, and signed "A. J. L. (L. S.), Agent for G. & W.," is that of the agent, and not that of the principal.

In *Fullam v. West Brookfield*, 9 Allen, 1, an action against the alleged principal on a contract reading, "We, the undersigned, a committee chosen by the town of West Brookfield, . . . do hereby agree to pay," etc., and signed by three persons who sealed the same individually and added to their signatures the words, "Committee for the Town," the court states that the contract is not so executed as to bind the principal, but is executed in the name and as the contract of the individuals who signed and sealed it.

#### Agreement as agent.

A charter party under seal entered into between the plaintiff and the defendant as agent for another, in which the defendant is described as agent in every part where his name occurs, and which he signed and sealed as "Agent for L.," is not the personal obligation of the agent (*Potts v. Lazarus*, 4 N. C. [2 Car. Law Repos. 83]), since it is apparent from the instrument that it was not intended to bind such agent, and the form of executing the instrument will not govern in such case.

In *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70, a deed executed by an agent which reads, "Arthur W. McGill, Agent for" the company, "being empowered by a vote of said company," etc., and "for and in behalf of said company, . . . do give, grant," etc., and signed by such agent, who

adds to his signature the descriptive term "agent" for the company, naming it, and seals it with his seal, was held to bind the corporation.

An agent who entered into a bond under seal for the conveyance of land, in which he agreed "to cause" his principal "to make" a title to the purchaser, and who signed the same—"T. D. acting for J. D.," is stated in *Oliver v. Dix*, 21 N. C. (1 Dev. & B. Eq.) 158, to stand in the relation of surety to his principal.

The facts in *Deming v. Bullitt*, 1 Blackf. 241, are not clearly stated. In one part of the opinion it is stated that a bond which sets forth that A. B., as agent of C. D., legally appointed for the purpose, binds the said C. D. to make a title, etc., and which is executed as follows, "A B (seal), as agent for C D," is the deed of C D, provided the authority of A B be sufficient. Apparently, however, in this case, the bond in question was executed in such a manner as to be beyond the authority of the agent, and was therefore held not binding on the principal.

#### Agreement by principal.

A bond under seal reciting that "I, Z. M. P. G., am held and firmly bound," and signed "W. G. for Z. M. P. G. (Seal)," is not the personal obligation of the signer. *Grubbs v. Wiley*, 9 Smedes & M. 29.

In *Hunter v. Miller*, 6 B. Mon. 612, where a contract compromising a dispute as to land was made with "William S. Hunter, Agent for Thomas Todd and Mary Hunter, representatives of William Stewart, deceased," and contained an agreement that such representatives shall convey certain land, and was signed "Wm. S. Hunter for (Seal) Thomas Todd and Mary Hunter," the contract was held to evidence an intention to bind the principal, and therefore imposed no personal liability upon Hunter.

In *Wilbur v. Larkin*, 3 Blackf. 55, a bond reciting that "we, Lionel J. Larkin . . . are held," etc., and signed "for L. J. Larkin, George Crum (L. S.)," is admissible as the bond of Larkin in an action against him, since he is named in the body of the bond as one of the obligors, and it appears to be executed for him by an agent.

In the absence of proof of authority, a person who executes an agreement under seal purporting to be between a third person and certain persons as directors of a corporation, and signs the same "for the directors, R. S. (L. S.)," is personally liable on such contract. *White v. Skinner*, 13 Johns. 307, 7 Am. Dec. 381.

#### Joint agreements.

A lease purporting to be between a lessor as landlord, and a corporation and "W. W. P., Prest.," as tenant, which is signed by the landlord and the corporation and "W. W. P., Prest.," and sealed with three seals, imposes a personal obligation upon the president, and parol evidence is inad-

missible to vary the instrument. *Soule v. Palmer*, 49 N. Y. Supp. 475.

### III. Simple contracts.

#### a. In general.

#### 1. Mere addition of word indicating representative capacity to signature.

"The ordinary rule undoubtedly is," says the court in *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665, "that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*."

One who signs a writing, affixing to his signature or to the pronoun by which he designates himself in the body of the contract the word "agent," "trustee," "president," "cashier," etc., is to be regarded merely as explaining himself. *Bingham v. Stewart*, 13 Minn. 106, Gil. 96.

One who enters into an agreement to submit a cause to arbitration, signing the same "George Griggs, Agt.," without disclosing the name of his principal or the principal being known to the other party, is personally bound by the award. *Winsor v. Griggs*, 5 Cush. 210.

There is *dictum* in *Campbell v. Porter*, 46 App. Div. 628, 61 N. Y. Supp. 712, to the effect that a contract signed "J. G. P., Agent," is the personal contract of the signer, the word "agent" being mere *descriptio personæ*. The action in this case was not on the contract, and the question of the agent's liability was apparently not very carefully considered by the court.

It is stated in *Kenyon v. Williams*, 19 Ind. 44, that a duebill signed "S. N. Chappell, Agt.," purports to bind no one but Chappell, and the addition of the abbreviation for agent appended to his signature does not add to or vary its legal effect.

Where two persons signed a duebill "for work done on . . . schoolhouse and hall," and added to their signatures the word "committee," there being no disclosure of a principal, it was held to be the personal obligation of the signers. *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39.

On the contrary, a duebill acknowledging a sum of money due, as "balance due for wages as clerk of steamer Kentucky, No. 2," signed "F. P. Carson, Captain," and containing no direct undertaking on the part of Carson to pay the obligation, imposes no personal liability upon him. *Carson v. Lucas*, 13 B. Mon. 213. The court states that, since the instrument shows clearly that the debt is the debt of the steamer, the word "captain" becomes significant; and in the absence of a direct obligation to assume the debt personally, as in this case, the captain will not be held personally liable.

Where, in a purchase of land by several persons, title of the same is taken in the name of a trustee, and promissory notes executed by such trustee and signed "M. R., Trustee," without disclosing the nature of



the trust or the names of the *cestui que trust*, the promissory notes are the personal obligations of such trustee, and parol evidence is inadmissible to show a different liability. *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 959.

There is *dictum* in *De Roy v. Richards*, 8 Pa. Super. Ct. 119, 29 Pittsb. L. J. N. S. 78, to the effect that a note signed "E. D., Tr.," is the personal obligation of such signer.

Only a synopsis of the case of *Crusselle v. Chastain*, 76 Ga. 840, appears in the report. The second headnote is, in substance, that the addition of the word "trustee" to the name of the signer of a note, without more, is mere *descriptio personæ*, and the debt is that of the maker individually. It appears from the balance of this case, that the action was one in which the *cestui que trust* was sought to be held on an obligation thus signed.

The court in *Bingham v. Kimball*, 17 Ind. 396, recognizes a liability on the part of the signer of a duebill given for a balance due on lumber previously furnished the state board of agriculture, and signed "J. J. Bingham, Superintendent," as to form of signature; but liability is denied on the ground that there is no consideration for the note, it being shown by the pleadings that the note was given in payment of lumber delivered to the state board of agriculture, of which the signer thereof was superintendent.

On the contrary, where a husband purchased a horse for his wife and advised the vender that the purchase was so made for her, and the vender inquired as to the wife's responsibility, and, upon satisfying himself as to the same, completed the purchase and accepted a note in the payment of the purchase price, signed "C. L. R., Agt.," there was held to be no personal liability on the part of the husband. *Crandall v. Rollins*, 83 App. Div. 618, 82 N. Y. Supp. 317. Extraneous facts were considered in this case, and no question seems to have been raised in regard thereto.

A letter written on the letter head of a state agency of an insurance company by the manager thereof, and signed "G. W. E., Manag.," stating that a certain commission was due the person to whom addressed, on renewals, but containing no promise as to who should pay the commission, imposes no personal obligation upon the manager, since the writing standing alone is too indefinite to constitute a contract on his part to pay commission, but, being ambiguous, parol evidence is admissible to show intent. *Anderson v. English*, 105 App. Div. 400, 94 N. Y. Supp. 200.

Where an order for machinery was given and signed "L. M. Co., P. H. S. Pres., H. C. B., Sec'y, D. J. S., Treas.," and it was understood at the time that a limited liability company was to be formed and the machinery purchased for such company, and afterwards the limited liability company was formed and the manufacturer accepted the note of such company in payment of the 42 L.R.A. (N.S.)

machinery, there is no personal liability on the part of the president, secretary, and treasurer of the original company. *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 34 L. ed. 1019, 11 Sup. Ct. Rep. 360.

It does not appear in *Wilmoth v. Hensel*, 151 Pa. 200, 31 Am. St. Rep. 738, 25 Atl. 86, how the offer of reward was signed. The person who offered the reward was chairman of the state committee of a political party, and claimed to have been acting only in his representative capacity. His individual liability was left to the jury, and he was found individually liable and judgment on this verdict was affirmed by the supreme court.

#### Absence of authority.

Auctioneers who give a receipt for a deposit on a sale of property, the receipt stating the terms of the contract, and reciting that the title is to be made to a certain person, and being signed "J. P. and Son, Auctioneers," without disclosing the name of the principal and without authority from such principal, are personally liable on such contract. *Bush v. Cole*, 28 N. Y. 269, 84 Am. Dec. 343.

Where certain creditors of an absconding debtor, by mutual agreement, appointed one of their number as trustee to manage the affairs of the debtor, but without taking any legal proceedings to that effect; and such trustee, by correspondence, entered into a contract with a third person, a part of which correspondence was carried on on letter heads of the absconding debtor and signed by the trustees, who added to their signatures the word "trustees," other parts on letter heads of the trustees and signed by them as trustees, as in the first instance, and part of the reply letters addressed to the trustees individually and other parts to them as trustees, but with no knowledge on the part of the writer of the agreement between the creditors, and no knowledge of the alleged trusteeship further than that the writer added the word "trustees" to their signatures, the trustees are individually liable on the contract. The additional reason is advanced in this case that the defendants were without authority to charge the debtor's property. *Dunlevie v. Spangenberg*, 66 Misc. 354, 121 N. Y. Supp. 299.

#### 2. Addition of name of principal following word indicating representative capacity.

Where there is nothing to show that the principal has any corporate existence, or that it was, as a partnership or otherwise, capable of contracting, a person who signs a contract "John J. Blair, President Iowa Railroad Contracting Co.," is personally liable upon the contract. *Woodbury v. Blair*, 18 Iowa, 572.

Parol evidence is admissible in an action on a duebill signed "J. A. B., Supt. C. F. M. Co.," to prove that the consideration for the bill passed to the corporation, of which the signer was superintendent, and that it was

given to such corporation, and that he had authority to bind it by the bill, and acted solely as such superintendent to the knowledge of the plaintiff, who was an assignee of the bill, and upon the establishment of such facts the superintendent is not personally liable. *Schaefer v. Bidwell*, 9 Nev. 209, 1 Mor. Min. Rep. 409.

An acknowledgment of the receipt of money "to be used to buy Spencer rifles" for a company of volunteers, "said money to be returned as soon as the county bounty is paid to said company," and signed "L. B. Capt. 49th Regt. Mo. Vols. Com'd'g Post," is the personal obligation of the signer, since there is no principal to be charged. *Blakely v. Bennecke*, 59 Mo. 193.

In *Church v. Graham*, cited in *Murray v. Carothers*, 1 Met. (Ky.) 80, a duebill acknowledging an amount due "for balance on meetinghouse," and signed by certain persons, who add to their signature the word "trustees" and "as Trustees for C— Church, at Pleasant Hill," was held not to be the personal obligation of such signers, since it appears from the face of the writing that it was not executed for a debt which they owed, and that it was not intended by the parties that they should be personally bound.

#### Bills and notes.

Parol evidence is admissible in an action on a note signed "W. C. C., Pres. Moniteau Coal & Coke Co.," "to explain whether the instrument or the contract is that of the company by its president, or that of the president himself. *Turner v. Thomas*, 10 Mo. App. 342.

A secretary who signs a note by adding to his signature the words, "Ass't Sec'y Aurora Brewing & Malting Co.," was held in *Gaff v. Theis*, 33 Ind. 307, to have bound his principal, where it was alleged and proved in an action against the principal that the note was that of the corporation.

Where the deacons of an unincorporated church society incurred an indebtedness and gave their note therefor, adding to their signatures the words "Deacons M. C. Church," they were held personally liable on the note. *Burton v. Grand Rapids School Furniture Co.* 10 Tex. Civ. App. 270, 31 S. W. 91. The court in this case states that the members or committee of a religious organization who incur liability, assent to it, or subsequently ratify it, are personally liable therefor.

### 3. Addition of name of principal preceded by word "of."

#### (a) Ordinary contracts.

A duebill acknowledging a certain sum of money due, and signed "D. R. Burbank, Pres't of the Henderson Coal Co.," and attested by "W. Rankin," and containing nothing to show whose is the debt nor anything on the face of the note indicating a different intention, a personal undertaking on the part of the signer is imported and a judgment L.R.A. (N.S.)

ment against him individually by default will not be disturbed. *Burbank v. Posey*, 7 Bush, 372.

It is stated in *Phillips v. Knight*, 20 R. I. 624, 40 Atl. 762, that a contract signed "D. T. L., Correspondent of E. J. K. & Co.," is the personal contract of the signer, and the words added to his signature are merely descriptive of such person.

An agreement entered into by the president of a corporation, who was duly authorized, or whose act was subsequently ratified, by the company, which he signs as president of the corporation, is prima facie not personally binding upon him. *Webster v. Widmayer*, 4 Lack. Leg. News, 1.

#### (b) Bills and notes.

A promissory note signed "E. F., Trustee of N. P. F.," is the personal obligation of the signer. *Conn v. Scruggs*, 5 Baxt. 567.

Where a trustee executed a promissory note in the payment of the one half of a party wall, according to a previous agreement, and signed the said note "P. M. F., Trustee of M. E. Meade and Children," such trustee is individually liable on the note, and there is no such latent ambiguity as will permit the introduction of parol evidence. The court states that the extension of time by the debtor constitutes a sufficient consideration for the individual promise of the trustee. *Webster v. Switzer*, 15 Mo. App. 346.

#### Notes given by trustees of religious societies.

A joint and several note signed by persons who add to their signatures the words, "trustees of Union Religious Society, Phelps," is the personal obligation of such signers. *Hills v. Bannister*, 8 Cow. 31. There is no discussion on this point. The court cites *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280, an action on a sealed instrument, as authority for its decision. Nothing is said as to who was intended to be bound, except in the pleading of the defendants, where it is alleged that they intended to bind the church society.

The court in *Brockway v. Allen*, 17 Wend. 40, recognizes that where the trustees of a religious society have given a note in which they add to their signatures the words, "trustees of Baptist Society," they are prima facie liable, but when it appears that the note was given for supplies furnished the society and with the knowledge of the payee that they promise as agents of the society, such trustees are not personally liable. The decision in this case, holding them liable, is based upon a matter of pleading.

Where money was borrowed by a church society and a note given therefor signed by the vestrymen, who added to their signatures, "vestrymen of the Episcopal Society," and the holder of the note, who was an assignee, recognized the society and no one else as his debtor, there is no personal lia-

bility on the part of such vestrymen. *Johnson v. Smith*, 21 Conn. 627.

There is *dictum* in *Sheridan v. Carpenter*, 61 Me. 83, to the effect that a note signed "J. P. H., Treas. of St. Paul's Parish," is the note of the treasurer individually.

#### Notes of public officers.

In *Fowler v. Atkinson*, 6 Minn. 578, Gil. 412, an action against school trustees on a promissory note, it is held that the description of the signers as trustees of said school district does not have the effect of relieving them from personal liability thereon, but in order to effect this, it must appear, in or from the instrument itself, that it was executed by the signers in their capacity as trustees.

An offer of a reward made by the selectmen of a town, in which the language is simply that a "reward will be paid," and signed by the selectmen, who add to their signatures the words "selectmen of Milton," imposes a personal obligation upon such selectment. *Brown v. Bradlee*, 156 Mass. 28, 15 L.R.A. 509, 32 Am. St. Rep. 430, 30 N. E. 85.

There is *dictum* in *State ex rel. Cunningham v. Helms*, 136 Ind. 122, 35 N. E. 893, to the effect that where a township trustee borrows money to complete a schoolhouse being erected for the township, gives a promissory note, signs it individually, adding to his signature the words, "Trustee of Sugar Creek Twp., Hancock County, Indiana," that such trustee is not personally liable on the obligation.

The magistrates of a county who meet during the recess between the regular terms of the county court and offer a reward for the apprehension of escaped slaves are not personally liable upon such offer of reward. *Hite v. Goodman*, 21 N. C. (1 Dev. & B. Eq.) 364. It does not appear from the report of this case whether the offer was signed, and if so in what manner.

#### 4. Addition of name of principal preceded by "for."

"Where an instrument shows on its face the names of the contracting parties, the agent may sign his own name first and add to it, as in the present case, 'Agent' for his principal; or he may sign the name of his principal first and add, by himself as agent. Either form may be followed; all that is required in such case is that the contract shall purport on its face to be the contract of the principal." *Smith v. Morse*, 9 Wall. 76, 19 L. ed. 597.

It is stated in *Walbridge v. Kilpatrick*, 9 Hun, 135, an action against the principal, that the signature, "W. G. C., Agent for F. K." is an execution of the instrument in the name of the principal, not in the name of the agent.

A duebill signed "G. P. Agt. for D. R. M. Co." is not the personal obligation of such signer. *McCall v. Clayton*, 44 N. C. (Bus. & Com. L.) 422.

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In the case of *Wright v. Roberts*, referred to in *Hunter v. Miller*, 6 B. Mon. 625, the action is stated to have been on an instrument reading, "I have bought of Wright & Ward from 8 to 10 tons of hemp," etc., and signed "W. B. Roberts, Agent for O. F. Payne," and it was held that Roberts was not personally liable.

In *Dubois v. Delaware & H. Canal Co.* 4 Wend. 285, an action in assumpsit against the principal, the court referring to *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193, states that a contract entered into by a contractor and a canal company, signed "M. W. Agt., for Delaware & Hudson Canal Co. L. S." is not the personal obligation of such agent.

In *Burgess v. Fairbanks*, 83 Cal. 215, 17 Am. St. Rep. 230, 23 Pac. 292, a principal was held bound by a duebill signed by an agent who designated himself as agent for the principal, naming him; but there is no discussion, the finding of the lower court to this effect being merely sustained, as it is said that it will be presumed that such finding was supported by evidence.

In *Rawlings v. Robson*, 70 Ga. 595, and agent who signed a note in payment of fertilizer purchased on behalf of his wife, as "J. A. Robson, Agent for Wife," was held to have succeeded in binding his wife.

The widow and heirs of a decedent are not liable on a promissory note signed by their attorney, as "attorney for the estate of L. H. (the decedent)," "since they are nowhere disclosed on the instrument. The action in this case was by an indorsee, and it was held that he must recover, if at all, on the note, and not on an assumpsit. *Merchants' Bank v. Hayes*, 7 Hun, 530.

But in *Bowen v. Penny*, 76 Ga. 743, one who interposed a claim in an execution and gave a replevin bond for the property levied upon, which bond was signed, "John P. Penny, Trustee for M. T. Penny," was held personally liable. The court states that the words, "Trustee for M. T. Penny," are words of description merely and in no wise restrict his liability; that he put in the claim, the property levied on was turned over to him and was consumed by him and he is liable to the plaintiff.

A guaranty of a note signed "J. F. H., Trustee for F. B. H.," is *prima facie* the personal obligation of the signer, and in order that he may show that he contracted in a representative capacity, it is necessary that he first prove the existence of his capacity so to contract. *Peterson v. Homan*, 44 Minn. 166, 20 Am. St. Rep. 564, 46 N. W. 303.

There is *dictum* in *Parks v. S. & L. Turnp. Road Co.* 4 J. J. Marsh. 456, to the effect that an instrument signed, "R. Winchester, Agent for the T. R. Com'y," is the personal obligation of Winchester.

Parol evidence is admissible in an action on a duebill signed "for Thomas D. Owings, James Grubb," to show that Grubb did not intend to contract individually. *Owings v. Grubb*, 6 J. J. Marsh. 31.

In equity the signers of a charter party

as follows, "for A. D. & Co., T. W. & J. C. H. & Co., Agents," may show that there was an express agreement that such agents were not to be personally liable and thereby relieve themselves from liability. *Wake v. Harrop*, 1 *Hurlst. & C.* 202, 31 *L. J. Exch.* N. S. 451, 8 *Jur. N. S.* 845, 7 *L. T. N. S.* 96, 10 *Week. Rep.* 626, affirming 6 *Hurlst. & N.* 768.

No question was raised in *Rew v. Pettet*, 1 *Ad. & El.* 196, as to the original liability of church wardens who had signed a note as "J. P., G. W., Church Wardens for Parish of C., J. F., Overseer." *Patterson, J.*, states in the course of his opinion that the payee of the note who had loaned the money to the parish would not trust the parish because the church wardens could not bind themselves in that character, and, accordingly, took the note of the church wardens and an overseer; and since the signers of the note could not bind themselves as parish officers, they contracted as individuals. It was urged against the liability in this case that the statute of limitations had run against the note. A payment had been made by the parish, which is treated as the agent of the defendants, within a time previous to the beginning of the suit, that would take the case out of the operation of the statute of limitations, and the entry of payment was signed by one of the signers of the note, and this was held to relieve the case from the operation of the statute, and the signers were held liable.

With reference to an agreement by which a broker was to receive a certain sum for having listed men credited to a certain ward so as to make up its quota under a call from the state to furnish men for the Army, the agreement reading, "the said F. is to receive the sum," etc., and being signed, "R. E., Agt., for Ward 6, Lowell, Mass.," the court states that if the signer of the paper were merely an officer or agent whose duty it was to certify that the conditions of an agreement had been performed, the language would not establish a personal liability upon such agent, and therefore such liability is a question of fact to be submitted to the jury under proper instructions. *Shattuck v. Eastman*, 12 *Allen*, 369.

#### Contracts beyond authority.

In *Wallace v. Bentley*, 77 *Cal.* 19, 11 *Am. St. Rep.* 231, 18 *Pac.* 788, some agents who signed a receipt for a certain sum of money, which receipt contained an informal contract for the sale of land, by adding to their name the word "agents" for the principal, naming him, were held not liable on the contract, since such contract contained no apt words to charge them, nor was the other contracting party entitled to special damages by reason of the representations of the defendants on account of which he claims to have been prevented from purchasing the premises. This decision, however, is based upon the fact that the action was founded upon the agents' lack of authority, and no special attention is given to the question of signature.  
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In *Coffman v. Harrison*, 24 *Mo.* 524, where a duebill had been signed by an agent as "agent for" a corporation, it is stated that if such agent was without authority to so execute the duebill, he himself would be bound.

#### b. Simple agreement in body of contract.

##### 1. Signed by adding word or words indicating representative capacity.

##### (a) Ordinary contracts.

##### Agents and trustees.

Where a contract for the sale of real estate had been entered into, and thereafter the purchaser paid to the agent of the vendor the first payment, and received from such agent a receipt acknowledging payment and agreeing substantially as the vendor agreed in the contract of sale, that in case the title was not good "this \$1,000 will be refunded by us," and signed "Mead & Coe, Agents," such contract was held in *Mead v. Altgeld*, 136 *Ill.* 298, 26 *N. E.* 388, to be the personal contract of the agents and in case of a failure of title the same might be enforced against them.

In *Anthony v. Comstock*, 1 *R. I.* 454, a somewhat informal redelivery bond had been executed by the agent of a corporation upon the return to him of property taken by an officer on a libel against the corporation, and contained the promise that "I hereby promise to return said coal . . . or pay the amount that may be awarded," etc., and was signed "W. P., Agent." It was held that such agent was personally liable, and that there was no such latent ambiguity in this instrument that would make the introduction of parol evidence admissible to explain the intention of the parties.

In *Savings Bank v. Central Market Co.* 122 *Cal.* 28, 54 *Pac.* 273, a promissory note reading, "we promise to pay," etc., had been signed by a corporation, and was signed after the name of the corporation by some stockholders certain of whom added to their signatures the word "trustee," and such addition was held not to change their personal liability.

It does not appear how the note was signed in *Crum v. Boyd*, 9 *Ind.* 289. It was held in that case that an agent who binds himself personally to pay will be liable, although the consideration moves to his principal.

In construing a contract governed by the laws of Massachusetts, in *Pease v. Pease*, 35 *Conn.* 131, 95 *Am. Dec.* 225, an action against the successor in office of a trustee who guaranteed a note, the court holds that a contract of a guaranty of negotiable instrument signed by "Zelotes Terry, Trustee," according to the principles of agency would not bind the principal, but that it was competent to show by parol evidence that "Ze-

lotes Terry, Trustee," was the business name of defendants, in which case there would be no personal liability.

In *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350, an action by the assignee of the principal on notes given in payment of some harvesting machines, an agreement by the agent of the harvesting machine company to the effect that the purchaser might return the machine in event of its failure to work, "and I will return his note," and signed "A. M. S., Agent," is stated to be the contract, *prima facie*, of such agent, but that evidence might be introduced of a different intention.

It is stated in *Keeley Brewing Co. v. Neuhauer Decorating Co.* 194 Ill. 580, 62 N. E. 923, that a proposition written on the stationery of a decorating company, containing the name of the company at the top, to make certain improvements for the person to whom the proposition is made, and reading, "We propose," etc., and signed "D. E. L. Mfg. Agt. & Supt. of Contracts," is so uncertain as to render parol evidence admissible to explain who was intended to be bound; and that the burden of proof is upon the agent to show that the decorating company was the principal to the contract, and, having failed to sustain the burden, the contract will be regarded as that of the agent personally.

#### Effect of a custom.

In *Humfrey v. Dale*, 7 El. & Bl. 266, under a custom of trade that where a broker contracts without disclosing his principal's name he is personally liable, proof of which is made by parol evidence, brokers who had signed a bill of sale as "B. M. & Co., brokers," were held personally liable thereon; affirmed in El. Bl. & El. 1004, 27 L. J. Q. B. N. S. 390, 5 Jur. N. S. 191, 6 Week. Rep. 854.

So, in *Fleet v. Murton*, L. R. 7 Q. B. 126, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 97, evidence of a custom was admitted in an action against the brokers on a contract stating, "We have this day sold for your account to our principal," etc., and signed "M. & W., Brokers," and the brokers held personally liable. A similar holding appears in *Hutchinson v. Tatham*, L. R. 8 C. P. 482, 42 L. J. C. P. N. S. 260, 29 L. T. N. S. 103, 22 Week. Rep. 18.

#### Committees.

A writing acknowledging the receipt of certain notes and containing an agreement that upon the return of certain bank stock "to us, we will return" the above-described notes, and signed by three persons who add to their signatures the words, "special committee," is the personal obligation of such signers; and the fact that these persons were appointed as members of the committee of a bank, with the knowledge of the other contracting party, to contract for the bank and that they so intended, is immaterial; 42 L.R.A. (N.S.)

since they did not carry out their authority or their intent, but executed a contract which imposed no liability upon the bank, but simply a personal liability upon themselves. *Orchard v. Binnering*, 51 N. Y. 652.

In *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505, a voluntary association had been organized for the purpose of conducting a normal school, and certain members of the association were appointed a committee known as the "board of regents" to take charge of the school and conduct the affairs. The board contracted for the services of a teacher but did not reduce the contract to writing, but after the rendition of the services an order was drawn on the treasurer and signed by one of the members as president and another as secretary, and this order was not paid. The action, however, seems to have been founded upon the original contract, and the members of the committee were held personally liable for the wages.

See also *Brondrup v. Tureman*, 12 Ky. L. Rep. 47, post, 111. e, 1 (a).

#### Corporate officers.

In *Laramee v. Tanner*, 69 Minn. 156, 71 N. W. 1028, where an order was drawn on one who had subscribed a guaranty fund payable to "R. F. J.," in case of deficiency at a meeting, on the grounds of a certain driving club, the order stating that it was for "the amount of your assessment to subscription of guaranty fund of the summer meeting of the Minneapolis Driving Club," and being signed "R. F. J., Secy.," there is *dictum* to the effect that such an order is the personal obligation of the signer.

Where the president of a corporation, in response to a letter addressed to him as such president, requesting certain information and a guaranty as to goods shipped to another corporation, of which he was president also, replies on the letter heads of the latter corporation, and signed the name "W. A. stating, "I will see that you are protected in any dealings that you may have with this corporation," and signed the same "W. A. P., Pres't," he is personally liable on such guaranty. *J. I. Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227.

Parol evidence is admissible in an action on a bond given by the trustees of a lodge, to show that the same was executed by such trustees with the understanding that they were not to be personally liable, where had it not been for the oral agreement the bond would not have been executed. *Hoopers v. Beale*, 90 Pa. 82.

A contract entered into by a bank and signed by the cashier, who adds to his signature the word "cashier," such signing having been done by the direction of the president of the bank in the course of a transaction by which the bank became the owner of a note, is binding upon the bank where it took the note and brought action upon it. *Merchants' Bank v. Meyers Steel & Wire Co.* 2 N. Y. Week. Dig. 214.

## Collateral agreement.

Where a debt is due from a corporation, and the directors execute a guaranty therefor reading, "We hereby agree as guarantors to be responsible and liable to pay you . . . any and all indebtedness now or hereafter owing to you by the L. C. Asso. . . . same shall hold good . . . until we notify you of our purpose to be no longer held as guarantors," and sign the same by adding to their signatures the words, "as board of directors," such directors are personally liable thereon, and there is no such ambiguity therein as will render parol evidence admissible to change that liability. *Marx v. Luling Co-op. Asso.* 17 Tex. Civ. App. 417, 43 S. W. 596.

In *Kline v. Bank of Tescott*, 50 Kan. 91, 18 L.R.A. 533, 34 Am. St. Rep. 107, 31 Pac. 688, a number of persons had signed on the back of a note and added to their signature, "board of directors," and it was held that these persons were prima facie liable as guarantors, but that evidence was admissible to show the real intent.

## Contract beyond authority of officer or of corporation.

A letter written on the letter head of a bank by its cashier to the cashier of another bank, requesting him to sign a replevin bond and stating that "we will stand between you and all harm," being a contract beyond the power of the cashier to make for his bank, it is binding upon such cashier individually, in the absence of clear and unequivocal proof that such cashier was claiming to act for the bank, and that he was not intending to bind himself personally. *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123.

Where the directors of a building society received money and gave a receipt therefor signing the same by adding to their signature "directors," when in fact the society had no authority to borrow money, such directors are personally liable. *Richardson v. Williamson*, L. R. 6 Q. B. 276, 40 L. J. Q. B. N. S. 145.

## Public officers.

A note reciting the number of the insurance policy for which it was given, and reading, "we promise to pay," etc., and signed by three persons, who add to their signatures respectively the words, "president," "secretary," and "director," and containing nothing on its face to indicate that it was the contract of a school district as claimed, is the personal obligation of such signers; and the fact that the policy was issued to the school district does not establish the liability of the district for the premium, or show that the signers did not intend to bind themselves personally therefor. *American Ins. Co. v. Stratton*, 59 Iowa, 696, 13 N. W. 763.

An order for the delivery of goods containing a promise in the words, "we agree 42 L.R.A. (N.S.)

to pay," etc., and signed by two persons, who add to their names respectively the term "Pres. School Board" and "Sec'y School Board," is the obligation of such signers, where no principal is disclosed nor no corporation indicated of which such signers are officers, and parol evidence is inadmissible to show a different intent. *Wing v. Glick*, 56 Iowa, 473, 41 Am. Rep. 118, 9 N. W. 384.

In the absence of any evidence to contradict the prima facie liability on a contract by the president of a school board, reciting, "I promise to pay J. A. B. or order for causing full-page view of the L. Graded School Building to be printed in the atlas of Clearfield county, and signed "J. T. L., President Sch. Bd.," the court should direct a verdict against the signer individually. *Forcey v. Caldwell*, 6 Sadler (Pa.) 550, 9 Atl. 466. It apparently was conceded in this case that the school board had no power to enter into this contract.

Where a county court has appropriated the funds for a public improvement, and the fund has been collected and commissioners appointed with the power to dispose of it for the improvement, and such commissioners enter in a contract reciting the above facts and promising to pay, in the language, "we, R. P., etc., commissioners, appointed by the county court . . . promise to pay" etc., in the absence of any disclosure of intention other than the instrument, the court assumed that the funds were in the hands of the commissioners, and they were held personally liable on the obligation. *Powell v. Finch*, 5 Yerg. 446. It does not appear from the report of this case how the agreement was signed.

In *Gillaspie v. Wesson*, 7 Port. (Ala.) 454, 31 Am. Dec. 715, certain militia officers entered into a contract for the purchase of a horse, the contract reciting, "We have purchased . . . on account of the United States . . . said sum to be paid by the 25th day of December next," and was signed by such officers, one as a "Brigade General," another as the "Col. Com.," another as "Capt.," and another as "Lieut.," it was held, in view of the fact that the contract stipulated for the payment by a certain time when no appropriation had been made by the government to meet the expenses of the campaign in which the debt had been incurred, and in the absence of any proof showing the authority of the officers to bind the government, that the signers were individually liable. It was held unimportant in this case that the officers were ordered into service and that they had purchased the horse for use in such service.

A United States marshal who offers a reward for a fugitive is not relieved from liability by the addition of the words "U. S. Marshal" to his signature. The court states that it was the duty of the marshal to arrest the fugitive, and in proclaiming a reward to further his object, he was acting as a principal. *Murray v. Kennedy*, 15 La. Ann. 385, 77 Am. Dec. 189.

## (b) Bills and notes.

## (1) Notes.

## a. Liability of one who signs as maker.

## Agents.

Where the agent of a corporation takes out an insurance policy for the corporation in his own name, and in payment of the premium gives a promissory note reading, "I promise to pay," etc., and signs the same "E. K. P., Agent," such signer is personally liable on the note notwithstanding the insurance company had notice that he was acting as agent, and parol evidence to vary the writing is not competent. *Collins v. Buckeye State Ins. Co.* 17 Ohio St. 215, 93 Am. Dec. 612.

In *Williams v. Robbins*, 16 Gray, 77, 77 Am. Dec. 396, an action against the alleged principal on a note reading, "I promise to pay," etc., and signed "A. C., Ag't.," the court states that the note is the personal note of the agent; therefore, no liability rests upon the alleged principal.

There is *dictum* in *Hall v. Bradbury*, 40 Conn. 37, to the effect that one who signs a note reading, "I promise to pay," etc., by merely adding the word "agent" after his signature, is personally liable on such note.

It is stated in *Ezell v. Edwards*, 2 Tex. App. Civ. Cas. (Willson) 767 that, although an agent signs a note by adding to his signature the word "agent," he will be personally liable thereon and the suffix to his name will be regarded as *descriptio personae*.

So, in *Cortland Wagon Co. v. Lynch*, 82 Hun, 173, 31 N. Y. Supp. 325, an action by a bona fide indorsee against the principal on a note reading, "I promise to pay," and signed "P. L., Ag't." it is stated that the agent is personally liable on such note. There is *dictum* of like effect in *Manufacturers & T. Bank v. Love*, 13 App. Div. 561, 43 N. Y. Supp. 812.

Where a parish judge gives a note for money loaned him and applied by him to the discharge of his own obligation, signing the note by adding to his signature the word "parish judge," he is personally liable on such note. *Paillette v. Carr*, 3 Mart. (La.) 489.

A promissory note reading, "I promise to pay," and signed "W. F. W., Agt.," is *prima facie* the personal obligation of such agent, but as between the immediate parties to such note, parol evidence is admissible to show that the said agent was doing business for another to the knowledge of the payee; that many business transactions had taken place between them, and notes signed exactly as the note sued upon is signed had been given in such transactions; and that the consideration for the note sued upon was goods delivered to the said agent's principal. *Keidan v. Wintgar*, 95 Mich. 430, 20 L.R.A. 705, 54 N. W. 901.

Where the creditors of a partnership of which the plaintiff was one appointed a trustee to take charge of the partnership 42 L.R.A. (N.S.)

affairs, and such trustee, in completing a building owned by the partnership, purchased lumber of the plaintiff and gave to him the note in suit, reading, "I promise to pay," etc., and signed "P. G. P., Trustee," such trustee is not individually liable if the plaintiff agreed to accept his note in his representative capacity alone; and whether or not plaintiff did so agree is a question of fact. *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738.

In *Moore v. McClure*, 8 Hun, 557, a promissory note reading, "I promise to pay," etc., and signed "J. S. M., Agent," which was alleged to be the note of the principal by her said agent for and on account of goods, wares, and merchandise sold and delivered to her, was held to be in such form as to entitle the holder to introduce proof of the allegation made in the petition, and upon proof of the allegation the note would be binding upon the principal. The court in this case disapproves of the doctrine that the name of the principal must appear on the face of the note in order to render him liable.

Where the payee of a note was informed that the signers signed in their representative capacity and refused to become individually liable, a note given by trustees for the benefit of creditors in payment of a contract entered into by the assignor and confirmed by such trustees, reading, "we promise to pay," etc., and signed by the trustees, who add to their signatures the words, "as trustees, etc.," imposes no personal obligation upon such trustees. *Kerby v. Ruegamer*, 107 App. Div. 491, 95 N. Y. Supp. 408.

## Corporate officers.

The signers of a promissory note reading, "we promise to pay, etc.," who have added the words "president" and "secretary" to their names respectively, are personally liable on such note, although there is attached to the note a copy of the resolution, containing an impress of the corporate seal, authorizing the execution of the note, and parol evidence to vary this liability or reform the instrument is not admissible. *San Bernardino Nat. Bank v. Andreson*, — Cal. —, 32 Pac. 168.

See also *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624, *infra*, III. b, 2 (b), (1) a.

A note reading, "We promise to pay," etc., and signed "W. C. B., Pres., S. A. C., Secty.," is *prima facie* the personal obligation of the signers, and where such officers fail to show authority to act a different intention may not be shown. *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261.

A promissory note reading, "we promise to pay," etc., and signed by two persons, who add respectively to their names the abbreviation "Pres." and "Secy.," and given by such persons in consideration of certain furniture delivered to a religious corporation of which they were officers, was

construed in *Saul v. Southern Seating & Cabinet Co.* 6 Ga. App. 843, 65 S. E. 1065, to be the personal obligation of the signers; since they do not, on their faces, disclose any principal for whom the signers could be construed as acting in the capacity of agents; but the liability of such signers was denied in this case on the ground that there was no consideration for their obligation, the contract for the furniture having been entered into by a committee for the corporation, and the notes afterwards given.

Under a statute providing that where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability, a note written on a blank form at the top of which is the name of a corporation, and reading, "We promise to pay," etc., and signed "W. H. B., President," and in the lower left-hand corner "H. M. P. Secy." is the personal obligation of such signers. *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

In *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320, a note in the first person plural, signed by one who added the word "president" to his signature, was held to be the personal liability of the signer, although it was in evidence that the note had been given in renewal of a previous note of the corporation of which such person was president, and that the defendant, in executing it, intended to sign as president of the corporation, did not then, or at any other time, say or do anything to lead the payee to believe that he intended to make or deliver his own note and not the note of the corporation; and, further, that the plaintiff, who could not read writing, did not at the time know in what manner the note was executed, but at the end of every month presented it and received from the corporation the interest due thereon, and never claimed or commanded from the signer the payment thereof, prior to the bringing of the action. This decision is based on the fact that there was no disclosure of principal.

In *Savings Bank v. Central Market Co.* 122 Cal. 28, 54 Pac. 273, where certain stockholders of a corporation had signed a promissory note previously signed by the corporation, and reading, "We promise to pay, etc.," with intention of ratifying the act of the corporation in executing the note, and had affixed to their signature the words, "as stockholders," it was held that as there was nothing appearing in the note which indicated any such intention, but, on the other hand, was an unambiguous promise to pay, the stockholders were personally liable. In the course of the opinion, the court states that the fact that they promised to pay as stockholders was as unim-

portant as it would have been had they promised to pay as citizens of the United States.

A note reading, "we promise to pay," etc., and signed by several persons, one of whom adds to his signature the word "trustee" and another the word "secretary," is binding upon such persons individually. *Price v. Taylor*, 5 Hurlst. & N. 540, 29 L. J. Exch. N. S. 331, 6 Jur. N. S. 402, 2 L. T. N. S. 221, 8 Week. Rep. 419.

A note reading, "we promise to pay . . . in part payment for . . . engine and . . . boiler," and no where disclosing the principal, and signed by certain persons as a "board of business managers," is the obligation of such signers personally, and evidence will not be received to show that it was the obligation in fact of the corporation. *Richmond Locomotive & Mach. Works v. Moragne*, 119 Ala. 80, 24 So. 834.

In *Second Nat. Bank v. Midland Steel Co.* 155 Ind. 581, 52 L.R.A. 307, 58 N. E. 833, an action against the principal, the court regarded the liability of the principal as being determined by the liability of the agent, and entered into a discussion of the liability of the agent, and held that a promissory note containing at its head the name of the alleged principal, and reading, "we promise to pay," etc., and signed "R. J. Beatty, President," is not of such a form as to require a conclusive presumption that the signer is individually liable, but parol evidence is admissible to explain intent.

In *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480, an action against the seminary on a note reading, "I promise to pay," etc., and signed "E. M. Pres. per E. B.," it was held that parol evidence was admissible to show who was to be bound.

There is *dictum* in *Chatham Nat. Bank v. Gardner*, 31 Pa. Super. Ct. 135, to the effect that a promissory note containing at its head the name of a limited partnership, and reading, "we promise to pay," etc., and signed "A. M. M., Treasurer," and in the lower left-hand corner "G. A. M., Secretary," imposes no personal liability upon the signers.

#### Effect of adding seal.

A promissory note reading, "we promise to pay," etc., and signed "Wm. B. Swormstedt, Secy." and containing on the lower left-hand corner the impress of a seal bearing the words, "Neil Mfg. Co., Madison, Ind.," is not the personal obligation of such secretary, since it is apparent from the instrument that the intention was to bind the corporation. *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330. See *Miller v. Roach*, *infra*, IV. c.

In *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664, where a note reading, "we promise to pay," and signed by one who added the word "Pres't." to his signature and another who added the words "Sec. G. M. Co.," contained the impress of the



seal of a corporation, the court were equally divided as to whether or not this relieved the signers of personal liability, and a judgment in favor of such officers was affirmed under the statute.

In *Tama Water Power Co. v. Ramsdell*, 90 Iowa, 747, 52 N. W. 209, 57 N. W. 631, the court was of the opinion that in the absence of an averment in the petition that the company named as the promisor was a corporation, an impression of a seal containing the name of the promisor would not control the rights of the parties.

As to the effect of adding a seal, see *San Bernardino Nat. Bank v. Andreson*, — Cal. —, 32 Pac. 168, III. b, 1 (b) (1) a; *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624, III. b, 2 (b) (1) a; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988, IV. c; *Reed v. Fleming*, 209 Ill. 390, 70 N. E. 687, III. b, 2 (b) (1) a; *Pitman v. Kintner*, 5 Blatchf. 250, 33 Am. Dec. 469, III. e, 1 (b); *de Bebian v. Gola*, 64 Md. 262, 21 Atl. 275, III. b, 3 (b) (1); *Miller v. Roach*, 150 Mass. 140, 6 L.R.A. 71, 22 N. E. 634, IV. c; *Hood v. Hallenbeck*, 7 Hun, 362, III. b, 3 (b) (1); *Dutton v. Marsh*, L. R. 6 Q. B. 361, 40 L. J. Q. B. N. S. 175, 24 L. T. N. S. 470, 19 Week. Rep. 754, III. c, 1 (b) (1); *Foster v. Geddes*, 14 U. C. Q. B. 239, III. c, 1 (b) (2); *City Bank v. Cheney*, 15 U. C. Q. B. 400, III. b, 2 (b) (1) a.

#### Public officers.

It is stated in *Trustees of Schools v. Rautenberg*, 88 Ill. 219, an action against the village in which the village was held not liable, that a note reading, "I promise to pay, etc.," and signed by two persons, who add to their signatures the words "school trustees," is the individual liability of such signers. The money for which the note was given in this case was borrowed from a bank and used in the construction of a schoolhouse. It is stated in the opinion that it was not borrowed on the credit of a school district, but on that of individual trustees, and therefore they became liable.

In *McClellan v. Reynolds*, 49 Mo. 312, the court recognizes the general rule that parol evidence is admissible, and states with reference to a note reading "I promise to pay . . . a balance due . . . for building a schoolhouse," and signed "C. P. R., Local Director," that the indications upon the note are that the defendant did not intend to make a personal contract, and the facts set out which, by the motion, were admitted to be true, conclusively show that such was the case. In the subsequent action of *McGee v. Larramore*, 50 Mo. 425, the court, apparently without any extrinsic evidence, states that a note similar to that passed upon in *McClellan v. Reynolds* shows it to be an obligation of the school district, and not of its signer, and hence the signer is not personally liable upon it.

In *Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139, an action against the principal on a note reading, "we promise to pay," etc., and signed by two persons, who add to their signatures the words, "school trus-

tees," the court states that the note which was confessedly executed upon consideration moving only to the use and benefit of the school district, is binding on no one, unless upon such school district.

In equity, parol evidence is admissible in an action on a promissory note reading, "we promise to pay," etc., and signed "Trustees, J. M. Stickleman, Joseph Litsch," to show that the consideration for such note was property sold the township of which the defendants were trustees, and that it was the intention of the parties to bind the township, and not the signers individually. *Western Wheeled Scraper Co. v. Stickleman*, 122 Iowa, 396, 98 N. W. 139.

See also *McNeil v. Shober & C. Lithographing Co.* 144 Ill. 238, 33 N. E. 31, *infra*, III. b, 2 (b).

#### b. Liability of one who signs as indorser.

The indorsement of a promissory note serves a twofold purpose,—first, it serves to convey the indorser's title to the instrument; second, it is ordinarily a contract to become liable for the payment of the instrument upon certain conditions. It will be seen that the cases differ as to the liability which an indorser assumes where he adds a word indicating representative capacity to his signature.

Where a note made payable to "D. B., Agent," is indorsed by such agent in the same form, he is personally liable upon such indorsement. *Barnhisel v. Commercial Nat. Bank*, 7 Ohio C. D. 533, 14 Ohio C. C. 124.

There is *dictum* in *Hately v. Pike*, 162 Ill. 241, 53 Am. St. Rep. 304, 44 N. E. 441, to the effect that one to whom a note was made payable as "Adolph Pike, President," and who indorsed the same as "Adolph Pike, President," is individually liable on the indorsement.

Where a promissory note is given by a corporation to its treasurer and indorsed by him "A. J. B., Treasurer," such indorsement is *prima facie* the personal obligation of the indorser, but extrinsic evidence is admissible to show that it was made in his official capacity as treasurer of such corporation. *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1116.

Where a note made payable to "T. F. L., Pres't," is indorsed by him in the same form and given to the holder in payment of a debt due by the corporation of which the signer is president, the president cannot be held liable as a matter of law. *Seyfert v. Lowe*, 7 W. N. C. 39.

The court was of the opinion in *Sharpe v. Bellis*, 61 Pa. 71, 160 Am. Dec. 618, that an indorsement of a promissory note made payable to one individually, by him as "G. S. B., Pres't," imposes no personal liability upon him as against one who knew his official capacity and relation to the company, and accepted the note in payment of a debt of the company.

A note given by a corporation payable to "R. B., Treas.," and by him indorsed "R. B., Treasurer," in payment of a debt of the

corporation to the creditor, who had knowledge of the official capacity of the indorser, imposes no personal obligation upon such treasurer. *Babcock v. Beman*, 11 N. Y. 200. The court in this case takes the view that this is a qualified or special indorsement by which the payee passes the title to the bill, but does not contract to pay the amount of the bill himself in case of the failure of the maker to do so.

There is no ambiguity in the indorsement of a promissory note made payable to the order of "G. M., Sec. & Treas.," signed "Peninsula C. Co., G. M. Sec. & Treas., and indorsed by the payee, "G. M., Sect'y & Treas.," so as to admit of parol evidence, but such indorsement is that of the Peninsula C. Co. *Falk v. Moebis*, 127 U. S. 597, 32 L. ed. 266, 8 Sup. Ct. Rep. 1319.

So, in *Bowne v. Douglass*, 38 Barb. 312, an assignee to whom a note was made payable as assignee, who indorsed the same as "P. B., Assignee," was held not personally liable thereon, and no attention is given to the fact that the holder, a remote indorsee, had notice of the character in which the assignee signed.

In deciding that one who, in indorsing a note made payable to him individually, added to his signature on such indorsement the word "agent," is a competent witness in an action against the maker of such note, the court in *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 550, states that such an indorser is not liable to his indorsee. The indorsee in this case was familiar with the entire transaction and knew that it was not the intention of the indorser to bind himself personally.

See *Ferris v. Thaw*, 72 Mo. 446, III. b, 2 (b) (1) a.

## (2) Drafts and checks.

### a. Liability of one who signs as drawer.

#### Agents.

Where the drawer of a check does not, at the time of making the contract, disclose the fact of his agency, he is personally liable, and the fact that he signed the check "R. K. Bickford, Agent," is no disclosure of his agency. *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436.

Where an agency purchased coal without disclosing the name of the principal, and sent a draft to the vender on their principal in payment thereof, signed "J. M. & Bros., Agts., the agents are personally liable. *Reid v. McChesnev*, 8 U. C. C. P. 50.

A draft drawn by an agent who signs "H. S. W., Agent," but disclosing nowhere on the draft the name of the principal, was held not to bind the principal in *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558. In the course of the opinion the court states that it is well settled if a private agent draw a bill or enter into any other contract in his own name without stating that he acts as agent, so as to bind his principal, he will be personally liable, and it is not enough, to charge the principal or protect the agent from personal responsibility, that

he merely described himself as agent, if the language of the instrument imports a personal contract on his part.

A postdated check drawn by an agent and signed by him by adding to his signature the word "agent," without disclosing his principal, does not bind such principal in the hands of a bona fide holder. *Anderton v. Shoup*, 17 Ohio St. 125.

A draft drawn by "D. B., Agent," in the event of its dishonor, renders such agent personally liable. *Barnhisel v. Commercial Nat. Bank*, 7 Ohio C. D. 533, 14 Ohio C. C. 124.

There is *dictum* in *Penn. Mut. L. Ins. Co. v. Conoughy*, 54 Neb. 123, 74 N. W. 422, in an appeal involving the liability of the principal alone, that a check drawn by one who signs "N. J. S., Gen'l Agt.," is the personal obligation of such agent.

In *Webb v. Mauro, Morris* (Iowa) 488, only a syllabus of the case appears; in this it is stated: "If A draw a bill on B, payable to the order of C, appending the word 'agent,' without stating for whom he is agent, he is personally liable, and in an action brought by C against the drawer and acceptor, A is an incompetent witness to prove his agency or the genuineness of letters going to establish such agency and the liability of defendant."

Where one draws a draft and adds to his signature the abbreviation "Ag't.," and there is nothing on the face to disclose agency other than the abbreviation, such drawer is personally liable; and parol evidence is not competent to show that the drawer was the agent of the drawee, and that it was given in payment of a purchase made on behalf of such drawee and that these facts were well known to the payee, where such draft is in the hands of a third person and there is nothing to negative the presumption that he obtained it in the usual course of trade before it was presented and dishonored by the refusal of the drawee to pay it. *Bedell v. Scarlett*, 75 Ga. 56.

On the contrary, an agent who has charge of a factory for his principal, to the knowledge of the lessor of the factory building, is not individually liable on a draft drawn on his principal payable to the lessor for rent, which draft is signed "J. H., Agent," since the addition of the word "agent" to his signature is notice to the payee of the draft that the drawer will not be personally responsible. *Hicks v. Hinde*, 9 Barb. 528. The court in this case relies upon *Mott v. Hicks*, 1 Cow. 514, 13 Am. Dec. 550, and holds that the word "agent" added to the agent's signature is equivalent to a declaration that he would not be held personally responsible on the draft. The court refrains from passing upon the admissibility of evidence of extrinsic facts, but in distinguishing the case from *Pentz v. Stanton* relies upon a fact which could only have been shown by parol evidence.

The court states that the acceptor of a bill of exchange, like the maker of a note, is considered as the original and principal debtor and primarily liable, and the drawer

and indorsers are considered his sureties, liable as such, guarantying the performance of the principal's contract. The engagement of the drawer, like that of an indorser, is conditional; namely, that he will pay the bill provided it is presented in proper time to the acceptor and he fails to pay it, and provided also that he is duly notified of the dishonor of the bill. The drawer may, like an indorser, add to his signature restrictive or qualifying words to exempt himself from personal liability, and the word "agent" added was held to be such a restrictive word.

The doctrine of this case was approved in *Conro v. Port Henry Iron Co.* 12 Barb. 27, where the court states that adding the title "agent" to the signature of the drawer of a bill is notice that the party means not to be personally liable, and when the principal is indorser he alone is responsible.

See *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229, *infra*, III. b, 1 (b) (2) c, where agent was sought to be charged both as drawer and indorser.

#### Corporate officers.

A draft drawn by the treasurer of a corporation payable to himself as treasurer, but nowhere containing the name of the alleged principal, and signed "W. P. C., Treas.," is the personal obligation of such treasurer, notwithstanding the plaintiff in the action knew that the draft was drawn by the defendant as treasurer solely on behalf of the company, and parol evidence is not competent to vary the writing. *Ohio Nat. Bank v. Cook*, 38 Ohio St. 442.

The president of a limited partnership who gives a check in payment of freight charges due from the partnership and signs the name "W. P. W., Pres.," is individually liable thereon. *Baltimore & O. R. Co. v. Wilkins*, 10 Pa. Co. Ct. 269. No opinion is rendered in this case; one of the attorneys in his argument refers to a statute and argues that this requires the full name of the partnership association to be set forth in checks and other writings used in the transaction of its business. The opposing attorney argues that as the railroad company knew that the check was intended as that of the partnership association, and the suit was between the original parties, the statute in question did not render the drawer personally liable. The importance attached by the court to these arguments cannot be ascertained further than that the president was held individually liable.

A draft drawn, signed by one as "C. F. H., Pres't.," is the individual obligation of the signer. *Rand v. Hale*, 3 W. Va. 495, 100 Am. Dec. 761.

Parol evidence is admissible in an action on a draft signed "E. M. Treas.," with nothing else on the face of the draft to indicate representative capacity, to show that the signer of the draft was the treasurer of a railroad company and that it was given in payment of a debt due the payee, and that it was drawn on a corporation which was the financial agent of the railroad company, 42 L.R.A. (N.S.)

and that it was so received and accepted by the payee. *Martin v. Smith*, 65 Miss. 1, 3 So. 33.

In *La Salle Nat. Bank v. Tolu Rock & Rye Co.* 14 Ill. App. 141, parol evidence was held admissible to show who was intended to be bound by a draft bearing the name of the corporation and drawn payable to "the order of ourself" and signed "Phil R. De Steiger, Pres't.," the indorsement being "De Steiger Glass Co., Phil. R. De Steiger, Pres't."

A check signed "E. P. A., Sect'y, W. E. W. B., Pres't.," for the benefit of one who knew the signers thereof were officers of the corporation and intended to make this a corporate obligation, and that the same was executed according to the usual custom of executing such check, is not the personal obligation of the president (the only person against whom suit was brought), and the fact that the name of the principal is nowhere disclosed on the check cannot be taken advantage of by the one for whose benefit the check was made, since he knew the principal. *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665.

A draft signed "B. F. C., Pres.," authorized by the corporation of which the signer was president before the bill was made and delivered, and intended to represent and bind the company as the bill of the company, will be held binding upon such company. *Devendorf v. West Virginia Oil & Oil Land Co.* 17 W. Va. 135.

In *Brenner v. Lawrence*, 27 Misc. 755, 58 N. Y. Supp. 769, where the creditors of a banking house presented their bill, and the cashier was instructed by the owners of the bank to draw a check for the amount of the claim, and did so, signing the same by adding the word "cashier" to his signature, as between the parties the check was held to be the obligation of the bank. The court suggests a distinction in case the checks had been held by a bona fide purchaser thereof, and states whether or not the cashier would be liable individually in such case is not considered.

#### Public officers.

In *Chemung Canal Bank v. Chemung County*, 5 Denio, 524, an order on the treasurer of a county to pay a certain named bank a sum of money, "being for the full amount of orders of the late treasurer of the county taken up by the bank," and signed by a number of persons, who add to their signatures the word "supervisors," is stated to be the individual obligation of those who signed it, and the addition of the word "supervisors" mere *descriptio personae*.

Where township trustees, in pursuance of duties prescribed by law, draw an order on the commissioner of schools, directing him to pay to a certain person a sum of money, "being the amount of tuition due him," and sign the order by adding to their signature the word "trustee," such officers are not individually liable on the order in case of the refusal of the commissioner for want of

funds to pay all of the order. *Tutt v. Hobbs*, 17 Mo. 486.

A bill of exchange drawn by the counsel general of the French Republic upon the paymaster at the National Treasury in Paris, the drawer signing himself "counsel general" and referring in the body of the bill to public accounts in conformity with which it was drawn, imposes no personal liability upon the counsel general upon its dishonor. *Jones v. Le Tombe*, 3 Dall. 384, 1 L. ed. 647.

***b. Liability of one who signs as acceptor.***

**Corporate officers.**

Where a draft is drawn payable to the treasurer of a corporation and indorsed by him as "H. B. E., Treas.," such indorsement is personally binding upon the treasurer. *Eells v. Shea*, 20 Ohio C. C. 527, 11 Ohio C. D. 304. By the statement of facts it does not appear that there was an acceptance of the draft, but an indorsement as stated above. The court, however, refers to the action as being against the treasurer as acceptor.

In *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68, where a draft drawn by a corporation by its president and directed to its treasurer, the draft directing that the charge be made to the account of the corporation, was accepted by the treasurer, who signed his name and added the descriptive term "treasurer," such treasurer is not personally liable if he was authorized to pay out the money, and accept, as he accepted in this instance, all bills of exchange drawn by the company on its treasurer, and pay the same when due, and the payee of the draft had notice thereof, such draft being given in payment of an indebtedness due from the corporation; and parol evidence is admissible to establish the facts. Compare with *Tannatt v. Rocky Mountain Nat. Bank*, 1 Colo. 278, 9 Am. Rep. 156.

In *Tousey v. Taw*, 19 Ind. 212, an action on a draft drawn on "R. Tousey, Esq., treasurer" of a railroad company, naming it, and accepted by "R. Tousey, Treasurer," the draft having been given for a debt of the corporation, it was held that there was no consideration to sustain the individual liability of the treasurer, and therefore he was not liable.

A draft directed to "R. G., Treasurer," and accepted by the treasurer, signing his name "R. G., Treas.," which draft is made payable to the order of the treasurer individually, and indorsed by him individually, is the personal obligation of such treasurer. It does not appear from the report of this case whether the treasurer was sought to be held liable upon the indorsement or on the acceptance. *Gibbs v. Union Bkg. Co.* 2 W. N. C. 472.

***c. Liability of one who signs as indorser.***

Where the payees of a draft drawn payable 42 L.R.A. (N.S.)

to "F. A. Hawley & Co., Agents," indorsed the same "F. A. Hawley & Co., Agents," such payees are personally liable on the indorsement; and parol evidence is incompetent to show that the indorsers were agents of the drawers and were employed by them to sell such bills; that the bills were signed in blank by the drawers, and sent by them to the indorsers, who filled up, dated, and indorsed them as their agents and then sold them; and that the plaintiff in the action knew that the indorsers were the agents of the drawers on these bills. *Bartlett v. Hawley*, 120 Mass. 92.

The doctrine of prima facie liability seems to be recognized in *Davis v. Henderson*, 25 Miss. 549, 59 Am. Dec. 229, where an agent drew a draft on his principal in another city, the draft reading, "Pay to my own order . . . and charge the same to account of your agency at Natchez," and signed the same "J. D. H., Agent," and indorsed the draft in like manner; and it was held that the draft contained sufficient evidence of agency upon its face to prevent a third person acquiring the rights of a bona fide holder therein. Parol evidence was admitted in this case to show that no personal liability was intended.

**Bank cashiers.**

A draft drawn payable to the order of "John Peabody, Cashier," and indorsed "John Peabody, Cashier," is prima facie, the indorsement of the bank, and not that of a cashier individually. *Collins v. Johnson*, 16 Ga. 458.

An indorsement of a note by the cashier of a bank by adding to his signature the abbreviation "cas." was held in *Houghton v. First Nat. Bank*, 26 Wis. 663, 7 Am. Rep. 107, to be the indorsement of the bank alone. The court in this case disapproves of an argument that the indorsement is to be treated as the personal indorsement of the cashier.

In *Bank of State v. Wheeler*, 21 Ind. 90, an indorsement of a draft directed to "H. E., Cashier," to a bona fide purchaser in the same form, was held to bind the bank.

A draft made payable to the order of "S. P. S., Cas.," and indorsed by him in the same manner, was held in *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309, to be indorsed in such a manner as to render the bank of which the cashier was an officer liable on the indorsement. S. C. on second appeal, 19 N. Y. 312.

Where it is shown that a draft made payable to the order of D. C. C., Cashier, was owned by the bank of which such cashier was an officer, and was transmitted by its agent in the regular course of business for collection, and indorsed by the cashier in the same form as that in which the bill was made payable, such indorsement is that of the bank, and not of the cashier individually. The action in this case was one against the bank. *Bank of State v. Muskingum Bank*, 29 N. Y. 619.

2. *Signed by adding name of principal to word or words indicating representative capacity.*

(a) *Ordinary contracts.*

Where a promissory note is given for a debt of a corporation, reading, "we promise to pay," and signed by the corporation and others, and there appears on the back of the note a guaranty of the payment thereof signed by the directors of the corporation, who add to their signatures the words "as directors K. F. I. Co.," the body of the note containing nothing showing that it is an obligation of the corporation, such directors are personally bound by the guaranty, and they will not be allowed to show by parol proof that they signed in their agency capacity. *Keokuk Falls Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484. In so far as this decision holds the note in the case is not ambiguous, it is disapproved in *James v. Citizens' Bank*, 9 Okla. 546, 60 Pac. 290.

In the absence of evidence of agency, an agreement reading, "we, T. and B.," agree to do certain things, and signed "T. and B., Agents Steamer Flora," is the personal contract of such signers. *Pratt v. Beaupre*, 13 Minn. 187, Gil. 177.

Where there is nothing in the contract to indicate that the signer contracted in other than in his individual capacity, the addition of the words, "Treasurer C. & C. M. C.," does not relieve him of individual liability. The words following his name will be regarded as mere *descriptio personæ*. *United Electric Light & P. Co. v. Blackton*, 128 N. Y. Supp. 92.

In *Braum v. S. F. Hess & Co.* 187 Ill. 283, 79 Am. St. Rep. 221, 58 N. E. 371, an action against the principal on a guaranty reading: "We will guarantee, etc.," and signed: "J. E. Avery, Gen'l Agt. S. F. Hess & Co.," it is stated that this agreement is *prima facie* the individual obligation of J. E. Avery. The decision in this case, however, rests largely on the lack of authority of the agent to bind his principal.

But where the members of a committee of a corporation being organized wrote to a manufacturer and advised him that "our company being so far organized, by direction of the officers, we now order from you," and ordered certain machinery, and signed the letter by adding to their signatures the words "Prudential Committee G. H. F. B. Co.," and such manufacturer answered the letter addressing his letter to the corporation, no personal liability is incurred by the members of the committee. *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050.

Beyond authority.

In *Collen v. Wright*, 8 El. & Bl. 647, 27 L. J. Q. B. N. S. 215, 4 Jur. N. S. 357, 6 Week. Rep. 123, 2 Eng. Rul. Cas. 484, where an agent who had exceeded his authority in entering into an agreement for the lease of his principal's land, signed the agreement

"R. W., agent to W. D. G.," such agent was held personally liable.

So, in *Cherry v. Colonial Bank*, L. R. 3 P. C. 24, 6 Moore, P. C. C. N. S. 235, 38 L. J. P. C. N. S. 49, 21 L. T. N. S. 356, 17 Week. Rep. 1031, where the directors of a mining company wrote to a bank informing it that a certain person had been appointed local manager of the company and had authority to draw checks upon the account of the company, and signed the letter by adding to their signatures the words, "Directors L. F. Q. M. Co.," such directors are liable as upon a warranty, where the officer named by them did not have authority to draw the checks.

Public officers.

Where an appeal is taken from a judgment against a township, and an appeal bond given which recites "the undersigned, James Hobbs, Trustee of Columbus Twp., Bartholomew County, Ind., on behalf of said township, has this day appealed," etc., and which is signed "James Hobbs, T. C. T.," an abbreviation apparently for "Trustee of Columbus Township," Hobbs is personally liable on such bond, as the contract is in his own name. *Hobbs v. Cowden*, 20 Ind. 310.

(b) *Bills and notes.*

(1) *Notes.*

a. *Liability of one who signs as maker.*

A promissory note reading, "I promise to pay," etc., and signed "J. T. H., Treas. St. Paul's Parish," is the personal obligation of the treasurer, and parol evidence is inadmissible to show a different intention. *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409.

A promissory note reading, "we promise to pay," and signed by a number of persons each of whom adds to his signature the words, "Vestryman Grace Church," is in form the personal obligation of the signers, and, having been given for an indebtedness of the church of which the signers were the vestrymen, the note was held without consideration, and the signers not liable to an assignee of the note, who was not shown to be a bona fide holder. *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420.

A promissory note reading, "we promise to pay," etc., and signed by the names of two persons who add to their signatures the words, "Trustees Omega Lodge," is the personal obligation of such signers. *Coburn v. Omega Lodge, A. F. & A. M.* 71 Iowa, 581, 32 N. W. 513.

A note given for a debt of a lodge, and reading, "we promise to pay," etc., and signed by certain persons who add to their signatures the words, "Trustees of the Greenwood Lodge, No. 192, F. & A. M.," is the obligation of such signers. *McClellan v. Robe*, 93 Ind. 298.

A note reading, "we promise to pay to

the order of," etc., and signed by three persons who add to their signatures the words, "Trustees Perry Lodge 37, F. & A. M.," given in renewal of a note which had been given for a debt of the lodge, is the personal obligation of such signers, and parol evidence is not competent to explain the intention of the parties. *Williams v. Second Nat. Bank*, 83 Ind. 237.

Where a mortgage given by an Odd Fellows' Association concluded by stating that the party of the first part consented that the deed should be signed by the president, attested by the secretary, and its corporate seal thereto affixed, and was signed "W. M. Benham, Pres. Columbus Odd Fellows' Hall Asso.," and in the lower left-hand corner, was attested by "A. T. Lea, Sec'y," and as a part of the same transaction a promissory note was given reading, "I promise to pay," etc., and signed "W. M. Benham, Pres. Odd Fellows' Hall Asso., A. T. Lea, Sec'y," Benham and Lea are not personally liable on such note, if the association executed the note, and such persons signed the same only as officers of the association, and parol evidence is admissible to show the intention. *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997.

In *Ferris v. Thaw*, 72 Mo. 446, affirming 5 Mo. App. 279, an action on a promissory note given by a masonic lodge, reading "I promise to pay," etc., to the order of the treasurer, and signed "C. T., W. M., Polar Star Lodge, No. 79," and indorsed "I. W. L., Treasurer," the maker and indorser of such note were held liable, but on the theory that they had rendered themselves liable by the form of their signatures.

A promise made by the payee of a note given by the trustees of a lodge for a debt of the lodge, when the amount due on the note is tendered him, which he refuses, and requests the lodge to keep, that he will not hold such trustees personally liable, is without consideration and unenforceable. *McClellan v. Robe*, supra.

In *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 Am. Dec. 203, a note reading, "I promise to pay," and signed "R. H. P., Ag't Bellamy Mfg. Co.," is held to be the obligation of the principal. In the course of the opinion the court states there that is no form prescribed in which such an instrument shall be made, and it is immaterial whether the name of the principal or agent be placed first, if the authority exists and the intention be apparent, and further states that there can be no good reason why Palmer should have added "Agent Bellamy Mfg. Co.," to the signature if he intended to make a personal contract.

The action in *Bradley v. McKee*, 5 Cranch, C. C. 298, Fed. Cas. No. 1,784, was against the maker of a promissory note reading, "I promise to pay," etc., and signed "R. M., Agent W. C. Mfg. Co." The court refused an instruction to the effect that the maker is personally liable on the note unless he was authorized to bind the corporation, declared their names, and pro-

ceeded to act for them in the execution of it, and signed the same in pursuance and performance of his said authority. The action in this case was by a remote indorsee whose immediate indorser was apparently the agent who negotiated the loan for which the note was given. The court instructed the jury that if the note was given by the defendant bona fide as agent for the W. P. C. Co. for a loan of money to the said company, and the same was known to the agent who negotiated the loan at the time he discounted the said note, the plaintiff is not entitled to recover.

In *Bolles v. Walton*, 2 E. D. Smith, 164, an action against the proprietor of The Churchman on a promissory note reading, "we promise to pay," and signed "D. H. H., Chairman of the Ex. Com. of the Churchman Association," the proprietor was held not liable, the court stating that it nowhere appears upon the face of the note, nor is there anything indicating, that it was made on his behalf or by his authority.

#### Corporate officers and managers.

A promissory note reading, "we promise to pay," etc., and signed by one who adds to his signature the abbreviation "Pres.," and others who add to their signatures the words, "directors Omaha Suit P. and P. Co.," is a personal obligation of such signers. *Andres v. Kridler*, 47 Neb. 585, 66 N. W. 649.

A promissory note reading, "we promise to pay," and signed "W. F., President B. O. Co., W. H. H., Treasurer," is the personal obligation of such signers. *Scott v. Baker*, 3 W. Va. 285, 2 Mor. Min. Rep. 145.

A promissory note reading, "we promise to pay," etc., and signed "B. P. L., Treas'r Hallowell Gas Light Co.," is the personal obligation of the treasurer, and the fact that the payee of the note previously began an action against the corporation on the same note does not prevent the maintenance of an action against the treasurer, in the absence of a showing that he was caused to change his position or take some action in regard to the note which would render the maintenance of the present action injurious to him. *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11.

In *Williams v. Miami Powder Co.* 36 Ill. App. 107, it was held, in the absence of any evidence to the contrary, that notes reading, "we promise to pay," etc., and signed "T. E. Cutler, Pres., D. W. Williams, Sec'y Salem Coal & Mining Co.," imposed a personal liability upon Cutler and Williams.

A promissory note reading, "I promise to pay," and signed "W. H. England, Pres. & Treas. Chelsea Iron Foundry Co.," is the personal obligation of such signer, and parol evidence is not admissible to show a different intent. *Davis v. England*, 141 Mass. 587, 6 N. E. 731. Compare with *Kean v. Davis*, infra.

A promissory note reading, "I promise to pay," etc., and signed "O. O. P., Pres. Mid. B. & Cheese Co., M. A. C., Sec. Cr. &

C. Co.," is the personal obligation of the president and secretary; but upon sufficient proof, equity will reform the instrument and insert after the name of the president and before the name of the corporation the word "for," as was intended by the parties. *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391.

On the contrary, in *Farmers' & M. Bank v. Colby*, 64 Cal. 352, 28 Pac. 118, a promissory note in the first person plural and signed by two persons, one of whom designated himself as president of a corporation, naming it, and the other as secretary *pro tem.*, was held to impose no personal liability on such signers. The note in this case was indorsed by the payee and by the person who signed as president, in his individual capacity, and by others, and the court, considering all these facts, regards it as apparent from the face of the note as a whole, as the obligation of the company.

Promissory notes reading, "we promise to pay," and signed "for the Dubuque Times Co., Ferd. S. Winslow, Treasurer," and others which were signed "Ferd. S. Winslow, Treas. Dub. T. Co.," imposed no personal obligation upon the signer. *Wheeler v. Winslow*, 15 Iowa, 464.

A promissory note reading, "we promise to pay," and signed "G. H. C., Pres. Canada Gr. Trunk Telegraph Co., F. A. W., Sec'y. C. Grand Trunk Telegraph Co.," and containing the seal of the company, is not the personal obligation of the president and secretary. *City Bank v. Cheney*, 15 U. C. Q. B. 400. The action in this case was brought by an indorsee.

A promissory note reading, "I promise to pay," etc., and signed "J. H. A., Treas'r Ohio & Miss. R. R. Co.," being ambiguous, parol evidence is admissible to show who was intended to be bound. *Smith v. Alexander*, 31 Mo. 193.

Where the manager of an incorporated company gave a note reading, "we promise to pay," and signed the same by adding to his signature the words "Manager O. T. L. Co.," intending thereby to bind the corporation, such note was held binding upon the members of the company in an action against them on the note, and parol evidence was admissible to show the intent. *Fairchild v. Ferguson*, 21 Can. S. C. 484.

Parol evidence was held admissible in *Wyman v. Gray*, 7 Harr. & J. 409, in an action on a promissory note reading, "I promise to pay," etc., and signed "Edward Gray, Pres't Patapsco Man'g Co.," to show who was intended to be bound by the note, on the theory that if it was intended to bind the corporation, the note would be without consideration as to the president individually. The action in this case was by an indorsee after maturity. The court apparently was of the opinion that in form the note was that of the president individually, but that he was entitled to show lack of consideration to defeat liability.

The court in *Wyman v. Gray*, *supra*, makes no mention of detriment to the 42 L.R.A. (N.S.)

promisee as a consideration for the note, but apparently holds that if the credit was extended to the corporation, there would be no consideration for a note given by the president individually.

In *McNeil v. Shober & C. Lithographing Co.* 144 Ill. 238, 33 N. E. 31, where a personal judgment had been obtained in the trial court against the signers of a note which read, "we promise to pay," etc., and was signed "Malcom McNeil, President World's Pastime Exposition Company, Albert F. Dexter, Treas.," the signers, who were the appellants, had been permitted to show that the note was given for a debt of the corporation, and to give in evidence all of the attending facts and circumstances having any tendency to establish that it was the intention of the parties and of the makers of the note that it should be the note of the corporation, and not create any personal liability. The court states that the trial court held correctly that such a note was *prima facie* the personal obligation of the signers, and since the ruling of the trial court was as favorable as asked by appellants, there was no ground for reversal.

Parol evidence is admissible in an action on a promissory note reading, "I promise to pay," etc., and signed "C. S., J. S. Gen. Manag. and Supt. St. Lo. and M. M. Co.," to show the intention of the party as to who was to be bound. *Gerber v. Stuart*, 1 Mont. 172, 2 Mor. Min. Rep. 152. It is not clear, but apparently parol evidence is admitted on the ground of ambiguity in this case.

Where a party signs his name as cashier or agent for a banking, railroad, or other corporation, in drawing drafts and bills, or in accepting drafts or other evidences of indebtedness in its ordinary business, such obligation is the obligation of the corporation, and not of the cashier or other agent executing it. Most generally there is that on the face of the instrument itself, and especially where the execution is witnessed by the seal of the corporation attached thereto, that indicates unmistakably that it is the obligation of the corporation. It is seldom anyone takes such paper under the belief that it is the obligation of the officer executing it on behalf of the corporation. *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624. Within this rule a promissory note reading, "we promise to pay," etc., and signed at the right hand "Sam'l L. Keith, Pres't Chicago Roof'g Co.," and at the left hand, at the usual place for the signature of an attesting witness, "W. H. Kretzinger, Sec'y," with the seal of the Chicago Ready Roofing Company, attached, is not the personal obligation of the president and secretary.

Notes, one of which reads, "we promise to pay," etc., the other of which reads, ". . . promise to pay," etc., which are signed "William S. Reed, Pres't. Mt. Carmel Lgt. & Water Co.," and contains an impress of the seal of the corporation, and on the back an agreement to pay them in first

mortgage bonds of the Mt. Carmel Light & Water Company as soon as the bonds can be issued, are not prima facie the personal obligations of such president. *Reed v. Fleming*, 209 Ill. 390, 70 N. E. 667. In the course of the opinion, the court says that the words "President Mt. Carmel Light & Water Company" might be regarded as words of mere personal description, if nothing more appeared, but the seal of the corporation could not possibly be regarded in that light, as it is in no way descriptive of the president or any other officer, but is used to evidence and authenticate papers and obligations of the corporation.

A promissory note reading, "we promise to pay," and signed "J. I., Prest., J. J. I., Sect. D. M. Co.," and having the lower lefthand corner the impression of a seal containing the name of the corporation, imposes no personal liability upon the president and secretary, the court being of the opinion that the note is not ambiguous. *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664. The trial court admitted evidence on the theory that the note was ambiguous, and it was shown that the consideration passed to the corporation and that the note was taken on payment thereof, and on this theory it was stated that the officers were not liable. An equal number of the court were of the opinion that the officers were liable, and under the statutory rule the judgment of the lower court finding the officers not liable was affirmed.

There is *dictum* in *Trowbridge v. Scudder*, 11 Cush. 83, 3 Mor. Min. Rep. 471, to the effect that promissory notes reading, "I promise to pay," etc., and signed "Joseph M. Brown, Treasurer Ontonagon Copper Co.," given in payment of contracts beyond the corporate authority, are not the notes of the treasurer.

In *Drake v. Flewellen*, 33 Ala. 106, the court held that a note reading, "I promise to pay," and signed by one who designates himself as "Secretary A. M. F. College," is prima facie the personal obligation of such secretary, but that he can rebut this prima facie intendment by showing that the contract is in fact the contract of his principal. To render such a defense available, however, it must be made under a sworn plea, and must show that the corporation had authority to bind itself, and in absence of such a showing such a defense is not made out.

So, the president of a railroad company who has signed a promissory note reading, "I promise to pay . . . for the hire of three negro men," by adding to his signature "President W. & C. R. R. Co.," may relieve himself from personal liability on the obligation by showing that it was the obligation of the company, and was accepted as such, under a plea properly verified. *McWhorter v. Lewis*, 4 Ala. 198. In this case the agent omitted to verify his plea properly, and such a defense was held not available to him, and he was held liable.

It does not appear whether the president was a party defendant in *Rowley v. Hager*, 42 L.R.A. (N.S.)

— Or. —, 127 Pac. 36. In that case a contract read "we, the undersigned, hereby agree," etc., and was signed "F. R. S., President W. O. Co., Inc.," and in an appeal by the corporation, it was held that where it was the intention that corporations should be bound, this would be given effect, and as the circumstances indicated such intention, the corporation was held bound.

See *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531, 60 Am. St. Rep. 178, 47 N. E. 227, *infra*, III. c.

#### *b. Liability of one who signs as indorser.*

There is no personal liability on the part of one to whom a note is made payable as "J. A. S. Hamilton, Prest.," who indorses said note as "J. S. Hamilton, President" Princeton Factory, since the credit was given by the indorsee expressly to the company, as is apparent by the indorsement. A statute governing this case provided that where the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract, and that the question to whom the credit is given is a question of fact to be decided by the jury under the circumstances of each case. *Bank of University v. Hamilton*, 78 Ga. 312.

#### *(2) Drafts and checks.*

##### *a. Liability of one who signs as drawer.*

In order to relieve an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent, and a mere description of the general relation or office which the person signing the paper owes to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or exempt the agent from personal liability, and within this rule a draft drawn by an agent of a corporation on the corporation, signed "D. F. & Co., Agts., P. F. & M. Ins. Co.," and chargeable to the account of the drawers, was held the personal obligation of drawers. *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 104.

A bill of exchange drawn payable to the order of "The Elizabethtown and Summerville Railroad Co.," and signed "John Kean, President Elizabethtown and Summerville Railroad Co.," and indorsed "The Elizabethtown and Summerville Railroad Co. by John Kean President," is the personal obligation of the president, and parol evidence is not admissible to relieve him from such liability. *Kean v. Davis*, 20 N. J. L. 425.

This case was reversed by the court of errors and appeals (21 N. J. L. 683, 47 Am. Dec. 182) and it was there held that the instrument in question presented so much doubt as to make parol evidence ad-



missible to show whose contract it was intended to be.

The facts that a draft was signed by one who added to his signature the words "Prest. T. N. Co.," and that he was proved to have been at the time of the issuance of the draft president of the corporation, and that in this capacity he drew the draft for the benefit of the company, and that the company received the proceeds and subsequently recognized their liability by their own bond as collateral, render such draft the obligation of the company. *Thompson v. Tioga R. Co.* 36 Barb. 79. A similar holding appears in *Olcott v. Tioga R. Co.* 40 Barb. 179, affirmed in 27 N. Y. 546, 84 Am. Dec. 298.

**b. Liability of one who signs as acceptor.**

Where a draft is drawn on "J. A. R., Agent," and accepted by him as "J. A. R., Agent K. & O. C. Co.," such acceptance binds him personally, and parol evidence is inadmissible to prove that no personal liability was intended. *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 583.

The treasurer of a corporation who accepts a draft drawn upon him personally by adding to his signature the words "Treas. N. M. Co." is not personally liable thereon if he had authority to bind the company, and the holder of the draft had notice of the agency; and proper extrinsic evidence is admissible to prove such facts. *Bruce v. Lord*, 1 Hilt. 247.

Thus, where the president of a railroad company exceeds his authority in accepting a draft drawn upon him as "Pres't S. & T. R. R. Co.," it was held in *Lazarus v. Shearer*, 2 Ala. 718, that he was personally liable to the payee of such draft, although the railroad company had ratified his act in accepting the draft.

It was urged in this case that the action against the agent should have been on the case for having exceeded his authority. In answer to this contention, the court states that the acceptance is prima facie the personal engagement of the president to pay the bill, and is one on which he is suable, and he having failed to show that he made it in his official character in virtue of an authority for that purpose, the plaintiff is entitled to judgment. *Lazarus v. Shearer*, supra. The form of signature of the president in accepting the draft is not clear from the report of the case. Parol evidence was held inadmissible in this case, because the plea of the defendant setting up the extrinsic facts to relieve himself from liability was not verified by his affidavit.

**3. Signed by adding name of principal, preceded by word "of."**

**(a) Ordinary contracts.**

In *Harkins v. Edwards*, 1 Iowa, 426, where a contract reading, "we, the under-

signed, agree to pay damages incurred by an insured boat, was signed, "Edwards & Turner, Agents of Franklin Marine & F. Ins. Co. New York, Wm. H. Farner," there was held to be no personal liability on the part of such signers. The plaintiff in this case insisted that he had refused to take the obligation of the insurance company, and thereupon, the agents gave him their personal obligation. No mention is made of this fact in the opinion of the court, except that parol evidence was held inadmissible to vary the written contract.

A contract made by the agent of a broom company with an employee, and reciting in the first part of the contract, "I will give R. R.," etc., and in the latter part of the contract containing language inconsistent with the idea that the company was not designed to be made responsible, as "should we detain him longer than Sept. 1st, we will allow him \$7 per day," etc., which contract is signed, "L. M., Agent of S. B. Co.," is not the personal obligation of the agent. *Rogers v. March*, 33 Me. 106.

In *Society of Shakers v. Watson*, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 730, an action against the principal on a promissory note reading, "we promise to pay," etc., and signed "B. & F., Trustees of the Society of Shakers at Present Hill, Ky.," the defense was presented that the note was executed so as to bind only the individuals B. and F. The court disapproved of this defense, and held that the language of the instrument with respect to the party to be charged is equivocal, and that parol evidence may be introduced to show who is to be bound.

In *Olcott v. Tioga R. Co.* 27 N. Y. 546, 84 Am. Dec. 298, a contract executed by "J. R. W., Prest. of the P. M. Co." was held to be the contract of the company, and the court disapproved of an argument that it was the contract of the signer individually.

In *Potter v. Bassett*, 35 Mo. App. 417, an agent who had executed a lease by signing the same, "B. S. B., Agent of the estate of R. Long, deceased," the body of the lease having similar descriptive words following his name, was held to be the proper person to be made defendant in an action to cancel the lease for fraud. The granting portion of the lease in this case read "that the said Bassett (Agent) has leased the said party of the second part for five years," etc.

**Public officers.**

The commissioners for building a courthouse, who enter into an agreement with the contractor by which they acknowledge a certain sum of money due him for work and labor on the courthouse, and promise in the words "we promise to pay," and sign the same by adding to their signatures the words, "commissioners for building the courthouse of Owego Village," are not personally liable upon such agreement, in the absence of a clear intention to assume personal responsibility. *Fox v. Drake*, 8 Cow. 191.

Where township trustees entered into a

contract such as the township could not legally make, for the purchase of road tools, and in the order for the same, which reads, "the undersigned agree to pay," etc., and signed by the three trustees, who add after their signatures the words, "Trustees of Sumner Township, Buchanan County, Iowa," such trustees are individually liable on such obligation. *Revolving Scraper Co. v. Tuttle*, 61 Iowa, 423, 47 Am. Rep. 816, 16 N. W. 353. The court in this case states that the language in the body of the instrument controls the liability.

**(b) Bills and notes.**

**(1) Notes.**

**Notes of officer of religious societies and lodges.**

A promissory note reading, "we promise to pay," etc., and signed by three persons, who add to their signatures the words, "Trustees of the First Universalist Church of Pierceton," was held to be the personal obligation of such signers, since the note did not purport to bind the church or be the contract of the church, but did purport to bind those who signed it. *Hays v. Crutcher*, 54 Ind. 260. This case is distinguished by the court from *Means v. Swormstedt*, 32 Ind. 87, 2 Am. Rep. 330, on the theory that the seal affixed by the signer in that case relieved him from personal liability, and from the case of *Pearse v. Welborn*, 42 Ind. 331, on the theory that in that case the makers of the note not only added to their signatures the letters which indicated the offices they held and the character in which they acted, but in the body of the note the promise was made by them as master, warden, and trustees of the lodge.

The case of *Hays v. Crutcher*, 54 Ind. 260, was followed in *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226, an action on a note identical in form with that in the earlier case, but from which the descriptive words added to the signature had been erased, the court holding that such erasure made no difference on the question of liability.

Again, in *Hayes v. Brubaker*, 65 Ind. 27, a note in this form was held to be the personal obligation of the signer; in this case the descriptive word still appeared. In the last two cases parol evidence was held incompetent to vary the effect of the form used.

In *Sumwalt v. Ridgely*, 20 Md. 114, the court states that a promissory note reading, "we promise to pay," etc., and signed, "B. F. S., Treas. of St. Stephens Epc'l Church fund," is the personal obligation of such signer, and, in the absence of evidence of a lack of consideration, is binding upon him.

In *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177, a note reading, "I promise to pay, etc.," was signed by three persons, who added to their signatures the words, "as trustees of the First Universalist Society," and placed in the hands of the payee to obtain the signature of another person. 42 L.R.A. (N.S.)

The payee tore from the note the words "as trustees of the First Universalist Society," and afterwards obtained the signature of the other person. The court held that the note showed a personal undertaking, and while the descriptive words which were torn from the note showed that it was as trustees that they were induced to make the note, yet they do not show any attempt by words usually deemed apt for that purpose to bind the corporation, and therefore the tearing of them off in nowise affected the liability of the persons who had signed previously, and consequently, the last signer, who was the appellant in this case, was bound also. The court states that the language, "I promise to pay, etc.," is inconsistent with the idea of corporate liability, and therefore, those who sign a note containing such language are personally liable.

A promissory note reading, "we promise to pay, etc.," and signed by certain persons, and containing on the left hand corner, and remote from the names of the signers, the words, "Signed by Trustees of I. O. O. F. Lodge, No. 738 of Sadorus," is the personal obligation of such signers, and extrinsic evidence cannot be admitted to show the intention of the parties. *Tenbrook v. Ellers*, 71 Ill. App. 328.

A promissory note reading, "we promise to pay," etc., and signed by a number of persons, who add to their signatures the word "trustees" of a named church, and bearing the corporate seal, is prima facie the personal obligation of the signers, but parol evidence is admissible to show real intent. *Hood v. Hallenbeck*, 7 Hun. 362. See *Means v. Swormstedt*, on effect of seal, supra, III. B. 1 (b) (1) a.

Under a statute making the vestrymen of a parish a body corporate, in *Creswell v. Holden*, 3 MacArth. 579, where promissory notes reading, "we promise, for ourselves and our successors, to pay," etc., were signed by persons styling themselves "Vestrymen of St. James Parish," the language of such contract was held not appropriate for a personal obligation, but fitting for an official act; and therefore to impose no personal obligation on the vestrymen. The face of the note in this case contained the words "secured by deed of trust;" and this deed of trust was recorded and was notice that the note in question was given by the makers in their official capacity, and for the purpose of securing the purchase money of property for their parish.

**Notes of corporate officers and trustees.**

A promissory note given by the president of a railroad company, and stating that it was given for a policy of insurance issued by a named insurance company, and containing a promise in the following words: "I promise to pay said company or their treasurer, for the time being, the sum of \$500, in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation and by-laws, require," and signed "Cheever New-

ball, Pres't. of the Dorchester Ave. R. R. Co." is the personal obligation of such president, since the words "I promise to pay" import a personal obligation. *Haverhill Mut. F. Ins. Co. v. Newhall*, 1 Allen, 130.

A promissory note reading, "I promise to pay," etc., and signed "John S. Eldridge, Trustee of Sullivan Railroad," is the personal obligation of said Eldridge, and it is immaterial that, at the time of giving the said note, he was trustee of the railroad company, and as such had entire charge of the property and business of the company, and while managing its affairs gave the note in suit, and took up with it a promissory note of the corporation, due to a bank, and delivered the note to the cashier with bonds of the railroad corporation as collateral security. *Fiske v. Eldridge*, 12 Gray, 474. The note in this case was made payable to the order of Eldridge, and indorsed by him, "John S. Eldridge, Trustee." This case is distinguished from *Mann v. Chandler*, 9 Mass. 335, on the ground that the signer there was the treasurer of the corporation.

In *Rupert v. Madden*, 1 Chand. (Wis.) 146, a note containing an individual promise, and signed by adding the words "As Trustee of the Louisiana Co." to the signature, was held to bind the agent personally.

In *Rowe v. Table Mountain Water Co.* 10 Cal. 441, it was held that the principal was bound by a note which was worded in the first person singular, and signed by the agents, who designated themselves as "president" and "secretary," respectively, of the corporation, naming it. The allegations of the petition in this case, that it was the intention of the corporation to be thus bound, were admitted by default, and the court, in passing on this question, said that a party may bind himself, if such is his design, by his signature; and if he admits such to be his intention, he cannot complain if he is held by it.

In *Barker v. Mechanics' F. Ins. Co.* 3 Wend. 94, 20 Am. Dec. 664, an action against the principal, the court states that a promissory note reading, "I promise to pay," and signed "J. F. Pres. of the M. S. Ins. Co.," is the personal obligation of the president, since he has not contracted in the name of his principal.

It is stated in *Chamberlain v. Pacific Wool Growing Co.* 54 Cal. 103, an action against the principal, that where an agent signs a note reading, "I promise to pay," by adding the words "President" of a corporation, naming it, to his signature, it is the personal obligation of such signer, and not the obligation of the principal which he thus attempts to bind. There were elements of fraud in the case that were determinative of the decision holding the principal not liable.

A promissory note reading, "we promise to pay," and signed "G. M., Treas. of Mechanic Falls Dairying Association," is the personal obligation of the treasurer, and 42 L.R.A. (N.S.)

parol evidence is not admissible to vary the intention expressed in the instrument. *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 77.

A promissory note reading, "we promise to pay," etc., and signed by several persons, who add to their signatures the words "President, Directors of Prospect & Stockton Cheese Co.," is the personal obligation of the signers, and there is not such ambiguity as will render parol evidence admissible. *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421.

A promissory note reading, "we promise to pay," etc., and signed by three persons, who add to their signatures the words "Directors of Thedford Irrigation & Power Co. Limited," is the personal obligation of such signers notwithstanding it was not their intention to bind themselves individually. *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512. The court in this case suggests that a reformation of the contract to correspond with the intention of the parties might be had.

The case of *Keokuk Falls Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484, on the question of what constitutes ambiguity, was overruled in *Janex v. Citizens' Bank*, 9 Okla. 546, 60 Pac. 290, where, in an action on a promissory note reading, "we or either of us promise to pay," etc., and signed, "R. W. B. J. G. President of the E. T. Co., F. R. J., Secretary of the E. T. Co.," such instrument was held uncertain and ambiguous, so that parol testimony was competent and admissible to enable the court to charge as maker the person or corporation which it was intended should be bound when the note was executed. The note in this case was given to a partnership which afterwards incorporated and became the assignee of the note from the partnership.

#### Notes of public officers.

In *Wallis v. Johnson School Twp.* 75 Ind. 368, a promissory note reading, "I promise to pay to the order of, etc., out of the township funds, etc.," and signed, "Fred K. Monroe, Trustee of Johnson Tp.," was held to be the obligation of the township, and it is stated not to be the individual undertaking of Monroe. The court states that the provision in the note that it is to be paid out of the township funds, together with the descriptive words annexed to Monroe's name, may fairly be deemed to show an intention to make it the obligation of the township.

In *Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139, it was held, in an action against the principal, that the trustees of a school had succeeded in binding the school on a promissory note reading, "The subscriber, residing in Monticello, etc., promise to pay," etc., and signed by three persons, who added to their signatures the words, "Trustees of Monticello School."

Where a vice consul borrows money and gives a written agreement for the return

thereof, in which it is stated to have been borrowed "for the use of the vice consulate of Italy," and which is signed by him by affixing to his signature the words, "Vice Consul of Italy," and impressed with his official seal, he is personally liable on the instrument. *De Bebian v. Gola*, 64 Md. 262, 21 Atl. 275. On question of effect of seal, see *Means v. Swormstedt*, III. B. 1 (b) (1) a.

### (2) Drafts.

There is *dictum* in *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432, to the effect that where a draft was drawn by a principal upon an agent without any words indicating representative capacity, and accepted by the agent as "W. S. B., Agent of H. W. H.," the agent is *prima facie* personally liable; but that parol evidence may be introduced to show that it was not the intention to bind him personally.

A draft drawn "to L. S., Baltimore," and accepted by "L. S., Treas. of L. F. & M. Co.," being ambiguous as to who was intended to be bound, parol evidence is admissible to explain the intent; and if the treasurer was authorized and did in fact accept the draft as treasurer of the corporation, and it was understood between the payee and the acceptor that the latter was not to be personally liable, such an acceptance imposes no personal liability upon the treasurer. *Lafin & R. Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472, 2 Mor. Min. Rep. 167.

### 4. Signed by adding name of principal, preceded by word "for."

#### (a) Ordinary contracts.

A charter party by which "C and M., agents for owners of the American Barge G." chartered her to certain parties for a certain voyage, and signed the agreement "C. & M., Agents for owners," is the personal obligation of the signers, since they did not disclose the name of their principal, nor was it known to the other party. *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423.

In *Adams v. Hall*, 3 Asp. Mar. L. Cas. 1, 37 L. T. N. S. 70, the contracting part of a charter party read "J. H. & Co. for the owners," and the contract was signed, "For the Owners, J. H. & Co." Letters were admitted in this case which acknowledged a personal liability, and no objection seems to have been raised to the admission of such evidence. Construing the letters and the contract together, the court held the agent personally liable. The chief justice states that the agent was a part owner.

An agreement which acknowledges the receipt of money by the agent, which further recites that "I obligate myself to use [the money] in running capital of the Marietta mill and keep the same in money, stock, material or paper not subject to the debts of the mill, I further obligate myself to pay Mrs. Meals 12 per cent interest on 42 L.R.A. (N.S.)

the same, . . . I further obligate myself and promise to pay her, etc.," and signed "E. Faw, Agent for the Marietta Paper Mill Co.," is the personal obligation of such Faw. *Faw v. Meals*, 65 Ga. 711.

In *Persons v. McDonald*, 60 Neb. 452, 83 N. W. 672, an instrument acknowledging the receipt of certain money as part payment for certain land, and signed "J. P. P., Attorney for E. P.," is stated, in an action against the principal, to be the contract of the attorney alone.

Where an attorney called on some abstracters and informed them that he was acting as agent and attorney for another, and not in his individual capacity and gave them an order for an abstract, signing the order, "Simeon W. King for A. & R.," the initials following his name being the initials of his clients' names, there is no personal liability incurred by such attorney, and parol evidence is competent to prove that he so informed the abstracters. *King v. Handy*, 2 Ill. App. 212.

Where the agent of shipowners contracts with the owner of slaves to transport the slaves between two cities, at the same time disclosing his principal, and, upon receiving part of the agreed compensation, giving a receipt therefor, signing the same, "for the owners, M. C. M.," such agent is not personally liable to return the compensation upon failure to transport the slaves, where he has paid the same to his principal. *Waddell v. Mordecai*, 3 Hill, L. 22.

A remainderman who, acting as agent for the life tenant, and so informing a prospective lessee, enters into negotiations for a lease of the premises, and in response to a letter from the prospective lessee stating that he should probably occupy the premises for three years or more, writes a letter stating, "I accept the terms you there state to be understood between us as correct, and place the house at your disposal from April 1st, for three years," and signs the letter, "Wm. F. Whitney, Agent for Elizabeth H. Whitney," is not personally bound by the agreement, so as to prevent his claiming the premises after the death of the life tenant. *Page v. Wight*, 14 Allen, 182.

In *Campbell v. Baker*, 2 Watts, 83, where the manager of an iron works purchased some articles for the iron works, and gave a writing reading, "I will come under obligation to pay W. C. the amount of rye and corn at the time appointed," and signed the same, "for J. B., M. B.," the contract was held not to be the personal obligation of the manager.

In *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, a contract for the hire of a yacht was entered into by "C. S. L.," who was described in the contract as the hirer, and all covenants and agreements were on the part of such hirer. The contract was signed, "C. S. L. for the Sun Printing & Pub. Assn." The action was against the association, and the court states the question to be whether the document is the individ-

ual contract of L. or that of the Sun Association. A distinction is made between sealed and unsealed instruments, and in the latter class it is stated that the intent of the party is alone material, and when this is ascertained it is conclusive that where the principal is disclosed and the agent is known to be acting as such, the agent cannot be made personally liable unless he agreed so to be liable; and within this rule the court holds the contract in question to be that of the principal.

A contract for the sale of iron, commencing, "we hereby agree to sell," and signed by a certain agent as agent for the Iron Co., is held, in *Many v. Beekman Iron Co.* 9 Paige, 188, to be enforceable against the corporation.

In *Crutcher v. Memphis & C. R. Co.* 38 Ala. 579, a contract by the agent of a railroad company which stated that he had hired certain negroes for work on the railroad, and agreed to pay therefor a certain sum, the agreement reading, "I agree to pay," etc., and being signed by the agent, who describes himself as "agent for M. & C. R. R. Co.," was held prima facie to be the personal obligation of the agent; and in the absence of evidence showing a different intention, inadmissible as evidence in an action against the railroad company on such contract.

An agent was held to have bound his principal in *Stringfellow v. Mariott*, 1 Ala. 573, where a warranty in the first person singular was signed "S. R. M. for B. M.," the court holding that the agent was a competent witness in the case, since he was not personally liable on the instrument. The court in this case relies on *Martin v. Dortch*, 1 Stew. (Ala.) 479, a case in which it was admitted that the parties intended to bind the principal.

In *Roney v. Winter*, 37 Ala. 277, an agreement reading, "we promise to pay . . . for the hire of Jim and Jerry . . . We are to feed the said negroes," etc., and signed, "For the Montgomery Iron Works, J. S. W., President, S. I., Secretary," was held prima facie not to bind the president, and there being no evidence of an intent to bind him, he was held not liable on the obligation.

An agreement purporting to be a specification for building a town way, which is signed by the contractor and two persons who add to their signatures the words, "road commissioners for Ashland, Mass.," to which was subsequently added an agreement reading, "we, the subscribers, the road commissioners aforesaid, agree to pay," and signed the same by adding to their signatures the words, "commissioners of Ashland" was held in an action against the town to be the contract of the town. *Cutler v. Ashland*, 121 Mass. 588.

In *Cox v. Borstadt*, 49 Colo. 83, 111 Pac. 64, where a firm of real estate agents, without authority from the owner, entered into an agreement of sale of the property, in the body of which agreement the real estate agents are described as "V. M. C. & Co., 42 L.R.A. (N.S.)

Agents," the agreement further describing the property and naming the owner, and being signed "V. M. C. & Co. per J. H. H., Agent for B. C. T.," such agents were held personally liable for a return of the deposit made by the purchaser at the time of the purchase.

See *Fox v. Drake*, 8 Cow. 191, supra, III. b, 3 (a).

### (b) Bills and notes.

#### (1) Notes.

Where the agent of a manufacturing company, with power to bind the company, borrowed money for its use and benefit, and gave a promissory note therefor, reading, "I promise to pay," etc., signed, "A. W. M., Agent for the M. M. Co.," the agent is not personally liable thereon. *Hovey v. Magill*, 2 Conn. 680. The court states that where the expression "I promise," contained in the body of the instrument, is qualified by the agent adding to his signature a word designating his character as agent, which unequivocally shows that he did not mean to bind himself, he will not be personally bound.

"I can see no good reason," says the court in this case, "for the addition of 'agent,' but to render the note obligatory on the company, and exclude all idea of individual liability . . . but if we consider the word 'agent' as merely *descriptio personæ*, we give it no operation, and really expunge it from the writing. We are bound, however, to give effect to every word, if possible, and the only way to give this word any effect is to make the note binding on the company."

A promissory note reading, "I promise to pay," etc., and signed, "Pro Wm. Gill, J. S. Colburn," the agent having authority to execute such an instrument, imposes no personal liability upon him. *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160.

This case was followed in *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146, where the agent had added the words, "Agent for David Perry," to his signature.

On the contrary, a promissory note reading, "I promise to pay," etc., and signed, "J. L. R. for I. I.," was held the personal obligation of the signer, and not to be ambiguous, so as to render parol evidence admissible. *Fash v. Ross*, 2 Hill, L. 294. The doctrine of this case was adhered to in *Taylor v. McLean, McMull*, L. 352, in an action against the principal, on a note signed, "D. M. for J. M."

A promissory note reading, "I promise to pay," etc., and reciting that it was given "for L. F. Co. for corn," and signed, "L. C. for L. F. Co.," is the personal obligation of the signer. *Moore v. Cooper*, 1 Speers, L. 87. See *Robertson v. Pope*, infra.

In *Robertson v. Pope*, 1 Rich. L. 501, 44 Am. Dec. 267, an action against the principal on a note signed, "for N. P. S. B.," the doctrine of the earlier South Carolina

cases was overruled, and it was held that on such a signing the principal, and not the agent, is liable.

A promissory note reading, "I promise to pay," etc., and signed, "for M. T. & W. R. R. Co., J. F., Sect.," imposes no personal liability upon the secretary. *Alexander v. Sizer*, L. R. 4 Exch. 102. One of the judges who concurred in the majority opinion in this case observed that the surrounding circumstances may be looked at in order to enable the court to come to a right conclusion, and the circumstance that the money was to go and did go in this case to the company, and not to the secretary, is strong evidence that the contract is that of the company, and not of the secretary.

See *Wheelock v. Winslow*, 15 Iowa, 464, where a note signed similarly was also held to impose no liability on the officer.

A note reading, "I promise to pay," and signed, "for" the partners, naming them, and following the names of the partners the signature of R. M., was held in *Re Buckley*, 14 Mees. & W. 469, 14 L. J. Exch. N. S. 341, not to be personally binding upon R. M. apart from his interest in the partnership, where he had authority to execute the note.

A promissory note reading, "I promise to pay," etc., and signed, "R. A. E.," and in brackets immediately following the signature, the words "for S. H. E.," is the personal obligation of the signer. The court regards the fact that the descriptive words in this case were in brackets as determinative of the liability of the signer, and there is *dictum* to the effect that if they had not so been in brackets the signer would not have been personally liable. *Early v. Wilkinson*, 9 Gratt. 68.

In *Offutt v. Ayres*, 7 T. B. Mon. 356, an action on a promissory note reading, "I promise to pay," etc., and signed, "for B. Ayres, W. B. Ayres," the trial court held B. Ayres not liable in an action against him upon such note, and the appellate court regarded his liability as depending upon the liability of W. B. Ayres. It is stated that W. B. Ayres is personally liable on the obligation, and B. Ayres is not.

The case of *Offutt v. Ayres* is referred to in *Cook v. Sanford*, 3 Dana, 237, in which an action was brought on a promissory note reading, "we promise to pay," etc., and signed, "V. McKnight for N. B. Cook & Co." The court distinguishes the *Offutt* Case from the *Cook* Case on the ground that in the latter the promise is in the words, "we promise," and holds that this shows an intention that the note was to be the obligation of a number of individuals. The action in this case was against Cook & Co., and they were held liable.

There is *dictum* in *DeWitt v. Walton*, 9 N. Y. 571, an action against the principal, to the effect that a promissory note reading, "I promise to pay," etc., and signed, "D. H. H., Agent for the Churchman," is a personal obligation of such signer. 42 L.R.A. (N.S.)

In *Rice v. Gove*, 22 Pick. 158, 33 Am. Dec. 724, an action against the principal, the court regarded the liability of the principal as being determined by the fact that the agents had not intended to bind themselves; and it was held that a promissory note reading, "we jointly and severally promise to pay," and signed, "Patten & Johnson, for Ira Gove," was not intended to be the personal contract of such agents, and therefore the principal was liable. The court in this case holds that the fact that the promise is made "for Ira Gove" controls the fact that it is made "jointly and severally."

In *Neptune v. Paxton*, 15 Ind. App. 284, 43 N. E. 276, where certain unissued stock of a bank was held for the bank by a trustee, who gave his note for the same, not for any indebtedness due from him to the bank, but merely as the agent of the bank, and reading, "we, or either of us, promise to pay," etc., and signed, "W. M. Tyler, Trustee for Bank," there was held to be no personal liability to the bank on the part of such signer. The court states that where the payee knows that the person signing the obligation does not sign or execute it as his individual undertaking, but that he signs it as the agent or representative of and for another, he cannot enforce it against such agent.

A promissory note reading, "I promise to pay . . . for E. B., E. F., F. D., and H. H. S., being money advanced by said Byars (payee) in a suit for the above named," and signed, "W. D., Attorney for E. F., F. D., and H. H. S.," executed without authority on the part of the attorney, is personally binding upon him, since, if the false description the agent appended to his name is rejected, there is a contract on his part to pay the money sued for. *Byars v. Doores*, 20 Mo. 284.

A promissory note reading, "I promise to pay," etc., and signed, "for P. S., G. B., Attorney," which the attorney had no authority to execute, is personally binding upon him, and the name of the person for whom he assumed to act will be rejected as surplusage. *Dusenbury v. Ellis*, 3 Johns. Cas. 70, 2 Am. Dec. 144.

Where a county which had no authority to execute a note for a debt of the county authorized an agent to borrow money for the construction of a courthouse, and such agent borrowed the money and issued a promissory note reading, "I promise to pay," etc., and signed the same, "A. B., Agent for Lewis County," such note was held, in *Exchange Bank v. Lewis County*, 28 W. Va. 273, not to be the obligation of the county, but is stated by the court to be the obligation of the signer alone.

## (2) Drafts.

The addition of the descriptive term, "agent for S. T.," to the signature, does not relieve the signer from personal liability on a draft containing nothing in the body thereof showing an intention to make

the alleged principal liable, since a signature of that kind can be taken as a mere description of the relation which the party signing bears to another, as well as showing that the particular act in question is done in behalf of and as the contract of that other, and extrinsic evidence is inadmissible to show that the bill was drawn in a representative capacity, and that payee had full knowledge thereof. *Tannatt v. National Bank*, 1 Colo. 278, 9 Am. Rep. 156. The doctrine of this case is disapproved in *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68.

A check signed "D. P. Fr." is prima facie the personal obligation of the signer, but parol evidence is admissible to explain the intention of the parties. *Barclay v. Pursley*, 110 Pa. 13, 20 Atl. 411. The meaning of the abbreviation is not apparent; a contract executed as a part of the same transaction was signed, "J. A. Jr. Pr. D. P. for," and it is possible that it is an abbreviation of "For."

#### Liability of one who signs as acceptor.

A draft drawn on "W. C.," and stated to be for machinery supplied adventurers in certain mines, and accepted by writing across the face of the draft, "accepted for the company, payable at the Union Bank, W. C., purser," makes the bill binding on him personally. The court states that the draft being drawn on him personally, he must either make himself personally liable or not at all; and to prevent the draft having no effect, it will be held the personal obligation of the acceptor. *Mare v. Charles*, 5 El. & Bl. 978, 25 L. J. Q. B. N. S. 119, 2 Jur. N. S. 234, 4 Week. Rep. 267, 2 Mor. Min. Rep. 124.

In *Haines v. Nance*, 52 Ill. App. 406, an order drawn on a building committee of a church by the contractor, and accepted by the committee, as follows: "H. H. Nance, Jas. Cole, J. B. Spicer, Building Committee for M. E. Church Parsonage," was held to impose a personal liability on such signers, as no apt words were used to bind the church or the building committee as an organization, and parol evidence tending to show that the acceptors intended to bind the building committee, and not to assume any personal liability, is inadmissible.

A member of a firm upon which a bill is drawn as the "A. C. Mining Co.," who accepts the same in the following form, "per Proc. A. C. Mining Co. W. C. Van U. London Manager," is individually liable as a member of the firm on such acceptance. *Owen v. Van Uster*, 10 C. B. 318, 20 L. J. C. P. N. S. 61.

#### c. Agreements in which the name of the principal is disclosed.

##### 1. Signed by word or words indicating representative capacity.

###### (a) Ordinary contracts.

###### Committees and agents.

In *Partridge v. Hollinshead*, 105 Ga. 278, 42 L.R.A. (N.S.)

30 S. E. 787, where a building committee described themselves in the contract as "building committee of the Lincoln County Institute," and it was agreed in the contract that the parties of the first part should deliver to the parties of the second part, the building committee or their legal representatives, a certain quantity of lumber, and further, that said parties of the second part agreed to haul said lumber from the mill, and contracted to pay the party of the first part for the framing, weather boarding, etc., by a certain date, and further agreed to pay the balance of the bill as soon as the balance of the lumber was delivered in the schoolhouse yard, the contract was held to be a direct agreement on the part of the members of such committee to purchase the lumber and pay for the same personally, and the addition to their signatures of the descriptive term "building committee" not to relieve them from such personal liability, the court stating that, where the parties have, by direct agreement in the contract, bound themselves, such agreement will be given effect; and the fact that they have added some descriptive term to their signatures will not serve to relieve them from the liability imposed by the terms of the contract.

A building contract entered into "by and between the trustees and building committee of St. Francis' R. C. Church, J. M., President, F. L., Secretary, J. B., L. Z., R. S., members, all of the city of Detroit, by authority of the Right Rev. John S. Foley, Bishop of the diocese of Detroit, parties of the first part," for the construction of a new schoolhouse, chapel, and parochial residence for the parish of which they were officers, and in which they promised and agreed for themselves, their heirs, executors, and administrators, signing the same as individuals, except one, who added to his signature the title "president," and another, "secretary," is the personal contract of such signers, and they cannot evade their clearly expressed liability under the contract by showing that they were agents. *Landyskowski v. Lark*, 108 Mich. 500, 66 N. W. 371.

There is *dictum* in *Fowler v. McKay*, 88 Neb. 387, 129 N. W. 551, an action against the principal on a contract purporting to be by "M. & C., Agent of J. M.," and signed, "M. & C., Ag'ts," to the effect that such contract is in form that of the agents only.

It is held in *Rice v. Western Fuse & Explosives Co.* 64 Ill. App. 603, that a contract entered into by an agent without authority, containing apt words to charge him, binds him personally, notwithstanding he has signed the paper, "E. S. Rice, General Agent," and is named in the body of the instrument as "E. S. Rice, General Agent for E. J. Dupont de Nemours & Co." This decision rests more, however, upon the fact that it was beyond the authority of the agent.

On the contrary, a contract entered into

by a building committee of a church society for the construction of a new church building, which was signed by the members of the committee, who added the term "building committee" to their signatures, was held not to be the personal obligation of such signers, where there was no intention to assume any personal liability to the party with whom they were contracting with reference to the church society. *Hewitt v. Wheeler*, 22 Conn. 557. "It ought always to be a rule of construction," said the court, "that whether an agent contracts under seal or without one; by writing or by parol; and whether his principal is the state, or other corporation, or an individual,—that the intention of the parties, gathered from all the legitimate evidence which belongs to the case, shall be held to be the sure and only criterion of the character and effect of the agent's act."

A "call" sent by the elders and trustees of a church to a minister to become the pastor of the church, which contains a promise that "we hereby promise and oblige ourselves to pay to you" a certain yearly salary, and which is signed by the church officers, three of whom sign individually, without indicating the capacity in which they sign, and one of whom signs by adding the word "moderator" to his signature, imposes no personal obligation on the signers. *Paddock v. Brown*, 6 Hill, 530.

See also *Goodenough v. Thayer*, 132 Mass. 152, *infra*, III. e, 1 (a).

#### Corporate officers.

An agreement entered into by the president of an historical association, reading "I, J. L. D., President of the Southern Historical Association, hereby agree to pay

A. D. C. . . . as stipulated in the original contract between A. D. C. and the Southern Historical Association . . . the foregoing agreement to render void all parts of contract previously made between Southern Historical Association and A. D. C.," and signed, "J. L. B., President," is the personal obligation of such signer. *Candler v. DeGive*, 133 Ga. 486, 66 S. E. 244.

A lease to one as "Treasurer of the Eagle Lodge No. 114, I. O. O. F.," signed by him, "N. T. Coburn, Treas.," is binding upon Coburn personally. *Seaver v. Coburn*, 10 Cush. 324. The lease in this case is stated in *Barlow v. Congregational Soc.* 8 Allen, 460, to have been under seal, but it does not so appear in the report of the case.

A release of a judgment by the president of a bank, commencing, "I, J. G., Prest. of said bank, acknowledge satisfaction," etc., and signed, "J. B., Pres.," was held in *Booth v. Farmers' & M. Nat. Bank*, 4 Lans. 301, not to be in such form as to bind the bank.

Where an order is drawn by the superintendent of a ranch on a form containing at its head the name of the company owning the ranch, and purporting to be payment in full on account of building and

repairs, and the same to be chargeable to the ranch, which bill is signed, "P. B., superintendent," and it appears from evidence that the ranch belonged to the company whose name appeared at the head of the bill, and that the payees of the bill had performed labor, and it appears also that the owner of the ranch intended that such labor accounts should be settled in the manner in which it was done in this case, the owners of the ranch will be held liable on such bill. *Texas Land & Cattle Co. v. Carroll*, 63 Tex. 48.

#### Public officers.

In *McGee v. Larramore*, 50 Mo. 425, an action on a note reading, "I, C. W. L., Director of subdistrict, etc., agree to pay . . . for school merchandise," and signed by the director by adding to his name the word "director," and accepted by "M. G. D., Township Clerk," the court held that the director was not personally liable on such order. The order in this case was held non-negotiable, and therefore an assignee, who was bringing the suit, acquired no greater rights than the payee of the instrument.

The facts do not clearly appear in *Wiley v. Shank*, 4 Blackf. 420. In the opinion it is stated that a contract by which two persons, by name describing themselves as trustees of a certain school district, agree that the "trustees" shall pay a teacher a certain sum for his services, and which is executed by those persons in their own names, is binding upon them individually.

In *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82, a contract by the selectmen of a town, in which they agree as "we, the undersigned selectmen of Runmey," and sign the same by adding to their signatures the word "selectmen," to repay the selectmen of another town for expenses incurred in the support of a certain poor family, is the personal obligation of the said signers. The liability in this case, however, is based upon the lack of authority to bind the town; and the court indicates that it is of the opinion that the form of signature is sufficient to bind the principal.

#### (b) Bills and notes.

##### (1) Notes.

#### Agents and trustees.

In holding that persons who signed a note reading, "We, the trustees of the Seventh Presbyterian Church, promise to pay," by adding the word "trustees" to their signatures, were personally liable, the court states that, although the words "the trustees of the Seventh Presbyterian Church" appear in the body of the note, and the word "trustees" is appended to the defendants' signatures, there are no words used implying an undertaking on the part of the corporation; the corporation is not assumed to be acting by or through the



defendant, nor does it even appear that the defendant acts for or on behalf of the corporation. *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

A note given by the trustees and treasurer of an unincorporated society, reading, "the trustees and treasurer, or their successors in office, of the Durham Agricultural and Horticultural Society, promise to pay," etc., and signed by the trustees, who add to their signatures the word "trustees," and by the treasurer, who adds to his signature the word "treasurer," is the personal obligation of such signers. *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918. In this case the statute of limitations had run against all the signers except one, who had made payment, and it was held that this took the note out of the statute as to him, and he was held personally liable for the entire amount. The court in this case states that the promise does not purport to be the promise of the association, but is the promise of the "trustees and treasurer, or their successors in office."

On the contrary, a promissory note reading, "We, the undersigned, Worshipful Master and Warden of Mt. Vernon Lodge, No. 163, F. & A. M., and Trustees of said Lodge, for its use, promise to pay, etc.," and signed by the officers, each of whom affixed to his signature the abbreviation for his office, and the trustees, who added to their signatures the word "trustees," which is given for an obligation of the lodge, was held to impose no personal liability upon such signers, since the intent to bind the lodge is apparent. *Pearse v. Welborn*, 42 Ind. 331.

In *Simanton v. Vliet*, 61 N. J. L. 595, 40 Atl. 595, a promissory note reading, "we, the trustees of Musconetcong Grange No. 114, known as W. Fleming & Co., promise to pay," etc., and signed, "W. M. S. I. W., Trustees," is ambiguous, so that parol evidence is admissible to show who was intended to be bound. The court states that, in the absence of the words "known as W. Fleming & Co.," the note would contain a clear and express promise on the part of the corporation to pay, and the individuals would not be personally liable; but the addition of these words raises a doubt as to the intention of the parties, and therefore parol evidence is admissible to explain the intention. On the trial of this cause it was shown that the payee of the note took the same as the obligation of the signers, and the court charged the jury that, in order to hold the defendants liable for the payment of the note, there must be evidence that it was their intention to make it a personal or individual obligation. The finding of the jury that the signers were individually liable was held supported by sufficient evidence. 63 N. J. L. 458, 43 Atl. 738.

A promissory note reading, "We, the trustees of P. H. College, promise to pay," etc., and signed by the trustees, is *prima facie* the obligation of the signers, but they

may show by parol evidence that they were trustees of the college, and, as such, authorized to contract and execute notes; that the note in question was given for an account of the college and for a debt due and owing from the same, and that the defendants, acting as trustees, executed the note with the intent to bind the college, and not with the intent to render themselves individually liable, all of which was well known to the holder of the note, and on proof of these facts they are released from liability. *Traynham v. Jackson*, 15 Tex. 170, 65 Am. Dec. 152. It does not appear from the report of the case what if any additions were made by the trustees to their signatures.

#### Corporate officers.

Where the secretary of a building association signs a note for money loaned the society, containing at the top of the note the name of the association, and reading, "we jointly and severally promise to pay," and signed by two persons, who add the word "directors" to their signatures, and the secretary, who adds the word "secretary" to his signature, such secretary is personally liable on the instrument. *Bottomley v. Fisher*, 1 Hurlst. & C. 211, 31 L. J. Exch. N. S. 417, 8 Jur. N. S. 895, 6 L. T. N. S. 688, 10 Week. Rep. 669.

A note written on the blank form of a bank, reading, "we promise to pay," etc., and signed, "T. F. Pres't," and to the left, opposite the name of the president, "J. L., Cash'r," is *prima facie* the personal obligation of the president and cashier, and, in the absence of any explanation, a recovery thereon may be had. *Fitch v. Lawton*, 6 How. (Miss.) 371.

A promissory note reading, "We, The Tama Paper Co., promise to pay," etc., and signed, "John Ramsdell, Pres., A. T. Ramsdell, Sec.," was held to be the personal obligation of such signers where it did not appear that the paper company was a corporation, or whether it was a partnership or voluntary association of persons, and since it designated the Ramsdells as promisors, they were held liable; and the fact that the words "president" and "secretary" were added to the names did not limit the obligation. *Day v. Ramsdell*, 90 Iowa, 731, 52 N. W. 208, affirmed on rehearing, 90 Iowa, 733, 57 N. W. 630.

The fact that a corporate seal is added to such a note does not relieve the signers from personal liability. *Tama Water Power Co. v. Ramsdell*, 90 Iowa, 747, 52 N. W. 209, 57 N. W. 631.

It appears in this case that the note read, "Tama Water Power Co. agrees to pay." The court speaks of this as being an error in the abstract, and nothing further appears with reference thereto.

A promissory note reading, "the president, by the order of the board of the Hustonville & Bradfordville Turnpike Road Co., promise to pay," etc., and signed, "E. J. Dodd, Pres.," and by the directors of such

company, who did not add the word "directors," however, to their signatures, was held to evidence an intention to bind the signers personally, and therefore a personal liability was imposed. *Caphart v. Dodd*, 3 Bush. 584, 96 Am. Dec. 258.

In *Whitney v. Sudduth*, 4 Met. (Ky.) 296, an action on a promissory note reading, "we, or either of us, Joseph Cantrell, Pres't, Dr. Jos. Cantrell, L. G. Sudduth, Jas. T. Ware, and J. W. Allison, Directors of Centerville & Jacksonville Turnpike Co., promise to pay, etc.," and signed by Joseph Cantrell, who affixed to his signature the word "Pres't," and the other persons named in the body of the note, who, so far as it appears from the report, did not affix the title "Directors" to their signatures, the defendants were held individually liable; but it is not clear that Cantrell, the only person who affixed a word indicating representative capacity to his signature, was one of the defendants. This case follows *Trask v. Roberts*, 1 B. Mon. 201, the court taking no notice of the fact that that case involved public officers, nor that the promise there was "as" trustees.

In *Dutton v. Marsh*, L. R. 6 Q. B. 361, 40 L. J. Q. B. N. S. 175, 24 L. T. N. S. 470, 19 Week. Rep. 754, 4 Eng. Rul. Cas. 278, a promissory note reading, "we, the directors of the Isle of Man Slate & Slag Co. Limited, do promise to pay," etc., and signed by several persons, one of whom adds to his signature the word "chairman," and containing to the left of the signatures of the persons the seal of the corporation, was held to be the personal obligation of the signers. The defendants other than the chairman added no words indicating representative capacity to their signatures.

The court in this case states that where parties, in making a promissory note, or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing,—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company,—they are individually liable; but if they state that they are signing the note or acceptance on account of or on behalf of some company or body of whom they are directors and the representatives, in that case they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represents. Compare this statement with cases in III. d, *infra*.

It is further stated that where the contract in form does not purport to be on behalf of or on account of the company, the mere affixing of the seal is not sufficient to relieve the signers from personal liability.

See *Means v. Swormstedt*, III. b, 1 (b) 42 L.R.A. (N.S.)

(1) a, and cases there referred to on effect of seal.

A promissory note written on a blank form containing the name of a corporation on the margin, reading, "we promise to pay," etc., and signed, "J. C., Pres't.," and in the lower left hand corner, "P. H. C., Treas.," is the individual liability of the president and treasurer, as against a bona fide holder of the instrument. *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910. A similar holding appears in *First Nat. Bank v. Wallace*, 150 N. Y. 455, 44 N. E. 1038, affirming 80 Hun, 435, 30 N. Y. Supp. 83,—an action on a promissory note written on a blank form on the margin of which is the name of the corporation, and reading, "we promise to pay," and signed "W. T. W., Pres't, G. T. S., Treas." Followed in another action on a similar note. *First Nat. Bank v. Wallis*, 84 Hun, 376, 32 N. Y. Supp. 382.

A promissory note reading, "we, the president and directors of the Dulaney's Valley & Sweet Air Turnpike Co. of Baltimore County, promise to pay," etc., and signed by "Charles T. Haile, Pres., J. N. Henderson, Director, Joseph G. Vance," being ambiguous and uncertain as to whether the individuals signed it in their individual or official capacity, parol evidence is admissible to show the intention. *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139.

Where a promissory note reading, "The Directors of the Huntville Turnpike Co. promise to pay," etc., and signed by such directors, who add to their signatures the word "directors," has been treated by the payee as an obligation of the corporation, and suit brought against the corporation, and judgment obtained, the payee will not thereafter be permitted to treat the note as the individual liability of the signers. *Aimen v. Hardin*, 60 Ind. 119.

#### Public officers.

The trustees of a school district who sign a note reading, "we, the trustees of school district No. 20, county of Olmsted, promise to pay," etc., by adding the word "trustees" to their signatures, are prima facie individually liable on such note. *Bingham v. Stewart*, 13 Minn. 106, Gil. 96. Compare with *Fowler v. Atkinson*, 6 Minn. 578, Gil. 412.

But where two of the trustees of a school district at a regularly called meeting of which the other trustee was notified, but did not attend, gave a note to a teacher for wages, reading, "we promise to pay . . . for and on account of his wages as teacher in school district number 4, up to this date," and signed the same by adding to their signatures the word "trustees," such trustees are not personally liable on the note, since they described themselves as agents, and had in fact authority to make the contract in question, and these facts

were known to the other party. *Horton v. Garrison*, 23 Barb. 176.

Where the agents of a school district, who have no authority to bind the district by a promissory note, execute such a note, reading, "we, J. J., Prudential Committee, and P. E. G., clerk of school district No. 16, in Weare, duly authorized to hire money in the name of said district for the purpose of building a schoolhouse . . . jointly and severally promise to pay," etc., and sign the same, "J. J., Prudential Committee, P. E. G., Clerk," such signers are individually liable on the note. *Weare v. Gove*, 44 N. H. 196. Counsel for the defendant in this case urged a distinction between the case of an agent who exceeds his authority and a case where he simply executes the authority which the principal confers, but which he has no power to confer. The court, however, disapproved of the distinction.

See *Warford v. Temple*, 24 Ky. L. Rep. 2268, 73 S. W. 1023, where the words "we, or either of us" were inserted by mistake. III. c. 1 (b).

## (2) Drafts and checks.

### a. Liability of one who signs as drawer.

#### Agents.

In *Sayre v. Nichols*, 5 Cal. 487, where an express agent drew a draft, signing his name and affixing the term "agent" thereto, it was held to be his personal obligation, and the word "agent" appended to his name was mere *descriptio personæ*, not affecting his liability in any way. This case came up for hearing on a second appeal in 7 Cal. 535, 68 Am. Dec. 280, where a fuller statement of the facts is given. The draft in question was one purchased of an express company, and contained the name of the express company at the top thereof, and the charge was to be made to account of the office. It was signed, "C. P. Nichols, per G. W. Coley," with the word "agent" opposite both names, but should have been "C. P. Nichols, per G. W. Coley, agent." The court lays down the rule that where the agent discloses the name of the principal, or that fact is otherwise known to the party receiving the bill, at the time same is made, then the agent is not responsible, though the name of the principal be not stated on the face of the paper, and only the name of the agent is signed, with the term "agent" appended to it; and it was accordingly held that the agent was not personally liable. Evidence seems to have been admitted in this case on the question as to whether or not the third party knew the fact that the agent had acted only as agent of his principal; at any rate the court, in commenting upon such evidence, says that it authorized a finding by the jury that the purchaser of the draft knew that the agent so acted.

The court in this case, after referring to the rule that the word "agent" appended

to the name of the signer of an instrument is merely *descriptio personæ*, continued: "But I confess I could never understand the reason upon which this rule was founded. When a party appends to his name the place of his residence, as, for example, Chas. Carroll of Carrollton, or affixes a letter to his name, as John Smith, T., I can well understand that he intends by this a description of the person: but when he appends the term 'agent' or other term of like import, I cannot understand it as a description of the person, but I take it to be a clear designation of the capacity in which the party acts. . . . I cannot believe that a person signing his name and appending the word 'agent' to it, ever did intend anything else than a designation of the capacity in which he acted."

A check drawn by the chairman of the committee of a political party, upon funds belonging to such party, and given to the payee for a debt contracted by him and due from the party, and not for any debt due or contracted by the defendant individually, and signed, "M. F. Q., Chairman," imposes no personal obligation upon such chairman, as against the original payee. *Markley v. Quay*, 14 Phila. 164.

In *Fuller v. Hooper*, 3 Gray, 334, an action against the principal on a draft drawn on a blank form containing thereon the name of a corporation, directing it to be placed to the account of the corporation, and signed, "W. B., agent," parol evidence was held admissible to show that the corporation consisted of a single individual, who was sought to be charged in this case, so as to render the draft provable as a claim against his estate.

#### Corporate officers.

A check given by the treasurer of a corporation for a debt of the corporation, and made out on a blank form, on the margin of which is the name of the corporation, and signed, "I. B. Farnsworth, Treas.," imposes no personal obligation on Farnsworth, since it is apparent from the face of the instrument that the writing is the act of the principal. *Carpenter v. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360.

An order drawn on the treasurer of a corporation known as the Sons of Temperance, as payment "in full of copies of Kentucky New Era, ordered to be sent to General D. G. W. Patriarchs at January session of G. division," and signed, "Geo. W. Williams, G. W. P.," and attested by an officer of the corporation, imposes no personal liability upon Williams, since it appears on the face of the instrument that the order is drawn on the treasurer of the corporation of which he is an officer, and is given to pay a debt of the corporation, and is attested by another corporate officer. *Taylor v. Williams*, 17 B. Mon. 489.

A draft drawn on a form containing the name of the corporation, directed to "J. H. P., Treas.," made payable to the order

of "J. S., Cashier," chargeable to the account of the corporation, and signed "W. C. B., Pres't, J. C. W., Sec'y," imposes no personal obligation upon the president and secretary. *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. ed. 1078. The draft in this case was in the hands of an indorsee, but nothing is said as to his being a bona fide holder.

In *Gillig v. Lake Bigler Road Co.* 2 Nev. 214, an action against the principal, upon a draft drawn on a form containing at the head the name of the corporation, and signed "B. L., Sup't," and directed to "J. E. P., Sect.," and by him accepted as "J. E. P., Secty. L. B. R. Co.," it was held that the company was liable on such draft as drawer and also as acceptor.

In *Montour Iron Co. v. Coleman*, 31 Pa. 80, the principal was held liable on a draft drawn on "P. P., Pres't M. I. Co.," and accepted by him as "P. P., Pres't."

A draft drawn by the cashier of a bank on a form containing at its head the name of the bank, and directing the drawee to charge the same to "this institution," and signed by the cashier with the addition of the word "cash'r" to his signature, is stated in *Safford v. Wyckoff*, 1 Hill, 11, to appear on its face clearly enough to have been intended to be a draft of the bank. Liability was denied in this case by virtue of the provisions of a statute, but on an appeal from the second trial of this case, reported in 4 Hill, 442, a judgment finding the bank not liable was reversed.

#### **b. Liability of one who signs as acceptor.**

Where a contract is made with a railroad company, and credit given to the corporation, and drafts drawn, one on "J. O. E." and others upon "J. O. E., Treasurer of the N. & N. W. R. Co.," and accepted by him as follows: "Accepted, payable on return of March estimates, J. O. E., Treas.," the treasurer is not individually liable on such acceptances. The court, in the course of the opinion, speaks of the treasurer as a public agent; the sense in which the term "public agent" is used is not clearly disclosed. The holder of the draft in this case was an indorsee, but nothing is said as to his character as a bona fide holder, the court stating that he had sufficient notice by the language of the acceptance that defendant was not personally liable. *Amison v. Ewing*, 2 Coldw. 366.

A draft made out on a printed blank of a company by an agent of such company, on another person, whose name appears on such blank as "agent," and accepted by him by writing across the face of the draft the words, "Accepted June 15, E. P. Loring, Agent," is, as against a holder in due course, the personal obligation of such Loring, and it is wholly immaterial that the acceptor was in fact the agent of the company named on the face of the draft, and that the plaintiff in the action knew that he was such agent, as there is nothing to

disclose that he signed as agent of such principal in this instance. *Slawson v. Loring*, 5 Allen, 340, 81 Am. Dec. 750.

A bill addressed to "J. L., Pres. of the Astor Bank," and accepted by "J. L., Pres.," is held, in *Andrews v. Astor Bank*, 2 Duer, 629, to be the obligation of the principal.

In *Farmers' & M. Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457, an action on a draft drawn "to John A. Wells, Cashier Farmers & Mechanics' Bank of Michigan," and accepted, "John A. Wells, Cashier," the court regarded the liability of the bank on this acceptance as determined by the liability of the cashier, and held that the cashier was not individually liable thereon.

See *Gillig v. Lake Bigler Road Co.* 2 Nev. 214, *supra*, III. C. 1 (b) (2) a.

#### **2. Signed by adding name of principal to word or words indicating representative capacity.**

##### **(a) Ordinary contracts.**

A duebill given the debtor for a "balance due him on account of" the corporation, "in accordance to the order of the directors of said board," and signed, "Wm. Bacon, Pres. Crabb Orchard & O. Turnp. Road Co.," imposes no personal liability upon the signer, since it shows in the obligation itself that the debt is the debt of the corporation, and the words "Pres. of" etc., instead of being merely *descriptio personæ*, show that the acknowledgment is made by an officer who had the right, under the law, to bind the corporation by his signature. *Humber v. Crabb Orchard & O. Turnp. Road Co.* 13 Ky. L. Rep. 327 (action against the corporation).

In *Pearson v. Post*, 2 Dak. 220, 9 N. W. 684, affirmed in 108 U. S. 418, 27 L. ed. 774, 2 Sup. Ct. Rep. 799, the action was on an agreement which purported to be by "A. W. W., Supt. of the K. M. Co.," and was signed, "A. W. W., Supt. K. M. Co.," and seal attached. The statute in this case provided that any instrument within the scope of his authority by which an agent intends to bind his principal does bind him if such intent is plainly inferable from the instrument itself, and the distinction between sealed and unsealed instruments was abolished. The action was against the K. M. Co., and it was held liable, and the signer of the instrument held by virtue of being a member of such company.

##### **(b) Bills and notes.**

###### **(1) Notes.**

Where the secretary of an insurance company upon a loss gave a note to the insured, reading, "I promise to pay . . . value received by O. M. & F. Insurance Co.," and signed the same, "P. H. G., Secty. O. F. Co.," at the same time taking a cancellation of the policy, such secretary was held personally bound by the note. *Armour v. Gates*, 8 U. C. C. P. 548.

A promissory note reading, "we, the di-

rectors of the C. P. A. M. & S. Asso., promise to pay," etc., and reciting that it is "signed by directors C. P. A. M. & S. Association," followed by the names of the directors, is ambiguous, and parol evidence of the existence of the corporation, the official capacity of the defendants, and their authority to make the instrument, together with evidence tending to prove that it was intended and understood by all the parties at the time the note was executed that the same should be the note of the corporation, and not the individual note of the defendants, is admissible. *Miller v. Way*, 5 S. D. 468, 59 N. W. 467.

In *Ligon v. Irvine*, 1 Rich. L. 502, decided at the same time as *Robertson v. Pope*, 1 Rich. L. 501, 44 Am. Dec. 267, the action was against the signer of a promissory note reading, "we promise . . . for work done on the building of the G. S. (Glenn Springs) Comp.," and signed, "O. B. I., Pres. G. S. C.," and the officer was held not personally liable.

In *Lacy v. Dubuque Lumber Co.* 43 Iowa, 510, an action against the principal on a promissory note reading, "I promise to pay," and signed "M. H. Moore, P. D. L. Co.," and written on a blank form containing at the top the name of the corporation of which the signer was president, such note was held to bind the corporation. This case was decided on a demurrer to a petition which alleged that the consideration moved to the corporation, and that the note was executed by the corporation's president as the note of the corporation.

The intention as to who is to be bound by the instrument must be determined from the instrument itself; and within this rule a promissory note reading, "we, the Board of Education, . . . promise to pay," etc., and signed "J. W., President of the Board, J. F. S., Clerk," is not the personal obligation of the signers. Liability based upon lack of authority is confused with liability arising from the form of the instrument. It is apparent that the theory of the plaintiffs in this case was that the officers were liable because they were without authority. *Second Nat. Bank v. Wilcox*, 2 Ohio C. C. 325, 1 Ohio C. D. 511.

## (2) Drafts.

A draft drawn on "W. A. G., Treasurer of the W. I. C. Co.," and accepted in the form, "Accepted, W. A. G., Treas. W. I. R. W. & C. Co.," with an impression of a seal which, on the trial, was proved to be the seal of the corporation, was held to be the personal liability of the treasurer. *Foster v. Geddes*, 14 U. C. Q. B. 239.

A draft drawn by the agent of a corporation, payable to another agent, and directed to "J. R. L., President Rosenfield Mng Co.," and indorsed by the payee to another agent of the corporation in payment of wages due from the company, and accepted, "J. R. L., President Rosenfield Mng Co.," is the personal obligation of 42 L.R.A. (N.S.)

the president. *Moss v. Livingston*, 4 N. Y. 209, 2 Mor. Min. Rep. 119. All the judges concurred in holding the agent liable in this case, but several of them (the number is not mentioned) on the ground that he did not show himself authorized to make the contract.

In *Haight v. Naylor*, 5 Daly, 219, a draft drawn on "N. W. D., Ag't C. B. Co.," and accepted by such agent in the same form, was held not to bind the principal, the words added being treated as mere *descriptio personæ*.

In *Shelton v. Darling*, 2 Conn. 435, a draft drawn by a commission house on its agent, who is described in the draft as agent of the commission company, which is accepted by such agent, who adds to his signature, "agent C. C.," was held to be the obligation of the commission company, and to impose no personal liability on the agent, nor could there be a recovery against the agent in *indebitatus assumpsit*, since the creditor held an instrument which was a valid security for his debt.

A draft drawn on "P. C. D., President N. D. & H. Co.," and accepted by him in the form, "Accepted, payable at the office of the Bank of Upper Canada. P. C. D., President N. D. & H. Co.," as against an indorsee of the draft, is the bill of the president individually. *Bank of Montreal v. DeLatre*, 5 U. C. Q. B. 362.

A draft drawn "to H. B., Cashier of York Building Co.," and accepted "per H. B.," is held, in *Thomas v. Bishop*, 2 Strange, 955, to be the personal obligation of the cashier upon such acceptance, since there is nothing in writing to bind the company, nor can any action be maintained against it upon the bill.

## 3. Signed by adding name of principal preceded by "of."

### (a) Ordinary contracts.

In *M'Williams v. Willis*, 1 Wash. (Va.) 199, the action was upon an oral agreement for rent due under a lease, and for breach of some of the terms of the lease entered into by the treasurer of an unincorporated association. Upon the trial an agreement in writing was introduced in evidence in which the treasurer was described as "treasurer of the J. Club." It was held in this case that the treasurer was personally liable. It does not appear from the report of the case how the agreement was signed.

An agreement entered into by the building committee of a church, by which the building committee, "the said party of the second part, for themselves and their successors, do hereby agree to pay," etc., and signed and sealed by the members of the committee with the words "Building Committee of M. E. Church of Thomaston," following their signatures, not being executed by the defendants in the name of their alleged principal, nor in their own name, for such principal, nor appearing that they

had authority to bind another, is the personal obligation of such signers. *Copeland v. Hewett*, 96 Me. 525, 53 Atl. 36.

Where a vice consul borrowed money and gave an acknowledgment of the receipt thereof as having been received "for the use of this vice consulate of Italy," and signed the receipts "E. De Merolla," adding the seal of the vice consulate of Italy, and on one note prefixing to his signature the words, "Vice Consul of Italy," the obligation is the personal obligation of De Merolla. *De Bebian v. Gola*, 64 Md. 262, 21 Atl. 275. It was held in this case that the use to which the borrower put the money was entirely immaterial to the lender, and did not affect the contract.

Where the agents or trustees of a company made an agreement within the scope of their authority with one from whom they purchased property for the company, reading, "we, the agents of the W. M. Co., promise to pay," and sign the same with the addition of the words, "agents of the W. M. Co.," such signers are not individually liable on the contract, where the intention was to bind the company. *Roberts v. Button*, 14 Vt. 195.

"In giving a construction to this contract," says the court, "we may and indeed must take into consideration the subject-matter of the contract, the time, place, and manner of its execution, and the other writings connected with the same contract, and the defendant's authority and character."

In *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123, a lease reading: "This agreement made . . . between Randolph Marshall, Agent of Oliver Dougherty," and signed, "Randolph V. Marshall, Agent of O. R. Dougherty," was held to be the lease of the principal in an action against him, as it clearly appears from the instrument that Marshall was the agent of the lessor and acted as such.

There is no personal liability on the part of the signers of an instrument reading, "Due John H. Duffield, on settlement, the sum of \$239 . . . for the joiner's work of the new Washington Seminary. (Signed) James McHenry, R. Tilford, F. Ratts, Building Comm. in behalf of the Trustees of the new Washington Seminary," since there are no words to bind them individually. *McHenry v. Duffield*, 7 Blackf. 41.

Where a non-negotiable order is drawn on the treasurer of a board of trustees of a church, and accepted by him by adding to his signature the words "treasurer" of the board of trustees, parol evidence may be introduced in an action against the church to show his agency, and that he accepted the order as such agent. *Gilbert v. First Presby. Church*, 4 Ohio Dec. Reprint 312.

#### (b) Bills and notes.

A promissory note reading, "we, the trustees of the Methodist E. Church in Rock-42 L.R.A. (N.S.)

port, promise to pay, etc., and signed by a number of individuals who add to their signature the words, "trustees of the M. E. Church," is the personal obligation of such signers, notwithstanding it was given on the representation that no individual responsibility could arise therefrom, and that the only object was to show the indebtedness of the church. *Mears v. Graham*, 8 Blackf. 144.

In *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39, a promissory note reading, "we, the trustees of the First Free Will Baptist Society of Chicago, promise to pay," etc., and signed "trustees of the First Free Will Baptist Society of Chicago, Ill.," followed by the names of a number of individuals, was held not to be the personal obligation of such individuals; since the proper corporate name of the organization appears in the instrument and in the signatures, and the individual names of the trustees were not individual signatures or individual acts, but a component part of the signature of the corporate name in the form that it was required to be made. This case is distinguished by the court from *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175, on the ground that here the proper corporate name appears in the note, while in the *Powers Case* the proper corporate name did not so appear.

The members of an unincorporated religious association who, for work done in building a parsonage, give an instrument in writing reading, "we, the trustees of the M. E. Society, for building a parsonage house on Frankfort circuit, promise to pay," etc., and signed by the trustees, who add to their signatures the words, "trustees of said house," are personally liable on said instrument, since they are members of the unincorporated association, and if the other members of the association should also have been joined, the defendant should have taken advantage of this objection by a plea in abatement. *Chick v. Trevett*, 20 Me. 462, 37 Am. Dec. 68. It was further held in this case that the loss or damage to the promisee constituted a good consideration for the personal liability of trustees.

#### Note of corporate officers and trustees.

A promissory note reading, "I, the subscriber, treasurer of the Dorchester Turnpike Corporation, for value received, promise," etc., and signed "Gardner L. Chandler, Treas. of Dorchester Turnpike Corporation," which is given for a debt of the corporation, imposes no personal obligation upon the signer. *Mann v. Chandler*, 9 Mass. 335.

In *Blanchard v. Kaull*, 44 Cal. 440, the promise in the note was that "we, the trustees" of a corporation, naming it, promise to pay, etc., and the note was signed by three persons, who added to their signature the designation "trustees" of the corporation, naming it, and the action was brought against the three signers and a number of

others who were claimed to be partners, it was held, since the note did not purport to be the notes of such signers, that they were not personally liable thereon; the court stating that they described themselves as trustees of a corporation and appended the same designation to their signatures, and therefore showed that they were acting as agents. A mortgage executed to secure the notes in suit in this case described the mortgagor as the corporation.

A draft directed to "J. & S., joint managers for the R. M. M. Insurance Association," and accepted "J. J. & W. S. as joint managers of the R. M. Association," is in form the personal obligation of the managers. *Jones v. Jackson*, 22 L. T. N. S. 828.

#### **4. Signed by adding name of principal preceded by "for."**

##### **(a) Ordinary contracts.**

A bond acknowledging that "C. E., attorney in fact of P. E." [and others] are held and firmly bound, and signed and sealed by one of the obligors, but by the attorney in fact as "C. E., attorney in fact for B. E.," was held in *Eckhart v. Reidel*, 16 Tex. 62, to impose no prima facie personal obligation upon the attorney in fact. The court treats this instrument as an unsealed instrument, although not much emphasis is placed upon the distinction.

##### **(b) Bills and notes.**

In *Macbean v. Morrison*, 1 A. K. Marsh. 545, an action on a promissory note reading, "I promise to pay . . . being on account of wages at the Madison Hemp & Flax Spinning Co., Manufactory, Madison county," and signed, "For the Madison Hemp & Flax Spinning Co., W. McBean, Pres't," it was held that the obligation of the signer was determined from the obligatory part of the instrument, and since in this case it reads, "I promise to pay," the signer was bound individually.

Promissory notes reading, "I promise to pay, etc.," for cotton seed for Green J. Jordan's plantation, and signed D. Spradley Agent, for Green J. Jordan, which were given by Spradley as the agent of Jordan and so understood by the payee of the notes at the time the contract was made, impose no personal liability upon the agent. *Tiller v. Spradley*, 39 Ga. 35.

In *Webb v. Burke*, 5 B. Mon. 51, where a note was given to evidence the balance due on the purchase price of land, and the vendee, who was unable to sign, requested another to sign for him, and such other did so sign the note in the principal's presence, reading, "I promise to pay . . . the last payment for a certain tract of land where the said Burke now lives," as follows: "John B. Burke, Agent for Samuel Burke," with the intention of binding Samuel Burke only, there was held to be no personal obligation on the part of

John B. Burke, and parol evidence is admissible to show the intent.

##### **Drafts.**

In *Nicholls v. Diamond*, 9 Exch. 154, 23 L. J. Exch. N. S. 1, 2 C. L. R. 305, 2 Week. Rep. 12, a draft directed to "J. D., Purser W. D. Mining Co.," and accepted in the form "J. D. accepted per proc. W. D. Mining Co.," was held to be the personal obligation of the purser. The court states that he accepted the bill for himself and another, and having no authority to accept for that other, he was personally bound.

A bill directed "to the directors of the I. S. & A. Co." and "accepted for the I. S. & A. Co., R. P. Manager," and signed immediately below such acceptance by three persons, who add to their signatures the word "directors," is not personally binding upon the manager. *Bult v. Morrell*, 12 Ad. & El. 745, 10 L. J. Q. B. N. S. 52.

#### **d. Agreement "as" agent for or on behalf of another.**

##### **1. Signed with word or words indicating representative capacity.**

##### **(a) Ordinary contracts.**

In *Hutchinson v. Tatham*, L. R. 8 C. P. 482, a charter party had been entered into between the plaintiff and the defendants "as agents to merchants," the defendants' signature to the contract being expressed to be by them "as agents to merchants," a custom was introduced to the effect that if the principal's name is not disclosed within a reasonable time after the signing of the charter party, the broker is personally liable. The court discusses the liability apart from custom, and, while the statements on that question are possibly nothing more than *dicta*, the reasoning of the court is so clear that it is given herewith. It is that, "apart from the evidence of custom, it is quite clear that upon a contract framed as this is, the defendants could not be personally liable. It appears on the face of the contract that they are contracting on behalf of others: It is analogous to the case of a contract in which a broker says that he sells on account of somebody else as principal and signs himself broker." The court then refers to the case of *Fleet v. Murton*, L. R. 7 Q. B. 128, 41 L. J. Q. B. N. S. 49, 26 L. T. N. S. 181, 20 Week. Rep. 97, and continues, "The contract in either case shows on the face of it that the party signing it is acting as agent;" and in conclusion the court stated, "On these authorities, and according to the general understanding in mercantile matters of effect of a contract so furnished, it seems to me that on such a contract, apart from custom, the defendants are not responsible." The question as to the admissibility of evidence of the custom above referred to was then discussed, and such evidence held admissible and a

judgment on a verdict for the plaintiff was affirmed. On question of custom see *Fleet v. Murton*, supra; and *Humfrey v. Dale*, 7 El. & Bl. 286.

Where a bill of sale reciting that the property is "sold on behalf of Mr. L. R. . . . the freight to be paid according to charter," and further stating "the shipment to take place in this or the next month," is signed "H. K. as Agent," there is no personal liability incurred by the said agent. *Green v. Kopke*, 18 C. B. 549, 25 L. J. C. P. N. S. 297, 2 Jur. N. S. 1049, 4 Week. Rep. 598.

On the contrary, a contract made by the agents of a foreign principal which recites that it is made "in behalf and representation of" the principal, containing an agreement for the employment of the other contracting party as fireman on a steamer, and the further agreement that the principal was at liberty to terminate or continue the engagement when the ship arrived at his port, was held to be the personal obligation of the agent. *Wilson v. Zulueta*, 14 Q. B. 405, 19 L. J. Q. B. N. S. 49, 14 Jur. 366. It does not appear how the contract was signed. The court in this instance refused to apply the rule in England that wherever an agent in that country, on behalf of a principal residing abroad, makes a contract to be performed abroad, the agent is to be considered liable, but held that the agent had made himself liable by the form of contract.

It was held in *Bacon v. Dubarry*, 1 Ld. Raym. 246, that one who submits to an award as attorney for another is personally bound by such award, but it is not stated how the attorney in the case signed the submission.

In *Watson v. Murrell*, 1 Car. & P. 307, 28 Revised Rep. 779, the court is of the opinion that an agreement by an attorney to pay costs, in the language, "Mr. M. on the part of the parish . . . agrees to pay costs," is the personal agreement of the attorney. It does not appear how this contract is signed.

In *M'Calla v. Rigg*, 3 A. K. Marsh. 259, a statement of account directed to the building committee of Fayette Hospital and accepted, "in behalf of said committee as their chairman, I acknowledge the above balance" to be due the contractors, which acceptance is signed "and, M'Calla (Chr. Com.)," imposes a personal liability upon M'Calla as a member of the committee. In the course of the opinion the court says that this would have imposed no personal liability upon M'Calla if he were not one of the building committee, but from his signature he must be understood to be one of the committee and by his acknowledgment of the indebtedness of the committee, he must himself be chargeable.

A contract entered into by "J. R., J. C. R., J. C., and G. H. as agents authorized by the log owners," and signed by three of such persons each of whom adds to his name the word "agent," is the personal obligation of such signers, since the principal is not 42 L.R.A. (N.S.)

disclosed, and it appears that the log owners had constituted four persons their agents to make the contract and only three of them had joined in it. *Rollins v. Pheips*, 5 Minn. 463, Gil. 373.

In *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521, an action on an agreement by a school district committee reading: "We, the undersigned committee for the first school district . . . promise in behalf of said district to pay, . . . providing said Andrews shall complete a schoolhouse in said district to the acceptance of a committee," and signed by the members of the committee, who add to their signatures the word "committee," the court refused to apply the strict rules of law applicable to instrument under seal, and held that the intention of the parties as gathered from the instrument was that the members of the committee were not to be individually liable.

#### (b) Bills and notes.

A note reading, "we jointly promise to pay . . . for value received in stock on account of the L. & B. I. & H. Co.," and signed by three persons who added to their signatures the word "directors," and another who adds to his signature the word "secretary," is not the personal obligation of the directors who gave the note for property sold to the joint stock company. *Lindus v. Melrose*, 2 Hurlst. & N. 293, affirmed in 3 Hurlst. & N. 177, 4 Jur. N. S. 488, 27 L. J. Exch. N. S. 326, 6 Week. Rep. 441. In the affirming opinion the court considers the fact that the promise was made jointly, and holds that this is consistent with the company's promise.

A note given by the trustees of a church reading: "We, the undersigned trustees of the . . . Church . . . for ourselves as such trustees and our successors in office, promise and bind ourselves, for said congregation and such successors in office, to pay," etc., and reciting that the consideration for the note was money advanced by the payee in the building of the church, and signed by the trustees, who add to their signatures the word "trustees," imposes no personal liability upon such signers, where it was the intention not to bind the trustees individually; and parol evidence is admissible to show such intention. *Klostermann v. Loos*, 58 Mo. 290.

A promissory note reading, "we, as trustees of the Methodist Church," promise to pay, etc., and signed by three persons, who add to their signature the word "trustees," being a contract or promise made by the signers in a fiduciary capacity, is not admissible in evidence in an action against the individual. *Leach v. Blow*, 8 Smedes & M. 221.

The intention to bind the principal was held to appear from a promissory note reading, "I promise to pay . . . for the use of N. E. P. Union Store," etc., and signed "S. S. N., Treas.," so that the treasurer could not be held personally liable. *Dow v. Moore*, 47 N. H. 419.



So, where it appears that goods are sold on the credit of a company and a promissory note given, reading, "I promise to pay . . . for the Susquehanna Cotton & Woolen Manf. Co.," and signed "S. B., Agt.," such agent, having disclosed his principal at the time of entering into the contract, is not personally liable thereon. *Rathbon v. Budlong*, 15 Johns. 1.

On the contrary, in *Healey v. Story*, 3 Exch. 3, 18 L. J. Exch. N. S. 8, a note given by the directors of a joint stock company, reading, "on demand we jointly and severally promise to pay . . . on behalf of the W. N. Association," and which is signed by the directors, who add to their signatures the word "directors," is held to be the individual obligation of such directors.

So, in *Penkivil v. Connell*, 5 Exch. 381, 19 L. J. Exch. N. S. 305, 1 Lowndes, M. & P. 398, a note given by the directors of a joint stock company, who add to their signatures the word "directors," and reading, "we, the directors of the R. Bank, . . . for ourselves and the other shareholders of this company jointly and severally promise to pay . . . on account of the company," was held to be the personal obligation of the directors.

A promissory note reading, "we, the subscribers, promise to pay . . . on behalf of Cambridge City Greys," and signed by certain individuals and "E. F., Sect.," is the personal obligation of the signers. *Kendall v. Morton*, 21 Ind. 205.

A note reading, "we promise to pay . . . for S. G. Society," and signed by three persons who add to their signatures the word "trustees," and another who adds to his signature the word "secretary," is the personal obligation of such signers. *Allan v. Miller*, 22 L. T. N. S. 825.

It does not appear in *American Ins. Co. v. Sorter*, 4 Ohio Dec. Reprint. 226, how the note was signed. The action was one by an insurance company upon a note given for a premium on a policy of fire insurance by certain trustees. In the answer of the trustees it was alleged that they signed and delivered the note as trustees of a church, and not as individuals. It is held that, the name of the real party in interest not being set out in the note itself, the words "as trustees" were simply descriptive of the party, and the instrument was construed as the individual note of the trustees.

Where the directors of a corporation which was not entitled to do business, by reason of the fact that the certificate or articles of the association had not yet been filed with the secretary of state, executed a note reading, "the undersigned, as directors of the North Mo. Central District Stock etc., Asso. promise to pay," etc., and signed the same with the addition of the word "directors" to their signatures, such signers are individually liable; since the corporation had no power to issue the note. *Hurt v. Salisbury*, 55 Mo. 310.

In *Barlow v. Congregational Soc.* 8 Al-  
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len, 460, a promissory note reading, "on demand, I as treasurer of the Cong. Society or my successors in office promise to pay," etc., and signed "F. S. R., Treasurer," was held in an action against the congregation to be a note of the congregation; and in the opinion it is stated that wherever it appears upon the face of a simple contract made by the agent of one named therein, and whom he can legally bind thereby, that he acts as agent and intends to bind his principal, the law will give effect to the intention, in whatever form expressed.

#### Public officers.

A promissory note reading, "we, as trustees of the town of Harrisburg, jointly and severally promise to pay," etc., and signed by "E. Sutton, Pres.," and certain other persons, following whose signature is the word "trustees," is the personal obligation of such trustees, and parol evidence is not admissible to show an intent different than that imported by writing. *Trask v. Roberts*, 1 B. Mon. 201. The court regarded the fact that the trustees promised severally decisive of this case.

In *Harvey v. Irvine*, 11 Iowa, 82, a promissory note reading, "we, or either of us, promise to pay . . . in behalf of school district No. 6," etc., and signed "James M. Irvine, Pres't, L. B. Bullock, Sec'y, Conrad Peitz, Treas.," was held not to impose any personal liability upon the signers.

A promissory note reading, "as treasurer of the town of M., I promise to pay," etc., and signed "W. G. B., Treasurer," in the absence of proof of authority of the treasurer to make a promise binding upon the town, was held to be the personal obligation of the treasurer. *Ross v. Brown*, 74 Me. 352.

Where a special committee, with no authority to bind a town by promissory note, executed such a note reading, "we jointly and severally promise to pay . . . in official capacity," etc., and signed the same by adding to their signature the words "Whitefield Road Committee," the unauthorized words will be disregarded, and the balance, which makes a promise on the part of the individual, will render them individually liable. *Savage v. Rix*, 9 N. H. 263. The court further states that there is nothing on the face of the instrument, showing that it was intended to bind the town; and in the absence of such a showing, evidence cannot be introduced to supply the deficiency.

#### 2. Signed by adding name of principal preceded by "of."

##### (a) Ordinary contracts.

A contract to furnish a person with convict labor, entered into by one duly authorized "as superintendent or agent of" a state

prison, imposes no personal obligation upon the superintendent. *Dawes v. Jackson*, 9 Mass. 490. It does not appear in this case how the contract was signed.

### (b) Bills and notes.

An agent who is duly authorized and directed by a corporation to execute a promissory note on its behalf for a demand due by the corporation is not liable on a promissory note reading, "I. C. W., as agent of the G. M. T. Co., promise to pay," and signed "C. W., Agent of the G. M. T. Co.," *Proctor v. Webber*, 1 D. Chip. (Vt.) 371.

Where the president of a corporation, who was duly authorized, gave a note in payment of a claim against the corporation, to a purchaser of such claim from the creditors, the note reading, "I promise to pay as Pres't of the P. O. & M. Co.," and signed "A. B. F., Pres't of the P. O. & M. Co.," the president is not personally liable, since he has clearly and unmistakably indicated his intention not to become liable thereon. *Randall v. Snyder*, 1 Lans. 163.

The cashier of a bank who has been appointed by a debtor of the bank, with power to collect a warrant and apply a part of the proceeds to the extinguishment of the debt of the bank, and has entered into an agreement as cashier to pay the debtor a certain part of the proceeds of the warrant, and signed the same as "cashier of the F. & M. Bank," is not individually liable on such agreement, since the debtor knew that he was dealing with the cashier as agent for the bank, and not upon his own account. *Barbour v. Litchfield*, 4 Abb. App. Dec. 655.

Where a school director, under the belief that he had power to bind the district by a note, and under this mistake of the law, in which the other contracting party equally participated with equal opportunities of knowledge and intending to bind the district only, executed a note reading, "I, as director of subdistrict . . . promise to pay," etc., and signed "W. J., Director of Subdistrict," etc., it was held in *Humphrey v. Jones*, 71 Mo. 62, that there was no personal liability on the part of said director.

### 3. Signed by adding name of principal preceded by "for."

A charter party in which certain agents are named in the body thereof as "G. Bros. as agent to S. F.," and which is signed "for S. F., G. Bros. as Agent," imposes no personal liability upon the agent. In the body of the charter party in this case, the principal was referred to as "merchants," and in another place as "charterers." The court held, however, that the plural use of these words was not sufficient to weigh against the whole tenor of the document. *Deslands v. Gregory*, 2 El. & El. 610, affirming 2 El. & El. 602, 30 L. J. Q. B. N. S. 36, 6 Jur. N. S. 651, 2 L. T. N. S. 634, 8 Week. Rep. 585. 42 L.R.A. (N.S.)

### e. Agreements purporting to be by the principal.

#### 1. Signed with word or words indicating representative capacity.

##### (a) Ordinary contracts.

Under this subdivision are classified those contracts in which the promise is by the alleged principal. For cases in which the particular officer who signs promises to pay, see subdivision III. d, 1, above, unless the name of the officers given constitute the corporate name, as in *Yowell v. Dodd*, 3 Bush, 581, 96 Am. Dec. 256, *infra*.

In *Lynch v. McDonald*, 155 Cal. 704, 102 Pac. 918, a contract between a corporation and an individual, signed by the president of the corporation as president and again as director, was held to impose no personal liability upon such president. The exact method of signing in this case does not clearly appear. Parol evidence was apparently admitted in the lower court to show that the signer did not intend to assume any personal liability, and the supreme court, in holding the evidence sufficient to justify the finding of the trial court, states that parol evidence is admissible to show such intention. Some equitable grounds were also shown in this case, and were held to be sufficient to sustain the decision of the lower court.

It is stated in *Raleigh & G. R. Co. v. Pullman Co.* 122 Ga. 700, 50 S. E. 1008, where a letter was written on the letter heads of a railroad company by its general manager, who was duly authorized in that regard, and signed by such manager, with the addition of the words "general manager" to his signature, in answer to a letter written him by the superintendent of the Pullman Car Company that the contract thus entered into was not binding on the general manager personally.

An agreement by which *Thayer v. Lincoln*, agents of the steamer *Atrato*, agree to let a certain space upon the steamer for the conveyance of stock, reciting, the "steamer agreeing to put on board a condenser capable of supplying the stock with water in sufficient quantities," and further prescribing certain duties for the captain, and making the freight payable not to the agent, but to other persons at the close of the voyage, and giving the steamer a lien upon the stock until payment, such agreement being signed "Thayer & Lincoln, Agents,"—evidences an intention to bind the shipowners; and this intention is so apparent that it is not to be controlled by the words, "agents of the steamer *Atrato*," instead of for the steamer *Atrato*; and such agents are not personally liable. *Goodenough v. Thayer*, 132 Mass. 152.

A contract purporting to be between B. & Co. and the Mozart Hall Co., in which B. & Co. agree to deliver on cars at the factory certain furniture which is described, "in consideration of which the undersigned, being duly authorized to purchase the above

articles, agree to pay," etc., being signed by certain persons who designate themselves "committee on furniture" (of Mozart Hall Co.), imposes no personal obligation upon such signers. *Brondrup v. Tureman*, 12 Ky. L. Rep. 47.

An agreement entered into by a contractor with "The Sackett's Harbor Presbyterian Society by their committee of the second part" for the construction of a church building, in which the agreements are all on the part of the said party of the second part, imposes no personal liability upon the members of the committee who sign the same and affix to their signature a seal and the word "committee;" since the name of the principal and the fact of the agency of the defendants as well as the interest of the principal and the want of individual interest in the defendants, all appear in the written agreement, and the defendants are nowhere named as the contracting parties, and no expression is used indicating an intent to bind them in a personal capacity. *Stanton v. Camp*, 44 Barb. 274. The agreement in this case was an agreement under seal, but it was not properly pleaded and was treated by the court as a simple agreement.

In *Kessel v. Austin* Min. Co. 144 Fed. 859, a contract purporting in its body to be the obligation of the corporation, and signed by its manager, was held to be the obligation of the corporation. The form of signature does not appear from the report of this case.

In *Allen v. Pegram*, 16 Iowa, 163, a deed in substance reciting "that the Bank of Nebraska . . . hereby conveys . . . the following real estate, . . . and we do hereby covenant," etc., and signed without any corporate seal, "S. M., Cash'r, B. F. A., Pres't," is stated to be the personal obligation of such officers; but this decision is placed by the court upon the ground that the corporation was not lawfully organized, and when there is no principal who can be made legally responsible, the agent who undertakes to act for and bind such a principal will himself be personally chargeable.

Commissioners appointed under an act of the legislature authorizing a town to issue bonds for the construction of a highway are personally liable on a contract entered into by them with the contractor for the construction of a certain part of the work, where there were no funds remaining to pay such contractor at the completion of the work. *Paulding v. Cooper*, 10 Hun, 20. The contract in this case was made between the members of the committee not as individuals, but as a body corporate, and concluded with an express statement that they did not intend to assume any individual liability whatever. It does not appear how the commissioners signed.

The court in this case states that the commissioners were public officers, and were charged with the duty of keeping the work within the limit authorized by the act, and whenever a contract was made they were

charged with the duty of holding the amount necessary to perform it. It further states that they must assume one of two positions either of which will uphold the action; that is, they either contracted with plaintiff in excess of their power, or they contracted with sufficient funds and suffered those funds to be appropriated to other purposes,—either of which was a violation of duty, which rendered them liable to the plaintiff.

### (b) Bills and notes.

An agent who signs a promissory note reading, "The Patent Cloth Manfg. Co. promise to pay," etc., as "W. F., Agent," is not personally liable on such note. *Shotwell v. McKown*, 5 N. J. L. 828.

In *Shaver v. Ocean* Min. Co. 21 Cal. 45, 2 Mor. Min. Rep. 130, a promissory note reading, "The O. M. Co. promise to pay," etc., and signed by one who affixed the word "trustee" to his name, and another who merely signed his name, was held not to impose any personal liability on such signers in an action against them and the corporation jointly.

In *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480, a promissory note reading: "The western Seaman's Friend Society agrees to pay," etc., and signed "B. Frankland, Gen. Sup't." was held not to be on its face, the note of Frankland, nor, by its terms, the note of the corporation; but it was a question of fact as to who was intended to be bound, and this having been decided against the signer, he was held bound.

A promissory note reading, "the president and directors of the Woodstock Lamp Co. promise to pay," etc., and signed "W. H., Pres.," imposes no personal liability upon the president in favor of one who was familiar with the circumstances under which the note was given and knew that the consideration therefor moved to the corporation. *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 550.

A promissory note reading, "the president and directors of the Hustonville & Bradfordville Turnpike Road Co. will pay," etc., and signed "E. J. Dodd, Pres.," and by others to whose names there is appended, no word indicating representative capacity, evidences an intention not to bind the signers personally, and therefore no personal obligation will be imposed upon them. *Yowell v. Dodd*, 3 Bush, 581, 96 Am. Dec. 256. Compare with *Caphart v. Dodd*, 3 Bush, 584, 96 Am. Dec. 258.

A promissory note reading, "we, the president and directors of the Corydon Steam Mill Company, promise to pay," etc., and signed "T. S. Kintner, President (seal),"—the seal affixed being the seal of the corporation,—the note being given for corporate debts, is not the personal obligation of such president, since he contracted in the name of his principal and under the corporate seal. *Pitman v. Kintner*, 51 Blackf. 250, 33 Am. Dec. 469. See *Miller*

v. Roach, 150 Mass. 140, 6 L.R.A. 71, 22 N. E. 634, IV. c. infra. See Means v. Swormstedt, as to effect of adding seal, supra, III. b, 1 (b) (1) a.

The principal was held liable in *Montour Iron Co. v. Coleman*, 31 Pa. 80, on a promissory note reading, "Montour Iron Co. promise to pay," and signed "P. C. Pres't." The instrument in this case was made payable to the president and was indorsed by him as "P. C., Pres't."

Where a partnership association borrowed money, and one who had been elected treasurer gave therefor a promissory note containing a promise by the company, and signed by such person, with the addition of the word "treasurer" to his signature, the obligation is that of the association. *Walker v. Wait*, 50 Vt. 668.

In *McCreary v. Chandler*, 58 Me. 537, the directors of an unincorporated association gave a promissory note reading, "The M. N. Co. promise to pay," and signed the same and added to their signatures the word "directors," the signers were held individually liable, but on the theory that they were members of the association.

Where a member of a church society, without authority, executed a promissory note reading, "The second Methodist E. Society . . . promise to pay, etc., and signed the same "E. W., Treas.," and also affixed his name with that of eight other persons described as "trustees of Second M. E. Society in Manchester," the contract containing no apt words to bind the defendant, he is not personally liable thereon. *Moor v. Wilson*, 26 N. H. 332.

Promissory notes one of which reads, "we, or either of us, trustees of District No. 6, . . . promise to pay," etc., "it being money borrowed of said Temple to build a schoolhouse in said District No. 6;" the other of which reads, "we, or either of us, the trustees White School District No. 6, . . . promise to pay," etc., "it being money this day borrowed of said Temple to build a schoolhouse in said District No. 6,"—both of which notes are signed "T. W. Warford, L. F. Green, Trustees," the money having been loaned to said trustees in their representative capacity, and the words, "we, or either of us, promise to pay," having been inserted in the note by mistake, imposed no personal liability upon such trustees. *Warford v. Temple*, 24 Ky. L. Rep. 2268, 73 S. W. 1023.

## 2. Signed by adding name of principal following word indicating representative capacity.

A promissory note reading, "The Howard County Agricultural Asso., who execute this note by her directors . . . do promise to pay," etc., and signed by certain persons, who add to their signatures, "Directors Howard County Agricultural Asso.," imposes no personal liability upon the individuals whose names are signed as directors. *Armstrong v. Kirkpatrick*, 79 Ind. 527. 42 L.R.A. (N.S.)

## 3. Signed by adding name of principal preceded by word "of."

### (a) Ordinary contracts.

A contract by the trustees of a religious society in which the principal is named throughout the body, and which is signed by the trustees, with the addition "trustees of the New Methodist Church Society and Building Committee," and which contains a forfeiture clause providing that the recovery is to be had for the use and benefit of the church, is not binding upon the trustees individually. *Winship v. Smith*, 61 Me. 118.

In *Sherman v. Fitch*, 98 Mass. 59, a mortgage of personal property in which a corporation was the grantor, and the agreement throughout was that of the corporation, and which was signed "G. R. S., Pres. of" the corporation, with a seal attached, was held in an action against the corporation to be its mortgage. No seal was necessary here, and the contract was construed as a simple contract.

An agreement to submit to arbitration, purporting to be between the mayor, recorder, alderman, and freeman of the city of Detroit, "By E. P., mayor of said city and agent for that purpose duly appointed, and containing a certificate of an office acknowledgment in which the city is referred to in the same manner, and signed "E. P., Mayor of Detroit," was held in an action against the city to be its obligation. The court stating that no part of the instrument shows that the mayor makes any contract individually. *Detroit v. Jackson*, 1 Dougl. (Mich.) 106.

An agreement which purports throughout the body of the same to be the agreement of the town of B., and which is signed by selectmen who add to their signature the words "selectmen of B.," is held in *Blanchard v. Blackstone*, 102 Mass. 343, to be the obligation of the town; and in the course of the opinion the court states that it is certainly neither the deed nor the simple contract of the selectmen. The agreement in this case was under seal, but the court rejected the seal as not being necessary and having no effect, and treated the writing as a simple contract.

### (b) Bills and notes.

A promissory note reading, "the trustees of the Third Unitarian Church of Chicago as such trustees promise to pay," etc., and signed by five trustees, each of whom affixes to his signature the words "as trustee of the Third Unitarian Church of Chicago," is not the personal obligation of such trustees, since it contains apt words to bind the corporation. *Little v. Bailey*, 87 Ill. 239.

See *New Market Sav. Bank v. Gillet*, 100 Ill. 254, 39 Am. Rep. 39, supra, III. c, (3) (b).

A promissory note executed without authority by a county judge in which the promise is by the county, and which is signed

by the judge, who adds to his signature the words, "county judge of St. Clair county," is not binding upon such signer personally, because there are no apt words in it sufficient to bind him. *Duncan v. Niles*, 32 Ill. 541.

**4. Signed by adding name of principal preceded by word "for."**

**(a) Ordinary contracts.**

A contract purporting to be with the principal throughout, and signed "for V. & T. (the principal), C. K.," imposes no personal liability upon C. K., the agent. *Mahony v. Kekulé*, 14 C. B. 390, 2 C. L. R. 343, 23 L. J. C. P. N. S. 54, 18 Jur. 313, 2 Week. Rep. 155.

A person who executes a charter party reading, "it is this day mutually agreed between Mr. P. A. B.," etc., and another, and signed "R. A. H. pro P. A. B.," which signature was attested in the following form, "witness to the signature of P. A. B. Pr. R. H., T. W.," cannot be treated as a party to the instrument and sued upon it, in absence of a showing that he was the real principal. *Jenkins v. Hutchinson*, 13 Q. B. 744, 18 L. J. Q. B. N. S. 274.

A charter party by which "R. & F. of London, Merchants, . . . bind themselves to ship" certain merchandise, and which provides that the said merchants shall have a certain time for loading and discharging the cargo, and for all over such time shall pay £4 per day, and which is signed "by authority of and as agents for Mr. A. H. S. of M. pro R. & F. W. F. M.," is the personal obligation of R. & F., since they are the contracting parties in the body of the instrument, and there is nothing in the signature to prevent their being personally liable. *Lennard v. Robinson*, 5 El. & Bl. 125, 3 C. L. R. 1363, 24 L. J. Q. B. N. S. 275, 1 Jur. N. S. 853.

A written receipt given upon the delivery of goods "which the several railroad companies between Boston and Zanesville agree to transport over their lines . . . on the terms and conditions mentioned in their respective published tariffs, . . . each delivering to the next connecting road, but assuming no responsibility or control of property beyond its own line," signed "G. Williams, Jr., for the Corporations," imposes no personal obligation upon Williams, although he did not disclose to the shipper the names of the railroad companies in the receipt referred to, nor did such shipper know the companies, and although there were a great many different ways of transportation to which the description in the contract would apply equally well, and although Williams was not the agent for one of the railroad companies over whose lines he sent the goods; and an oral promise by such agent to pay for goods lost is without consideration and unenforceable. *Lyon v. Williams*, 5 Gray, 557. The court in this case states that it is true that the names of the corporations are not dis-

closed, but they are capable of being made certain by proper inquiry, and the plaintiff consented to take the contract thus generally designating the parties with whom the liability was to rest for the safe and proper conveyance of the goods, and therefore has no right to resort to the liability of the agent.

**(b) Bills and notes.**

Where a township trustee who has executed a promissory note to a contractor for the building of a schoolhouse, reading "Sheffield Township promises to pay," and reciting that the note is given for work done on the school building, and is to be paid out of a special fund, and signed "A. W. G., trustee for Sheffield Township," the township having authority to execute such a note, such trustee is not individually liable thereon. *Sheffield School Twp. v. Andress*, 56 Ind. 157.

**Beyond authority.**

There is no personal liability on the part of the signer of a note reading, "the pastor and deacons of the First Freewill Baptist Church, in behalf of said church, promise to pay," etc., who adds the words, "Agent for the First Freewill Baptist Church in Lowell," to his signature, even though such signer has exceeded his authority, since the body of the note contains the names of the promisors, who alone are the stipulated parties to the promise contained in the note. *Jefts v. York*, 4 Cush. 372, 50 Am. Dec. 791.

In a subsequent action on the money counts against the agent in the above case, the court held that such agent had acted without authority, and that, if the parties had acted under a mutual mistake of law and a belief on the part of both that the agent had authority to bind the principal by the contract, and if, before such agent had paid over the money or applied it to the use of his supposed principal, or otherwise put it out of his own control, the mistake was discovered, and the lender gave notice to the agent not to pay it, but to return it, it then became money held to the use of the lender, and might be recovered back in indebitatus assumpsit, otherwise the agent would not be liable. *Jefts v. York*, 10 Cush. 392.

**f. Corporate signature in which the name of the corporation is followed by that of one or more of the officers.**

A promissory note reading, "we promise to pay," etc., and signed with the name of the corporation followed by the name of an officer or officers, imposes no personal liability, although the name is not preceded by the word "by."

This has been held with reference to a note in this form signed by the president and secretary. *Wilson v. Fite*, — Tenn. —, 46 S. W. 1056; *English & S. A. Mortg. & Invest. Co. v. Globe Loan & T. Co.* 70 Neb.

435, 97 N. W. 612, 6 Ann. Cas. 999; *Aungst v. Creque*, 72 Ohio St. 551, 74 N. E. 1073.

Such a note given for a debt of the corporation in the usual course of business imposes no personal liability on the officers. *Fisk v. Carbonized Store Co.* 67 Ill. App. 327.

In the absence of evidence that the officers intended to bind themselves personally, such a note imposes no personal liability on the officers. *American Nat. Bank v. Omaha Coffin Mfg. Co.* 1 Neb. (Unof.) 322, 95 N. W. 672.

In *Kline v. Bank of Tescott*, 50 Kan. 91, 18 L.R.A. 533, 34 Am. St. Rep. 107, 31 Pac. 688, an action on such a note, the trial court held that on the face of the paper it was the note of the corporation alone, and that the officers were not liable personally. No appeal was taken from this ruling, the appeal being by other parties who had signed as a board of directors, and were held individually liable by the trial court, a decision reversed on the appeal.

Such a note is prima facie the obligation of the corporation, and not the personal obligation of the secretary and president. The action in this case was against the corporation. *Northeastern Coal Co. v. Tyrrell*, 133 Ill. App. 472.

See also *Roney v. Winter*, 37 Ala. 277, III. b, 2 (b) (1), supra.

It has also been held with reference to a note signed by the names of the president and treasurer following the name of the corporation, that such officers are prima facie not personally liable, in *Miers v. Coates*, 57 Ill. App. 216, where such a note was signed "Columbian Athletic Club, Dominick C. O'Malley, President C. A. Club," and to the left side of the instrument, where attesting signatures are usually placed, were the words "Chas. J. Miers, Treas."

Likewise, such notes signed by the president alone after the name of the corporation have been held not to impose any personal obligation on such officer.

Such a note imposes no personal liability upon the president, the use of the word "we" instead of "I" not having the effect of rendering it the joint contract of both the officer and the corporation. *Latham v. Houston Flour Mills*, 68 Tex. 129, 3 S. W. 462.

Such a note imposes no personal liability upon the president, and parol evidence is not admissible to show that the name of the corporation was written by the secretary, and afterwards the president signed his own name, adding thereto the word "president," as a joint maker, intending to bind himself. *Liescher v. Kraus*, 74 Wis. 387, 5 L.R.A. 496, 17 Am. St. Rep. 171, 43 N. W. 166.

Such note is prima facie the obligation of the corporation, and not the personal obligation of the president, the word "we" being properly used to denote a corporation aggregate. *Thompson v. Hasselman*, 131 Ill. App. 257.

In *Swarts v. Cohen*, 11 Ind. App. 20, 38 N. E. 536, such a note containing at the head

the name of a firm was held to be ambiguous, and parol evidence admissible to determine the liability.

The court in *Wood v. Grand Valley R. Co.* 5 D. L. R. 428, says of such a signature that it is the signature of the corporation, and not that of the president, but in this case, where the agreement in question was one which it would have been competent for the parties to make without any writing, and recited that the president undertakes and agrees on his own behalf and on behalf of the corporation, the writing is said to be a record of the terms of an agreement already made, but not itself to constitute the agreement; therefore the absence of the personal signature of the president is not fatal, and he is held personally liable.

It is held in *Castle v. Belfast Foundry Co.* 72 Me. 167, that a note reading, "we promise to pay," and signed "B. F. Co., W. W. C. Prest," binds the company.

In *Reeve v. First Nat. Bank*, 54 N. J. L. 208, 16 L.R.A. 143, 33 Am. St. Rep. 675, 23 Atl. 853, such note was held to be the note of the corporation alone, so that a notice to the corporation was sufficient to bind the indorser of the note.

So, such a note signed by the treasurer after the name of the corporation was held not to be the personal obligation of such officer, in *Draper v. Massachusetts Steam Heating Co.* 5 Allen, 338.

Where the corporate seal is impressed upon the note over the name of the signer, such a note imposes no personal obligation upon the treasurer, since the seal will be treated as the signature of the corporation. *Miller v. Roach*, 150 Mass. 140, 6 L.R.A. 71, 22 N. E. 634. See *Pitman v. Kintner*, 5 Blackf. 250, 33 Am. Dec. 469.

The treasurer of a corporation is not jointly liable with the corporation on such note. *Gleason v. Sanitary Milk Supply Co.* 93 Me. 544, 74 Am. St. Rep. 370, 45 Atl. 825.

Such note, which was given for money loaned to the corporation, is prima facie the obligation of the corporation, and not the personal liability of the treasurer. *Derby v. Gustafson*, 131 Ill. App. 281.

Such note, signed by appending the name of a corporation by means of a stamp, and immediately beneath this the name of the treasurer, is not prima facie the obligation of the treasurer, and cannot be used as a set-off in an action by him individually. *Williams v. Hipple*, 17 Pa. Super. Ct. 81.

A promissory note reading, "we promise to pay," etc., and signed "The Sanitary Milk Supply Co., T. A. H., Treas.," is the several note of the company alone, and not the joint note of the company and its treasurer. *Gleason v. Sanitary Milk Supply Co.* supra.

#### Miscellaneous.

Parol evidence is admissible on a promissory note reading, "we promise to pay," and signed "T. Mining Co., J. E. M., Sup't," to show that it was understood by the parties to be the note of the company, and that the

consideration for which it was given passed to the company, and if such facts are established, the superintendent is not personally liable thereon. *Bean v. Pioneer Min. Co.* 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86.

An agreement with the manager of a corporation, which recites "we promise to pay" for certain advertising in railroad cars, and which is signed "E. F. M. Co., H. P., Mang.," imposes no personal obligation upon the manager, where the obligee receives the contract as the contract of the corporation, and not as that of the manager. *Chase v. Pattberg*, 12 Daly, 171.

In *Keeley Brewing Co. v. Neubauer Decorating Co.* 194 Ill. 580, 62 N. E. 923, it was held with reference to a proposition made on the stationery of a company, containing the name of the company at the head thereof, and also the name of the manager of the art department and of the superintendent of contracts, and signed "Neubauer Decorating Co., D. E. Livermore, Supt. of Contracts," that such proposition when accepted was the obligation of the company.

But in *Savings Bank v. Central Market Co.* 122 Cal. 28, 54 Pac. 273, where a number of stockholders had signed a corporation note after the name of the corporation, intending to ratify the act of the corporation, and had added to their names the words "as stockholders," the note was held to be the joint note of the corporation and stockholders.

On the contrary, such notes have been held personally binding upon the officers who have thus signed, as a matter of construction.

A promissory note reading, "we promise to pay," and reciting that it is payable at the office of the Dubuque Mattress Company, and signed "Dubuque Mattress Co., John Kapp, Pt.," binds Kapp individually. *Mathews v. Dubuque Mattress Co.* 87 Iowa, 246, 19 L.R.A. 676, 54 N. W. 225.

The fact that the note in this case contained on its face the words, "accepted March 21, 1889," and was made payable at the office of the Dubuque Mattress Company, was held not to render it ambiguous, so as to permit the introduction of parol evidence to show the intention of the parties that only the Dubuque Mattress Company was to be bound.

A promissory note reading, "we promise to pay," etc., and signed "Independent Mfg Co., B. I. Brownell, Pres., D. B. Sanford, Secy.," binds Brownell personally; the letters "Pres." after his signature are to be regarded simply as descriptive of the person. *Heffner v. Brownell*, 70 Iowa, 591, 31 N. W. 947.

A promissory note reading, "we promise to pay," etc., and signed "Belle Plaine Canning Co., A. J. Hartman, Pres., H. Wessel, Secy.," binds Hartman and Wessel personally. *McCandless v. Belle Plaine Canning Co.* 78 Iowa, 161, 4 L.R.A. 396, 16 Am. St. Rep. 429, 42 N. W. 635.

Where a promissory note is given for the debt of a corporation, the note reading "we

promise to pay," etc., and signed "K. F. I. Co., P. R., Secty., A. B. H., Pres.," the president and secretary are personally liable on such note. *Keokuk Falls Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484. In setting forth a copy of the note, no descriptive words appear after the signature of president and secretary, but the court states that they were added as given above. In so far as this case holds the note sued upon not ambiguous, it is disapproved in *Janes v. Citizens' Bank*, 9 Okla. 546, 60 Pac. 290, *supra*.

In each of these cases parol evidence was held inadmissible to show a different intent. Compare Iowa cases with *PEASE v. GLOBE REALTY CO.*

But in equity a note reading, "we promise to pay," and signed "Herndon Natural Gas & Land Co., F. A. Percival, Pres. Alex. Hastie, Sec'y," given for the exclusive benefit of the land company, and intended by the signers to bind the company alone, and so accepted by the payee, will be reformed, and the signers relieved from liability. *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543.

Where the names of more than one officer follow the word "by" or "per."

As stated above, it seems to be established that a signature containing the name of the principal, signed "by" an agent, is binding upon the principal, provided the agent had proper authority to make the contract, and such cases have not been included within this note. It occurs sometimes that two or more names follow the word "by" or "per," and the question then arises as to whether it was intended to apply to the names after the first.

Such a note reading, "I, or we, promise to pay," etc., and signed "Coleman & Ames White Lead Co. per C. I. Williams, Sec. Geo. J. Williams, Gen. Mangr.," and sealed with the seal of the corporation, was held in *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988, not to impose any personal liability upon Geo. J. Williams, the court being of the opinion that the word "per" applied to both officers who signed after the name of the corporation. It is stated that the use of the words "I" or "we" in the body of the note does not affect or change the legal import of the instrument, as there is no personal pronoun which is properly adapted to use by a corporation in making a note. See, generally, as to effect of seal, *Means v. Swormstedt*, III. b, 1 (b) (1) a, *supra*.

In *Bailey v. Thomas*, 10 Ky. L. Rep. 543, such a note signed by the name of the corporation followed by the word "by" and the name of the president followed by the word "president," the name of the vice president followed by the word "vice president," and the names of the directors followed by the word "directors," imposes no personal liability upon the signers, since the word "by" is intended to apply to all the names which follow it, and not merely to the name of the president, which appears first. The court states that the use of the words "we" in

the body of a note does not show an intention to bind more than one, as the want of grammatical accuracy cannot control the intention of the parties.

But a note reading "we promise to pay," and signed "The Pendleton Glass Co. by B. F. Aiman, Pres., C. B. Orvis, Vice Pres., Chas. Roach, Sec'y, A. B. Taylor, Benj. Rogers, J. R. Boston, Directors," is prima facie the joint obligation of the signers. It appears that those named as directors in the signature were the only parties appealing from a judgment against them. The jury in this case found that the payee of the note did not agree to take the note of the corporation alone, that the said directors did not sign the note as officers of the corporation, but that they did sign it as individuals. *Taylor v. Reger*, 18 Ind. App. 466, 63 Am. St. Rep. 352, 48 N. E. 262.

#### Cases decided upon particular pleadings.

Where the complaint in an action upon such a note, signed "Jas. E. Stafford, Pres., J. Zapf, Mgr. Albany Furniture Co., alleges that such note is the joint note of the company and the other signers, and the case is heard as upon demurrer, an individual judgment against Stafford and Zapf will be sustained. *Albany Furniture Co. v. Merchant's Nat. Bank*, 17 Ind. App. 531, 60 Am. St. Rep. 178, 47 N. E. 227.

In *Duffner v. Ball*, 86 Ill. App. 519, it was held error to sustain a demurrer to a petition in an action against the officers on such a note, reading, "we promise to pay," etc., and signed "Girard Mercantile Ass'n, John Ball, President, A. S. Hamilton, Treas., George Ball, Sec'y," in which it is alleged that the defendants were indebted to the payee for the sum of the note, and in consideration thereof executed and delivered the same to him. The court state, however, that it does not decide whether the note is the promise of the corporation alone, or of it and the officers jointly.

In *Lumley v. Kinsella Glass Co.* 85 Ill. App. 412, an instruction to the jury to the effect that a note reading, "we promise to pay," and signed "U. S. Desk Mfg. Co., Wm. Lumley, Sec'y," is prima facie the personal obligations of both the corporation and its secretary, under which the jury in this case had rendered a verdict against both the corporation and secretary, was held correctly to state the law. The instruction in this case is contrary to the Illinois cases cited above.

In *Atkins v. Brown*, 59 Me. 90, recovery against the president individually was denied on a promissory note reading, "we promise to pay," and signed "A. F. Co., A. B. B., President," on a matter of pleading. Recovery was allowed in this case on an oral promise made by the president.

Where officer who signs is doing business as corporation.

A promissory note signed "People's Savings Bank, Geo. H. Simmons, Pres.," and given to a corporation whose officers were 42 L.R.A. (N.S.)

fully informed that Simmons was doing business alone under the name of the People's Savings Bank, and made this loan to him under that name, is the personal obligation of Simmons, exactly as if the instrument had been signed simply in his own name. *Union Brewing Co. v. Interstate Bank & T. Co.* 144 Ill. App. 415, affirmed in 240 Ill. 454, 88 N. E. 997.

#### Liability on indorsement.

The form of execution, and the capacity in which the parties were sought to be held liable, in *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162, do not clearly appear from the report of that case. In the course of the opinion the court states that a note made upon a blank form signed by one as secretary and another as president, and payable "to the order of ourselves," and indorsed "Wooster Brewing Co., G. B., Prest., G. M. D., Sect.," and the name of the company indorsed in the handwriting of Gibbs, is the note of the company.

#### IV. Contracts of representatives of decedents' estates, guardians, trustees, and assignees.

##### a. In general.

In case of the representatives of decedent's estates, guardians, trustees, assignees, and receivers, there is no principal to be bound, but the contract is binding upon the maker in his representative or personal capacity. The liability of the maker in his representative capacity is not discussed herein, but the note has been confined to the personal liability of such officers. Neither is the question of the right of such officers against the estate or funds being administered by them, upon being held liable for an obligation thus entered into, considered.

An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal. *Duvall v. Craig*, 2 Wheat. 45, 4 L. ed. 180.

##### b. Representatives of decedents' estates.

The doctrines applicable to agency have been applied in the case of the representatives of decedents' estates, and such officers held liable on the theory that they have made the contract their own.

Thus, a title bond reciting "that I, W. J. C., . . . executor of the last will and testament of A. J. G., deceased, am held and firmly bound . . . for the payment of well and truly to be made, which, I bind myself, my heirs, executors, and administrators," and signed "W. J. C., Executor of A. J. G. (Seal)," is the personal obligation of such executor. *Patterson v. Craig*, 1 Baxt. 291.

And where an executor is, by the terms of a will, authorized to carry on the busi-



ness of a testatrix at his election, and does so elect, and in pursuance thereof purchases the interest of another in such business, and gives a promissory note for the payment of the purchase price, signed "F. S. (seal), manager of the F. T. Co.," such executor is personally liable with the company on such note. *Froelich v. Froelich Trading Co.* 120 N. C. 39, 26 S. E. 647.

A promissory note reading, "as executors . . . we severally and jointly promise to pay . . . on demand, with lawful interest," without any words limiting the liability to the estate of the decedent, is the personal obligation of such executors. The court states that, on account of the fact that, by the engagement to pay interest, the creditor was induced to suspend his claim and admitted demand, and by reason of the further fact that such a promise imported a payment at a future day, the executors made the debt their own. *Childs v. Monins*, 2 Brod. & B. 460, 5 J. B. Moore, 282, 23 Revised Rep. 513.

There is *dictum* in *Sutherland v. St. Lawrence County*, 42 Misc. 38, 85 N. Y. Supp. 696, to the effect that a promissory note reading "I promise to pay," etc., and signed "O. B. R., Ex.," is the personal obligation of the executor.

There are a number of cases passing upon the liability of representatives of decedents' estates in which it is not clear whether the liability is based upon the form of the contract showing an intention to become personally liable, or whether it is based upon a lack of authority, a doctrine that is discussed below.

#### Administrators.

An administrator who executes a promissory note in renewal of one executed by his decedent is personally liable thereon, although he adds to his signature the words, "Admr. F. L. estate." *Cornewaite v. First Nat. Bank*, 57 Ind. 268.

There is *dictum* in *Erwin v. Carroll*, 1 Yerg. 145, to the effect that where an administrator has renewed notes of his intestate, signing his name "J. P., Administrator of J. P., Dec'd." and sealing the same, such administrator becomes personally liable for the debt, and the words added to the signature are but descriptive of the person.

In *Tryon v. Oxley*, 3 G. Greene, 289, where an order was drawn by one who added to his signature the word "administrator," there being nothing in the order designating the deceased person or estate to which his administration applied, it was held that the order was the personal obligation of such signer.

An administrator who has accepted a draft drawn upon him as administrator by signing the same "J. T., Administrator," is personally liable thereon. *Tassey v. Church*, 4 Watts & S. 346.

An administrator who accepted an order drawn on him by stating that it was "to be paid when funds are received for the estate," and added to his signature the word "ad-

ministrator," is individually liable on such acceptance. *Carter v. Thomas*, 3 Ind. 213.

#### Executors.

A contract executed by certain persons as executors, for the amount of an account due and owing by their testator at the time of his death, is the personal liability of such executors. *Kerchner v. McRae*, 80 N. C. 219.

A bill of sale containing a warranty of a slave, and signed by one as executor, is stated in *Sypert v. Sawyer*, 7 Humph. 413, to be a contract for which the executor is personally responsible.

An acknowledgment of indebtedness reciting "I, E. F., Executor, admit and acknowledge . . . and that I will pay the same," and signed "E. F., Executor," is the personal obligation of such signer. *Sims v. Stilwell*, 3 How. (Miss.) 176.

A note payable on demand containing no limitation as to the liability, and expressing sufficient evidence of consideration, given by an executor, and reading, "I promise as Ex'or of J. G. C. to pay," etc., and signed J. S., Ex'or of J. G. C., dec'd, is the personal obligation of the executor. *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

There is *dictum* in *Carr v. Branch*, 85 Va. 597, 8 S. E. 476, to the effect that where two persons sign a bond for the payment of money as executors, they are personally liable thereon.

By far the greater number of cases passing upon the liability of the representatives of decedents' estates upon contracts entered into by them determine the liability upon whether or not the contract in question is one that is within the authority of such officers to execute. Where the contract is beyond the authority of the officer to execute, he is personally liable thereon. *Perry v. Cunningham*, 40 Ark. 185 (liability of acceptor of a draft); *Sims v. Stilwell*, 3 How. (Miss.) 176 (acknowledgment of indebtedness); *Winter v. Hite*, 3 Iowa, 142 (promissory note); *Kirkman v. Benham*, 28 Ala. 501 (draft); *Russell v. Cash*, 2 La. 185 (draft); *Christian v. Morris*, 50 Ala. 585 (note); *McLean v. McLean*, 88 N. C. 394 (note, *dictum*).

An executor, administrator, or guardian is not an agent in any such sense as above intended. He is so in a general sense, it is true, but his virtual and real character is of another class. With him it is not a mere question of fact whether he has authority, for there is no one to give it, but it is a question of law, and the law denies the authority. *Winter v. Hite*, 3 Iowa, 142.

In *Patterson v. Craig*, 1 Baxt. 291, the court, after referring to the general doctrine of agency, says: "The case of an executor or administrator stands upon a somewhat different principle. In executing a bond or obligation to pay money, they have no principal to bind, and if the obligation purports to bind them without qualification or limitation, then they must be held so bound. If an executor or a administrator make a note

or bill, and sign it as executor or administrator, he is personally liable, unless he expressly limit his promise by the words, 'out of the assets of my testator's estate,' or 'if the assets be sufficient,' or in some equivalent way."

A deed in which the covenants are made by the administrators "in our said capacity of administrators," which is signed by each administrator as administrator of the estate of the deceased, and sealed by them expressly as administrators, is the personal contract of such representatives. *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83.

In *Fleischman v. Shoemaker*, 1 Ohio C. D. 415, 2 Ohio C. C. 152, where a contract for the sale of a decedent's real estate had been signed by two or three executors, upon whom was conferred the power of sale, it was held that the two who had signed the contract were not liable as executors, and their liability as individuals was denied in this case on account of the form of action.

In *Woods v. Ridley*, 27 Miss. 119, an action against an administrator *de bonis non*, the court states that the first administrator who had signed the note as administrator was personally liable on the same, and was therefore an incompetent witness in the action against the administrator *de bonis non*.

Where the executors purchased goods and gave their note therefor reading, "we as Executrix and Executors of the late B. P. promise to pay," and signed the same by adding to their signatures the words, "Executrix and Executors of the B. P., deceased," it being beyond the power of such representatives to bind the estate by a note, they are personally liable thereon. *Kerr v. Parsons*, 11 U. C. C. P. 513.

An indorsement of a note in the following form: "Estate of Jona. D. Wheeler, Henry F. Wing, Executor," was construed to mean "estate of Wheeler by Wing," in *Grafton Nat. Bank v. Wing*, 172 Mass. 513, 43 L.R.A. 831, 70 Am. St. Rep. 303, 52 N. E. 1067, and it was held that the executor was not personally liable. The court in this case states that the failure of Wing to bind his principal is not enough to make the contract his own.

In *Hostetter v. Hoke*, 17 Kan. 81, a personal judgment had been rendered against an administrator on a promissory note reading, "I, Administrator of the estate of . . . promise to pay," etc., and signed "S. H. Hostetter, Administrator of the estate of W. R. Gage, deceased," and, no exception having been taken, the supreme court held that, since in some cases a personal judgment is proper on such a note, the judgment of the trial court must be affirmed.

It is not intended to discuss the general question of liability for contracts beyond authority. It is urged, however, in some such cases, that the addition of a word indicating the office held by the signer relieves him from personal liability, even though the contract is beyond his authority as such officer. The practically unanimous weight 42 L.R.A. (N.S.)

of opinion is that the addition of such a word does not relieve the signer from personal liability.

#### Ordinary contracts—sealed.

An administrator who, after describing himself in the premises of a deed as administrator of the estate of his decedent, covenants as follows: "I, the said Elijah Hazen, do for myself, my heirs, executors, and administrators, covenant," etc.,—is personally liable on such covenant, and the addition of the word "administrator" to his signature does not relieve him of such liability. *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169. "It has long been an established principle," says the court, "that whenever a man undertakes to stipulate for another by an instrument under seal, without authority or beyond authority, he is answerable personally for the nonperformance of his contracts; and if he choose to bind himself by a personal covenant, he is legally liable for a breach of it, even although he describe himself as covenanting as . . . administrator."

Where executors who were authorized by the will to sell land conveyed the land by a deed in which they were stated to be "executors of James Taylor," and in which they, "executors to J. T., in consideration . . . forever warrant and defend," and which they signed as executors, they are personally liable on the covenants. *Godley v. Taylor*, 14 N. C. (3 Dev. L.) 178. Although, from the language of the court, it seems that the decision is based more on the doctrines applicable to agency generally, the court relies upon *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83, a case decided upon the doctrine that the covenants were beyond the authority of the administrator. Nothing is said as to the contract being a sealed one.

#### Simple contracts.

So, in an action on an injunction bond in which the executor's undertaking was personal, expressly stipulating to pay the judgment, the fact that he described himself as executor does not relieve him from liability. *Hopkins v. Morgan*, 7 T. B. Mon. 2. It does not appear in this case, however, how the bond was signed.

A devisee of an undivided half interest in an estate, who was also the executrix of the estate, who enters into an option contract to sell the real property originally belonging to the estate, is personally bound by such contract to the extent of her interest, and the word "executrix" added to her signature will be regarded as *descriptio personae*. *Millard v. Smith*, 119 Mo. App. 701, 95 S. W. 940.

Where an administrator, in carrying on a farm belonging to the estate of his intestate, purchases some horses by a letter which he signed "A. S., Admr.," he is personally liable, since the contract is beyond his authority, and the words added to his signature do not relieve him of such liability.

ty. *Rich v. Sowles*, 64 Vt. 408, 15 L.R.A. 850, 23 Atl. 723.

#### Bills and notes.

Where an administratrix gave a promissory note for a claim due from her decedent's estate, and signed the same by adding the word "administratrix" to her signature, and thereafter made payments on the note and gave renewal notes from time to time, in the absence of a showing of an insufficiency of assets, such administratrix is personally liable upon the note, and the addition of the word "administratrix" to her signature does not limit her liability. *Jenkins v. Phillips*, 41 App. Div. 389, 58 N. Y. Supp. 788.

In the absence of an express stipulation to pay out of the funds of the estate, an administrator who signs a promissory note, "M. S. M. as administrator," is individually liable. *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101.

In *Dunne v. Deery*, 40 Iowa, 251, the court is of the opinion that an executor who executes a note, and adds to his signature, "as executor for" a decedent's estate, is personally liable on such note; but holds that while the administrator will be personally liable, yet, if that for which it was given was legally a claim against the estate, the recovery may be had on such note against the estate.

Where an administrator indorsed a note and gave it in payment of a claim due by the intestate's widow for necessities furnished to her after her husband's death, the administrator is personally liable for the payment of the note, and it is immaterial that he added to his signature the word "administrator." *Sickman v. Allen*, 3 E. D. Smith, 561. Forbearance by the creditor was held a sufficient consideration for the promise.

A promissory note reading, "we, the undersigned, executors and executrix . . . promise as such executors and executrix to pay," etc., and signed by the executrix with the addition of the word "executrix" to her signature, and by the executors, each of whom adds to his signature the word "executor," not restricting the promise to pay to the assets of the estate, is binding personally upon such personal representatives. *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea, 742. It was admitted in this case that the assets of the estate were ample to pay all debts.

An executor who indorsed a note payable to "J. D. A., Executor," in the same form, is personally liable notwithstanding the addition of the word designating his office; and parol evidence is inadmissible to qualify the indorsement. *Abney v. Citizens' Nat. Bank*, — Tex. Civ. App. —, 152 S. W. 734.

An executor who has accepted a draft drawn on him by writing across the face, "Accept. A. S., Executor," the act being beyond the power of such executor, is not released from liability thereon by the addition of the word "executor" to his signature.

*Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737, 5 N. E. 452, reversing 25 Hun, 76.

In a subsequent appeal of this case, parol evidence was held admissible to show that the draft was taken by the payee for the plaintiff, who was his wife, or with a view of transferring it to her; that it was understood by the plaintiff and her husband that the draft should be taken upon the security of the drawer's interest in the estate of his mother; and that when the draft was drawn, it was understood between the drawer, payee, and the plaintiff, that it was to be paid out of such interest in the estate, and that the acceptor accepted only in his capacity as executor, and stated that he would not become personally liable. *Schmittler v. Simon*, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162.

An executrix who has given a note for money borrowed to pay debts of the estate, and signed the same, "L. L. M. Exrx. of E. M.," is personally liable on such note, and this liability is not modified by the fact that the creditor knows that the money so borrowed is to be used in payment of the debt of the testator. *Morehead Bkg. Co. v. Morehead*, 116 N. C. 410, 21 S. E. 190.

Neither is such administratrix relieved of personal liability though she adds after the word "administratrix" the word "of," and the name of a deceased person. *Hopson v. Johnson*, 110 Ga. 283, 34 S. E. 848.

The addition of the words "executor of the estate of Kelso" to the name of an executor who signed a promissory note does not relieve him from personal liability on such note. *Livingston v. Gausson*, 21 La. Ann. 286, 99 Am. Dec. 731.

An executor is not relieved of liability on a promissory note executed for money borrowed on behalf of the estate by designating himself as "executor of the estate in his signature." *McFarlin v. Stinson*, 56 Ga. 396.

It is stated in *Higgins v. Driggs*, 21 Fla. 103, that a note reading, "I promise to pay," and signed, "E. F. A., Executrix of the estate of J. F. A.," is the personal obligation of such signer.

In *Aughinbaugh v. Roberts*, 4 W. N. C. 181, an executor signing with the addition of the words, "executor of the estate of C. H., deceased," to his name, drew a promissory note payable to his individual order, and indorsed it individually. It does not appear whether the action is founded on his indorsement or against him as maker. The court, in the course of the opinion, states that the maker of the note is liable personally, and the fact that he has described himself as executor does not limit his liability. It is also stated that, under the circumstances of this case, the indorsement becomes a direct, not a contingent, liability, therefore he is not entitled to notice of dishonor.

In *Bank of Louisiana v. Dejean*, 12 Rob. (La.) 16, it was held that a note given by an executor, reading, "I promise to pay," etc., and signed, "F. DeJean, Executor,"

given in renewal of a note of the decedent, and with no intention of binding the executor individually, creates no new liability on the decedent's estate, and does not render the executor personally liable. A similar holding appears in *Gillet v. Rachal*, 9 Rob. (La.) 276, where a note was given in payment of an account due from the decedent. It does not appear from the report of the latter case, however, how the note was signed.

A promissory note reading "I promise to pay," etc., and signed, "P. H. A., Executor of last will of James Johnson, deceased," not containing any words which expressly exclude the idea of personal liability upon the executor, and there being no evidence of a lack of consideration, such executor is personally liable. *Rittenhouse v. Ammerman*, 64 Mo. 197, 26 Am. Rep. 215.

Neither is an administrator who signs a promissory note reading, "I promise to pay," etc., relieved of liability by signing, "E. B. G., Estate J. J. Glisson, administrator. (L. S.)" *Glisson v. Weil*, 117 Ga. 842, 45 S. E. 221.

Effect as to whether debt is a new one or a renewal.

An administratrix who has signed a promissory note reading, "I promise to pay," in renewal of notes made by her intestate during his life, is not relieved of liability by the addition of the word "administratrix" to her signature. *Harrison v. McClelland*, 57 Ga. 531.

Where a promissory note originates with an administrator, and there is no evidence that the debt evidenced by the note did not also so originate, the liability is that of the administrator individually. *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36.

#### Necessity of consideration.

A promissory note given by the personal representatives of a decedent's estate, and signed, "M. T., administratrix, J. H. Administrator to the estate of John Topping, dec'd," on which such representatives have paid out of the estate all the money applicable to such debt, is not binding upon such representatives individually for the balance, since there is no consideration over and above the amount of assets which they had in their hands applicable to the payment of the note. *Bank of Troy v. Topping*, 9 Wend. 273.

It is recognized in this case that forbearance to sue may constitute a sufficient consideration for the individual liability of the personal representative, but it is held that the fact that the note was made payable in this case sixty days after date did not show such consideration.

The doctrine of this case was approved in *Bank of Troy v. Topping*, 13 Wend. 557, where the principal part of the opinion was taken up with a discussion as to what constitutes sufficient proof of the lack of assets so as to relieve the personal representative of individual liability. It is held that the 42 L.R.A. (N.S.)

note is prima facie evidence that there are assets to pay. See *Rittenhouse v. Ammerman*, supra.

An administratrix can be held only to the extent of the assets, in the absence of any other consideration, on a note reading, "I promise to pay," etc., and signed, "L. R. B., adm'x." *Boyd v. Johnston*, 89 Tenn. 284, 14 S. W. 804.

In *McGrath v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687, an action on a promissory note reading, "I promise, as the executor of the state of P. V. B. . . . due by said estate to H. H. S. for medical services rendered most of which during last illness," and signed "J. P. B., Executor," it was held that the note itself states the consideration, and parol evidence is not admissible to vary such statement. The opinion is not clear on the question of liability of the executor. It is stated that he may show that there were no assets, and also that nothing was due plaintiff, or a less amount than demanded, in order to relieve himself of his liability.

Where an executor gave a promissory note, signing the same by adding to his signature the word "executor," for the amount found due from his testate upon the settlement of a partnership of which his testate was a member, but failed to secure the estate from any further or other liability for partnership debts, so that there was no detriment to the creditors nor benefit to the estate, there was no consideration for the promise, and it is not enforceable. *Walker v. Patterson*, 36 Me. 273.

In *Worthington v. Barlow*, 7 T. R. 453, where an administratrix had submitted a cause to arbitration and an award had been made against her, it was held that this determines not only the amount to be paid, but that the administratrix had assets, and she could not therefore avoid the payment on the plea that she had no such assets. This decision is not decided on the theory that the contract was beyond the authority of the administratrix.

#### Contract within authority.

Where the contract is one which the personal representative may make for the estate, it does not bind him personally. Thus, an agreement entered into by an executor of an estate by which the estate obtained a certain indemnity against a heavy responsibility, in lieu of an uncertain and litigated claim, made exclusively in behalf of the estate which such executor represented, and by affixing to his signature the word, "executor of F. S.," it is held in *Chouteau v. Suydam*, 21 N. Y. 183, to be the obligation of the estate, the court stating that such agreement imposes no personal obligation upon the executor.

#### c. Guardians.

In passing upon the liability of a guardian, it has been held that where he was without authority to enter into the contract for his ward, he became personally liable.

Thus, a promissory note reading, "I, P. F., as guardian of E. F., promise to pay," etc., and signed, "P. F., Guardian," and given upon a sufficient consideration, was held to be the personal obligation of such guardian. *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87.

A guardian who executes a promissory note for a debt of his ward is personally liable on such note, although he executes the same as guardian; but he may lawfully indemnify himself out of the estate of the ward by action for money paid to his use. *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61.

A guardian who is tenant in common with his ward in certain real estate, and who signs a contract for the conveyance of such real estate personally and also as guardian of the said ward, is not personally liable on the contract in respect to the interest or shares of his ward, the other contracting party knowing he was acting for his said ward. *LeRoy v. Jacobosky*, 136 N. C. 443, 67 L.R.A. 977, 48 S. E. 796. It is suggested by the court in this case that the other contracting party may have a remedy in some other form of action, but as this action was based squarely upon the contract, there is no liability.

In other cases it is not clear whether the liability is placed upon the lack of authority or the form of the contract.

Thus a note, signed by a guardian with the addition of the words "Guardian of J. T. T." to the signature, was held to be the personal obligation of such guardian. *Carter v. Wolfe*, 1 Heisk. 695.

And a promissory note reading, "we promise to pay," etc., and signed "C. G. R., Guardian, H. D. R., Guardian, rights of my wife, C. G. R.," was held to be the personal obligation of the signers. *Robertson v. Banks*, 1 Smedes & M. 666. There is no discussion in this case.

In other cases the guardian has been held liable on the ground that he bound himself by the form of the contract.

In *Sperry v. Fanning*, 80 Ill. 371, where a contract entered into by a guardian who contracted as guardian of the estate of his ward was executed by adding to his name, "guardian of the estate of Henry W. Kingsbury," such contract was held to be the personal obligation of the guardian. The court distinguished between the agreement of an agent who describes himself as contracting for a principal, and the covenant of a principal who contracts by and through an agent; and states that the former may be regarded as the personal contract of the agent, while the latter may be held to be the undertaking of the principal.

A promissory note reading, "I promise to pay," etc., and signed "J. G., Guardian of G. W. C.," is personally binding upon the guardian. *Gibson v. Irby*, 17 Tex. 173.

#### Miscellaneous.

In *Abrams v. Musgrove*, 12 Pa. 292, an action against a devisee of a testate for serv-  
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ices rendered such testate, an instrument was introduced in evidence reading, "I, J. J., guardian of G. A., am held and firmly bound," etc., and signed, "J. J., Guardian," and in passing upon the competency of J. J. as a witness in the case, the court states that he is not personally liable on this contract. It does not appear that J. J. was regularly appointed guardian, but he seems to have stood more in the relation of an agent to his ward.

#### d. Trustees and receivers.

"We think the case of a trustee," says the court in *Printup v. Trammel*, 25 Ga. 240, "different from that of an executor, who has no right to deal with the property of his testator. His duty begins and ends with the collection of the assets of the estate. . . . It is not the same with trustees, who are often under the necessity of dealing in a manner, for the benefit of his *cestui que trust*, to create a debt payable in future. In such cases there are many reasons founded in good policy, justice, and sound sense why a trustee should not be held personally liable."

The court in *Ogden City Street R. Co. v. Wright*, 31 Or. 150, 49 Pac. 975, in speaking of the nature of a trustee's contract, says: "When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such," citing from *Taylor v. Davis* (Taylor v. Mayo) 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147.

If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate. *Ibid*.

In *Jordan v. Trice*, 6 Yerg. 479, where certain trustees in a bill of sale of a slave executed by them as "trustees of W. H. W." warranted the soundness of the slave, the contract showing no clear intention on the part of the trustees not to be bound personally, such trustees were held individually liable. It does not appear from the report of this case how the agreement was signed.

An agreement reading, "I promise to pay," and signed "S. L. R. as Trustee of F. N., W. T. W. as Trustee of F. N.," and containing nothing that indicates that both parties agreed to act upon the responsibility of the trust funds alone, or some other responsibility excluding that of the trustee, *prima facie* binds such trustees personally. *Ogden City Street R. Co. v. Wright*, 31 Or. 150, 49 Pac. 975.

The court in *McLeod v. Despain*, 49 Or.

536, 19 L.R.A. (N.S.) 276, 124 Am. St. Rep. 1066, 90 Pac. 492, 92 Pac. 1088, states that a trustee who has signed a guaranty of notes by adding the word "Trustee" to his signature is personally bound thereon.

Where the trustee of certain property, to whom the trust estate was indebted, yielded possession of the property to his successors, and received from such successors an agreement in consideration of his yielding possession of the premises, that the incoming trustees would apply all the money which should come into their hands as trustees, after paying taxes and current expenses, to the payment of the claim of the outgoing trustee, which agreement is signed by the trustees adding to their signatures the words, "Trustees of the C. C. Property," such trustees are personally liable on the agreement. *Taylor v. Davis* (Taylor v. Mayo) 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147.

A deed in which two of the grantors are named as "R. J. & E. C., Trustees for the said J. C.," throughout the instrument, and which is signed by the trustees "R. J., Trustee for J. C. (L. S.), E. C., Trustee for J. C. (L. S.)," is the personal obligation of such trustees, and they are liable for a breach of the covenants therein contained. *Duvall v. Craig*, 2 Wheat. 45, 4 L. ed. 180.

In *Lewis v. Harris*, 4 Met. (Ky.) 353, where property had been conveyed to a trustee, and for the balance due on the purchase price, a promissory note reading, "we, John B. Lewis, Trustee for Ann R. Talbott, and Ann R. Talbott, John H. Talbott, and W. H. Middleton, jointly and severally promise to pay," etc., signed "John B. Lewis, Trustee for Ann R. Talbott, Ann R. Talbott, John H. Talbott, Wm. H. Middleton (security)," such note was held to show an intention on the part of Lewis not to bind himself individually, and there was held to be no individual liability on the note.

The trustees of an association for the purchase of real estate, who have given a note reading, "we, as trustees, but not individually, promise to pay," etc., and signed by the trustees, who add to their signatures the word "trustees," and a mortgage securing the same, for the unpaid purchase price of land deeded to them as trustees, are not personally liable on such note, in the absence of evidence that they have funds in their hands belonging to the association. *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148, 25 Am. Rep. 49.

Where a trustee executes a bond for the payment of money, in which he is named as trustee, and binds himself, his heirs, executors, and administrators, signing the same "J. P. R., Trustee," without stating for whom he is trustee, he is personally liable on such obligation. *McDowall v. Reed*, 28 S. C. 466, 6 S. E. 300.

Where a trustee contracts to sell land without being able to complete the contract, by an agreement which states "I acknowledge receipt of money and I agree to

sell and to convey," etc., and which is signed "P. P., Trustee," and in which there is nothing to intimate of whom such person is trustee, he is personally liable on the contract, and the fact that he declares himself a trustee does not relieve him of liability. *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463.

A promissory note signed "R. A. J., Trustee," in the absence of showing for whom the signer was trustee, or that the notes were executed by defendant in trust capacity, is the personal obligation of such signer. *Moss v. Johnson*, 36 S. C. 551, 15 S. E. 709.

But in *Printup v. Trammel*, 25 Ga. 240, where the note was signed "Daniel S. Printup, Trustee for Mrs. Abbey Farrar," and was given for property which the payee had sold to the *cestui que trust*, it was held that the payee ought not to be allowed to recover against the trustee individually. The court in this case distinguishes between executors and trustees, stating that the latter have a right to deal with the property of their *cestuis que trust*, and are not liable on account of lack of authority.

Following this rule, in *Gaudy v. Babbitt*, 56 Ga. 640, the court holds that a promissory note reading, "I promise to pay," which a trustee signs adding to his signature the word "trustee," is sufficient to bind the estate. The decision in this case turns on other grounds.

A promissory note made payable to A. D. S. & Co., and indorsed "A. D. S. & Co., F. M. S., C. M. S., Trustees estate of A. D. S.," imposes a personal liability upon such trustees, notwithstanding they have power under the will to execute such indorsement. *Roger Williams Nat. Bank v. Groton Mfg. Co.* 16 R. I. 504, 17 Atl. 170. The court in this case states that the true reason for holding a trustee personally liable upon such contract is that he has no principal, or rather that he is the principal himself.

See also as to trustees, *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 959, III. a, 1; *Cruselle v. Chastain*, 76 Ga. 840, III. a, 1; *Kerby v. Ruegamer*, 107 App. Div. 491, 95 N. Y. Supp. 408, III. b, 1 (b) (1) a; *Dunlevie v. Spangenberg*, 66 Misc. 354, 121 N. Y. Supp. 299, III. a, 1; *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225, III. b, 1 (a); *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738, III. b, 1 (b) (1) a; *Shaver v. Ocean Min. Co.* 21 Cal. 45, 2 Mor. Min. Rep. 130, III. e, 1 (b); *Webster v. Switzer*, 15 Mo. App. 346, III. a, 3 (b); *Conn v. Scruggs*, 5 Baxt. 567, III. a, 3 (b); *Society of Shakers v. Watson*, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 730, III. b, 3 (a); *Fiske v. Eldridge*, 12 Gray, 474, III.-B-3-b-1; *Bowen v. Penny*, 76 Ga. 743, III. a, 4; *Neptune v. Paxton*, 15 Ind. App. 284, 43 N. E. 276, III. b, 4 (b) (1).

A promissory note given by the receivers of a railroad company to one of the receivers, reading "we promise to pay," and signed by the receivers, who add to their signatures the word "receivers," is the personal obligation of such signers. *Towne v. Rice*, 122 Mass. 67. The same holding ap-

pears in this case with reference to the liability of the payee on his indorsement, which was made by adding the word "receiver" to his signature.

#### Without authority.

Where an assignee for the benefit of creditors, without power to bind the estate, gave a promissory note reading, "we, or either of us, as joint principals, promise to pay," etc., and signed the same with his assignor, adding the word "assignee" to his signature, he is personally liable on such note. *Warren v. Harrold*, 92 Tex. 417, 40 S. W. 364.

In *Hall v. Jameson*, 151 Cal. 606, 12 L.R.A.(N.S.) 1190, 121 Am. St. Rep. 137, 91 Pac. 518, a trustee with power only to mortgage the trust property, who gave a promissory note reading in the first person singular, and signed by him with the addition of the word "trustee" to his name, is held personally liable on such note, and, being a contract in which the trustee did not purport to bind anyone but himself, it cannot be varied by parol evidence.

In *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529, in the absence of a showing of authority to bind the beneficiaries in the trust, a promissory note reading "I promise to pay," etc., and signed by one who added the word "trustee" to his signature, was held to be his personal obligation, and he was not allowed to show by parol evidence in an action thereon against him, that there was an agreement at the time the note was given that he was not to be personally liable, but that the payment was to be made out of the trust funds of which he was the trustee.

Where a guaranty of the payment of a note expressed to be for value received was signed by one as "J. F. H., Trustee for F. B. H.," and such trustee fails to show his capacity as trustee, he is personally liable on the guaranty. *Peterson v. Homan*, 44 Minn. 166, 20 Am. St. Rep. 564, 46 N. W. 393. W. A. E.

#### MISSISSIPPI SUPREME COURT.

McCALL COMPANY, Appt.,

v.

W. D. HUGHES.

(— Miss. —, 59 So. 794.)

**Monopoly — exclusive contract — duty to pay.**

One cannot refuse to pay for goods purchased for resale because the contract under which they were furnished to him

**Note.**—The above case is commented on in the note appended to *Brent v. Gay*, 41 L.R.A.(N.S.) 1034, as to agreements collateral to contracts forming illegal combinations, and the enforcement thereof by members of such illegal combinations. 42 L.R.A.(N.S.)

sought to establish a monopoly by forbidding sale of rival goods and fixing the price at which they should be sold.

(October 14, 1912.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in defendant's favor in an action brought to recover the value of patterns sold by plaintiff to defendant under the terms of a contract. Reversed.

The facts are stated in the opinion.

Messrs. Denny & Denny for appellant.  
Messrs. Ford, White, & Ford for appellee.

Cook, J., delivered the opinion of the court:

Appellant filed its declaration against appellee, alleging that it had sold to appellee certain patterns at certain fixed prices, and filed with his declaration a written contract by the terms of which appellee bound himself to sell the patterns of appellant, and none other, in the town in which he was engaged in business. This contract was to extend over a period of two years, and the patterns were to be sold at a price to be fixed in the catalogue of appellant company, to be issued from time to time. Recovery was sought for the value of the patterns at the contract price, together with a penalty, which was termed "liquidated damages." To this declaration appellee demurred, upon the ground that the contract set out in the declaration was in violation of the anti-trust statute of the state; the provisions of the contract binding appellee to sell no other patterns than those of appellant for a term of two years, and to sell the patterns at prices to be fixed by appellant, tending to create a monopoly, and being in restraint of trade. The trial court sustained the demurrer to the declaration.

Appellant then filed an amended declaration, simply declaring upon account of goods sold and delivered to appellee, and omitting all claims for the alleged penalty for a violation by appellee of his contract filed with the original declaration. Appellee filed pleas to this amended declaration, averring: (1) That the contract relied upon by the plaintiff in the case was the same contract set out in his original declaration, and that the terms of the same were unenforceable, because said contract provided that defendant should sell only patterns manufactured and sold by plaintiff, and called "McCall's patterns;" and (2) that the contract was unenforceable and violative of the anti-trust laws of the state, because defendant was required under said contract to sell the patterns of plaintiff only at such prices as should be fixed by

plaintiff in its catalogue, without any reference to the cost of manufacture, the law of supply and demand, or the selling price of like commodities by defendant's competitors. Plaintiff demurred to these pleas. The demurrer was overruled, and, plaintiff declining to plead further, the suit was dismissed; therefore this appeal.

It is insisted by appellee that plaintiff could not invoke the aid of the court to recover for patterns which had been sold and delivered to defendant under the terms of the contract, because the clauses of the contract obligating defendant to sell no other patterns, and to sell at prices to be fixed by the plaintiff, were in violation of the anti-trust statute. If appellant was seeking to enforce the terms of the contract challenged by appellee, we may concede the soundness of appellee's conclusion; but does it therefore follow that he should be absolved from paying for the goods purchased and probably sold in due course of trade, because he had entered into a contract in restraint of trade? So far as the sale and delivery of the goods is concerned, the contract was executed, and, according to the averments in the declaration, defendant himself sought to revoke the contract as to the time limit, but declined to pay for the goods which had been purchased. Common honesty demands that defendant should pay for the goods purchased, and he cannot shelter himself behind the provisions of the anti-trust statute against certain provisions of the contract, which it is not sought to enforce. It may be true that the terms of the contract which are set up to defeat recovery could not be enforced in a suit filed for that purpose; but the question here is an entirely separate and distinct question from this, and is in no way affected by the anti-trust statute. Conceding the invalidity of the two clauses of the contract referred to, nevertheless, the remainder of the contract is enforceable. *Andrews v. New Orleans Brewing Asso.* 74 Miss. 362, 60 Am. St. Rep. 509, 20 So. 837; *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 24 L.R.A.(N.S.) 913, 71 Atl. 265; *Central New York Teleph. & Teleg. Co. v. Averill*, 199 N. Y. 128, 32 L.R.A.(N.S.) 494, 139 Am. St. Rep. 878, 92 N. E. 206. Appellee for about two years received the benefits of and profited by the contract; but, when he decides to discontinue his business with appellant, and appellant demands payment for goods sold, the answer is: "We have been violating the law for two years, and I have decided to reform my ways, but will retain the gains of our illicit and illegal relations, and you must satisfy yourself with the losses."

Reversed and remanded.

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## NORTH CAROLINA SUPREME COURT.

A. R. HERRING et al., Appts.,  
v.  
CUMBERLAND LUMBER COMPANY  
et al.

(— N. C. —, 74 S. E. 1011.)

### Contract — avoiding penalty — invalidity of contract.

1. One who purchases timber at less than its value upon agreement to build a railroad to the property, under penalty of additional payment upon failure to build the road, cannot escape the penalty by relying on the fact that his undertaking is prohibited by statute.

### Pleading — prayer for judgment — form of relief.

2. The facts alleged, and not the form of prayer for judgment, determines the nature of the relief to be granted.

(May 28, 1912.)

**A**PPEAL by plaintiffs from a judgment of the Superior Court for Sampson County in defendants' favor in an action brought to recover the amount of a penalty for failure to construct a railroad. New trial.

The facts are stated in the opinion.

Mr. George E. Butler for appellants.

Messrs. Stevens, Beasley, & Weeks for appellees.

**Note.**—*HERRING v. CUMBERLAND LUMBER Co.* seems to be a case of first impression upon the precise question as to the rights and remedies of a party who has conveyed property to a corporation in consideration of an *ultra vires* executory undertaking by the latter. The decision therein, however, seems clearly to be correct, under the general principles governing illegal or partially illegal or *ultra vires* contracts; and it has been said, generally, that "where money has been paid or property transferred to a corporation under a contract which is not *malum in se*, but which is merely *malum prohibitum*, the party receiving may be made to refund to the party from whom it has received, the value of that which it has actually received; and to this end he may maintain against the corporation the equitable common-law action for money had and received, or a suit in equity to compel an accounting and restitution of what the corporation has received through the transaction." 10 Cyc. 1155.

As to an action for money had and received as a proper remedy to recover money secured by a fraudulent contract, see note to *Martin v. Hutton*, 36 L.R.A.(N.S.) 602.

A. C. W.



Walker, J., delivered the opinion of the court:

This action was brought to recover the amount of a penalty imposed by a contract between the plaintiff and the Wallace Manufacturing Company, for failure to comply with one of its stipulations. The question involved arose upon the following facts: Plaintiff and certain other neighboring landowners agreed to sell the timber on their lands to the said company for a stated price, and defendant agreed to pay the price and also to construct a standard gauge railroad from Delway to Wallace, and to complete the same for use and transportation on or before March 15, 1908, and, upon failure to do so, it is provided by the contract that the Wallace Manufacturing Company shall forfeit and pay to the said landowners, as a penalty, an amount equal to 10 per cent of the price paid for the timber, and 2½ per cent on said price for each additional year of its default during the next five years, making 22½ per cent in all if the default should continue as long as five years after March 15, 1908. The parties conveyed the timber by deeds to the Wallace Company, coupled with the right to cut timber of a certain fixed dimension, and to build on the land roads, tramroads, and railroads for the purpose of cutting and removing the timber. There is a provision in the deed that the trees sold to the company shall not be removed except by the standard gauge railroad. The Wallace Company conveyed to the defendant Cumberland Lumber Company "the timber and tree rights, property rights, and easements" acquired under the deed of the plaintiff to it. The standard gauge railroad has never been constructed, and plaintiff sues to recover the penalty alleged to be due to him by the terms of his deed to the Wallace Company.

The defendants' counsel contend that the building of a standard gauge road is not within the chartered powers and privileges of the defendants, and that it is also expressly forbidden by Revisal, § 2598. We need not decide whether or not this is a correct position, as we are of the opinion with the plaintiff upon another view of the matter. It appears in the case that the plaintiff and his neighbors, who joined with him in the agreement to sell their timber to the Wallace Manufacturing Company, one of the defendants, were influenced in fixing the price of the same by the stipulation of the said company to construct this road, and that they sold the timber at much less than its reasonable worth because of this agreement, believing that, if the road was

built and put into operation, the benefit or advantage they would derive therefrom would compensate them for the loss of the difference between the price charged by them for the timber and the real value thereof. This being so, it would seem to be very unjust and inequitable that the defendants should repudiate their agreement and rely on its invalidity for the purpose of evading the payment of a reasonable price for the timber; in other words, that they should be allowed to keep the amount of the difference between the price paid for the timber and its true value, and at the same time refuse to execute their part of the contract to build the road, even upon the ground that it is *malum prohibitum*. If the stipulation to construct the road is invalid, the plaintiff, if *particeps criminis*, is not *in pari delicto*. He can recover the amount of his loss without declaring upon the alleged illegal stipulation, and relief can be given without enforcing this part of the contract. In such a case, the action, it may be said, is not based on the agreement alleged to be illegal or invalid, but on the promise created by law to repay money of the plaintiff improperly obtained. 9 Cyc. p. 547.

The principle governing such cases is well stated in *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. (Anno. ed. 1912) 211: "The rule of law is well settled that no action will lie to enforce a contract *malum in se*, nor, if executed, to recover money paid under it. In all such cases the maxims, *ex turpi causa non oritur actio*, and *in pari delicto potior est conditio defendentis et possidentis*, apply. In regard to contracts not immoral or criminal in themselves, but prohibited by statutory law, the same general rule may be said to apply, not, however, universal in its application, but subject to certain exceptions as binding in authority as the rule itself. Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under contracts of this character, in which the public interest will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy. Hence Judge Story admits that, even between parties *in pari delicto*, relief will sometimes be granted if public policy demands it. 1 Story, Eq. Jur. §§ 298-300. Other cases are to be found arising under contracts made in violation of a statute, in the application to which of the general rule, courts have been governed by the plain and obvious purposes of the law, and in such it has been

repeatedly held that an action would lie against a party receiving money under such a contract, upon a promise, implied by law to refund it. Thus, in *Smith v. Bromley*, 2 Dougl. K. B. 697, note, Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action. . . . But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover."

Lord Mansfield said in *Browning v. Morris*, Cowp. pt. 2, p. 790: "It is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side,—upon the office keeper." This view of the case is not in conflict with what was decided in *Edwards v. Goldsboro*, 141 N. C. 60, 4 L.R.A.(N.S.) 589, 8 Ann. Cas. 479, 53 S. E. 652, as in that case there was an illegal agreement which was contrary to public policy, if not *contra bonos mores*, and the action was for the recovery of money actually paid to carry out the illegal transaction, which was not only forbidden by law, but injurious to the public, and the parties were *in pari delicto*. In this case the defendants have acquired the plaintiff's timber at an undervalue, upon a promise which they refuse to perform, and seek to shelter themselves behind its alleged illegality. There is nothing contravening public policy in permitting plaintiff to recover at least what he had lost by not receiving a fair and full price for his property, not exceeding the amount named in the contract. *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 525; *White v. Franklin Bank*, 22 Pick. 181; 1 Pom. Eq. Jur. § 403; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 48 L. J. Ch. N. S. 522, 40 L. T. N. S. 243, 27 Week. Rep. 464; 9 Cyc. 546; *Bishop, Contr. §§ 628 et seq.*; *Prescott v. Norris*, 32 N. H. 101; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442.

The case of *Morville v. American Tract Soc.* 123 Mass. 129, 25 Am. Rep. 40, is much like the one at bar, and the court there said: "The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the de-

fendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act."

The case of *Jaques v. Golightly*, 2 W. Bl. 1073, was an action to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance, contrary to the statute (14 Geo. III. chap. 76). It was urged that the plaintiff, being *particeps criminis*, and having knowingly transgressed a public law, was not entitled to relief, but the action was sustained by the unanimous opinion of the court. Blackstone, J., said: "These lottery acts differ from the stockjobbing act of the 7 Geo. II. chap. 8, because there both parties are made criminal and subject to penalties." See also *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132.

The plaintiff offered to show that the defendants purchased the timber at a greatly reduced price because of the promise to construct the railroad, which evidence the court excluded, and afterwards intimated that the plaintiff could not recover, and compelled him to submit to a nonsuit. We think there was error in both rulings, and a new trial is ordered. There are facts stated in the complaint sufficient, if established, to authorize a judgment in favor of the plaintiff for the difference between what he received for the timber and its true value.

The form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. *Voorhees v. Porter*, 134 N. C. 597, 65 L.R.A. 736, 47 S. E. 31. The plaintiff can unite two causes of action relating to the same transaction and have alternative relief; that is, a judgment upon either one or the other of the causes.

New trial.

Hoke, J., concurs in result.

# NORTH CAROLINA SUPREME COURT.

J. W. DOLES, Admr., etc., of Frank Brown,  
Deceased,

v.

SEABOARD AIR LINE RAILWAY  
COMPANY, Appt.

(— N. C. —, 75 S. E. 722.)

## Contribution — joint tort feorsors — liability.

1. A railroad company which causes the death of a passenger by starting the train before he is safely on board cannot have contribution from an express company, although the injury would not have occurred but for its negligence in leaving a truck too close to the track.

## Parties — joint tort feorsors — dismissal of one — right to complain.

2. One of two joint tort feorsors whose combined negligence causes death, for which an action is brought against both, cannot complain that his codefendant is dismissed from the action, since he is not entitled to contribution from him.

(September 11, 1912.)

**A** PPEAL by defendant from a judgment of the Superior Court of Northampton County in plaintiff's favor in an action brought to recover damages for the death of his intestate, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

**Note.** — The correctness of the above decision that one of two joint tort feorsors who are jointly sued cannot complain of a nonsuit on the evidence in favor of the other, seems very clear. Not only was the action based upon the actual and active negligence of both defendants, but the evidence showed that as between the two, the active and dominant cause of the injury was the actual negligence of the defendant who objected to the dismissal of the other from the action. But even assuming the parties to have been in *pari delicto*, the case furnishes an application of the rule, stated in 22 Cyc. 99, that there can be no contribution or indemnity between joint tort feorsors who are in *pari delicto*, and this would in itself seem to defeat any objection to the dismissal of the action. But as stated, the case presents the additional fact that the negligence of the objecting defendant was the dominant cause of the injury, and this fact would seem to leave no room for the objection whatever.

But another question might have been presented had the facts in the case been otherwise; that is, had it appeared that although the negligence of each defendant was a contributing cause as between themselves, the negligence of the defendant who

Messrs. Mason & Worrell and Murray Allen for appellant.

Messrs. S. T. Stancell, Peebles & Harris, and Gay & Midyette for appellee.

Walker, J., delivered the opinion of the court:

It is not necessary to make an extended statement of the facts in this case. The plaintiff's intestate, Frank Brown, was killed at Suffolk, Virginia, while, as alleged, he was boarding the defendant's passenger train at that place, bound for Margaretsville, in this state. The plaintiff's testimony tended to show that the intestate purchased a ticket for his passage from Suffolk to his destination, and was in the act of getting upon the passenger coach just after the conductor had given the call, "All aboard!" when the train was started, "at once after the signal was given," and the intestate, who was unable to gain a foothold because of the speed of the train and the crowded condition of the steps and platform of the car, was knocked under the cars by a truck of the Southern Express Company, which had been left on the platform at the station, within a few feet of the passing train, and killed. One witness testified that the train started with a jerk and "with full force," while passengers were trying to alight from the train and the intestate was attempting to get on the steps, and that plaintiff could have been seen by the engineer and the porter, who called for passengers to get aboard. On the contrary, there was evidence tending to show that the train started

was dismissed was the immediate cause of the injury. In such circumstances there might have been, in some jurisdictions at least, a right to contribution or indemnity, and of course in such jurisdictions the dismissal of the action as to such defendant would be prejudicial error as to the other; since the dismissal, being upon the merits, would be conclusive upon the latter. A general discussion of the question whether the rule denying contribution between joint tort feorsors is affected by the question of proximate cause, in the note in 36 L.R.A. (N.S.) 583, shows that there is a difference of opinion on the point, and indicates that the New Hampshire cases, at least, make an exception to the rule against contribution, holding that one actual wrongdoer may recover over against another if, by the application of the doctrine of last clear chance, the other's negligence is found to have been the proximate cause of the injury. But in jurisdictions taking the contrary view it would seem that a defendant could not be heard to object that the action was dismissed upon the merits as to his cotortfeasor.

See notes in 40 L.R.A. (N.S.) 1147, 1158, 1165. L. A. W.

at its usual speed, and that intestate was leaving the car, and jumped on the truck, and was killed. There was also evidence that he was warned not to leave the car by the porter, who told him that he would have the train stopped, so that he could get off safely. It may be said, generally, that some of the evidence tended to show negligence on the part of the defendant, which proximately caused the intestate's death, while there was other evidence which tended to prove that the intestate's death was caused entirely by his own fault in jumping from a rapidly moving train.

The court submitted the case to the jury in a charge which fully explained every phase of the evidence and clearly set forth the law applicable to the facts as they might find them to be. The charge of the court was in accordance with the principles laid down in *Roberts v. Atlantic Coast Line R. Co.* 155 N. C. 79, 70 S. E. 1080, and the essential facts of the two cases cannot well be distinguished. That case must control our decision in this one on all the points raised by the defendant, except the contention that the court should not have entered a nonsuit upon the evidence as to the Southern Express Company. The defendant objected to this ruling of the court, and relies upon *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070, to sustain his objection. But we do not see the analogy between the two cases. In that case, Wolvin's negligence was active and the efficient cause of the injury, while the negligence of the city of Wilmington was merely passive, in allowing the dangerous condition, brought about by Wolvin's negligence, to exist in one of its streets. The city did not actually co-operate with Wolvin in committing the wrong to the plaintiff's intestate. In the *Gregg Case*, approving what is said by Judge Cooley in his treatise on Torts, 3d ed. p. 254, we stated the general rule to be according to the maxim that no man can make his own misconduct the ground for an action against another in his own favor. If he suffers because of his own wrongdoing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one who was concerned in committing it. 155 N. C. 24, 70 S. E. 1070. Where two or more persons have participated in the commission of a wrong, the general rule undoubtedly is that a right to contribution or indemnity will not arise in favor of the one held responsible by the injured party. 38 Cyc. 493. There are exceptions to the rule, but this case is not included in any of them.

The case of *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191, seems to be a strong authority against the contention of the defendant.

It appeared that Churchill left his hatchway in an unsafe condition. Defendant's servant, in the performance of his master's business, interfered with it, so that it became more dangerous—that is, the danger already existing by the fault of Churchill was increased—and Mrs. Meston fell into the hatchway, and was thereby injured, and recovered damages of Churchill. It was held that Churchill was not entitled to indemnity or contribution from the defendant Holt, whose servant interfered with the hatchway. With respect to the right of indemnity, upon the facts presented, the court said: "In such a case, both parties, whether they act with a common purpose or independently, aid in creating the danger or nuisance, and it is impossible to apportion the degree of their respective negligence, or to determine by whose individual negligence the injury was caused. They are both wrongdoers, whose unlawful acts contribute to produce the injury. They are *in pari delicto*, and therefore neither can recover indemnity or contribution of the other. The plaintiffs contend that they had the right to go to the jury upon the question whether the sole cause of the injury to Mrs. Meston was the negligent acts of the defendant's servant. We must presume that proper instructions were given as to other aspects of the case; but, in the aspect of the case supposed in the instruction we are considering, that is, if the jury found that the plaintiffs negligently left the hatchway in a dangerous condition, and that the acts of the defendant's servant merely made it more dangerous, it is impossible for the jury to find that the fault of the plaintiffs did not contribute to the injury. It is like the case of a man injured by falling into a hole dug partly by one person and partly by another. The acts of both aid in creating the danger which causes the injury, and it cannot be ascertained whether the acts of one excluding the acts of the other would have caused the same injury. If the acts are unlawful, both are wrongdoers *in pari delicto*, and, though each would be liable to the person injured, neither could recover indemnity or contribution of the other." *Ibid*. When the same case was before the court on a former appeal (127 Mass. 165, 34 Am. Rep. 355), it was said: "The rule that one of two joint tortfeasors cannot maintain an action against the other for indemnity or contribution does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability. In such case the parties are not *in pari delicto*, as to each other, though as to third persons either may be held liable."

But that is not our case. Here the express company left the truck near the track

of the railroad company, and, if this was a negligent act, it would not have harmed the intestate if the defendant had not also been negligent. The two acts concurred in producing the injury, and, upon the assumption that the express company was negligent, it and the railroad company were joint tort feasons as to the plaintiff and as between themselves, and there is no right of indemnity or contribution. It may also be said that the defendant's wrong was the active and dominant cause of the injury, without which it would not have occurred, and it therefore has no ground whatever upon which to base a claim for compensation against its codefendant. *Lexington v. Etna Indemnity Co.* 155 N. C. 219, 71 S. E. 214.

We find no error in the record.

**OKLAHOMA SUPREME COURT.**  
(Division No. 1.)

CITY OF LAWTON et al., Pliffs. in Err.  
v.

JAMES G. HARKINS.

(— Okla. —, 126 Pac. 727.)

**Municipal corporation — arrest — liability.**

1. The police regulations of a city are not made and enforced in the interest of the

Headnotes by ROBERTSON, C.

**Note. — Liability of an officer for making an arrest.**

This note is intended to cover only cases decided since the preparation of the note on the same question in 51 L.R.A. 193.

As to the liability of an officer for using criminal process to collect a debt, see the note in 24 L.R.A.(N.S.) 301.

As to the liability of a sheriff, marshal, or constable for his deputy's tort in making an arrest, see note in 12 L.R.A.(N.S.) 1019.

As to the liability of the sureties on the bond of an officer for an illegal arrest, see the note in 33 L.R.A.(N.S.) 275, supplementing subdivision VI. of the note in 51 L.R.A. 193.

As to municipal liability for torts of police officers, see note in 12 L.R.A.(N.S.) 537.

And more specifically as to the liability of a municipality for acts which are not essentially police functions, but which are connected therewith, see the note in 17 L.R.A.(N.S.) 741.

It is said in 19 Cyc. 332, that normally any and every natural person, including legislators, irrespective of his public or private character or his personal status, is liable in an action for false imprisonment, whenever such person appears unlawfully to have detained another. This being true, the real

city in its corporate capacity, but in the interest of the public. A city is therefore not liable for the acts of its officers in attempting to enforce such regulations, and further because police officers can in no sense be regarded as servants or agents of the city. Their duties are of a public nature. Their appointment is devolved upon cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render the cities and towns liable for their assaults, trespasses, or negligent acts.

**Police — wrongful arrest — liability.**

2. Policemen, as such, were unknown to the common law. They are creatures of statute, and can exercise only such power and authority as has been granted by legislative enactment; yet, the office being authorized by statute, the policeman is a conservator of the peace, and has the right to arrest violators of the laws, ordinances, and police regulations, without warrant, as provided by statute; but he is not exempt from civil liability when he acts in a wrongful, oppressive, and illegal manner, and the general doctrines of the law touching personal liability for torts apply to policemen.

(September 12, 1912.)

**E**RROR to the District Court for Comanche County to review a judgment in plaintiff's favor in an action brought to recover damages for an alleged illegal arrest. Reversed.

The facts are stated in the opinion.

question in any case, so far as the present inquiry is concerned, is whether the arrest or detention is to be deemed unlawful on the part of the officer, and its answer, of course, depends upon whether he had a valid warrant, or whether the circumstances were such as to justify an arrest without a warrant, and upon other attendant circumstances.

**Under warrant — generally.**

An action for false imprisonment cannot be based upon an arrest under a warrant which was fair on its face. *Schnider v. Montross*, 158 Mich. 263, 122 N. W. 534.

In other words, an officer is not liable in an action for false imprisonment for making an arrest under a process regular on its face issued by a court having jurisdiction, he having no notice or knowledge of any irregularity in the proceedings or in the process. *Rowe v. Reneer*, 30 Ky. L. Rep. 545, 99 S. W. 250.

So a governor's extradition warrant which is fair on its face will protect a sheriff in an action for malicious prosecution if he proceeds according to law, although he may in fact bear malice toward the fugitive. *Regan v. Jessup*, 34 Tex. Civ. App. 74, 77 S. W. 972.

In *Campbell v. Hyde*, 92 Ark. 128, 122 S.

**Mr. Charles C. Black**, for plaintiffs in error:

The arrest was not such an act as the city under any circumstances could be held liable for.

4 Dill. Mun. Corp. 5th ed. § 1656; *Marth v. Kingfisher*, 22 Okla. 602, 18 L.R.A. (N.S.) 1238, 98 Pac. 436; *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949; *Bartlett v. Columbus*, 44 L.R.A. 795, and note, 101 Ga. 300, 28 S. E. 599; *Cook v. Macon*, 54 Ga. 468; *Gullikson v. McDonald*, 62 Minn. 279, 64 N. W. 812.

**Mr. W. E. Earl** for defendant in error.

W. 99, in which it appeared that the warrant was valid upon its face and was procured by the officer on his own affidavit, the court said in a general way that if the warrant is valid upon its face, the officer is protected, even though it was improvident or wrongfully issued, and then added that the person who procures the issuance of a writ though he act maliciously, is not liable for false imprisonment, but is liable, if at all, in an action of malicious prosecution. It appeared in this case that the officer acted in good faith upon statements made to him by other persons.

A constable who sends a justice's warrant to another county, and subsequently receives the prisoner from the sheriff of that county, and the sheriff who makes the arrest, are liable for false imprisonment where the sheriff made the arrest without obtaining the indorsement of a justice of the peace of his own county, as required by statute. *Sneed v. McFatrige*, 43 Tex. Civ. App. 592, 97 S. W. 113.

#### — jurisdiction of issuing court.

Where the court issuing the invalid process is without jurisdiction in the cause, the process affords no protection to an officer making arrest, no matter with what good faith he may act in the premises; and this is especially true where the writ shows lack of jurisdiction on its face. *Stephens v. Wilson*, 115 Ky. 27, 72 S. W. 336.

So an officer is not protected from liability in an action for false imprisonment, where the warrant showed upon its face that it was issued to apprehend the accused for an offense over which the justice had no jurisdiction. *Heller v. Clarke*, 121 Wis. 71, 98 N. W. 952.

And a warrant is insufficient to relieve an officer from liability for arresting a tax debtor under it, where, though issued by the tax collector in pursuance of a statute authorizing its issuance to distrain the person or property of any person delinquent in paying his taxes, "after the expiration of the time fixed for payments by vote of the town," the warrant does not show that the town had voted upon the matter, or that the collector had issued the summons required 42 L.R.A. (N.S.)

**Robertson, C.**, filed the following opinion:

The defendant in error, James G. Harkins, filed his petition in the district court of Comanche county on September 30, 1907, and, among other things, charged that John Lantzner, one of the plaintiffs in error, was, on August 6, 1907, a police officer of the city of Lawton, charged with the duties as such, to "enforce the laws and ordinances of such city, and keep the peace, arrest all violators of the laws and ordinances of the city, and the disturbers of the peace of said city, and bring them before the police judge, and file complaint against the

by law. *Jacques v. Parks*, 96 Me. 268, 52 Atl. 763.

And an officer is liable in an action for false imprisonment for arresting a person upon a warrant which is void because the complaint upon which it is based was signed by a person not authorized by statute to sign it. *Goodell v. Tower*, 77 Vt. 61, 107 Am. St. Rep. 745, 56 Atl. 790.

But a distinction is to be observed between entire lack of jurisdiction and excess of jurisdiction. An officer is protected in making an arrest under a warrant issued by a magistrate having authority to issue process in case of a violation of a particular ordinance, where, although the ordinance may be invalid, its invalidity has not been judicially determined. *Bohri v. Barnett*, 75 C. C. A. 327, 144 Fed. 389.

Indeed the invalidity of an ordinance under which a magistrate acts in issuing the warrant will not render the officer who serves it liable for false imprisonment, where the magistrate has general jurisdiction over the subject-matter, and the process is not void on its face. *Rush v. Buckley*, 100 Me. 322, 70 L.R.A. 464, 61 Atl. 774, 4 Ann. Cas. 318.

So an officer is justified in arresting one engaged in peddling without obtaining the license required by an ordinance, under a warrant issued by a magistrate having power to issue it, although the peddler is authorized to ply his trade under a state license. *Bohri v. Barnett*, supra.

And a judgment of a municipal court authorizing the enforcement of the payment of a fine by labor upon the street, though void for want of authority of the municipality thus to enforce the payment of a fine, will protect an officer in arresting the defendant, if he acted in good faith in attempting to execute the judgment. *Williams v. Sewell*, 121 Ga. 665, 49 S. E. 732.

As said in *Weigel v. Brown*, 194 Fed. 652, an officer is protected by process emanating from a court having general jurisdiction in the premises, although in the particular case and for a particular reason its command may be in excess of its jurisdiction; but where the mandate on its face commands that which the court has no authority to order, an officer is not protected in its execution.

wrongdoers." Record, p. 12. The petition further charges that, while Harkins was peacefully peddling the products of his farm to the merchants of said city, he was arrested by John Lantzner, one of the plaintiffs in error, and imprisoned for two hours unlawfully, maliciously, and without warrant or complaint, to his damage in the sum of \$5,000. The defendants both answered by general denial, and the cause was tried to a jury on March 29, 1909, and resulted in a verdict in the sum of \$500 in favor of plaintiff and against both defendants.

At the close of plaintiff's testimony, the

defendants each demurred thereto, for that the testimony offered was wholly insufficient to constitute any cause of action against the said defendants. These demurrers were overruled, and plaintiffs in error assign this ruling of the court as error.

Two questions are presented by this record for our consideration under the foregoing assignment of error, viz.: Was the city of Lawton liable in damages for the arrest and imprisonment of Harkins under the facts in this case? And, second, was Lantzner, the policeman, liable in damages to Harkins for such arrest and imprisonment under the same facts?

If the justice issuing the warrant had jurisdiction of the subject-matter and of the party, and the complaint stated facts sufficient to inform the accused of the nature of the charge against him, the proceedings will be sufficient to protect the officer in executing the warrant, although the complaint failed to allege facts essential to the crime, as, for instance, that it was wilfully committed, and although it showed on its face that the crime was committed at such an early date that it would be barred but for an exception in the statute of limitations, which the complaint failed to plead. *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084.

So an officer is not liable for false imprisonment in arresting a witness under an attachment valid on its face, issued by a justice originally having jurisdiction, although at the time the justice had lost jurisdiction by reason of an improper adjournment. *Holz v. Rediske*, 116 Wis. 353, 92 N. W. 1105.

And an arresting officer who signs a complaint cannot be held liable for false imprisonment upon the ground that the complaint failed to state the date of the commission of the alleged offense. *Roberts v. Brown*, 43 Tex. Civ. App. 206, 94 S. W. 338.

#### Without a warrant.

The cases dealing with that phase of the question which is concerned with whether the innocence of one arrested affects the right to arrest him without a warrant, under a statute authorizing such an arrest where the offenders shall be taken or apprehended in the act, etc., is discussed in the note to *Price v. Tehan*, 34 L.R.A. (N.S.) 1192.

An officer is not liable in an action for false imprisonment, for the arrest without a warrant of a person whom he is justified in believing has committed the crime. *Friesenhan v. Maines*, 137 Mich. 10, 100 N. W. 172.

And though a person was arrested and imprisoned without a warrant, and for an alleged crime of which the officer arresting had no personal knowledge, and of which the person arrested was in fact innocent, it is not false imprisonment if the officer acted upon information received from one on

whom he had reason to rely. *Van v. Pacific Coast Co.* 120 Fed. 699.

For a police officer may arrest without a warrant whenever he has reasonable ground to suspect that a felony has been committed, and it is wholly immaterial whether the suspicion arises out of information imparted to the officer from someone else, or whether it is founded upon his own knowledge. *Brish v. Carter*, 98 Md. 445, 57 Atl. 210.

And the fact that the paper which the officer believed to be a warrant was not such will not preclude him from defending an action for false imprisonment upon the ground that he had probable cause to believe that a felony had been committed. *Nelson v. Halvorson*, 117 Minn. 255, 135 N. W. 818.

A policeman specially assigned to look for suspicious characters in a neighborhood where crimes have been committed will not be held liable for the arrest of a person who, when accosted, refuses to answer the officer's questions. *Giaske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (OBTIE).

But an officer's possession of a warrant will not justify the arrest of the accused by the police department of another town under telephone directions to it by the officer holding the warrant. *McCullough v. Greenfield*, 133 Mich. 463, 62 L.R.A. 906, 95 N. W. 532, 1 Ann. Cas. 924.

So a postal card written by a sheriff to a police officer, requesting the latter to arrest a certain person, does not justify an arrest for an offense not committed in the officer's presence. *Gordon v. Hogan*, 114 Ga. 354, 40 S. E. 229.

And an officer who makes an arrest on the sole authority of a telegram from a private person does so at his peril. *Janex v. Wilson*, 119 La. 491, 44 So. 275.

Since an officer may arrest without a warrant only in cases of felony or breaches of the peace, an officer is liable for making an arrest without a warrant, for violation of an ordinance making it unlawful to peddle without a license. *Schnider v. Montross*, 158 Mich. 263, 122 N. W. 534.

So an officer is liable for arresting one without a warrant for the violation of a license ordinance, where he is not authorized to make the arrest without a warrant, and

The answer to the first question undoubtedly must be that a municipality, such as plaintiff in error, is not liable for the acts of its officers in attempting to enforce its police regulations, for such regulations are not made and enforced in the interest of the city, as such, but in the interest of the public generally; and this is true, even though the ordinance or regulation under which the act complained of is performed is void. 5 Dill. Mun. Corp. § 1656, and the many cases there cited.

The allegations of the petition are to the effect that the city, after the arrest of Harkins, through the acts of its mayor and chief of police, ratified the acts of Lantz- nester, its policeman, in making the arrest; and that therefore it is liable for such ar-

rest and imprisonment. Conceding, for the sake of argument, that the arrest by Lantz- nester was wrongful and illegal; that fact would not render the city liable in damages, for it is not within the power of a muni- cipality such as the city of Lawton, to rati- fy any such act, or to authorize the per- formance of same; and, as has been well said, if the city had no power to authorize Lantz- nester to commit such an act as is complained of in this case, it certainly would have no power to ratify the same after it had been performed. *Peters v. Lindsborg*, 40 Kan. 656, 20 Pac. 490; *Cal- well v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614. In 28 Cyc. 1299, it is said: "When, by the action of the state, a municipal corporation is charged with the

he fails to show that the offense was com- mitted in his presence. *Mitchell v. Gam- bill*, 140 Ala. 545, 37 So. 402.

And a police officer is liable for arresting without a warrant a man who he believes and has reason to believe has been guilty of indecent exposure of his person, and who refuses to state his name or business to the officer, since such arrest is justified only where felony or breach of the peace was committed in the presence of the officer. *Cook v. Hastings*, 150 Mich. 289, 14 L.R.A. (N.S.) 1123, 114 N. W. 71, 13 Ann. Cas. 194.

A police officer who, without a warrant, arrests an innocent person upon the sus- picion of a crime, and a private person who afterwards maliciously lays a false charge against him, are joint wrongdoers, either or both of whom the injured person may sue. *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608.

And an officer who unnecessarily arrests and locks up one member of a household in executing a writ of restitution directed against another is liable to him in an action for false imprisonment. *Rauma v. Lamont*, 82 Minn. 477, 85 N. W. 236.

An officer is liable irrespective of the question of probable cause, for the arrest of an innocent person for a supposed offense which is not shown to have been committed, where the statute authorizes an officer to make an arrest without a warrant for a criminal offense committed or attempted in his presence, or for a criminal offense which has in fact been committed and which he has reasonable ground to believe was com- mitted by the person arrested. *Wood v. Olson*, 117 Ill. App. 128.

#### Manner of making arrest — generally.

An officer is not liable for damages for having used handcuffs on a prisoner who was unknown to him, where he had a con- siderable distance to go after dark, and had another person under his charge, there being nothing to show wantonness or malice in his conduct. *McCullough v. Greenfield*, 133 42 L.R.A. (N.S.)

*Mich. 463*, 62 L.R.A. 906, 95 N. W. 532, 1 Ann. Cas. 924.

A person arrested does not waive his right to recover damages from the officer, by the fact that, when arraigned, he made no objection to the manner of his arrest, but pleaded guilty to the charge. *Ibid.*

#### —Voluntary submission.

One who, upon being erroneously sus- pected of being the person wanted for a crime, voluntarily submits to incarceration until he can prove his identity, cannot re- cover in an action for false imprisonment against the officer. *Vice v. Holley*, 88 Miss. 572, 41 So. 7.

So a person who, when accosted as a sus- pect, refuses to answer the officer's ques- tions and volunteers to accompany him to the police station, cannot hold the officer liable as for an arrest. *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43.

But where a person, upon being shown a warrant, accompanies the officer without protest and without the officer's hands being laid upon him, he is sufficiently restrained to support an action for false imprisonment. *Goodell v. Tower*, 77 Vt. 61, 107 Am. St. Rep. 745, 58 Atl. 790.

#### Arresting wrong person.

An officer who arrests without a warrant one who he erroneously believes is the per- son wanted for a felony is liable for false imprisonment, where such person makes no misstatement leading to his arrest, and the officer makes no effort to communicate with persons to whom the other refers him. *Vice v. Holley*, supra.

And it does not help the officer that a third person identified the suspect as the person who dealt with him in a transaction connected with the offense, where he does not identify him as the person whose name appears in the warrant, and where the of- ficer does not seek information from persons to whom the suspect refers him. *Miller v. Fano*, 134 Cal. 103, 66 Pac. 183.

The officer must use prudence and dili- gence to find out if the party arrested is



preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation *pro tanto* is charged with governmental functions in the public interest and for public purposes, and in the exercise of its powers and duties in respect of the enactment and enforcement of police regulations, it is entitled to the same immunity as the sovereign granting the power, unless such liability is expressly declared by the sovereign. The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is not liable therefore for the acts of its officers in attempting to enforce such regulations, and further because police officers can in no sense be regarded as serv-

ants or agents of the city. Their duties are of a public nature. Their appointment is devolved upon cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render the cities and towns liable for their assaults, trespasses, or negligent acts."

In the case at bar, it is conceded that Lantznester was a regularly appointed, qualified, and acting policeman under and by virtue of the provisions of the statutes of the state, and was not a special officer employed by the municipality in its corporate character, or in the performance of a corporate duty; and, this being true, the rule is well established that the municipality will not be liable for his assaults, tres-

the party described in the warrant, and if he brutally or carelessly arrests an innocent party, he is liable to him for damages. *Ibid.*

But an officer is not liable for a false imprisonment in arresting the person for whom the warrant was procured, although another person of the same name was the one wanted for the crime. *Douglass v. Stahl*, 71 Ark. 236, 72 S. W. 568.

So a warrant directing the arrest of J. I. Cox protects the officer in arresting James T. Cox, commonly known as J. T. Cox, he being the person for whom the warrant was intended. *Cox v. Durham*, 63 C. C. A. 338, 128 Fed. 870. The court said that since the law recognizes but one Christian name, and the middle name may therefore be treated as immaterial, the description contained in the warrant was sufficient to satisfy the mandate of the Constitution that a warrant shall particularly describe the party to be arrested. It was further held in this case that it was not necessary for the officer to show that the prisoner was "late of Boulder county, in the state of Colorado," as stated in the warrant, or that he had actually committed the offense for which the warrant was issued.

As to the liability of an officer for arresting the wrong person bearing the name appearing in the warrant, see *Blocker v. Clark*, 7 L.R.A.(N.S.) 268, and note there appended.

#### Subsequent detention — liability of arresting officer.

An officer who makes a valid arrest without any intent of detaining the person an unreasonable time, or to do him any other wrong, is not rendered a trespasser *ab initio* by reason of a subsequent illegal detention (*Friesenhan v. Maines*, 137 Mich. 10, 100 N. W. 172), and the discharge of a prisoner on habeas corpus, upon the ground that he had been detained for an unreasonable length of time, is a final adjudication that the detention was illegal, but it is not conclusive that the arrest was illegal. (*Ibid.*)

And, of course, an officer who, after unsuccessful

questioning a suspect, takes him to a police station at the latter's suggestion, cannot be held liable for false imprisonment because the sergeant after investigation committed him to jail. *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43.

But where an officer makes an arrest without a warrant, it is his duty to take the person arrested without any unnecessary delay before a magistrate or other proper judicial officer having jurisdiction, in order that he may be examined and held or dealt with as the case requires. *Newhall v. Egan*, 28 R. I. 584, 68 Atl. 471; *Schoette v. Drake*, 139 Wis. 18, 120 N. W. 393. And if, failing to do this, he discharges the prisoner of his own motion, he becomes a trespasser *ab initio*. *Stewart v. Feeley*, 118 Iowa, 524, 92 N. W. 670.

And it is held that taking a prisoner to another town where he is discharged by a state attorney, instead of performing the duty to use reasonable diligence to take the prisoner before the justice who issued the warrant, renders the officer a trespasser *ab initio*, and therefore liable in an action for false imprisonment. *Wright v. Templeton*, 80 Vt. 358, 130 Am. St. Rep. 990, 67 Atl. 817.

So an officer who, upon arresting one under meane process in a civil action, and without his consent, takes him to another county for safe keeping, the statute providing for his confinement in the county where arrested, is a trespasser *ab initio*, notwithstanding the writ follows the ancient general form. *Gibson v. Holmes*, 78 Vt. 110, 4 L.R.A.(N.S.) 451, 62 Atl. 11.

An officer who arrests persons for an offense which they have not committed will be held responsible for an unnecessary or unreasonable delay in giving them an opportunity to be heard or give bail. *Wood v. Olson*, 117 Ill. App. 128.

And though an arrest was properly made in the first instance without a warrant, an officer cannot justify his action in holding or detaining the prisoner for an unreasonable time before obtaining a warrant, upon the ground that such delay was necessary in order to investigate the case and procure

passes, or other acts of negligence. 28 Cyc. 1300, and cases cited there.

In *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218, the following rule is laid down: A distinction is drawn "between the liability of municipal corporations for acts of its officers in the exercise of powers which it possesses for public purposes, and which it holds as part of the government of the country, and those which are conferred upon it for private purposes. Within the sphere of the former, it enjoys the exemption of government from responsibility for its own acts and the acts of its officers deriving their authority from the sovereign power; . . . whereas in the latter it is answerable for the acts of those who are in law its agents."

In *Woodhull v. New York*, 150 N. Y. 450, 44 N. E. 1038, it is said that "if the corporation appoints or elects [the officers], and controls them in the discharge of their duties, if it can continue or remove them, or hold them responsible for the manner in which they discharge their duties, and if their duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be regarded as its agents or servants, and the maxim *respondet superior* applies. But if they are elected or appointed by the corporation in obedience to a statute to perform a public service not

local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, they are not to be regarded as the servants of the corporation, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondet superior* does not apply."

In *Blake v. Pontiac*, 49 Ill. App. 543, a case of illegal arrest and imprisonment, it is said: "Where the municipal body is simply exercising its police powers, any acts of its officers or agents, including the board of trustees or aldermen, in violation and against the terms and spirit of the statute when acting as a legislative body or as mere agents and officers executing the ordinance, are *ultra vires* and in excess of the power of the city; and for such acts of such officers, whereby damage occurs to any citizen, there is no remedy against the corporation."

It may be stated as a general rule, well established and abundantly supported by authorities, that a city is not liable for arrests such as the one complained of in the case at bar, made by police officers, and which are illegal for want of a warrant, or for unlawful acts of violence in the exercise of their official duties, in the absence of a statute expressly creating such liability. *Royce v. Salt Lake City*, 15 Utah, 401, 49

evidence against the accused. *Harness v. Steele*, 159 Ind. 286, 64 N. E. 875.

The failure of the officer to exercise reasonable diligence in taking a person arrested before a committing magistrate renders him liable to the person arrested, unless the delay is occasioned by the conduct of the latter. *Blocker v. Clark*, 126 Ga. 484, 7 L.R.A.(N.S.) 268, 54 S. E. 1022, 8 Ann. Cas. 31.

And assuming that it is competent for the person arrested to waive his right to object in an action for false imprisonment, that, having been arrested without a warrant, he was not taken before a magistrate in due time, no such waiver will be implied from the fact that, after being detained at the station, the prisoner was, by arrangement by his father, released into the latter's custody to appear when wanted, after which no proceedings were ever taken. *Newhall v. Egan*, 28 R. I. 584, 68 Atl. 471.

But a person arrested on a warrant valid upon its face, at whose request the officer omits his duty to take the prisoner as soon as possible before the court from which the warrant issued, cannot recover in an action of false imprisonment, upon the ground that the officer became a trespasser *ab initio*, in that, instead of taking him immediately before the court, he permitted his imprisonment to be used to enforce the payment of a debt owed by the prisoner. *Clark v. Tilton*, 74 N. H. 330, 68 Atl. 335. 42 L.R.A.(N.S.)

And if a person arrested voluntarily asks to be freed without arraignment, and his discharge follows, he impliedly waives any claim for damages which otherwise he might have had against the officer. *Horgan v. Boston Elev. R. Co.* 208 Mass. 287, 94 N. E. 386 (*obiter*).

A sheriff does not become a trespasser *ab initio* so as to render him liable for false imprisonment where, instead of immediately taking a person lawfully arrested before a magistrate, he causes physicians to examine into the prisoner's sanity, and pending the examination releases him upon his own request and promise to behave. *Mulberry v. Fuellhart*, 203 Pa. 573, 53 Atl. 504.

In *Calderone v. Kiernan*, 23 R. I. 578, 51 Atl. 215, in which the plaintiff complained that the defendant officer improperly refused to admit him to bail, the court apparently disposed of the question upon the ground that trespass for false imprisonment will not lie against an officer for doing what a writ valid and regular upon its face commands him to do, but that the action must be one in case for malicious motive and want of probable cause.

#### — liability of chief or jailer.

A police superintendent who detains one who has been arrested by an officer without

Pac. 290; Calwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; Odell v. Schroeder, 58 Ill. 353; Curran v. Boston, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 405, 24 N. E. 781; Peters v. Lindsborg, 40 Kan. 656, 20 Pac. 490; Culver v. Streator, 139 Ill. 238, 6 L.R.A. 270, 22 N. E. 810; Pollock v. Louisville, 13 Bush, 221, 26 Am. Rep. 260; Cook v. Macon, 54 Ga. 468; Harris v. Atlanta, 62 Ga. 290; Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1; Elliott v. Philadelphia, 75 Pa. 347, 15 Am. Rep. 591; Buttrick v. Lowell, 1 Allen, 172, 79 Am. Dec. 721; Worley v. Columbia, 88 Mo. 106; Kansas City v. Lemmen, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905.

The rule is also laid down in volume 20 Am. & Eng. Enc. Law, 2d ed. at page 1204, as follows: "Although appointed by municipal authorities or elected by the electors thereof, police officers and members of the force are generally regarded as public or state officers, for whose malfeasance, misfeasance, or nonfeasance in office the city is not responsible." See also, in support of this doctrine, the cases there cited in support of the above text.

In view of the foregoing, it is evident that the trial court erred in overruling the city's demurrer to plaintiff's evidence. The demurrer should have been sustained, and a

judgment in favor of the city for its costs should have been entered.

The other question raised by the record in this case presents greater difficulty. Policemen, as such, were unknown to the common law. They are creatures of statute, and consequently can exercise only such power and authority as has been granted by legislative enactment; and, further, they are in fact state officers rather than city officers, yet, the office being authorized and created by statute, the officer filling it is a conservator of the peace, and has the undoubted right to arrest violators of the laws and ordinances and police regulations, without warrant, in the classes of cases provided by statute; but he is not exempt from civil liability when he acts in a wrongful, oppressive, and illegal manner, and the general doctrines of the law touching personal liability for torts apply to policemen. 28 Cyc. 502.

Hence it seems that, while the city is exempt by law from liability for damages in this case, Lantzester, the policeman, is not, unless he kept within the law. That was the question submitted to the jury. The petition charges that the arrest was made without a warrant, and at a time when plaintiff had not violated any law of the state, or ordinance of the city, or police regulation; that he was not obstructing the streets of the city; that he was conducting

#### Probable cause.

Probable cause which will protect an officer in arresting for the killing of a child, the only persons in a house at the time, will be deemed to have existed where it appears that the arrest was made in reliance upon a statement of a reputable person professing to have seen the killing, that the shot came from the house, in contradiction of the statements of the inmates that the child accidentally shot himself, which are shown to have been false by their own statements after arrest, that the death was caused by the accidental discharge of a gun in the hands of one of them. Johnson v. Collins, 28 Ky. L. Rep. 375, 89 S. W. 253.

And an officer who has been instructed to keep a lookout for a stolen horse is justified in arresting a person driving a horse which substantially answers the description of that stolen, where the person's companion, upon being questioned, makes three contradictory statements as to its ownership, and is otherwise evasive and contradictory. Brish v. Carter, 98 Md. 445, 57 Atl. 210.

Probable cause for having made an arrest which will relieve the officer from liability for malicious prosecution is conclusively shown by the prisoner's conviction, although the conviction is subsequently reversed. Schneider v. Montross, 158 Mich. 263, 122 N. W. 534. L. A. W.

authority is liable in damages for the unlawful restraint, and it is no defense that he liberated him upon the intervention of friends who left a deposit for his reappearance, which the superintendent had no authority to accept. Price v. Tehan, 84 Conn. 164, 34 L.R.A. (N.S.) 1182, 79 Atl. 68, Ann. Cas. 1912 B, 1183.

And though a chief of police be not liable in the first instance for the unlawful arrest by a policeman, he may nevertheless be held liable for false imprisonment where he unlawfully or unjustly retains the prisoner in custody. Gold v. Campbell, 54 Tex. Civ. App. 269, 117 S. W. 463.

But though an officer illegally arrests a person, a jailer is not liable for confining him in obedience to an order of the police magistrate. Johnson v. Collins, 28 Ky. L. Rep. 375, 89 S. W. 253.

The mayor and chief of police of a city are liable in damages in case they arrest motormen of street cars to abate a nuisance caused by the operation of cars when the trolley wire is in such poor condition as to be liable to fall, when the object can be effected by merely cutting the wires or removing the controllers from the cars. Mumford v. Starmont, 139 Mich. 188, 69 L.R.A. 350, 102 N. W. 662.

Generally, as to the liability for assisting in an unlawful arrest or subsequent detention, see Cook v. Hastings, 14 L.R.A. (N.S.) 1123, and the note thereto appended. 42 L.R.A. (N.S.)

himself in a peaceable and inoffensive manner, engaged in the sale of his farm products, when the policeman, without just cause, and with profane and opprobrious language, insulted him and arrested him in a violent and forcible manner and placed him in the city jail, without filing any complaint or charge against him, and kept him in jail several hours, when he was released without a hearing; that the arrest was malicious, and done with intent to wrong, injure, and humiliate plaintiff, etc.

To the charges contained in this petition, Lantzner answered by a general denial; and much evidence was offered by the plaintiff in support of the allegations contained in the petition, as well as the answer thereto by Lantzner.

The learned trial judge, in his instructions, covered the issues involved on the theory that both defendants might be liable. As has been seen, the city was not liable under the facts of this case, yet Lantzner might be. The instructions thus given were therefore necessarily prejudicial to Lantzner, for that the jury, knowing that both were defendants, and by their joint verdict in the case, evidently did not intend that Lantzner should be held responsible for the full amount of the verdict; indeed, it is patent that the intent of the jury was that the plaintiff have a judgment for \$500, and that such judgment should be entered against both defendants. No attempt was made to say what proportion of said judgment each defendant should pay; nor, under the instructions given, would it have been proper for the jury to have determined that question. However, in simple justice to Lantzner, it is only fair to presume that the jury, in fixing the amount of recovery in this case, did so with the understanding that the city would be liable for at least half of the amount. Leastwise that issue and that phase of the case was not clearly presented to the jury by the instructions of the court; and since it has been determined that the city is not liable, it follows that Lantzner, in all fairness, should be given another trial, in order that the jury may consider his liability, if any, with the knowledge that the city was not liable, and that a joint judgment therefore could not be rendered in this case.

It therefore follows that the judgment of the District Court of Comanche County should be reversed, and the cause dismissed as to the city of Lawton, and as to the other defendant, John Lantzner, the judgment should be reversed and the cause re-  
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manded, with instructions to grant a new trial.

Per Curiam:

Adopted in whole.

## PENNSYLVANIA SUPREME COURT.

OWEN J. MULLEN

v.

CHESTER TRACTION COMPANY, Appt.

(235 Pa. 516, 84 Atl. 429.)

**Street railway — tickets good over connecting lines — liability of road issuing.**

A street car company which issues tickets good over a connecting road which it does not control is liable to a purchaser of a ticket for injury to him while a passenger on the other line, through the negligence of its employees, although the ticket was actually sold by a conductor of the company causing the injury as agent for the company issuing it, and the latter received no benefit from the sale.

(March 18, 1912.)

**APPEAL** by defendant from a judgment of the Court of Common Pleas for Dela-

**Note. — Responsibility assumed by one corporation in issuing tickets good upon line of another.**

This note is not intended to cover the question as to the liability of an initial carrier which issues a ticket good for transportation beyond its own line for the negligence of a connecting carrier.

The only reported case dealing with the exact question presented in *MULLEN v. CHESTER TRACTION Co.* appears to be *Barkman v. Pennsylvania R. Co.* 89 Fed. 453, which holds the carrier issuing a ticket good for transportation either on its own trains or those of another company operating trains on the same line, liable to the purchaser for injuries caused by the negligence of the other company in operating its train after he had been accepted as a passenger thereon. In an action against both carriers, the defendant issuing the ticket demurred upon the ground that it was improperly joined as a party to the action for tort, because the relation existing between itself and the plaintiff was merely contractual, and that, therefore, an action of tort would not lie against it. In overruling the demurrer, the court said that the railroad company selling the ticket cannot relieve itself from the responsibility of exercising reasonable care, for the safe conveyance of the passenger, by placing him in charge of another company; that it made no difference whether it carried passengers or permitted another to do so.

A. L. R.

ware County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Affirmed.

The facts are stated in the opinion.

Mr. J. B. Hannum for appellant.

Messrs. W. Roger Fronefield and Augustus Trask Ashton, for appellee:

The plaintiff was entitled to recover because the defendant entered into a contract with him, whereby the defendant agreed that he should be safely carried.

*Peters v. Rylands*, 20 Pa. 497, 59 Am. Dec. 746; *Weed v. Saratoga & S. R. Co.* 19 Wend. 534; *Barkman v. Pennsylvania R. Co.* 89 Fed. 453; *Prethrow v. West Jersey & S. R. Co.* 214 Pa. 113, 112 Am. St. Rep. 736, 63 Atl. 415; *Carter v. Peck*, 4 Sneed, 203, 67 Am. Dec. 604.

Mestrezat, J., delivered the opinion of the court:

The Southwestern Street Railway Company owns and operates a street railway running in a southerly direction from Philadelphia to Bow Creek, Delaware county. At this point the line connects with that of the Philadelphia & Chester Railway Company, which operates a street railway from that point to Third street, in the city of Chester. The Chester Traction Company, the defendant in this case, operates a system of street railways in the city of Chester and other parts of Delaware county. The lines of the three companies are physically connected, so that a car can be run from the starting point of the Southwestern, in Philadelphia, to the car barn of the defendant company, in the city of Chester.

All the stock of the three companies is owned or controlled by the Interstate Railways Company, a New Jersey corporation. They have the same general officers, but each company operates its own road. They have separate bank accounts, in which are kept the moneys belonging to each company. Each company has separate pay rolls and pays its own employees. The Philadelphia & Chester Railway Company, with its own money, pays the Southwestern Street Railway Company, which owns the cars operated by the former company, for the use of cars. It pays both the Southwestern Street Railway Company and the Chester Traction Company for the power furnished by them to it. It also pays the Chester Traction Company for all repairs and maintenance of the cars which are used on its road, and pays the wages of the motormen and conductors operating the Southwestern Company's cars.

Passenger tickets for transportation over the three roads were issued by the Chester

Traction Company in the following form: "Chester Traction Company. Good for One Five-Cent Fare. P. 207216. T. W. Grooket, Jr., Treasurer." They were issued in packages of six tickets, and sold for 25 cents. Each of the conductors on the several lines obtained a supply of tickets on beginning his day's work, giving his receipt for them, and at the end of the day he turned over all money received from the sale of the tickets and accounted for the unsold tickets. The money thus received by the Chester Traction Company was deposited in its account, and at the end of each month it paid to each of the other two companies the actual amount of money received for tickets used on their respective roads. The only profit which the Chester Traction Company derived from the tickets used on the other two roads consisted in the use of these moneys during the month, and in the fact that, so far as the tickets sold were never used by the purchasers, the proceeds were retained by the Chester Traction Company.

On September 22, 1908, the plaintiff purchased a package of six tickets for 25 cents from a conductor of the Philadelphia & Chester Railway Company. He used two of them on that day in going to his home in Philadelphia, one on the Philadelphia & Chester Railway and one on the Southwestern Street Railway. On the following day he boarded a car of the Southwestern Street Railway Company, in Philadelphia, to go to his work at Eddystone, Pennsylvania, which is on the Philadelphia & Chester Railway. By arrangement between that company and the Philadelphia & Chester Railway Company the car which he entered ran through to his destination at Eddystone. He gave the conductor of the Southwestern Street Railway Company two of the tickets. When the car in which he was riding got beyond the Southwestern road, and while it was on the road of the Philadelphia & Chester Railway Company, it collided with a car of the latter company, and the plaintiff was injured. He brought this action against the Chester Traction Company, which issued the ticket on which he was riding, to recover damages for the injuries he sustained by reason of "the carelessness and negligence on the part of the servants, agents, workmen, or employees, who had been employed by the defendant in the execution of their contract for transportation with the plaintiff, and who were in charge of the car upon which the plaintiff was riding as a passenger at the time of the aforesaid collision, resulting in the injuries above described." The trial resulted in a verdict and judgment for the plaintiff, and the defendant company has taken this appeal.

The appellant company contends that there was no contract between it and the plaintiff, because: (a) The ticket was not sold to the plaintiff by the defendant; (b) the defendant did not operate the Philadelphia & Chester Railway, on which the accident occurred, or the Southwestern Street Railway, and had no control over the operation of either; (c) that, while the defendant issued the tickets purchased and used by the plaintiff, it received no benefit from their sale and use.

The position of the appellee is that the defendant entered into a contract with him whereby it agreed to carry him safely to his destination; that it was bound to execute this contract, and the servants of the other two companies became, in the performance of the contract, the servants of the defendant; that the proceeds of lost and unused tickets, and the use of the money received from the sale of tickets for the time it was retained by the defendant, were a pecuniary benefit resulting from the sale of the tickets; that it is immaterial whether the defendant received any benefit from the sale of the tickets; and that there was nothing in the contract to notify him, and he did not know, that the three street car lines were separately operated, or were not operated by the defendant company.

The learned court below instructed the jury "that if the Chester Traction Company [the defendant] did know, when they delivered the tickets to this conductor, that he would use them for passage over either the Southwestern or the Philadelphia & Chester Railway, that they are responsible for any negligent act concerning the carrying of this passenger, just as though it had happened upon their own line." This is the subject of the second assignment, and raises the important and controlling question in the case. In finding for the plaintiff, the jury found that the defendant company had such knowledge, and therefore the company sold the tickets to be used not only on its own line, but on the line on which the plaintiff while a passenger was injured. The instruction complained of was not erroneous under the undisputed facts in the case. The ticket with which the plaintiff paid his fare was issued by the defendant company, purchased by the plaintiff, and, as disclosed on its face, was "good for one 5 cent fare." It was accepted by the conductor as a fare or compensation for carrying the plaintiff to his destination. Under the finding of the jury, the defendant issued the ticket to be used on the Philadelphia & Chester Railway, and thereby contracted with the plaintiff that it would carry him over that route.

It is clear, we think, that the defendant's  
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liability for the plaintiff's injuries is the same as though the ticket was being used and the plaintiff was being carried over a railway owned by the defendant company. The plaintiff contracted with the defendant to carry him over the railway on which he was traveling at the time he was injured, and, regardless of the real ownership of the railway, it must be considered, as between the plaintiff and the defendant company, the railway of the defendant. By the issuance and sale of the tickets, the defendant held itself out to the public that it had the means of transportation, and would, for the specified fare, carry passengers over this route. It is immaterial to the plaintiff as to what agreement the defendant had with the Philadelphia & Chester Railway Company to carry passengers. It is not alleged that the plaintiff knew of the existence of any such agreement, and hence its terms cannot relieve the defendant from the performance of its duty as a carrier under its contract with the plaintiff. In contracting for his transportation, the plaintiff knew the defendant, and no other company, and relied solely on the defendant to carry him as required by its ticket. When he entered the car, and the conductor accepted the ticket, the plaintiff became the passenger of the defendant company, and it was responsible for his safe transportation over the railway to the destination to which passengers were carried for the stipulated fare. He is not concerned with the ultimate responsibility for the negligence resulting in his injuries, and need not look beyond the party obligating itself to perform the duties of a carrier in transporting him to his destination.

There is no merit in the contention that the ticket was not sold to the plaintiff by the defendant. The tickets purchased by the plaintiff were issued by the defendant company and in its name, were given to the conductors of the other two lines to sell, and at the close of each day they turned over the proceeds of the sales and the unsold tickets to the defendant company. The conductors were therefore the agents of the defendant for selling the tickets, and the sales must be regarded as being made by the defendant. There is no evidence that the conductors acted for themselves or their companies in selling the tickets; on the contrary, the undisputed facts show that they acted as the agents of the defendant in making the sales.

We regard it as immaterial whether the defendant company received any benefit from the sales of the tickets. If no benefit accrued to it from the sales, it is a matter with which the interested parties alone are concerned, and with which the purchasers

of tickets have nothing to do. It could hardly be expected that the holder of a street railway ticket would, even at the risk of losing protection against the negligence of the carrier, investigate and determine whether the carrier, selling the ticket and agreeing to transport him, retained all or any part of the consideration for the service to be performed. No such duty is imposed on the passenger. Having paid full consideration to the company accepting his money and agreeing to carry him, the holder of the ticket is not affected by the ultimate destination of the passage money. It may be suggested, however, that it is not at all clear that the defendant company did not receive substantial benefits from the sales of the tickets. The conductors returned to the defendant each day the money received by them for the tickets, and it was retained by the defendant until the end of the month, during which time the company had the use of it. In addition to this, the defendant retained the proceeds of the sales of lost and unused tickets.

The ticket sold to the plaintiff by the defendant was for a continuous passage over the line on which it was used. It was not a coupon ticket, entitling the holder to ride over several separate and different railways; but each ticket was good for one fare over any one road on which the passenger desired to travel. The defendant company, in selling the ticket, was not acting as the agent of any other railway company, but for itself, and the road on which it was used was, *pro hac vice*, the road of the defendant company for the transportation of the holder of the ticket. If, as the jury found, the plaintiff was injured by the negligence of the carrier transporting him on a ticket issued by the defendant company, and without any fault on his part, he is entitled, under the facts of the case, to recover in this action.

The judgment is affirmed.

#### RHODE ISLAND SUPREME COURT.

FRANK H. STANLEY, Admr., etc., of  
Sarah E. Stanley, Deceased,  
v.

FIREMEN'S INSURANCE COMPANY.

(— R. I. —, 84 Atl. 601.)

Insurance — name of administrator —  
heirs' interest.

An insurance policy taken in the individual name of the administrator on property in his possession for payment of debts cannot by parol evidence be made to cover the interest of the estate and heirs at law.

(October 10, 1912.)

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**E**XCEPTIONS by plaintiff to the decision of the Superior Court for Providence and Bristol Counties, sustaining a demurrer to the declaration in an action brought to recover the amount due under a policy of fire insurance. Overruled.

The facts are stated in the opinion.

Messrs. Littlefield & Barrows for plaintiff.

Messrs. Mumford, Huddy, & Emerson, for defendant:

To permit parol evidence to be offered to show that the policy was intended to protect the interests of other persons not named or referred to in it would violate elementary rules of law.

Finney v. Bedford Commercial Ins. Co. 8 Met. 348, 41 Am. Dec. 515; Washburn-Crosby Co. v. Home Ins. Co. 199 Mass. 463, 85 N. E. 592; Graves v. Boston Marine Ins. Co. 2 Cranch, 419, 2 L. ed. 324; Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 23 L. ed. 868; Woodbury Sav. Bank & Bldg. Asso. v. Charter Oak F. & M. Ins. Co. 29 Conn. 374; Wise v. St. Louis Marine Ins. Co. 23 Mo. 80; Duncan v. Sun Mut. Ins. Co. 12 La. Ann. 486; Zimmerman v. Farmer's Ins. Co. 76 Iowa, 352, 41 N. W. 39; The Sydney, 27 Fed. 125; 1 Phillips, Ins. p. 160.

Vincent, J., delivered the opinion of the court:

This is an action of assumpsit, brought to recover the amount due under a policy of insurance issued by the defendant company to the plaintiff. The case is now before the court on exceptions to the decision of the superior court, sustaining the defendant's demurrer to the plaintiff's second amended declaration.

The plaintiff's declaration, as finally amended, contains, among others, the following allegations: That the plaintiff was duly appointed administrator upon the estate of his wife, Sarah E. Stanley; that he

*Note. — Interests covered by particular designation of insured on property belonging to a decedent's estate.*

Insurance in name of executor or administrator.

It is clear that an executor or administrator has an insurable interest in the real estate of his decedent sufficient to support a contract of insurance payable to him in his representative capacity, where the personal property is not sufficient to pay the debts of deceased, and it may be necessary to have recourse to the real estate for that purpose. Sheppard v. Peabody Ins. Co. 21 W. Va. 368; Herkimer v. Rice, 27 N. Y. 163.

It is not, however, clear whether an ex-

filed his petition in the probate court, setting forth that the personal estate of the decedent was insufficient to pay debts and expenses of administration, and praying that he, as administrator, might be authorized and empowered to take possession of her real estate, with power to lease, etc.; that he was so authorized and empowered, took possession of said real estate, and received the income thereof; that as such administrator he had an insurable interest in said property, and that Roger F. Ramsey, the father and heir at law of said Sarah E. Stanley, also had an insurable interest therein; that a policy was duly issued to, and the premium thereon paid by, the plaintiff; that the policy was issued to the plaintiff in his individual name, and that in

effecting such insurance he was acting in his capacity as administrator and as agent for Roger R. Ramsey, the heir at law of Sarah E. Stanley; and that the defendant, through its agent, Arthur O'Leary, who negotiated said insurance and wrote said policy, knew and agreed that said policy was intended to cover, and agreed that it should cover, the plaintiff's interest as administrator of said estate, and also the interest of the heir at law in said property.

The plaintiff's declaration is in two counts; the second count being the same as the first, except that it states separately the amount of the insurable interests of the plaintiff as administrator and the heir at law. To each of these counts the defend-

ecutor or administrator has an insurable interest in the real estate of his decedent when the personal property of the estate is sufficient to pay its debts. Thus, in *Clinton v. Hope Ins. Co.* 45 N. Y. 454, it being admitted in the action that the personal estate of the intestate was more than sufficient to pay his debts, the court said that the administratrix had therefore no interest in the real estate to support a contract of insurance. But it has been held that a policy of insurance on real estate, purporting to insure a designated person as executrix, is actionable without reformation, and parol evidence may be resorted to to show that it was intended thereby to insure the interests of such person and of her children as devisees of the property; and judgment may be rendered for any loss under such a policy in their favor. *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119. But the person to whom a policy is issued as the insured cannot maintain an action thereon as the administrator of an estate, on the theory that the policy was for the benefit of the estate; at least, without first having the policy reformed. *STANLEY v. FIREMEN'S INS. CO.*

An executor to whom real estate has been devised in his representative capacity for specific purposes has an insurable interest therein. *Phelps v. Gebhard F. Ins. Co.* 9 Bosw. 404. And although an insurance policy provides that if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance is a building on ground not owned by the insured in fee simple, it shall be void, the policy is valid even though the title of the insured is that of a life tenant and executrix, where, under the will of the deceased owner, the entire estate is devised to the executrix for certain purposes, since the executrix will be regarded as the sole and unconditional owner in fee simple, although the property in her hands or the proceeds of the insurance are impressed with a trust which a court of equity will compel her to execute. *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822.

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Insurance in name of estate of decedent.

In *Herkimer v. Rice*, 27 N. Y. 163, where the question was as to the right of the administrator and creditors of an insolvent estate on one side, and the heirs on the other, to proceeds of policies of insurance upon buildings. Denio, Ch. J., said in effect, in this case, that in common parlance and in legal language, when the estate of a deceased person is spoken of, the reference is to his effects in the hands of the executor or administrator. And this language was made the basis of a contention by counsel in *Clinton v. Hope Ins. Co.* 45 N. Y. 454, that the words "estate of Daniel Ross" have a definite legal signification, meaning his executor or administrator. But this contention, so far, at least, as it implies that such significance cannot be varied by evidence of the facts and circumstances, was repudiated by the court. And it was held in the *Clinton Case* that a policy of insurance upon a mill, purporting to insure the "estate of Daniel Ross," covered the interests of the heirs as well as those of the administratrix, it appearing that the estate was solvent, and that the administratrix, on applying for the insurance, informed the insurer's agent that it was desired for the benefit of the widow and heirs of the decedent, the language used to designate the insured having been inserted by such agent without instructions.

So, in *Weed v. Hamburg-Bremen F. Ins. Co.* 133 N. Y. 394, 31 N. E. 231, a policy on a mill, purporting to insure the "estate of O. Richards," was held to cover all the interest in the property left by the decedent, including the interests covered by a trust deed executed during his lifetime, under the terms of which any balance remaining after the discharge of the trusts named were to be returned to the decedent or his estate, it appearing that the insurer was informed of the existence of the trust. It was accordingly held that the existence of the trust did not avoid the policy under a provision thereof that the same should be void if the exact interest of the insured



ant demurred, assigning to each count the same grounds of demurrer, as follows:

"(1) That said count sets forth no cause of action in behalf of the plaintiff in his capacity as administrator of the estate of Sarah E. Stanley.

"(2) That said count is double, in that it alleges two causes of action; namely, a contract with the plaintiff in his capacity as administrator of the estate of Sarah E. Stanley, and a contract with the plaintiff as agent of the heir of Sarah E. Stanley.

"(3) Said contract sets forth a cause of action in favor of a certain person who is not a party to this action; namely, Jane A. Mills, administratrix on the estate of Roger R. Ramsey, who was heir at law and next of kin of Sarah E. Stanley.

"(4) That Jane A. Mills, administratrix on the estate of Roger R. Ramsey, who was heir at law and next of kin of Sarah E. Stanley, is not joined as a party plaintiff in this action, and is a necessary party thereto.

"(5) That said count is bad, in that it founds a right of action upon a parol variation of the written contract; to wit, upon an agreement between the defendant's agent on the one part and the plaintiff on the other part, outside of and in variation of the policy of insurance in said count mentioned.

"(6) That said count is bad, as being in effect an attempt to reform a written contract in an action at law."

The policy in question was issued to the plaintiff in his individual name, although he now alleges that it was, in fact, procur-

in property were not truly stated. The court distinguished *Weed v. London & L. F. Ins. Co.* 116 N. Y. 106, 22 N. E. 229 (holding that the trust avoided a policy upon the same property and describing the insured in the same way, under a provision as to sole and unconditional ownership), for the reason that the existence of the trust deed was not made known to the insurer in that case, and also because it was found by the referee that the intention was to insure the heirs of Richards, and in consequence of the trust deed they had no title.

In the *Weed Case*, the court said: "What is the precise significance of the word 'estate,' when used as it is here, has not been determined in any case, and the law has not assigned to it any definite meaning. It is an indeterminate word, the precise meaning of which is to be ascertained from the circumstances under which it is used. It may be used to represent the interest of administrators in personal estate, or the interest of widow and heirs in real estate, or the interest of all these in both personal and real estate; and the scope to be given to it will depend largely upon the persons who procured the policy, and the purpose for which it was procured. Here the plaintiff knew of the trust deed. He needed an insurance covering all the interests in the property. He could have had no purpose to insure any particular or limited interest. It was difficult, if not impossible, to specify what particular interest the administrator or the heirs or the trustee had, and hence the comprehensive word 'estate' was used to cover all the interests. The plaintiff procured this insurance through an insurance broker, and it does not appear that he had any negotiation in reference thereto with the defendant or its agent. He must therefore be presumed to have chosen the phrase inserted in the policy, and the defendant assented to it, and must be held to have assented to its use in the most comprehensive sense that will give validity to the policy. In the absence of proof it cannot be assumed that the defendant used the phrase in any restricted sense, and certainly not in a sense which  
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would render the policy void *ab initio*. The estate of one who dies intestate may mean all the property which he leaves for his widow, heirs, next of kin, and creditors,—the whole body of his property as he leaves it at his death."

#### Insurance in name of deceased owner.

Where an insurance company, with knowledge through its agent, of the death of the owner of the real estate insured, issues a policy naming the deceased owner as the insured, with a provision that the loss thereunder shall be payable to a designated mortgagee as her interest may appear, a condition in the policy requiring the owner of property to be correctly stated is waived, and a recovery of the loss thereunder may be had by the mortgagee or his assignee; and this is true although the assignee is the administratrix of the estate. *Burke v. Niagara F. Ins. Co.* 58 Hun, 605, 34 N. Y. S. R. 701, 12 N. Y. Supp. 254, affirmed in 128 N. Y. 668, 29 N. E. 148.

And an administrator is entitled to the proceeds of insurance policies on real estate issued to the deceased owner in his lifetime and renewal by the administrator. *Herkimer v. Rice*, 27 N. Y. 163.

And generally a policy is valid although made payable to the estate of a deceased person and her legal representative; since an insurance company will not be permitted to issue a policy so worded, take the premium thereon, and pretend to insure and protect from loss, and then, when the loss occurs, insist that it is not liable, because, instead of having named the heirs, executors, or administrators of the deceased person as the insured, the policy simply specifies the estate of such person as the insured. *Magoun v. Fireman's Fund Ins. Co.* 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5.

So, an administratrix of an estate has an insurable interest in the property of a decedent, and may make a contract of insurance in the name of the latter for the benefit of his estate or someone having an insurable interest in the property covered there-

ed for the benefit of himself as administrator and of Roger R. Ramsey the sole heir at law of Sarah E. Stanley. The plaintiff further alleges that the agent of the defendant who negotiated the contract of insurance and wrote the policy knew that said policy was intended to cover, and agreed that it should cover, the plaintiff's interest as administrator and also the interest of the heir at law.

The plaintiff contends that he is entitled to offer parol testimony in support of these allegations, and that, upon sufficient proof of the alleged agreement and understanding between himself and the defendant's agent, he would have the right to recover for the loss which he has sustained as administrator, and also for the loss sustained by the heir at law, notwithstanding the fact that the written instrument by its terms covers nothing more than the individual interest of the plaintiff. There can be no

doubt that if it had been indicated in the policy that the same was issued for the benefit of the plaintiff as administrator and of Roger R. Ramsey, or even if the policy had contained some language indicating or suggesting other and distinct interests, that parol testimony might properly be offered to show who the parties were, as well as the extent of their interests.

The general rule is that a policy made in the name of a particular person will not protect the interest of any other person, unless it contains some words which indicate that it is intended that the interest of some other person be covered. *Cooley, Briefs on Ins. p. 787*, and cases cited. In *Higginson v. Dall*, 13 Mass. 96, the court in its opinion said: "The policy itself is considered to be the contract between the parties; and whatever proposals are made or conversations had between the parties prior to the subscription, they are to be con-

by. If the insurance company had knowledge when the policy was issued that the person named therein as the insured was dead, and knew who were the real parties in interest, it is bound, since it cannot in good faith and with such knowledge make the contract and receive the premium, and then deny the validity of the contract. *Queen Ins. Co. v. Peters*, 10 Ga. App. 289, 73 S. E. 536.

#### Insurance in name of heirs, etc.

A trustee need not be specifically named. It is sufficient if the insured is designated as the heirs or representatives of the deceased; since there may be a valid policy in favor of the testamentary trustee of the real estate of a deceased person in whom the title to the insured premises was vested at the time of the insurance, he holding the title in trust for the heirs of the decedent, and hence being entitled to the benefit of the policy in trust for the beneficiaries under the will, although he is not specifically named. *Savage v. Howard Ins. Co.* 52 N. Y. 502, 11 Am. Rep. 741.

#### Parol evidence to show persons meant by ambiguous designation in policy.

Where the designation of the insured may be applicable to several persons, or if the description of the assured is insufficient or ambiguous, as where it is to the estate of a designated person, so that it cannot be understood without explanation, extrinsic evidence may be resorted to to ascertain the meaning of the contract, and when thus ascertained it will be held to apply to the interests intended to be covered thereby, and persons will be deemed to be comprehended within it who, at the time, were in the minds of the contracting parties. *Weed v. Hamburg-Bremen F. Ins. Co.* 133 N. Y. 394, 31 N. E. 231.

So, where a policy of insurance is issued to a person known to the company to be 42 L.R.A. (N.S.)

deceased, as the insured therein, parol evidence is admissible of the death of the person known as insured prior to the issuance of a policy, and the fact of the knowledge thereof through its agent, and the issuance of letters testamentary to one of the plaintiffs in the case. *Burke v. Niagara F. Ins. Co.* 58 Hun, 605, 34 N. Y. S. R. 701, 12 N. Y. Supp. 254, affirmed in 128 N. Y. 668, 29 N. E. 148.

Where an insurance policy is renewed after the death of the insured, and at the expiration of a policy issued in his lifetime, and a renewal certificate is issued reciting that the premium was paid by the estate of the decedent, and at the expiration of this policy it is again renewed and a receipt for the premium given to the executors, which policy is again renewed, the court will have reference to the parties intended to be insured by the grant of renewal certificates, and considering that the executor as such has no interest in the real estate owned by decedent at the time of his decease, except as the title may be vested in him to carry out some trust created in the will, the insurance company will be deemed to have intended to insure and to have insured such interest in the real estate in question as has vested in the executor by the will. *Phelps v. Gebhard F. Ins. Co.* 9 Bosw. 409.

And it has been held that where an insurance company issues a policy insuring real estate in the name of an executor or administrator, the policy bears evidence on its face that it was issued to a person as trustee for the benefit of others, and the sense in which the term was used being ambiguous, extrinsic evidence may be resorted to for the purpose of clearing the ambiguity, and it may be shown to have been used as equivalent to the phrase, "for the benefit of the parties entitled to the estate." *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

A. G. S.

considered as waived if not inserted in the policy or contained in a memorandum annexed to it." In *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. 664, 21 L. ed. 246, Mr. Justice Miller said: "Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved, . . . as in all other cases where contracts may be made either by parol or in writing. But it is also true that, when there is a written contract of insurance, it must have the same effect, as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have. . . . To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterwards, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law. . . . The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement." Many other authorities to the same effect might be cited, were it necessary to do so.

Numerous authorities recognize the admissibility of parol testimony in explanation of the written instrument, when its terms are incomplete or ambiguous; as, for instance, where the insurance is effected and the policy issued "for whom it may concern," or for the "owners" of a vessel or cargo, parol testimony may be offered to show who the parties in interest, or the owners are. But none of the cases cited upon the plaintiff's brief support his contention. None of them go to the extent of holding that a person who is not named in the policy, and whose existence is not even suggested therein, can, through the aid of parol testimony, make himself a party to the contract, and obtain the benefits of its provisions. Take, for example, the case of *Sheppard v. Peabody Ins. Co.* 21 W. Va. 368, upon which the plaintiff appears to place great reliance. This case, when carefully examined, turns out to be one in which a policy was issued to one John A. Sheppard, administrator on estate of Amos Sheppard; and the question presented to the court was whether or not, the estate being solvent, the administrator had an insurable interest therein.

We think that the introduction of parol testimony, in accordance with the plaintiff's contention, showing circumstances and verbal understandings and agreements, between the plaintiff and defendant's agent, prior to the execution and delivery of the policy, would in effect be founding a right of action on a parol variation of a written contract, and would be an attempt to reform a written contract in an action at law, which, under the great weight of authority, he cannot be permitted to do. If the plaintiff desires to reform his contract, he must do so through a court of equity, and not in an action at law.

The plaintiff's exceptions are overruled, and the case is remitted to the Superior Court for further proceedings not inconsistent with this opinion.

#### KENTUCKY COURT OF APPEALS.

CHESAPEAKE & OHIO RAILWAY COMPANY, Impleaded, etc., Appt.,

v.

BRYANT FRANCISCO.

SAME, Appt.,

v.

PLENNY CHILDERS.

SAME, Appt.,

v.

MARTIN BOWLING.

(149 Ky. 307, 148 S. W. 46.)

**Carrier — Liability for act of insane employee.**

1. A railroad company is liable to the extent of compensatory damages for injuries inflicted upon a passenger by an insane conductor in charge of the train on which the passenger is riding.

**Appeal — damages — insult to passenger — excess.**

2. An award of \$600 as damages to a passenger for insult and abuse by a conductor on a railroad train will not be interfered with on appeal, as excessive, although there is evidence tending to show that the conductor was insane when committing the

**Note. — Civil liability of insane persons for torts or negligence.**

For earlier cases on this question, see note in 26 L.R.A. 153.

As to liability of lunatic for torts of his committee, guardian, or employee, see note attached to *Gillet v. Shaw*, post, 87.

The general rule seems to be that a lunatic is liable to respond in compensatory damages for his torts in which wrongful or malicious intent is not an essential element, but that under no circumstances is he liable in punitive damages.

In *Avery v. Wilson*, 20 Fed. 856, it was

offense, if there is also evidence that he was merely under the influence of liquor at the time, while he was continued in his position for some time afterwards.

(June 21, 1912.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Pike County in favor of plaintiff in each case, in actions brought to recover damages for alleged assault and abuse by defendant's servant. Affirmed.

The facts are stated in the opinion.

Mr. J. M. York for appellant.

Mr. Roscoe Vanover, for appellees:

A passenger is entitled to kind and courteous treatment from the carrier.

3 Thomp. Neg. § 3101; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; Sherley v. Billings, 8 Bush, 147, 8 Am. Rep. 451; Louisville & N. R. Co. v. Finn, 16 Ky. L. Rep. 57; Strull v. Louisville & N. R. Co. 25 Ky. L. Rep. 678, 76 S. W. 181.

The insanity of a conductor does not excuse the railroad company.

Young v. Young, 141 Ky. 76, 132 S. W. 155; Williams v. Hays, 143 N. Y. 442, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449.

Punitive damages may be awarded.

Louisville, H. & St. L. R. Co. v. Joplin, 21 Ky. L. Rep. 1380, 55 S. W. 206; Illinois

said that in no case can vindictive damages be assessed against a person *non compos mentis*.

Wrongful killing; assault.

Thus in Young v. Young, 141 Ky. 76, 132 S. W. 135, in affirming a judgment against a lunatic in an action for damages for wrongful killing, it was said that it is settled by the great weight of authority that an insane person is just as responsible to the extent of compensation for his torts as a sane person, with the possible exception of those torts in which malice and therefore intention, actual or implied, is a necessary ingredient, like libel, slander, and malicious prosecution.

And in Ballinger v. Rader, 153 N. C. 488, 69 S. E. 497, it was said that the estate of an insane person who committed a homicide would be liable in damages to persons injured by such act.

And in Feld v. Borodofski, 87 Miss. 727, 40 So. 816, in affirming a judgment against a lunatic for damages for assault and battery, the court said an assault and battery is within the general rule of liability where intent is immaterial, and not within the exception in relation to torts as to which intent is material; and it was further said that though the declaration charged that the act was wrongfully done, it did not bind appellee to show intent or malice.  
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C. R. Co. v. Stewart, 23 Ky. L. Rep. 637, 63 S. W. 596; Lexington R. Co. v. Cozine, 111 Ky. 799, 98 Am. St. Rep. 430, 64 S. W. 848; Cincinnati, N. O. & T. P. R. Co. v. Strosnider, — Ky. —, 121 S. W. 971.

Messrs. Childers & Childers also for appellees.

Clay, C., delivered the opinion of the court:

These three appeals, involving the same questions, will be considered together. Plaintiff Bryant Francisco alleges that on September 15, 1909, while he was a passenger on defendant's train from Hellier to Pikeville, defendant's conductor, Jack O. Johnson, assaulted, cursed, and abused him. Plaintiff Plenny Childers alleges that while a passenger on defendant's train in the month of August, 1909, defendant's conductor, Jack O. Johnson, cursed and abused him. Plaintiff Martin Bowling alleges that while a passenger on defendant's train in the month of August, 1909, defendant's conductor, Jack O. Johnson, assaulted, cursed, and abused him. The actions were brought against the railway company and Jack O. Johnson. In each case damages in the sum of \$2,000 were asked. In each case the railway company and Johnson filed a joint answer, denying the allegations of the petition. The answers were verified by Johnson on January 3, 1910. During the month of September, 1911, the railway company filed a

So, in Moore v. Horne, 153 N. C. 413, 138 Am. St. Rep. 675, 69 S. E. 409, 21 Ann. Cas. 1350, it was held that as a lunatic is liable in a civil action for torts he may commit, it was error in an action for damages for assault by a lunatic to admit evidence on the part of the plaintiff that defendant was sane when he committed the act, since punitive damages were not demanded.

Destruction of property.

In Re Heller, 3 Paige, 199, where an idiot under the care of a committee of the court pulled down a schoolhouse standing on land owned in common by himself and the trustees of the school district, the trustees were compensated by a partition of the land.

And in Mutual F. Ins. Co. v. Showalter, 3 Pa. Super. Ct. 452, an action by an insurance company against a lunatic's estate to recover under the subrogation clause of a policy for amount paid to his sister on account of her loss on a building owned by his sister and himself jointly and which he set on fire, it was held that insanity was no defense.

In Stanley v. Hayes, 8 Ont. L. Rep. 81, a lunatic who had set fire to a barn was held liable for the damage done, as evidence showed that, while not responsible to the extent of an ordinary man, yet he was not utterly unconscious that he was doing

separate amended answer in each case, wherein it pleaded that, at the time complained of in the petition, the conductor, Jack O. Johnson, was partially insane, and his mind was so far demented that he did not know right from wrong, or what he was doing, and within a short time thereafter Johnson was convicted of lunacy and sent to the asylum for the eastern district of Kentucky, at Lexington; and at the time of the filing of the answer he was hopelessly insane. The allegations of the amended answer were controverted of record. A trial before a jury resulted in each case in a verdict of \$600 against the railway company. The railway company appeals.

The evidence in each case sustains the allegations of the petition. Indeed, it was practically admitted that the conductor on the occasions in question did, in the presence of other passengers, curse and abuse plaintiffs and treat them in an outrageous manner. The only defense made by the railway company was that Johnson was insane. The company's physician testified that in his opinion Johnson was unbalanced at the time he abused plaintiffs. He observed Johnson, and was confident of this fact, not only from what he saw, but from the further fact that Johnson subsequently became hopelessly insane. Although aware of the fact that Johnson was unbalanced, he did not communicate this fact to the officers of the road. For plaintiffs, there was some proof to the

effect that Johnson's manner towards passengers was all right except when he was drinking, and that on the occasions referred to he was drinking.

The court, in each case, instructed the jury as follows:

"(1) The court instructs the jury that it was the defendant company's duty to give plaintiff courteous treatment while he was a passenger on its train, and if the jury believe from the evidence that Jack O. Johnson, conductor in said train, cursed plaintiff in anger, or used insulting or abusive language in anger to plaintiff, in the presence and hearing of other passenger or passengers, and thereby humiliated plaintiff or caused plaintiff to suffer mental anguish, they will find for the plaintiff such sum in damages as they may believe from the evidence will reasonably compensate plaintiff for such humiliation or mental anguish, if any he suffered, so that the sum so found does not exceed \$2,000, and if the jury do not so believe and find they will find for the defendant.

"(2) The court instructs the jury if they believe from the evidence that said Jack O. Johnson, conductor on said train, cursed plaintiff in anger, or used abusive or insulting language in anger to the plaintiff, in the presence and hearing of other passengers, and that same was done wantonly and wilfully, or done with reckless indifference to the rights of the plaintiff as a passenger on

wrong. The inference might be gathered from this decision that one who is totally deranged might not be held liable for his torts. This case cites *Donaghy v. Brennan*, 19 New Zealand L. R. 289, as holding that insanity is not a defense in an action claiming damages for an assault.

#### Trespass, trover, infringement.

And in *Re Wolf*, 9 Kulp, 523, it was said that as lunatics are liable for their torts, an action of trespass does not abate because of the lunacy of the defendant.

In *White v. Farley*, 81 Ala. 563, 8 So. 215, it was said that insanity would not be a defense to an action of trover.

In *Avery v. Wilson*, supra, a case of patent infringement, it was held that plaintiffs were entitled to a perpetual injunction, and to an account to ascertain the profits derived by defendant from his infringement, though the defendant, who admitted the infringement, set up as a defense his lunacy at the time of the tortious acts complained of.

#### Negligence.

But where the insanity of the charterer of a vessel was due to physical and mental exhaustion resulting from his being on duty almost continuously for three days and nights in efforts to save the vessel during

a storm, it was said that such a case warranted a qualification of the rule as to the responsibility of insane persons, and so he was held not liable for loss of vessel because of lack of care or skill in her navigation after he became irresponsible. *Williams v. Hays*, 157 N. Y. 541, 43 L.R.A. 253, 68 Am. St. Rep. 797, 52 N. E. 589.

#### Libel.

An exception to the general rule as to the liability of a lunatic for torts seems to be made in an action for libel and slander. Thus in *Irvine v. Gibson*, 117 Ky. 306, 111 Am. St. Rep. 251, 77 S. W. 1106, 4 Ann. Cas. 589, it was held that total derangement at the time defamatory words were uttered, or an insane delusion on the subject to which the words related, is a good defense to an action therefor, citing cases covering that point included in note in 28 L.R.A. 153. The court said that though their view of the law was that insanity would be a complete defense to an action for slander and libel, yet in order to defeat a case like the one at bar, where defendant accused plaintiff of being the mother of an illegitimate child by her (defendant's) husband, the evidence of total derangement or of the delusions must be satisfactory, thus intimating that otherwise such defense would fail.

J. H. B.

said train, then the jury is not confined to compensatory damages as in instruction No. 1, but in their discretion may or may not give plaintiff exemplary or punitive damages, as a punishment for said wrongful act, so that the whole sum so found does not exceed \$2,000.

"(3) The law presumes every man sane until the contrary is shown by the evidence, and if the jury should believe from the evidence that the conductor, Jack O. Johnson, was at the time of the injury complained of without sufficient reason to know what he was doing, or that as a result of mental unsoundness he had not then sufficient will power to govern his actions or conduct by reason of some insane impulse which he could not control, then and in that event the jury, although they should find for the plaintiff, could not find for the plaintiff punitive or exemplary damages as defined in the second instruction.

"(4) The jury will also consider the evidence as to the condition of the said Johnson's mind in mitigation of actual or compensatory damages, if they should believe plaintiff entitled to actual or compensatory damage as defined in the first instruction."

The railway company, after its objections to the foregoing instructions were overruled, moved the court to give the following instruction: "If the jury believe from the evidence at the time of the utterance of the abusive words set out in the petition to the plaintiff by Jack O. Johnson, conductor of defendant's train was so far demented or of unsound mind, as not to know the extent of his acts, and the defendant company could not, by the exercise of reasonable diligence, have discovered his mental condition before the alleged abusive language, then the jury will find for the defendant company."

It is first insisted that the court erred not only in the instructions given, but in refusing to give the instruction offered by the railway company.

While certain eminent law writers have criticized the doctrine, it may be stated that, by the great weight of authority, the law is well settled that an insane person, to the extent of compensation, is just as responsible for his torts as a sane person; and this rule applies to all torts, except, perhaps, those in which malice, and therefore intention, actual or imputed, is a necessary ingredient, like libel, slander, and malicious prosecution. Some of the courts have based the doctrine upon the principle that, where one of two innocent persons must bear a loss, he must bear it whose act caused it. The additional reason has been given that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain

him, and that tortfeasors may not simulate or pretend insanity to defend their wrongful acts, causing damage to others. *Young v. Young*, 141 Ky. 76, 132 S. W. 155; *Cooley, Torts*, p. 99; *Irvine v. Gibson*, 117 Ky. 306, 111 Am. St. Rep. 251, 77 S. W. 1106, 4 Ann. Cas. 569; *Buswell, Insanity*, § 355; 22 Cyc. 1211; *Williams v. Hays*, 143 N. Y. 442, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449; *McIntyre v. Sholtz*, 24 Ill. App. 605; *Bacon, Abr.* p. 7; 1 Hale, P. C. 15; *Weaver v. Ward, Hobart*, 134.

If an insane person is liable in compensatory damages for an injury inflicted by him, we perceive no good reason why the master should not be held liable for the tort of an insane servant while acting within the scope of his employment, and engaged in attending to the master's business. Though the person injured and the master may both be innocent, yet it is the master's servant who causes the injury, and therefore the master should bear the loss.

Besides, in case of passengers injured by the negligence or tort of one of its employees, a railroad company may not escape liability because it used ordinary care in hiring competent employees. It matters not what degree of care the railroad company may have exercised in this respect; it is still liable for the negligent or tortious act of such employee while acting within the scope of his employment. Ignorance of an employee's incompetency does not excuse it. When acting through a conductor as its agent, it is liable for an injury inflicted by him upon a passenger, whether such injury be the result of negligence, wilfulness, or unsoundness of mind, and without regard to its inability to discover, by the exercise of reasonable diligence, that his conduct and habits, or his mental capacity, were such as to induce a reasonable belief that such acts would follow. We therefore conclude that the railway company is liable in these actions to the extent of compensatory damages, regardless of whether the conductor was sane or insane at the time of the injuries complained of. It follows, therefore, that the trial court did not err in refusing the instruction offered by the railway company.

While the fact that the conductor acted as he did, coupled with his subsequent confinement in a lunatic asylum, is a strong circumstance tending to show that he was insane at the time complained of, yet the company's physician, when testifying to the conductor's incompetency, went no further than to say that he was unbalanced at that time. The fact remains that after that time he continued for several months to act as conductor on one of defendant's trains, and as late as January 3d he veri-

ned the answers filed in this case. There is also proof to the effect that he was polite and courteous when sober, but was abusive and insulting when drinking; and at the time complained of he had been drinking. Then, too, notwithstanding the fact that the company's physician states that the conductor was unbalanced, he admits that he did not call the attention of the officers of the road to this fact. Under these circumstances, we cannot say as a matter of law that the conductor was insane. As plaintiffs were entitled to recover for their mortification and humiliation of feeling, which was necessarily great when, without provocation, they were cursed and insulted in the presence of other passengers, and, in addition to compensatory damages, were entitled to recover punitive damages, provided the conductor was not insane, and being unable to say as a matter of law that the conductor was insane, we cannot say that a verdict of \$600 in each case was excessive.

We deem it unnecessary to discuss whether or not instruction No. 4 is a proper presentation of the law, for, even if correct, the error is in favor of defendant, and may not be complained of.

The judgment in each case is affirmed.

#### MARYLAND COURT OF APPEALS.

JESSIE B. GILLET, Appt.,  
v.

FRANCIS SHAW, JR.

(— Md. —, 83 Atl. 394.)

#### Master and servant — lunatic — liability for act of chauffeur.

An adjudged lunatic for whose benefit his committee has purchased an automobile is not liable, either personally or in estate, for injury inflicted upon a stranger by the

#### Note. — Liability of a lunatic for torts of committee, guardian, or employee.

GILLET v. SHAW is apparently a case of first impression as to the liability of a lunatic for a tort committed by the employee of his committee, and the decision seems to be in accord with principle and justice.

But two cases have been found which have considered the liability of a lunatic for the torts of his committee, and they are not in accord.

In Ward v. Rogers, 51 Misc. 299, 100 N. Y. Supp. 1058, it was held that as he had been deprived of the control and management of his estate, a lunatic was not liable for the negligence of his committee in leaving unguarded a hole in the floor of his building.

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negligence of the chauffeur in the operation of the machine out of the presence and without the authority of the lunatic.

(February 28, 1912.)

**A** PPEAL by plaintiff from a judgment of Circuit Court for Howard County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

Messrs. W. W. Parker, John R. M. Staum, and Martin F. Burke, for appellant:

The estate of the defendant, even though he be a lunatic, is liable for injuries caused by the use of that estate.

Tomlinson v. Devore, 1 Gill, 345; Cross v. Kent, 32 Md. 581; Stigers v. Brent, 50 Md. 220, 33 Am. Rep. 317; Coombs v. Janvier, 31 N. J. L. 243; Re Colvin, 4 Md. Ch. 126; Cooley, Torts, 2d ed. 122; McIntyre v. Sholty, 121 Ill. 660, 2 Am. St. Rep. 140, 13 N. E. 239, affirming 24 Ill. App. 605; Re Reed, 18 Misc. 285, 41 N. Y. Supp. 156; Warden v. Eichbaum, 3 Grant, Cas. 43; Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423; McCable v. O'Connor, 4 App. Div. 354, 38 N. Y. Supp. 572; Krome v. Schoonmaker, 3 Barb. 647; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24; Williams v. Hays, 143 N. Y. 442, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449; Haycroft v. Cressy, 2 East, 104, 6 Revised Rep. 380, 16 Am. & Eng. Enc. Law, 2d ed. 622; 2d Cyc. 1212; 16 Am. & Eng. Enc. Law, 409, note 2; Moore v. Horne, 153 N. E. 413, 138 Am. St. Rep. 675, 69 S. E. 409, 21 Ann. Cas. 1350.

Messrs. Robert Biggs, Joseph L. Donovan, and Edward M. Hammond, for appellee:

A lunatic is not liable for the torts of an

But in Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423, a lunatic was held liable for personal injuries occasioned by a defective doorstep in a house owned by him, but in the control of his guardian. The ground of the decision was that the guardian was his representative in the management of the property, and as he received the benefit of the income he should not be exempt from ordinary liability of ownership. The doctrine of this case was said, in Rooney v. People's Trust Co. 61 Misc. 159, 114 N. Y. Supp. 612, to be somewhat doubtful. The latter case, however, involved merely the individual liability of the committee.

As to civil liability of insane person for his own torts, see note to Chesapeake & O. R. Co. v. Francisco, ante, 83. J. H. B.

employee of his guardian, committed out of the presence and without the authority of the lunatic.

*Pearl v. M'Dowell*, 3 J. J. Marsh. 658, 20 Am. Dec. 199; *Chew v. Bank of Baltimore*, 14 Md. 299; *Fitzgerald v. Reed*, 9 Smedes & M. 94; *Hines v. Potts*, 56 Miss. 346; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Lazell v. Pinnick*, 1 Tyler, 247, 4 Am. Dec. 722; *Key v. Davis*, 1 Md. 32; *Doe ex dem. Thomas v. Roberts*, 10 Mees. & W. 778; *Jennings v. Rundall*, 8 T. R. 335, 4 Revised Rep. 680; *Greenwood v. Greenwood*, 28 Md. 386; *Deford v. State*, 30 Md. 200; *Baltimore & O. R. Co. v. Fitzpatrick*, 36 Md. 624; *Wainwright v. Wilkinson*, 62 Md. 146; 1 Clark & S. Agency, § 18, p. 37; *Mechem, Agency*, § 47, p. 35; 22 Cyc. 620; 16 Am. & Eng. Enc. Law, 2d ed. 308; *Story, Agency*, 9th ed. § 6, p. 5; *Jaggard, Torts*, § 54, p. 160; *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94; *Simpson v. Prudential Ins. Co.* 184 Mass. 348, 63 L.R.A. 741, 100 Am. St. Rep. 500, 68 N. E. 673; *Ward v. Rogers*, 51 Misc. 299, 100 N. Y. Supp. 1058; *Rooney v. People's Trust Co.* 61 Misc. 159, 114 N. Y. Supp. 612; *Reams v. Taylor*, 31 Utah, 288, 8 L.R.A. (N.S.) 436, 120 Am. St. Rep. 930, 87 Pac. 1089, 11 Ann. Cas. 51; *Robbins v. Mount*, 33 How. Pr. 24; *Armitage v. Widoe*, 36 Mich. 124.

**Briscoe, J.**, delivered the opinion of the court:

This case presents an interesting legal question and one of more than ordinary importance. The precise question is now for the first time before this court, and it is conceded that the cases on the subject in other jurisdictions are exceedingly few. The material facts upon which it is raised are practically undisputed, and the legal question is this: Is a lunatic liable for the torts of an employee of his guardian or committee, committed out of his presence and without the authority of the lunatic? The defendant in the case was adjudicated a lunatic on the 6th day of August, 1908, in the probate court of Middlesex county, Massachusetts, and Francis Shaw, Sr., his father, was duly appointed his guardian or committee, and charged with the care and custody of his person, his real and personal property. He was brought to Maryland in November, 1909, and placed in charge of Dr. Henry J. Berkeley, of Baltimore City, a specialist upon nervous diseases and mental troubles. Dr. Berkeley located the patient on the Morrison place, known as "Grovmont," near Ilchester, Howard county, Maryland, and under the supervision of a trained nurse and three male attendants. Prior to coming to Maryland, he had been

confined in an institution near the city of Boston, and, although improved by the treatment there, at no time in the years 1910 or 1911 was he capable of regulating his own movements or his property, but had to have nurses and attendants to look after him.

On the 31st of May, 1910, the plaintiff brought this suit in the circuit court for Howard county against the defendant, the lunatic, to recover damages for personal injuries received by her on the 27th of May, 1910, while driving a horse and buggy upon a public highway near Ilchester, in that county, by reason of the negligence of an alleged servant or employee (in this case a chauffeur) of the defendant, in operating and running an automobile upon the same highway, in a direction opposite to that in which the plaintiff was driving. At the trial of the case in the court below, upon the conclusion of the evidence upon the part of both plaintiff and defendant, the court rejected the plaintiff's prayers and granted a prayer upon the part of the defendant that, upon the pleadings and evidence, there was no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant. From a judgment upon the verdict so entered, the plaintiff has appealed.

Ordinarily, in negligence cases, like the one now before us, there are two prominent questions presented for the consideration of the court, and they are: First, whether the negligence is such as to permit or entitle the plaintiff to recover at all; and, secondly, whether the negligence was such as to render the defendant legally liable, to respond in damages, in a judgment against him. In the case at bar, it will only be necessary for us to consider the second proposition, namely, the legal liability of the defendant, because we are of opinion, upon the special facts of this case, even assuming the negligence of the chauffeur in charge of the automobile at the time of the accident, it was not the negligence of the defendant, and, this being so, he cannot be held personally liable, nor can his estate or property be made liable therefor.

The undisputed facts of the case, upon which this decision must rest, are these: The defendant is an adjudicated lunatic, and was so at the time of the accident; that he was unable to manage his property, regulate his own movements, or direct those of others. He was located on the Morrison place, in Howard county, in charge of Dr. Berkeley, and a home was established there for his benefit. The automobile was purchased by Dr. Berkeley, and paid for by the guardian of the lunatic, and was maintained for his



-Profit, as a part of the medical treatment recommended. The chauffeur in charge of the automobile at the time of the accident was employed by the guardian, and not by the lunatic; and he testified that, on the morning when he was running the automobile from Grovemont to Ellicott City, he was going about the business of the establishment and was engaged in the business of the place. Dr. Berkeley testified that the automobile was purchased, the chauffeur was employed under the instructions and by the directions of Francis Shaw, Sr., the guardian, and that he (the guardian) paid all the bills contracted by him that were necessary to maintain the establishment for the benefit of the lunatic. It further appears that neither the chauffeur nor the automobile was at the time of the accident under the direction, control, authority, or in view of the lunatic, and that the alleged negligent act was not committed by the lunatic himself, or under his immediate view, or by his direction, or by his express authority.

The contention of the plaintiff in answer to the defense of insanity, set up on behalf of the defendant, as stated in his brief, is not that the defendant *per se* is liable for the injuries inflicted and damages incurred by the use of the automobile, but that his estate is responsible for whatever loss and damage the use of his estate has brought upon innocent third persons." In other words, it is urged that the estate of the defendant, even though he be a lunatic, is liable for the injuries caused by the use of the property by the committee and the chauffeur.

According to the established law in this state, the acts of lunatics and infants are treated as analogous, and the contract of a person adjudged to be insane cannot be enforced against him. *Chew v. Bank of Baltimore*, 14 Md. 299; *Flach v. Gottschalk Co.* 88 Md. 369, 42 L.R.A. 745, 71 Am. St. Rep. 418, 41 Atl. 908; *Key v. Davis*, 1 Md. 32. In *Cross v. Kent*, 32 Md. 381, in an action of trespass, for damages against an insane person who had not been adjudged a lunatic and had no guardian, for setting fire to and burning a barn, it was held that a lunatic or an insane person, though not punishable criminally, is liable to a civil action for any tort he may commit. Judge Miller, in delivering the opinion of the court in that case, said the distinction between the liability of a lunatic or insane person in civil actions for torts committed by him and in criminal prosecutions is well defined; and it has always been held, and upon sound reason, that though not punishable criminally, he is liable to a civil action for any tort he may commit. 42 L.R.A. (N.S.)

1 Chitty, Pl. 76; 3 Bacon, Abr. 536; *William v. Hays*, 143 N. Y. 442, 26 L.R.A. 154, 42 Am. St. Rep. 743, 38 N. E. 449, and cases there cited. The general doctrine is stated in *Shearman & Redfield on Negligence*, § 57, to be that infants and persons of unsound mind are liable for injuries caused by their tortious negligence, and so far as their responsibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary because otherwise there would be no redress for injuries committed by such persons. While the law as thus stated may be true as to torts committed by the lunatic himself, it can have no application to a case like this, where the tort was not committed by the lunatic himself, or by his direction; and it is difficult to see upon what principle of law or sound legal reason that either the lunatic or his property can be made liable for the negligence or wrongs of an employee or servant of his guardian.

It is well settled that an adjudged lunatic has no capacity to contract, and cannot appoint an agent, so long as his lunacy continues. *Chew v. Bank of Baltimore*, 14 Md. 299; *Greenwood v. Greenwood*, 28 Md. 386; *Flach v. Gottschalk Co.* 88 Md. 369, 42 L.R.A. 745, 71 Am. St. Rep. 418, 41 Atl. 908; *Story, Agency*, § 6, p. 5; 31 Cyc. 1206; *Mechem, Agency*, § 47. In 22 Cyc. 620, the law is thus stated as supported by authority: It has been laid down that, in order to hold an infant liable for a tort, the tortious act must be committed by the infant himself, or under his immediate view, or by his discretion or authority. For as he cannot create an agency or appoint a servant, and therefore cannot delegate powers to another, he cannot guarantee or insure the fidelity, care, or skill of such other. *Story, Agency*, § 6; 16 Am. & Eng. Enc. Law, 308. In 31 Cyc. 1206, it is said: "One who is *non compos mentis* is naturally incapable of appointing an agent; being unable to comprehend business, he is equally wanting in discretion to select an agent to do such business. Accordingly, a lunatic is no more capable of constituting an agent than of binding himself by contract." The doctrine asserted by these authorities is fully supported by a number of cases. *Pearl v. M'Dowell*, 3 J. J. Marsh. 658, 20 Am. Dec. 199; *Burns v. Smith*, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94; *Simpson v. Prudential Ins. Co.* 184 Mass. 348, 63 L.R.A. 741, 100 Am. St. Rep. 560, 68 N. E. 673. In *Rooney v. People's Trust Co.* 61 Misc. 159, 114 N. Y. Supp. 612, it was held that the estate of a lunatic could not be held liable for the torts of one who is not his agent, in the legal sense. And to the

same effect are the cases of *Ward v. Rogers*, 51 Misc. 299, 100 N. Y. Supp. 1058; *Reams v. Taylor*, 31 Utah, 288, 8 L.R.A.(N.S.) 436, 120 Am. St. Rep. 930, 87 Pac. 1089, 11 Ann. Cas. 51; *Robbins v. Mount*, 33 How. Pr. 24. The cases relied upon by the appellant are unlike this, and are mostly cases where the negligent act was committed by the lunatic himself, or where the cause of action arose before the lunacy of the defendant, and before the appointment of the guardian or committee, and are not controlling here.

In this case the tort was not committed by the lunatic, or under his immediate view, or by his direction or authority. The chauffeur of the automobile was the servant and employee of the guardian, and not the agent of the lunatic, at least not in the legal sense, so as to bind the lunatic, either personally, or to render his property liable, for his personal torts. We therefore hold, upon both reason and the great weight of authority, that the defendant cannot be held liable in this case: First, because the tort was not committed by him personally, or in his presence, or by his direction; secondly, because not being capable of appointing an agent, he is not personally liable for the acts of one claimed to be his agent, and not being personally liable, neither his property nor estate can be held liable in damages therefor; thirdly, because the tort in this case was not the tort of the lunatic, but the tort of the chauffeur, who was not his agent, but the employee of the guardian; and, fourthly, because the tort of a servant or employee of a guardian of a lunatic cannot bind the lunatic, either personally, or render his property liable, under the special facts of this case.

For these reasons, the court below committed no error in withdrawing the case from the jury, and the judgment will be affirmed.

Judgment affirmed, with costs.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

LILLIAN R. CARNEY

v.

BOSTON ELEVATED RAILWAY.

(212 Mass. 179, 98 N. E. 605.)

#### Evidence — *res ipsa loquitur* — spark from electric train.

1. The doctrine of *res ipsa loquitur* does not apply to the fall of sparks from the machinery of an elevated train lawfully operated in a public street, to the injury of a person in the street below.

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#### Elevated railroad — fall of sparks — liability.

2. An elevated railway company lawfully operating in a public street is not liable for injury to a person in the street below by the fall of sparks from the train, which are the inevitable result of the careful operation of the road.

(May 25, 1912.)

**E**XCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Overruled.

The facts are stated in the opinion.

Messrs. William J. Miller and Benjamin F. Haines for plaintiff.

Mr. E. P. Saltonstall for defendant.

#### Note. — Liability of elevated railway company for personal injury to one on surface.

This note includes only cases involving liability of elevated railroads, strictly speaking. Cases on injury to persons under bridges of surface railroads, from falling objects, are excluded.

For liability of railroad company for personal injury to person struck by sparks or cinders escaping from locomotive (principally on surface railroads), see note to *Cincinnati, N. O. & T. P. R. Co. v. Baxter*, 18 L.R.A.(N.S.) 241.

#### Ground of liability; duty and degree of care, generally.

An elevated railway company is not an insurer of the safety of persons in the street below from injuries due to the operation of its road. Its duty is only to adopt such precautions and use such care and diligence as under all the circumstances a reasonably prudent person would take to prevent accidents; its liability is based solely on negligence to adopt such precautions or to exercise such care. In all of the cases cited the court assumes that the basis of liability is negligence. Ordinary care seems to be the degree required.

It is the duty of an elevated railway company to "use reasonable and ordinary care in selecting such appliances as are in practical use and of easy application," and it is for the jury to say whether precautions which reasonably prudent people would take to prevent accidents have been adopted. *Morsemann v. Manhattan R. Co.* 16 Daly, 249, 10 N. Y. Supp. 105.

Instructions that an elevated railway company is not bound to use the best and most select safeguards which human skill and ingenuity have invented and brought into use to prevent accidents, but must use due care and skill in operating its railroad, and take all reasonable means to guard against injurious consequences, even if they involve the making of additional fix-

Sheldon, J., delivered the opinion of the court:

The plaintiff was injured while she was riding in an open surface car beneath the defendant's elevated structure. She heard the rumble of an elevated train over her car, "saw the sparks flying," looked up and was struck in the eye by a spark, which could be found to have been a minute piece of hot iron, about as large as the point of a pin, coming from the elevated road, and, as we assume, from the contact shoe of the train which was passing thereon. The structure was properly in the street, and the defendant was authorized to operate its road by electricity. There was no evidence that it was a frequent occurrence for sparks to fall from its passing trains into

tures not contemplated in the beginning, so long as their adoption does not involve a radical change in the general construction of the road,—are proper. *Manson v. Manhattan R. Co.* 23 Jones & S. 18, a case of falling particles of iron accumulated on the rails.

In *Burke v. Manhattan R. Co.* 13 Daly, 75, a case of injury by falling cinders, an instruction was given that it was the duty of an elevated railway company "to adopt all the means which modern science, discovery, and invention afford, and all the facilities of the age within their power, in the operation of their roads, that they may so exercise their rights as not to cause injury to others." It was held this was error, but that the error was cured by a later instruction that if the company "used the best devices in known use to avoid throwing sparks, ashes, or cinders," and "used those carefully and with prudence, and were not guilty of any negligence in the use of the best-known devices, then they are not liable;" that it was "not bound to use any supposed improved device, or one which theoretically might be supposed to be better than the one in use, but only such whose utility had been tried and approved in practical operation."

In *Goll v. Manhattan R. Co.* 25 Jones & S. 74, 5 N. Y. Supp. 185, it was contended that the court should have charged that the elevated railway company was not obliged to build a shield or screen under its superstructure, but it was held there was no error in refusing the instruction, since it was properly covered by the following: "They [the elevated railway company] were not bound as against persons who were not passengers, to add to the construction and equipment of their road and its cars the best and most select safeguards with human skill and ingenuity, from time to time, have invented and brought into use to prevent accidents. Such rule applies only to passengers. As against all other persons who had a right to use the streets in common with them, . . . they discharged their duty if they

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the street, or indeed that this had ever before happened. There was nothing to indicate that the defendant ought to have foreseen this danger and to have guarded against it or given warning of its existence. There was no evidence that there was any practicable method or device for checking the emission of sparks from its trains or its electrical apparatus, or preventing their fall to the street, which the defendant had failed to adopt. There was nothing to show any lack of proper care on the part of the defendant in the operation of its trains or cars. Under these circumstances it is manifest that the case of *Woodall v. Boston Elev. R. Co.* 192 Mass. 308, 78 N. E. 446, and *Walsh v. Boston Elev. R. Co.* 192 Mass. 423, 78 N. E. 451,

adopted that which, under all the circumstances and in view of the peculiar structure of the road, inclusive of the danger to be apprehended, was reasonably adequate and safe. If they thus discharged their duty, under all the circumstances, they will not be held liable solely by reason of the fact that at the time and place of the accident they had no shield or screen under the structure."

In *Lowery v. Manhattan R. Co.* 12 Daly, 431, a case of injury by falling of live coals, an instruction was approved that the elevated railway company was "bound to use the most approved means that science and skill had invented to prevent fire from falling into the streets below its tracks;" the appellate court interpreting the word "approval," in view of the other charges, to mean "tested," and that the instruction must have been taken by the jury to mean that the company was bound to use that machinery which was found by use and experience to be the best of its kind. The court says that a charge that the company was not bound to use any appliances except such as were in general use would have been error.

#### Contributory negligence.

In none of the cases cited was the question of contributory negligence seriously urged as a defense. Whether one under an elevated railway is negligent in looking up—especially when a car is passing overhead—seems to have evoked no contention or discussion except in one case, *Walsh v. Boston Elev. R. Co.* 192 Mass. 423, 78 N. E. 451, in which it was held that it was not contributory negligence as matter of law for one under an elevated railway structure whose attention had been attracted by the noise of a passing electric car to look up, although by so doing sparks from the car entered his eye.

#### Rule of *res ipsa loquitur*.

In many of the cases the only, or at least the principal, question discussed, has been whether this rule applied and whether

cannot help the plaintiff. The ground on which those cases were decided, that there was evidence of an existing danger and of negligence on the part of the defendant in not providing an appliance to prevent the falling of sparks into the street, and in not applying to the railroad commissioners for the approval of a plan to accomplish that object, is lacking here. Either she has chosen, or the facts of the case have compelled her, to rest her claim simply upon the ground that she has been injured by a spark falling on her eye and that this spark came from a train of the defendant lawfully operated upon its elevated railroad.

She contends accordingly that these facts present a case for the application of the doctrine *res ipsa loquitur*,—that negligence

of the defendant may be inferred from the bare fact that she has been injured in the manner stated. It is true, no doubt, that the cause of her injury could be found to have come from the operation of apparatus which had been furnished and applied by the defendant and was wholly under its management and control. *McDonough v. Boston Elev. R. Co.* 208 Mass. 436, 94 N. E. 809; *Le Barron v. East Boston Ferry Co.* 11 Allen, 312, 317, 87 Am. Dec. 717; *Miller v. Ocean S. S. Co.* 118 N. Y. 199, 23 N. E. 462; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; *Scott v. London Dock Co.* 3 Hurlst. & C. 596, 34 L. J. Exch. N. S. 220, 11 Jur. N. S. 204, 13 L. T. N. S. 148, 13 Week. Rep. 410; *Kearney v. London, B. & S. C. R. Co.*

it had been overcome. Ordinarily the plaintiff, having proven the accident and the surrounding circumstances, has relied upon the rule for recovery, maintaining that the burden of an explanation rested upon the railway company; and his contention has prevailed except in several instances where negligence was purely a matter of conjecture.

In *Schachter v. Interborough Rapid Transit Co.* 146 App. Div. 139, 130 N. Y. Supp. 549, it was said that the trial court overstated the rule by instructing the jury that the facts raised a presumption of negligence as matter of law; that the statement should have been that the facts were sufficient to make out a prima facie case from which the jury might, if no evidence was offered in rebuttal, infer negligence. (Generally, as to the relation of the doctrine *res ipsa loquitur* to burden of proof, see note in 16 L.R.A. (N.S.) 527.)

Since the rule of *res ipsa loquitur* constitutes so large a part of the decision in these cases, it is not practical to separate and discuss it under an independent head, but it will be treated in the discussion of each case as the rule is there applied.

#### Falling cinders, coals, or sparks from engine.

The falling, from an engine on an elevated railroad, of a shower of cinders, some of which injured the eye of one in the street below, with evidence of the fall of sparks and cinders of large size as a common occurrence, which could be prevented by a spark arrester, makes a prima facie case of negligence. *Burke v. Manhattan R. Co.* supra.

In *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66, proof that plaintiff's eye was injured by a cinder from a locomotive of an elevated railroad was held insufficient to make out a prima facie case, there being no contention that the defendant was liable if the cinder came from the smoke-stack (apparently because of proof that the stack was in order and that the escape

of cinders from it could not be altogether avoided), but the claim being that it came from the ash pan, and there being no evidence that the ash pan was out of repair or that the cinder in fact came from it. The court said that when the damage was occasioned by one of two causes, for one of which the defendant is responsible, and the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause.

So, in *Wiedmer v. New York Elev. R. Co.* 114 N. Y. 462, 21 N. E. 1041, it was held that the mere fact that a coal or spark smaller than a pinhead fell from a locomotive and entered the eye of one on the sidewalk below, without proof of the falling of other sparks or coals at the time or at other times, and without proof of defective construction or operation of the engine, was not sufficient evidence of negligence to support a verdict for plaintiff; and that even on the supposition that the burden was on the railway company to prove proper construction and repair of the engine, yet, since it was not shown what direction the engine was going or the time of day, except that it was afternoon, the company was not obliged to offer proof as to the proper construction and repair of each engine passing over the place of the accident during the afternoon.

The *Searles* Case is distinguished in *Kister v. Manhattan R. Co.* 40 App. Div. 411, 58 N. Y. Supp. 132, holding that evidence of the falling of a number of burning cinders, coals, and sparks upon one in the street under an elevated railroad, without affirmative proof that the appliances of the engine were proper and in good repair, raised a prima facie case of negligence. The court also held that testimony that the coals were seen falling while a train was passing on the railroad, that the track extended partially over the sidewalk, that plaintiff was walking near the curb under the track, and that the wound was burned and contained particles apparently of coal and dirt, in the absence of evidence that the coals might have come from some other

L. R. 5 Q. B. 411. But this single circumstance is not always enough. Where, as here, the cause of the accident has come from the lawful operation by lawful means of an authorized instrumentality, and where any damage or injury that has resulted may have come without any negligence of the defendant, but may have arisen merely as an unavoidable accident from the careful and skilful exercise of its lawful rights in spite of the observance of all proper precautions, there no liability can arise without some affirmative evidence of negligence. In such a case the happening of the accident, with the resulting injury, is as likely to have come without the fault of the defendant as to have been due to its negligence, and the presumption of fact

upon which the doctrine *res ipsa loquitur* is based does not arise; the inference of negligence cannot be drawn without some evidence to support it. *Beatlie v. Boston Elev. R. Co.* 201 Mass. 3, 6, 86 N. E. 920; *Minihan v. Boston Elev. R. Co.* 197 Mass. 367, 373, 83 N. E. 871; *Thomas v. Boston Elev. R. Co.* 193 Mass. 438, 79 N. E. 749; *Wadsworth v. Boston Elev. R. Co.* 182 Mass. 572, 574, 66 N. E. 421; *Clare v. New York & N. E. R. Co.* 167 Mass. 39, 44 N. E. 1054; *Graham v. Badger*, 164 Mass. 42, 47, 41 N. E. 61. For this reason we recently have held that in the absence of a statutory liability a railroad company is not liable, without evidence of negligence on its part, for damage done by fire caused by sparks from its locomo-

source, was sufficient proof that they came from the passing engine.

A sufficient case to go to the jury is made by proof that as a pedestrian looked up at a train passing on an elevated railroad he was hit over the eye by a clinker or cinder about half an inch broad and somewhat longer, and so hot that it burned him; there being nothing between him and the locomotive, and no other vehicle passing at the time, and the evidence showing that a wire netting kept in repair would prevent the escape of such cinders from the ash pan. *McNaier v. Manhattan R. Co.* 46 Hun, 502, affirmed on second trial in 123 N. Y. 664, 26 N. E. 750.

In *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608, the negligence of an elevated railway company in permitting hot coals and ashes to drop from an engine upon a horse and driver in the street below was held to be the proximate cause of an injury to the plaintiff, who was run over by the wagon as it passed over the curb when the driver, in order to stop the horse, which had become unmanageable, intentionally attempted to drive against the curb. As indicated, the question discussed by the court of appeals was simply that of proximate cause, the negligence of the defendant being assumed.

In *Werner v. Brooklyn Elev. R. Co.* 11 App. Div. 86, 42 N. Y. Supp. 846, affirming a judgment against an elevated railroad company for the death of a child whose clothing was set on fire by a quantity of live coals which dropped from the elevated structure, the only points discussed were a ruling in respect to evidence and the amount of the damages.

Sparks and explosions from electric cars.

In *Schachter v. Interborough Rapid Transit Co.* 146 App. Div. 139, 130 N. Y. Supp. 549, the principal question raised was whether an elevated railroad company should be permitted to show that the negligence was that of an independent contractor making alterations on its elevated structure, that the work was not inherent-  
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ly dangerous, but that the contractor so negligently operated a derrick as to produce a short circuit by contact with a passing car, causing an explosion, and so frightening persons in an adjoining building that in attempting to escape they were injured. It was held that such proof should have been admitted. The court said that an elevator railroad company owes only ordinary care to prevent accidents to persons in buildings adjoining the track.

In *Woodall v. Boston Elev. R. Co.* 192 Mass. 308, 78 N. E. 446, it was held there was sufficient evidence to support a finding that the spark which injured the eye of one in the street under an elevated railroad came from the contact shoe of an electric car passing overhead; and that evidence that there had been previous trouble from falling sparks, and that it was practical to prevent their falling by the construction of a trough or pan under the track, was sufficient to sustain a finding of negligence on the part of the company.

It was held also in the *Woodall Case* that the fact that the elevated railway company had to submit the plans of construction to the railroad commissioners and obtain their approval before building the road, and was compelled to obtain a certificate from them after the road was completed and before operating it, if in the judgment of the board "it appeared to be in safe condition for operation," did not relieve the company from liability; that these were merely conditions precedent intended as safeguards for the public, so that the road would be, at least, apparently in safe condition when its operation began, but did not relieve the company from liability for defects then existing from its own negligence, and certainly not for negligence in not adopting additional means of protection found necessary after operation began.

The *Woodall Case* is followed in *Walsh v. Boston Elev. R. Co.* 192 Mass. 423, 78 N. E. 451, in which it was held that evidence that, as plaintiff was under an elevated railway on which an electric car was passing, a shower of sparks descended and something entered his eye, with evidence

tive engines. *Wallace v. New York, N. H. & H. R. Co.* 208 Mass. 16, 94 N. E. 306.

For the same reasons, in two cases closely resembling that which is here presented, it was held that no inference of negligence could be drawn from the happening of the accident, and the plaintiff was not allowed to recover. *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *Wiedmer v. New York Elev. R. Co.* 114 N. Y. 462, 21 N. E. 1041. In the last cited case, the court said that the evidence disclosed a single colorless fact, the emission of a coal smaller than a pinhead, and that the rule *res*

*ipsa loquitur* has not been extended far enough to authorize from this fact an inference of actionable negligence.

It is perfectly consistent with the evidence, that the defendant has taken all the precautions that were suggested in *Woodall v. Boston Elev. R. Co.* 192 Mass. 308, 78 N. E. 446, or which since have been discovered to be possible. If so, it has not been guilty of negligence. It follows that the judge at the trial acted rightly in ordering a verdict in its favor.

Exceptions overruled.

of the nature of the particle found in his eye, should have been submitted to the jury to determine whether the spark came from the elevated road; and that testimony of the frequent falling of showers of sparks, due to imperfect contact between the third rail and contact shoes, which could be prevented by increasing the contact area or by the use of a shield under the "third rail," made a *prima facie* case of negligence for the jury.

#### Bursting cylinder.

It was held in *Goll v. Manhattan R. Co.* 25 Jones & S. 74, 5 N. Y. Supp. 185, that the trial judge correctly instructed the jury that from the sudden bursting of a locomotive cylinder on an elevated railroad, scattering fragments on the street below, some of which injured plaintiff, negligence of the elevated railway company might be inferred.

Fall of iron, wood, etc., from elevated structure.

Proof that plaintiff was injured by an iron bolt which fell from an elevated structure as a train was passing is sufficient to raise a presumption of negligence, and is not overcome as a matter of law by evidence that defendant's foreman inspected the track the next day and found no bolts missing, and that the bolt in question was of a kind not in use by the defendant. *Sturza v. Interborough Rapid Transit Co.* 113 N. Y. Supp. 974.

The rule of *res ipsa loquitur*, it was held in *Wadsworth v. Boston Elev. R. Co.* 182 Mass. 572, 66 N. E. 421, was not applicable to a case of the fall of sawdust, shavings, and a piece of wood from an elevated railway structure, the sawdust injuring the eye of a passenger in an open surface car of the same company, where there was nothing to show whether the sawdust was thrown down or blown down by the wind, and the jury was left only to conjecture as to the company's negligence.

Negligence may be inferred from testimony of plaintiff, corroborated by other witnesses, that while driving under an elevated railway structure he heard a rumble as of iron overhead, and an instant later was struck by an iron bar about 2½ feet

long, and afterward saw on the structure men wearing workmen's clothes who had bars of iron, hammers, and tools, and that one of them came down and took the bar back upon the structure. *Hogan v. Manhattan R. Co.* 149 N. Y. 23, 43 N. E. 403. The court said that it is a well-settled rule of law that if a person erects a structure upon a city street he is bound to take reasonable care that nothing shall fall into the street and injure persons lawfully there, and that if anything falls from such a structure upon a person lawfully passing along the street the accident is *prima facie* evidence of negligence.

In *Metropolitan West Side Elev. R. Co. v. McDonough*, 87 Ill. App. 31, it was held that proof of the fall from an elevated railroad, completed, but over which cars were not yet running, of a bolt such as is used in the track construction, made a *prima facie* case of negligence against the company, requiring explanation.

An elevated railway company is not relieved from liability for negligence from the falling of an iron bar dropped by workmen erecting an elevated structure, because the negligence is that of a subcontractor, where the latter is acting by virtue of the charter given to the railway company; since as between the company and the public the subcontractor must be regarded as a servant of the railway company. *Metropolitan West Side Elev. R. Co. v. Dick*, 87 Ill. App. 40.

The rule of *res ipsa loquitur* applies to actions between master and servant as well as cases where there is no contractual relation; but for the rule to apply where an employee of the elevated railroad company, while at work on the surface, was injured by a block of wood 18 inches long falling from the elevated railroad on which a train was passing, there should be evidence that the wood was used in or connected in some way with the elevated road; the mere fact of the fall and injury is not sufficient to sustain a verdict; and an instruction that plaintiff could recover only upon proof that the wood had some connection with the elevated railroad is error in the absence of evidence upon which to base it. *Nolan v. Brooklyn Heights R. Co.* 68 App. Div. 219, 74 N. Y. Supp. 120.

A *prima facie* case of negligence arising

from the fact that an iron plate and part of a broken bolt, used in an elevated railroad structure, fall and injure one in the street below, is not overcome as matter of law by testimony of the railway company's track walker that it was his duty to examine during the daytime all the bolts and fastenings over that part of the track, and to keep them tight, and that at the time of the accident he was following out his instructions and performed them to the best of his ability. *Volkmar v. Manhattan R. Co.* 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870.

In *Anderson v. Manhattan Elev. R. Co.* 1 Misc. 504, 21 N. Y. Supp. 1, the court held that negligence might be inferred from the fact that one on the street below was struck and injured by a piece of wood knocked out of a rotten elevated railway platform by workmen dropping a heavy timber upon it, where the wood which fell was so rotten it could be broken with the hand and its condition was discoverable by ordinary inspection.

A prima facie case of negligence is made out by proof that a heavy iron wrench used by workmen on an elevated structure fell, and that, in an effort to avoid it, one in the street below was injured. *Brooks v. Kings County Elev. R. Co.* 4 Misc. 288, 23 N. Y. Supp. 1031.

A prima facie case of negligence is made out by showing that one on a street crossing in a populous city was struck by a bottle shoved down with the refuse from the drip pan under an elevated structure, into a cart standing near the crossing. *Treanor v. Manhattan R. Co.* 39 N. Y. S. R. 186, 14 N. Y. Supp. 270. That part of the opinion treating of prima facie negligence is affirmed in 21 N. Y. Civ. Proc. Rep. 364, 16 N. Y. Supp. 536, but the decision was reversed on other grounds.

So, a prima facie case is made by proving that injuries were caused by the fall from an elevated structure of a crowbar which was in use by an employee making repairs to the track; and the fact that the crowbar was dropped through the employee's efforts to save himself from falling does not, as matter of law, overcome the presumption of negligence. *Morseman v. Manhattan R. Co.* 16 Daly, 249, 10 N. Y. Supp. 105.

In *Maier v. Manhattan R. Co.* 53 Hun, 506, 6 N. Y. Supp. 309, it was held that the falling of a bar of iron, which, from its nature and the circumstances, the jury might infer had been a part of an elevated railroad structure, and fell from it while a train was passing, injuring one in his own yard near by,—made a prima facie case of negligence.

In the *Maier* Case it was contended that there was no evidence that the bar fell from the elevated track. The testimony for plaintiff showed that it was of the kind used in the elevated structure, that there was no other place from which it could have fallen, and that its flight was observed just after it began, from the direction of

a train passing on the elevated road. It was held this evidence would sustain a finding that the bar fell from the elevated structure.

It was held in *McGee v. Boston Elev. R. Co.* 187 Mass. 569, 73 N. E. 657, that one who, while walking under an elevated railroad, was injured by the falling of a quantity of snow, could not recover, in the absence of evidence as to where the snow came from, when it might have fallen from buildings abutting on the walk as well as from the elevated railway. R. E. H.

## MAINE SUPREME JUDICIAL COURT.

HERBERT A. FOGG

v.

LINWOOD C. TYLER.

PETITION OF JAMES M. BARTLETT.

(— Me. —, 83 Atl. 664.)

**Broker — receivership — priority of customer.**

There is no fiduciary relation between a stockbroker and his customer which will entitle the latter to priority over general creditors in case a receiver is appointed for the broker's affairs after the customer has paid money to him for the purchase of certain stock which has not been delivered, although the money paid remains in the broker's bank account when the receiver is appointed and goes into his possession.

(June —, 1912.)

**R** EPORT by the Supreme Judicial Court for Penobscot County for the opinion of the Law Court of a petition for the al-

*Note. — Right of customer who has advanced purchase money to broker or factor to preference in case of insolvency prior to the making of a purchase.*

The decision reached in *Fogg v. TYLER* does not seem to be supported either by the weight of authority or upon principle, although there are decisions which support the theory therein advanced. It is stated in 1 *Dos Passos, Stock Brokers & Stock-Exchanges*, page 293, that "the theory of the law is that the property of a principal, intrusted by him to his factor or broker for any special purpose, belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified and distinguished from all other property, and that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. And if the property in its original state and form was covered with a trust

lowance of petitioner's claim prior to those of general creditors of the bankrupt firm of Tyler, Fogg, & Company. Petition dismissed.

The facts are stated in the opinion.

Mr. Charles J. Dunn for petitioner.

Mr. Charles H. Bartlett for defendant.

Mr. E. M. Simpson for committee of unsecured creditors.

Hanson, J., delivered the opinion of the court:

On report. Petition for allowance of claim as a priority.

The record shows that prior to April 26, 1911, the petitioner corresponded with Linwood C. Tyler, of the firm of Tyler, Fogg, & Company of Bangor, in relation to the purchase of stocks; that on that day he called at the office of Tyler, Fogg, & Company, and "told Mr. Tyler, after some little conversation, that I had decided to take ten shares of the Commonwealth Gas & Electric Company stock, . . . and he very hastily calculated the interest and I made out a check for the amount he stated, which was

\$1,004.33, I think, and I didn't have time that evening to get my receipt, for the car came right along. I gave him my check, and the next morning Mr. Tyler mailed me a receipt, and stated I had overpaid him 72 cents, and enclosed 72 cents in stamps.

The case shows that Tyler, Fogg, & Company had contracted with Messrs. C. D. Parker & Company, of Boston, for 750 shares of the Commonwealth Gas & Electric Company, "with the arrangement that they were to carry it and as fast as we desired it, we should take it up from them." Tyler, Fogg, & Company had advertised the stock for sale, and the petitioner says that Mr. Tyler had given him "literature and also written me in regard to the stock. I had looked it up somewhat."

Mr. Tyler, who had charge of stock sales, was called to Boston later in the evening, and did not return until after the fire which destroyed his premises in the great conflagration of April 30, 1911. He returned immediately, and on May 5th received a letter from the petitioner, inquiring when the

in favor of the principal, no change of that state and form can divest it of such trust, or give the factor or agent, or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change." And this seems to be supported by the better considered authorities. Thus it has been expressly held that a broker to whom money has been given by a customer to invest holds such money, until actually invested and the purchased property received, in trust for the customer, and that in case of the bankruptcy of the broker before a purchase is consummated, the customer may reclaim money advanced to the broker. *Re A. O. Brown & Co.* 189 Fed. 440.

And in *Boisblanc's Succession*, 32 La. Ann. 109, where a bill of exchange was remitted to a broker to be invested by him, and he discounted it and placed the proceeds to his account and died insolvent without having made the investment, it was held that the customer could follow the money and claim it by preference out of the funds of the succession, provided he could identify and distinguish it; and that under the circumstances the fund was clearly identified.

And in *Mann v. Sands*, 2 N. Y. City Ct. Rep. 25, it was held to be the general rule that if a person employs a broker to buy a particular stock and gives him the money to pay for it, the broker becomes a fiduciary in respect to both stock and money; but that if the money be merely deposited, from time to time, with the broker to cover "margins," and settlements are had by struck balances, the relation thus formed would be that of debtor and creditor.

A case closely allied to the foregoing decisions is that of *Ex parte Cooke*, L. R. 4 42 L.R.A. (N.S.)

Ch. Div. 123, 46 L. J. Bankr. N. S. 52, 35 L. T. N. S. 649, 25 Week. Rep. 171, wherein a trustee employed a broker, who had notice of the trust, to sell certain consols belonging to the trust estate and invest the proceeds in railway stock. The consols were sold and the proceeds deposited to the broker's credit, but before a purchase of railway stock was completed the broker failed, and his customer laid claim to the proceeds. The court held that, since the broker knew that the money belonged to a trust, it could be followed if it could be traced; but James, L. J., and Bramwell, J. A., also expressly said that, apart from the question that the money belonged to a trust, the relation between the broker and his customer was fiduciary, since the money was in the broker's hands to be applied in a particular way, and that it could be followed by the customer.

The case of *Downing v. Lellyett*, — Tenn. —, 36 S. W. 890, upon which the court in the *Fogg Case* seems to have placed considerable reliance, while undoubtedly sound, is clearly distinguishable from the case under discussion, on the ground that, as the money was not advanced in the first instance by the customer, the transaction implied that the bank acting as broker was to use its own money in making the purchase, in which case the relation would be clearly that of debtor and creditor; and in fact that was the exact decision in the case.

The analogous question of the effect of a deposit by a broker or factor, to his own account, of the proceeds of a sale of a customer's stock or property, as creating a trust entitled to a preference, is treated in the note to *Furber v. Dane*, 27 L.R.A. (N.S.) 908, and reference is made to that note for such cases,

G. J. C.



stock would be delivered. His letter in reply follows:

Tyler, Fogg, & Co., Bankers, Bangor, Maine.  
Dealer in Bonds.

May 6, 1911.

Mr. J. M. Bartlett, Orono, Maine.

Dear Sir:—

In relation to the delivery of your certificate carrying ten shares of Commonwealth Gas & Electric Co. preferred stock, we beg to say that, as soon as we can get established and our vaults open, we will be in position to make delivery to you of your certificate carrying the ten shares of stock.

Our vaults look to be in good shape, and we expect that the contents will be found intact.

Yours very truly,

Tyler, Fogg, & Co.

The stock was not delivered. The reasons given by Mr. Tyler for the nondelivery of the stock were that his call to Boston gave him no time in which to order it on April 26, 1911, and the confusion incident to the fire causing delay in re-establishing business quarters and having access to their books and papers after his return, and that later, when delivery might have been effected, he was prevented by suit for the dissolution of the partnership of Tyler, Fogg, & Company, and the appointment of a receiver, against whom this petition is filed.

It is admitted that the check was deposited by the firm of Tyler, Fogg, & Company, the payees named therein, to the credit of said firm, in the Kenduskeag Trust Company, at Bangor, Maine, on the 27th day of April, A. D. 1911, and collected by said bank for the account of said firm, and that ever after to and including the time of the appointment and qualification of the receiver the balance of the account of said firm in said bank was ever in excess of said sum of \$1,003.61, and that said account between said times was not at any time overdrawn, and that the amount of the balance of said account in said bank has come to the possession of the receiver in this cause.

It is further admitted that no certificate for any shares of the capital stock of said Commonwealth Gas & Electric Company have ever come to the possession of said receiver.

It is admitted that Charles H. Bartlett, of Bangor, Maine, was appointed as receiver for the partnership of Tyler, Fogg, & Company, by decree dated June 6, 1911, and that he qualified as such and entered upon the discharge of the duties on the 9th day of June, 1911, and that on that date he took

possession of the assets of the estate of said partnership.

And the petitioner prays (1) that the receiver may be ordered to deliver the stock, if he be in a position to do so; or (2) to return the money paid, amounting to \$1,003.61, and for other relief.

In order to maintain this action, the petitioner must show (1) that the receiver had specific property belonging to him, or (2) that there was a fiduciary relation between the petitioner and Tyler, Fogg, & Company by and through which the latter agreed to procure for the petitioner as his agent ten shares of the capital stock of said Commonwealth Gas & Electric Company.

In view of the admission that "no certificate for any shares of the Commonwealth Gas & Electric Company have ever come to the possession of said receiver," it is not necessary to consider the first item in the prayer for relief. The petitioner does not seriously urge its consideration, but does insist that there was a fiduciary relation between the parties, "that the relation between the parties was that of agent and principal, or of trustee and *cestui que trust*," and cites *Furber v. Dane*, 203 Mass. 108-112, 89 N. E. 227, in support of his contention. In that case the plaintiff was an employee of a firm of stockholders. He gave the firm an order to sell for him twenty shares of copper stock, and they sold fifteen of these shares for \$757.50, for which sum, upon delivery of the certificate, they received a check in payment, which check they deposited in their general account with the American Trust Company, which collected it. Upon the same day the firm gave to its customer a check for his share of the proceeds of the stock sale. On the next day it made an assignment for the benefit of its creditors, and on the following day the check was presented at the bank by the payee named therein for payment. The firm's balance in the American Trust Company at no time after the deposit of the check for \$757.50 fell below that amount. The plaintiff contended that the balance of the account in the bank was affected with a trust in his favor to the extent of the amount due to him. He contended that, when the proceeds of his stock were received by the firm, he became entitled thereto, and that, being able to trace these proceeds into the account and into the balance remaining on deposit at the time of the bank's failure, he showed a trust attaching in his favor to that balance, quoting *Cole v. Bates*, 186 Mass. 584, 72 N. E. 333; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54-68, 26 L. ed. 693-699; *Re Hallett*, L. R.

13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732.

The decision of the case turned upon the point that the presentment of the check for payment was not in due season; but with reference to the contention of the plaintiff, the court said: "It would be difficult to deny this contention if it appeared that the firm stood in a fiduciary relation to him as to the proceeds of his stock, and that none of the other parties had equities superior to and countervailing his."

After a careful consideration of the testimony we are unable to agree with counsel for the petitioner that the facts in the case support his theory. It is not contended that Tyler, Fogg, & Company agreed to use the identical money represented by the check for the purpose of purchasing the ten shares of stock, and it does not appear that they were acting as agents of the petitioner. It does appear that the petitioner was a voluntary buyer of stock of his own selection, and, so far as the case shows, there was at the moment entire good faith on both sides of the contract. The transaction from petitioner's own showing did not create a trust relation between the petitioner and Tyler, Fogg, & Company. The negotiations were such as ordinarily occur between a buyer and seller in ordinary financial and commercial transactions. Tyler, Fogg, & Company had the stock for sale and wanted to sell. The petitioner wanted to purchase, and did purchase and pay for ten shares of stock, with the knowledge that the stock would not be delivered until some days later. There was no mention of agency, and no language used from which the relation of principal and agent can be inferred. The petitioner stood in the same relation to Tyler, Fogg, & Company as an ordinary buyer in an ordinary commercial transaction where no question of principal and agent is ever raised.

"One having purchased and paid for a specific quantity of an article acquires no title to it until separated from the residue. Until such separation, the claim of the vendee rests in contract, for a breach of which the remedy is by action. A purchase of growing crops, though paid for, passes no title against the creditors of the vendee, until possession or delivery be had. Unless such possession and delivery be had, prior to the death of the vendor and to the issuing a commission of insolvency upon his estate, the title is in the administrator in trust for creditors." *Stone v. Peacock*, 35 Me. 385.

In *Downing v. Lellyett* (1896) — Tenn. — 36 S. W. 800, the plaintiff requested a bank to purchase for him certain stock on margins. The bank purchased it, through

brokers, and made a draft on the plaintiff for the margins, which was paid. The bank remitted the amount by draft to its correspondent, and sent a check on such correspondent to the brokers, but by reason of the bank's failure the brokers did not obtain the money, and resold the stock. The amount remitted was eventually recovered back by defendant as the bank's assignee.

Held that the transaction between the plaintiff and the bank did not contemplate the purchase of the stock with plaintiff's own money, but by the bank with its own funds, and created the relation of creditor and debtor between them, and not of principal and agent, and that the plaintiff could not recover the amount paid from the defendant's assignee as a trust fund, though traced into his hands. *Akin v. Jones*, 93 Tenn. 353, 25 L.R.A. 523, 42 Am. St. Rep. 921, 27 S. W. 669, is quoted with approval. It is there said: "Any agreement or understanding or course of dealing whereby the bank is to use the identical moneys collected and substitute its own obligation in its stead, destroys all idea of a trust."

It is the opinion of the court that there was no fiduciary relation between the firm of Tyler, Fogg, & Company and the petitioner, and the entry must be:

Petition dismissed, with costs

## NEW JERSEY COURT OF ERRORS AND APPEALS.

LOUISA SCHULZ, Resp't.,

v.

LOUISA ZIEGLER, Appt.

(— N. J. —, 83 Atl. 968.)

Entireties — modification — tenancy in common.

1. The right of possession of husband and wife existing by virtue of an estate by the

Headnotes by PARKER, J.

*Note.* — Partition of estate by entireties.

The authorities dealing with all phases of the general question of tenancy by entireties are collected in a note to *Hiles v. Fisher*, 30 L.R.A. 305.

Specifically as to the right to partition of an estate by entireties, see cases on page 335 of the note in 30 L.R.A.

As to effect of divorce on tenancy by entireties and the right to partition in such case, see notes to *Hiles v. Fisher*, 30 L.R.A. 333, and *Alles v. Lyon*, 10 L.R.A. (N.S.) 463.

As shown in the earlier note the estate by entireties as it existed at common law is not subject to partition at the instance of one of the parties during the relation of husband and wife. *Miller v. Miller*, 9 Abb.

entireties as modified by the married woman's act amounts in its essential features to a tenancy in common for the joint lives, with remainder to the survivor.

**Same — conveyance of separate interest.**

2. By the husband's conveyance of his interest in such an estate, the grantee becomes tenant in common with the wife, but only for the joint lives of husband and wife.

**Same — partition.**

3. Such grantees may maintain partition against the wife, but the right is limited to the aforesaid tenancy in common for the joint lives.

**Pleading — motion to strike — effect.**

4. A motion to strike out a bill, under chancery rule 213, is in the nature of a demurrer.

Pr. N. S. 444; *Lerbs v. Lerbs*, 71 Misc. 51, 129 N. Y. Supp. 903; *Vollaro v. Vollaro*, 144 App. Div. 242, 129 N. Y. Supp. 43; *Merritt v. Whitlock*, 6 Lack. Leg. News, 76.

The rule is well established and numerous *obiter* statements are found in the books, announcing the rule as one of the incidents of the estate by entireties. *Chandler v. Cheney*, 37 Ind. 408; *Doe ex dem. Hardenbergh v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371; *Wentworth v. Remick*, 47 N. H. 226, 90 Am. Dec. 573; *Rogers v. Grider*, 1 Dana, 242; *Ketchum v. Walsworth*, 5 Wis. 95, 68 Am. Dec. 49.

The rule is based upon the principle that husband and wife are one person in law, and cannot take the estate, in parts or shares, like joint tenants or tenants in common, but each take the whole, or in the ancient phrase, they are seised *not per my et per tout*, but *per tout* only.

Nor is the rule changed by reason of the statute which provides that "husband and wife may convey to each other and make partition," etc., since the purpose of the statute was to emancipate a married woman from the rules of the common law, and was not intended to place her in a position in respect to her property rights where she could be coerced. The court said: "The word 'may,' as used in the statute, is permissive in character, implying a mutuality of action, but was never intended to place her in a position where, against her will, she may be forced to lose whatever advantages she possessed by holding real property under the rule. Such a construction would be repugnant to the uniform spirit of benefit to the married woman in her property rights, observable in all these statutes. And I therefore conclude that this law cannot aid the plaintiff in the prosecution of this action for partition." *Lerbs v. Lerbs*, 71 Misc. 51, 129 N. Y. Supp. 903.

In *Vollaro v. Vollaro*, 144 App. Div. 242, 129 N. Y. Supp. 43, the court pointed out that the action of partition was statutory, and was limited to estates in joint tenancy or tenants in common, so that there is no room for judicial construction of the vari- 42 L.R.A. (N.S.)

**Same — excessive prayer — remedy.**

5. Demurrer will not lie to the whole bill when the prayer is too broad, but should be restricted to that part of the relief prayed to which complainant is not entitled.

(June 19, 1912.)

**A**PPEAL by defendant from an order advised by the Vice Chancellor denying a motion made under rule 213 of the Court of Chancery to strike out a bill of complaint filed for the partition of certain land. Affirmed.

The memorandum filed by Walker V. C., is as follows:

"This is a bill for partition. The complainant is the daughter of the defendant.

ous married women's statutes and their effect upon the marital relation, so far as maintaining the action of partition is concerned; that at common law the writ of compulsory partition only ran in favor of one copartner against another, and was extended by the statutes of 31 and 32 Henry VII. to tenants in common and joint tenants.

But there may be a partition by deed or by parol with mutual consent. *Merritt v. Whitlock*, 200 Pa. 50, 49 Atl. 786 (holding evidence admissible, in a proceeding to obtain possession of land which had been sold to satisfy the surviving husband's debts, to show a parol partition between husband and wife by which a portion of the land was set apart in severalty to the wife).

*Hiles v. Fisher*, 144 N. Y. 306, 30 L.R.A. 305, 43 Am. St. Rep. 762, 39 N. E. 337, is very similar to *SCHULZ v. ZIEGLER*, holding that a purchaser on foreclosure sale under a mortgage given by the husband alone on land held by the entirety, where the wife was alive at the time of the sale, obtains the husband's interest subject to her right of survivorship, with a right to use an undivided half of the land during the joint lives of husband and wife.

In *Niles v. Niles*, 143 Ky. 94, 136 S. W. 127, the court sustained the right of the wife to sue her husband to obtain a decree for the sale of property which had been conveyed to them jointly, where it was not susceptible of division. The decision is placed upon the ground of the wife's capacity to sue, and the divisibility of the estate, which the court apparently treated as a joint tenancy as distinguished from the estate by entireties.

A wife holding land by entireties with her husband is not entitled to partition of trees cut therefrom by him, nor of lumber into which they are converted, since both are seized of the entirety. *Jones v. Smith*, 149 N. C. 318, 19 L.R.A. (N.S.) 1037, 128 Am. St. Rep. 661, 62 S. E. 1092.

As to the respective rights of husband and wife to the income or products from an estate held by the entirety, see note in 19 L.R.A. (N.S.) 1037. A. L. R.

The lands sought to be partitioned were deeded to the defendant and her husband, who thereupon became tenants of the premises by entirety. The husband and father conveyed all his right, title, and interest in the lands to his daughter, the complainant; and thereupon the mother and daughter, the bill alleges, 'became seised thereof as tenants in common in fee simple in the said premises for and during the joint lives of the said Jacob Ziegler and said Louisa Ziegler, his wife.' It is, of course, erroneous to plead that parties, complainant and defendant, became seised 'in fee simple' during the joint lives, etc. A life estate is not a fee simple. What they became by virtue of the father's conveyance to the daughter was tenants in common for the joint lives of the parents. The father's conveyance to the daughter did not operate in any wise to limit the estate of the wife or her right to the survivorship, and it seems that it will not defeat his right of survivorship, but that it amounts only to a conveyance of his right of possession during his life, and that it cannot operate to let in a third party as tenant by entirety with his wife. That estate exists only between husband and wife, and neither can dispose of any part of it without the assent of the other; the peculiar interest and estate not being severable. *Den ex dem. Wyckoff v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388. The husband can, however, alienate his interest in the estate for his own life. *Ibid.* See also *Servis v. Dorn*, 76 N. J. Eq. 241, 76 Atl. 246. Life tenants may be tenants in common, and their estates may be partitioned. *Roarty v. Smith*, 53 N. J. Eq. 253, 255, 31 Atl. 1031. The defendant is entitled to the enjoyment of her estate in the lands during the lifetime of herself and her husband by virtue of the married woman's act of 1852 (P. L. p. 407). *Servis v. Dorn*, *supra*. The complainant is entitled to the enjoyment of the estate and interest in the lands which she derived from her father's conveyance during the joint lives of her father and her mother, the defendant. The first section of our partition act (P. L. 1898, p. 644 [3 Comp. Stat. p. 3897]) gives the right to partition to tenants in common, and the parties to this suit are such. True, their estate is less than a fee simple, but it is an estate for the joint lives of the parents of the complainant, and such an estate is partible. If the premises should prove not to be susceptible of division between the parties, and shall be ordered to be sold, the purchaser's estate will terminate upon the death of either Mr. or Mrs. Ziegler. The motion to strike out the bill must be denied, with costs."

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Mr. George S. Silzer for appellant.

Mr. Charles T. Cowenhoven, for respondent:

Appellant's husband, Joseph Ziegler, could alienate his interest in the estate for his own life.

*Den ex dem. Wyckoff v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388; *Barber v. Harris*, 15 Wend. 615; *Jackson ex dem. Suffern v. McConnell*, 19 Wend. 175, 32 Am. Dec. 439; *Servis v. Dorn*, 76 N. J. Eq. 241, 76 Atl. 246; *Washburn v. Burns*, 34 N. J. L. 18.

Life tenants may be tenants in common and their estates may be partitioned.

*Roarty v. Smith*, 53 N. J. Eq. 253, 31 Atl. 1031; *Buttlar v. Rosenblath*, 42 N. J. Eq. 652, 59 Am. Rep. 52, 9 Atl. 695; *Buttlar v. Buttlar*, 67 N. J. Eq. 136, 56 Atl. 722; *Aubry v. Schneider*, 69 N. J. Eq. 630, 60 Atl. 929; *McDermott v. French*, 15 N. J. Eq. 78.

*Parker, J.*, delivered the opinion of the court:

We concur in the result reached by the court below, and, for the most part, upon the grounds expressed in the foregoing memorandum of Vice Chancellor (now Chancellor) Walker.

In *Buttlar v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695, it was decided that, by virtue of the married woman's act, the estate by entirety was affected in such a way as to endow the wife with the capacity during the joint lives to hold in her possession as a single female one half the estate in common with her husband, the right of survivorship still existing as at common law. The same case holds that the act did not turn the estate by entirety into a tenancy in common; but this must be read in view of the decision below (7 N. J. L. 143), which was that it was a general tenancy in common,—i. e., in fee; such an estate, in other words, as would have vested under the statute by a deed to two persons not husband and wife, without words of joint tenancy. 2 Comp. Stat. p. 1538, § 15. The essential point guarded by our decision was the preservation of the right of survivorship as at common law. Whatever the estate during the joint lives may be called, it is in effect a tenancy in common between husband and wife, or between the husband's grantee and the wife, during the joint lives, with remainder to the survivor. The essential feature of a tenancy in common is the unity of possession, as distinct from unity of title, interest, or time of creation. 2 Bl. Com. 191. Such a tenancy is partible by the express language of the statute. Were this not so, the creditors who in *Buttlar v. Rosenblath* enforced their claims against the husband's interest would be compelled to sit idly by and wait to see

which would die first, the husband or the wife or else enter during his lifetime into joint occupancy of the premises with her.

We hold, therefore, that by virtue of an estate by entireties the seisin of husband and wife during the joint lives is essentially a tenancy in common, terminated on the death of either, with remainder in fee to the survivor; and that the right of the husband may be transferred by him to a third party, who thereby becomes tenant in common for the joint lives in the husband's place; and that partition may be had between such purchaser and the wife of this tenancy in common, but without affecting in any way the common-law right of survivorship.

It is suggested that the bill should have been struck out because the prayer is too broad in asking for the absolute sale of the premises, instead of limiting such sale to the right of possession during the joint lives. But a motion to strike out a bill under the rule now numbered 213, which for present purposes is identical with rule 224 prefixed to 41 N. J. Eq. Reports, 6 Atl. iii., is in the nature of a demurrer (*Stevenson v. Morgan*, 63 N. J. Eq. 707, 53 Atl. 78; *Hanneman v. Richter*, 63 N. J. Eq. 753, 53 Atl. 177; *Holton v. Holton*, 72 N. J. Eq. 312, 65 Atl. 481), and a demurrer will not lie to the whole bill when the prayer is too broad, but only to the part of the relief to which complainant is not entitled (*Whitbeck v. Edgar*, 2 Barb. Ch. 106).

The order appealed from will be affirmed.

#### NORTH CAROLINA SUPREME COURT.

M. C. BRASWELL et al., Appts.,  
v.

PAMLICO INSURANCE & BANKING  
COMPANY et al.

(— N. C. —, 75 S. E. 813.)

#### Corporations — personal liability of directors — refusal to dispose of undesirable assets.

The directors of a bank are not personally liable to stockholders for loss due to their refusal to sell stock of a private cor-

**Note.**—Generally as to liability of directors to the corporation for losses through acts in excess of their authority or through errors of judgment, negligence, or inattention in the exercise of the powers conferred upon them, see note to *Bosworth v. Allen*, 55 L.R.A. 751, which is supplemented as to the liability of directors of banks for bad loans and investments, by the note to *Greenfield Sav. Bank v. Abercrombie*, 39 L.R.A.(N.S.) 173.  
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poration which they had taken as collateral and had been compelled to take over, except on condition that stock held by them individually should be purchased also, where the corporation owed the bank a large sum of money so as to make it advisable to maintain some control over its affairs.

(September 25, 1912.)

**A**PPEAL by plaintiffs from a judgment of the Superior Court for Edgecombe County sustaining a motion to nonsuit in an action brought to recover for losses alleged to have been sustained by reason of the fraud and negligence of the directors of the defendant bank. Affirmed.

The facts are stated in the opinion.

Messrs. Bunn & Spruill and Jacob Battle, for appellants:

Directors are trustees, and liable as such for losses attributable to their bad faith, misconduct, or want of care.

*McIver v. Young Hardware Co.* 144 N. C. 485, 119 Am. St. Rep. 970, 57 S. E. 169; *Harvey, Rights of Minority Stockholders*, 13.

Messrs. G. M. T. Fountain & Son and Marshall C. Staton, for appellees:

A stockholder can only sustain a bill of injunction on the trust when the corporation is the beneficiary of the trust, when there is fraud on the part of the directors, and then only when the corporation refuses to bring the action.

*Moore v. Silver Valley Min. Co.* 104 N. C. 534, 10 S. E. 679; *Coble v. Beall*, 130 N. C. 533, 41 S. E. 793.

Brown, J., delivered the opinion of the court:

Complaint in this case embodies several alleged causes of action, and asks for quite a variety of relief, and might strictly be regarded as multifarious. As the plaintiffs, however, have abandoned all their causes of action but one, it is not necessary that we should consider the character of the complaint, especially as no such point is made by the defendant. We merely advert to it, in order that it may not be regarded as a precedent.

The cause of action upon which the plaintiffs now rely is founded in tort, and is based upon the allegation that the defendants Staton, Zoeller, and Cobb, officers and directors of the defendant bank, were guilty of fraud and negligence in the conduct of the business of the bank. It is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action. *Solomon v. Bates*,

118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; *White v. Kincaid*, 149 N. C. 415, 23 L.R.A.(N.S.) 1177, 128 Am. St. Rep. 663, 63 S. E. 109.

In furtherance of this allegation, the plaintiffs offer to submit these issues: (1) Did the defendant corporation, under the control of the individual defendants, purchase, or continue to hold, the 175 shares of Tarboro Cotton Factory stock for their own personal ends and to the prejudice of the corporation? (2) If so, what damage has the corporation sustained? We are of opinion, upon a review of the evidence, that his Honor properly sustained the motion to nonsuit. It appears that the defendants were stockholders in the Tarboro Cotton Factory, owning 150 shares together, and that the defendant bank owned 175 shares, which had been hypothecated by one Nash as collateral security for a debt of \$12,000, upon which he had made default in payment. It also appears that the bank had acquired this stock in consideration of said debt, and that at the stockholders' meeting of the cotton factory this stock was generally voted by Mr. Cobb as cashier of the bank, who voted uniformly with the Statons, and they could not control the policy of the factory without voting the shares of the bank. It appears, furthermore, that the Tarboro Cotton Factory owed the bank \$35,000.

It is contended that the defendants refused to sell these shares to H. C. Bridgers, because they desired to retain them in order to protect their individual interests in the cotton factory, and that in so doing they were guilty of a fraud. We are unable to see anything in the evidence to support such contention. Bridgers was endeavoring to get sole control of the cotton factory. He testified that he approached Cobb with a view to buying the bank's shares, and asked him to name a figure at which they would sell their holdings, and that Cobb replied that he would not name a figure unless Bridgers would agree to take the holdings of all the Statons in addition. Bridgers does not say that he made Cobb any offer, but only asked him to name a figure. He states, however, that he was willing to pay par for the stock at that time. There is no evidence that Bridgers ever made a definite proposition to the board of directors to purchase the stock, and there is nothing to warrant the assumption that the directors were actuated by any sinister purpose.

Inasmuch as the cotton factory owed the bank \$35,000, the directors may have thought that it was the part of wisdom to retain control of the management of the 42 L.R.A.(N.S.)

factory, and not to put it absolutely in the hands of Bridgers. We see nothing in this which suggests a fraudulent purpose or a negligent disregard of the interests of the bank. Assuming that the sequel showed that the directors made a mistake, they are not infallible, and are not held liable for honest mistakes made in the exercise of their authority. 2 Cook, Corp. pp. 2071, 2072. Directors of corporations are not guarantors that they will make no mistakes in the management of the corporate business. They do not insure the corporation against loss arising either from their own honest mistakes, or from the mistakes of subordinate officers. They are required to exercise reasonable care and business judgment, but nothing further than this. They generally serve without pay, and usually, by reason of their interest in the company, have a direct concern in its welfare. The law requires them to do no more than exercise ordinary diligence, intelligence, and judgment in the management of the corporate business. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; 3 Cook, Corp. § 703; *Solomon v. Bates*, supra.

The judgment of the Superior Court is affirmed.

#### UNITED STATES SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.

T. J. WYNNE.

(224 U. S. 354, 56 L. ed. 799, 32 Sup. Ct. Rep. 493.)

**Constitutional law — due process of law penalizing refusal to pay claim.**

Exacting double liability and an attorneys' fee under the authority of a state statute, from a railway company refusing to pay within thirty days an excessive demand for the killing of live stock by one of its trains, takes the company's property without due process of law.

(April 15, 1912.)

*Note. — Constitutionality of statute imposing penalty or added liability for failure of railroad company to pay claim.*

As to the validity and effect of statutes imposing a penalty for the failure of a railroad company as a carrier to pay a claim, see the note to *Mobile & O. R. Co. v. Brandon*, post, 106, and see other notes therein cited.

As to the constitutionality of statutes imposing penalties upon railroad companies

**E**RROR to the Supreme Court of Arkansas to review a judgment affirming a judgment of the Circuit Court for Desha County in plaintiff's favor in an action brought to recover damages for the killing of two horses by defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. W. E. Hemingway and E. B. Kinsworthy, for plaintiff in error:

The statute and judgment deprive the railway company of its property without due process of law, and are unconstitutional and void, since they require the payment of double damages and an attorneys' fee merely because the company failed to pay an unliquidated demand, with respect to which there were bona fide and substantial doubts as to the extent of the damage and as to its liability.

for failure to fence tracks or build cattle guards, see the note in 31 L.R.A.(N.S.) 863.

And as to the constitutionality of statutes making railroad companies absolutely liable for damages by fire or to stock irrespective of negligence, see the note in 35 L.R.A.(N.S.) 1016.

While it is not intended in this note to discuss the validity of statutory provisions for attorneys' fee, that question having been discussed in the note in 17 L.R.A.(N.S.) 910, it may be noted at this point that, as shown in that note, there is much confusion with respect to the question, which was induced by the apparent changes of position of the United States Supreme Court on the subject. The cases which mark these changes of position are *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, holding void a statute imposing an attorneys' fee upon railroad corporations omitting to pay certain claims within a certain time after presentation; and *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, upholding a statute allowing an attorneys' fee to a successful plaintiff in an action against a railroad company for damages from fire caused by operating the railroad, and laboriously attempting to differentiate the *Ellis* Case.

In a similar way, the decision of the United States Supreme Court in *St. Louis, I. M. & S. R. Co. v. Wynne* runs counter to that in *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207, decided in 1889 and holding that an Iowa statute making railroad companies neglecting to pay for stock injured or killed for want of a railroad fence, liable for double the value of the stock killed or of the damage caused, did not deprive such companies of property without due process of law, nor deny them the equal protection of the laws. But it is to be observed that in this case the court did not touch upon the feature of the statute which is controlling in the *WYNNE* CASE; namely, that the statute is objection- 42 L.R.A.(N.S.)

*Pacific Mut. L. Ins. Co. v. Carter*, 92 Ark. 387, 123 S. W. 384, 124 S. W. 764; *Industrial Mut. Indemnity Co. v. Armstrong*, 93 Ark. 84, 124 S. W. 236; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

Mr. Powell Clayton, with Mr. Robert E. Wiley, for defendant in error:

The penalty provided in the statute in question is not so heavy as to deter the railroad company from contesting a claim, thus denying to it the equal protection of the law.

*Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207;

able in that it applies even where the claim against the railroad company is unreasonable. Instead, the court reached its decision in the light of those cases which involve ordinary statutes imposing double liability for injury to stock resulting from failure to fence tracks, the court saying that those statutes were more objectionable than this one, because they imposed the penalty merely for failure to fence tracks, whereas the latter imposed a penalty only where there had been a failure to fence tracks and a refusal to pay damages caused by such failure. So, the *Beckwith* Case cannot be said to be absolutely opposed to the *WYNNE* CASE, since the precise objection which prevailed in the latter seems not to have been urged in the former.

Likewise *St. Louis, I. M. & S. R. Co. v. Wynne*, 90 Ark. 538, 119 S. W. 1127, 17 Ann. Cas. 631, which is reversed in *St. Louis, I. M. & S. R. Co. v. WYNNE*, was decided without any apparent objection having been made to the excessiveness of the claim. Indeed, the Arkansas supreme court took pains to point out that double damages could not be recovered where the verdict of a jury assessing the amount of damage was less than the amount sued for. The court's attention seems not to have been directed to the fact upon which the decision of the United States Supreme Court turns; namely, that the plaintiff did not sue for as large a sum as he demanded before suing. Indeed, in a subsequent case (*Kansas City Southern R. Co. v. Anderson*, — Ark. —, 149 S. W. 58), the Arkansas supreme court pointed out that the fact that the amount demanded before suit in the *WYNNE* CASE was greater than the amount recovered was presented for the first time when that case was brought before the United States Supreme Court. In the *Anderson* Case the Arkansas court held that its previous decision in the *Wynne* Case, was not affected by the decision of the United States Supreme Court, and therefore held that the statute was constitutional and valid as applied to a case in which the amount recovered on trial was equal to the

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

The railroads are proper subjects of classification with respect to the matters contained in the statute attacked in this case.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 505; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Mr. Justice Van Devanter delivered the opinion of the court:

A statute of the state of Arkansas (Laws of 1907, act 61), relating to the liability of carriers by railroad for live stock killed, wounded, or injured by their trains, contains this provision:

"And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorneys' fee. And provided further, That if the owner of such stock killed or wounded shall bring suit

against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury, and not be entitled to recover any attorneys' fees."

The owner of two horses which were killed within the state by a train of a railway company served upon the company a written notice demanding damages in the sum of \$500. The company refused to pay the demand, and after the expiration of thirty days the owner brought suit in a court of the state to recover his damages, alleged in the complaint to be \$400. A trial to a jury resulted in a verdict for the owner, assessing his damages at the amount sued for, and the court, deeming the statute applicable, gave judgment for double that amount and for an attorneys' fee of \$50. The company objected that the statute, as thus applied, was repugnant to the due process of law clause of the 14th Amendment to the Constitution of the United States, but the objection was overruled, and on appeal to the supreme court of the state the judgment was affirmed. 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631. The case is here on a writ of error to that court.

It will be perceived that, while before

amount demanded before suit. It is clear, in view of the decision in *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 53 L. ed. 108, 28 Sup. Ct. Rep. 28, set out in the succeeding note, that the Arkansas court was justified in its assumption that the statute would have been upheld if it had provided in effect that double damages should not be recovered where the demand exceeded the recovery. But it is another question, and one not within the scope of the present note, whether the Arkansas court was justified in proceeding in the *Anderson Case* as if the statute had been amended or re-enacted without the defect on account of which it was declared unconstitutional by the Federal Supreme Court.

It was held in *Johnson v. Chicago, M. & St. P. R. Co.* 29 Minn. 425, 13 N. W. 673, that a statute allowing plaintiff \$10 as additional costs in case of recovery against a railroad for injury to stock was not unconstitutional as discriminating and partial legislation, or as denying to railroad the equal protection of the laws. From the headnote in the official report of this case it appears that the statute did not apply in case of a previous and sufficient tender by the railroad company. This case was followed in *Schimmele v. Chicago, M. & St. P. R. Co.* 34 Minn. 216, 25 N. W. 347, which merely added that there was no valid constitutional objection to the statute, whether the provision should be considered as a reasonable measure of compensation for expenses in re- 42 L.R.A. (N.S.)

covering just claims, or as an additional restraint upon the negligent management of the railroad.

And in *Jones v. Galena & C. Union R. Co.* 16 Iowa, 6, the court, without discussing the question, merely stated that it was competent for the legislature to fix the consequences attending the failure of the company to pay the simple or actual value of property injured or destroyed, in answer to objections that a statute making railroad companies absolutely liable to the owner of live stock killed or injured by reason of the want of a fence, unless occasioned by the wilful act of the owner, and making the company liable for double damages for failure to pay the claim within thirty days,—was unconstitutional in that it was special legislation and discriminatory, and that it was an invalid legislative encroachment upon judicial power to fix damages. That this case settled the constitutionality of the statute was the view taken in *Welsh v. Chicago, B. & Q. R. Co.* 53 Iowa, 632, 6 N. W. 13.

But in *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177, it was held that a statute imposing liability for double damages upon a railroad, not for the violation of any legislative command, but merely for the failure to pay a claim for live stock killed, within thirty days, was unconstitutional and void. This statute was not a so-called fence law, but simply declared that a railroad company should be



the suit the owner demanded \$500 as damages, which the company refused to pay, he did not in his suit either claim or establish that he was entitled to that amount. On the contrary, by the allegations in his complaint he confessed, and by the verdict of the jury it was found, that his damages were but \$400. Evidently, therefore, the prior demand was excessive and the company rightfully refused to pay it. And yet, the statute was construed as penalizing that refusal and requiring a judgment for double damages and an attorneys' fee. In other words, the application made of the statute was such that the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before the suit.

We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special treatment by the legislature, as was the case with the statute considered in *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28, but

liable for the value of any animal killed by the operation of its trains, and then extended the liability to double the value in case of failure to settle within thirty days. In the first place the statute was held void because it made the railroad companies absolutely liable and precluded the defenses of inevitable accident, contributory negligence, etc. Then the court added that a penalty could not be imposed merely for the failure to pay a claim, but could be justified only in case of the breach of a duty imposed by statute or in the event of wilful or wanton injury.

In *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, it was held that a statute giving to the owner of live stock double the value of his property injured or killed on a railroad track in case the claim therefor was not paid within thirty days after demand was unconstitutional as depriving railroad companies of property without due process, as partial and class legislation, and as violating the constitutional provision that all fines and penalties shall be appropriated exclusively to the use and support of common schools. The latter is, of course, more or less of a formal matter not relating to the exaction of the penalty, but merely to its destination; and it should be noted that such a constitutional provision was held to apply only to such forfeitures as inured to the public, in *Houston & T. C. R. Co. v. Harry*, 63 Tex. 256, cited in the note to *Mobile & O. R. Co. v. Brandon*, post, 106.

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attaches onerous penalties to the nonpayment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law. And, in principle, the supreme court of the state has so held since its decision in this case. In *Pacific Mut. L. Ins. Co. v. Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, that court had occasion to consider a statute of the state providing that if a loss under a policy of insurance was not paid within the time specified, "after demand made therefor," the company should be liable, in addition to the amount of the loss, to 12 per cent damages and a reasonable attorneys' fee. An insured demanded in payment of a loss under such a policy the sum of \$1,666.66, which the insurance company refused to pay, and in a suit on the policy, wherein it was found that the loss was but \$1,444.44, the insured was awarded the statutory damages and an attorneys' fee. That part of the judgment was reversed, and it was said:

"But the act makes the company liable

Attention is also directed to *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. 565, 19 S. W. 910, holding that a statute providing that where a railroad company should fail to pay the wages of an employee within fifteen days after demand it should be liable for 20 per cent of the amount due, as damages, was void, as special and class legislation and as taking a railroad company's property without due process of law. Among other things, the court said that this was an attempted penal regulation of the relation of master and servant, which, to be valid, must operate uniformly against all employers, and could not be tolerated where it singled out railroads. And it was held subject to the further objection that it afforded no protection against unreasonable or exorbitant demands.

Upon the authority of the last case a similar statute was held unconstitutional in *Missouri, K. & T. R. Co. v. Braddy*, — Tex. Civ. App. —, 135 S. W. 1059, as depriving railroad companies of property without due process of law and denying them the equal protection of the laws.

See also *State v. Divine*, 98 N. C. 778, 4 S. E. 477, holding unconstitutional a statute making the killing of cattle upon railroads a misdemeanor and subjecting the officers to indictment if they should fail to pay the owner's claim or consent to arbitration.

L. A. W.

for failure to pay the loss 'after demand made therefor.' The statute thus contemplates that there shall be a demand. A recovery for penalty and attorneys' fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the legislature to make the insurance companies pay a penalty and attorneys' fee for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right to resist the payment of a demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorneys' fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it."

In the brief for the railway company the contention is advanced that the statute would still be wanting in due process of law were it construed as imposing double liability, with an attorneys' fee, only where the prior demand is fully established in the suit following the refusal to pay; but that question does not necessarily arise upon the facts of this case, and we purposely refrain from considering it.

Confining ourselves to what is necessary for the decision of the case in hand, we hold that the statute, as construed and applied by the state courts, is wanting in due process of law, and repugnant to the 14th Amendment of the Constitution of the United States.

The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

#### MISSISSIPPI SUPREME COURT.

MOBILE & OHIO RAILROAD COMPANY,  
Appt.,

v.

ANNIE BELL BRANDON.

('98 Miss. 461, 53 So. 957.)

#### Constitutional law — equal protection — failure to pay claim — penalty.

A carrier is not denied the equal protection of the laws by permitting the recovery against it of a penalty for refusal to pay a claim for loss of freight within a specified time, although the amount finally recovered is less than the claim presented.

(January 16, 1911.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Monroe County in 42 L.R.A. (N.S.)

plaintiff's favor in an action brought to recover the statutory penalty for refusal of defendant to pay a claim for loss of freight within a specified time. Affirmed.

The facts are stated in the opinion.

Mr. J. M. Boone for appellant.

Messrs. Paine & Paine for appellee.

Smith, J., delivered the opinion of the court:

Appellee shipped a lot of household goods from Indianola, Mississippi, a point on the Southern Railroad, to Gibson, Mississippi, a point on appellant's railroad. The goods were delivered to appellee by appellant in a damaged condition. Thereupon appellee requested appellant in writing to settle this damage, stating the amount thereof to be \$60. Ninety days having expired without settlement having been made, this suit was instituted, resulting in a judgment in the court below for appellee in the sum of \$75, being \$50 actual damage and \$25 statutory penalty for not settling the claim within ninety days. The statute providing for this

*Note. — Constitutionality of statute imposing penalty or added liability for failure of carrier to pay claim.*

Generally as to the validity and effect of statutes imposing penalties for failure of a railroad company to pay claims, see the note to St. Louis, I. M. & S. R. Co. v. Wynne, ante, 102, and references therein to other annotation on analogous questions.

As to the constitutionality of legislation affecting the amount of liability or penalty for delay in delivery or for destruction of freight, see the note in 20 L.R.A. (N.S.) 126.

As said in 8 Cyc. 1101, the state has power to impose penalties as a means of enforcing its right of control over business affected with a public interest. The legislature is, of course, in this as in everything else, restricted by the constitutional guaranties of due process of law and the equal protection of the laws, and the real question in any case is whether these guaranties have been infringed.

The note to St. Louis, I. M. & S. R. Co. v. Wynne, ante, 102, shows that it is held, by the weight of authority, that statutes penalizing railroads for failure to settle claims for stock killed or fires set are constitutional, so far and only so far as they apply to cases in which the recovery of a claimant equals or exceeds the amount of the claim which the railroad failed to pay.

In harmony with this, it is held in Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28, affirming 73 S. C. 71, 121 Am. St. Rep. 921, 52 S. E. 797, that common carriers are not denied the equal protection of the laws by a statute requiring them to adjust and pay every claim for loss or damage to an interstate shipment within forty days after

penalty is chapter 196 of the Laws of 1908, and is as follows: "Railroads, corporations, and individuals engaged as common carriers in this state are required to settle all claims for lost or damaged freight which has been lost or damaged between two given points on the same line or system, within sixty days from the filing of written notice of the loss or damage with the agent at the point of destination; and where freight is handled

by two or more roads or systems of roads, and is lost or damaged, claims therefor shall be settled within ninety days from the filing of written notice thereof with the agent by consignee at the point of destination. A common carrier failing to settle such claims as herein required shall be liable to the consignee for \$25 damages in each case, in addition to actual damages, all of which may be recovered in the same suit; provided

the filing of a claim, under penalty of \$50 for each failure or refusal, where there can be no award of a penalty under the statute unless there is a recovery of the full amount claimed. While in the opinion in this case, the court alludes to the fact that there is some guaranty against excessive claims in that there can be no award of a penalty unless there be a recovery of the full amount claimed, the court goes on to say that the matter for adjustment is peculiarly one within the knowledge of the carrier, which can therefore determine the amount of a loss more accurately and promptly than anyone else. This, it will be observed, was the precise argument advanced in *MOBILE & O. R. Co. v. BRANDON* to justify its holding that a carrier is not denied the equal protection of the laws by such a statute, although the amount finally recovered is less than the claim presented. The *Seegers Case* was followed in *Frasier v. Charleston & W. C. R. Co.* 73 S. C. 140, 52 S. E. 964.

So, in *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.* 226 U. S. 217, 57 L. ed. 40, 33 Sup. Ct. Rep. 40, it is held that neither due process of law nor the equal protection of the laws is denied to the carrier by the imposition of a penalty of \$25 for a failure to settle a claim for damages to an intrastate shipment between two points on the carrier's line within sixty days from the giving of notice of the claim, where upon the trial the actual damages were assessed at the sum stated in the notice. In reply to a contention by the railroad company in this case, the court further held that the claim having been found just in every particular, and judgment having been rendered for the amount claimed, the railroad company could not urge that the statute was unconstitutional in that it equally penalized the failure to accede to an excessive or extravagant claim.

So, the Florida supreme court holds that a statute which authorizes a recovery of 50 per cent and reasonable attorneys' fees from carriers for failure to pay within sixty days a claim for loss or damage to freight, but provides that the penalty shall not attach unless the claimant recovers judgment for a sum greater than that offered or tendered by the carrier in settlement, does not deny the equal protection of the laws to carriers, and is not unreasonable or exorbitant. *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047. It will be observed that 42 L.R.A.(N.S.)

this statute was enacted after the Florida court had held void a similar statute because it made an unjust discrimination in that it expressly applied only to carriers by rail to the exclusion of carriers by water, express companies, etc. The latter statute was held void in *Seaboard Air Line R. Co. v. Simon*, 56 Fla. 545, 20 L.R.A.(N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234, holding that where the penalty was imposed upon carriers by railroad alone, to the exclusion of steamship lines, express companies, etc., the statute was inoperative, since it provided for an unreasonable classification which, in effect, deprived railroad carriers of due process of law, and denied them the equal protection of the laws.

Attention is also directed to *Houston & T. C. R. Co. v. Harry*, 63 Tex. 256, holding that a statute providing that any railroad company refusing to deliver a consignment of goods upon payment or tender of the freight charges shall be liable to the owner in an amount equal to the freight charges for every day of the detention was not unconstitutional as taking property without due process of law, or as punishing what is in substance a criminal offense by forms of civil procedure, and thus depriving the defendants of the guaranties attending criminal prosecution, or because it did not comply with the requirement that fines, forfeitures, and penalties be appropriated to working out and laying public roads. With respect to the last objection the court said that it was intended to include only such fines and forfeitures as, under law, might inure to the public. Note that on the latter point a contrary view was taken in *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, which is cited in the note to *St. Louis, I. M. & S. R. Co. v. Wynne*, ante, 102.

As interference with interstate commerce.

Penalizing the failure of a common carrier to adjust and pay within a specified time claims for loss or damage does not unlawfully interfere with interstate commerce even as applied to shipments from without the state, where the statute is construed by the state courts as affecting only the liability of carriers doing business in the state for property lost or damaged while in their possession. *Atlantic Coast Line R. Co. v. Mazurek*, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378.

For earlier cases on this point, see the note in 15 L.R.A.(N.S.) 983. L. A. W.

that this section shall only apply when the amount claimed is \$200 or less."

One of the assignments of error brings under review the action of the court in refusing appellant the following instruction: "The court charges the jury that, while plaintiff includes in her suit an item of \$25 statutory penalty, yet the court instructs you that if you find that the damage to her property is less than \$60, the account demanded of the defendant and sued for, then you will not allow any statutory penalty, but exclude the same from your verdict." Appellant's contention is that the statute must be construed to impose a penalty only in cases where the plaintiff recovers the full amount demanded, and unless this is done the statute would violate the 14th Amendment to the Federal Constitution, in that it denies to carriers the equal protection of the laws. The statute contains no such limitation upon the right to recover the penalty, and we cannot ingraft such upon it. The statute, however, does not violate this amendment to the Federal Constitution. Its object is "not to penalize a carrier for merely refusing to pay a claim within the time required, whether just or unjust" (*Best v. Seaboard Air Line R. Co.* 72 S. C. 479, 52 S. E. 223) and, "further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions." *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 78, 52 L. ed. 110, 28 Sup. Ct. Rep. 30.

One of the duties of the carrier is to pay to the party entitled thereto the actual damage sustained by him on account of the loss of or damage to freight while in its possession. The penalty imposed is for the failure to perform this duty within sixty days, or ninety days, as the case may be. The claim contemplated by the statute is the actual amount due, and not necessarily the amount claimed by the party suffering the damage. All the carrier is required to do in order to be relieved of the penalty is to pay or tender within sixty or ninety days to the party entitled thereto the amount actually due. Should such tender be made and refused, the penalty cannot be collected. The amount of damage sustained can be as easily ascertained by the carrier as by the claimant; in fact, in the language of the Supreme Court of the United States, in *Seaboard Air Line R. Co. v. Seegers*, supra: "The matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods, and has them in its custody, until the carriage is completed. It knows what it received, and what it deliv-

ered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly, and with less delay and expense, than anyone else, and for the adjustment of loss or damage to shipments within the state forty days cannot be said to be an unreasonably short length of time. It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification."

No tender having been made of the amount actually due, the court committed no error in refusing this instruction. There is no merit in the other matters complained of.

The judgment of the court below is therefore affirmed.

#### WASHINGTON SUPREME COURT. (Department No. 2.)

DELIA E. CASTOR, Appt.,

v.

K. MURAMOTO et al., Respts.

(69 Wash. 145, 125 Pac. 153.)

**Mortgage — foreclosure for default in interest — note providing for adding interest to principal.**

Default in payment of interest on a note which provides for a payment annually authorizes immediate foreclosure of the mortgage securing it, although the note provides that interest unpaid when due shall be added to the principal and bear interest, if the mortgage provides that in case of default in payment of principal or interest or any part thereof when due the premises

**Note. — Provision in bond or note that interest when due and unpaid shall be added to the principal, as affecting right to foreclose mortgage securing the same for default in interest.**

The position taken in *CASTOR v. MURAMOTO* is sustained by the few cases in point that are not distinguishable for the reasons pointed out in the foregoing opinion.

Thus, a provision of a note that any interest, which by the terms of the note

may be sold and the whole of the principal and interest, whether due or not, retained from the proceeds.

(June 24, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for King County sustaining a demurrer to and dismissing the complaint in an action brought to foreclose a mortgage for default in the annual payment of interest. Reversed.

The facts are stated in the opinion.

Mr. B. W. Colner for appellant.

Messrs. Carkeek, McDonald, & Kapp for respondents.

**Morris, J.**, delivered the opinion of the court:

In an action to foreclose a mortgage for default in the annual payment of interest, the court below sustained a demurrer to the complaint and dismissed the action, holding that under the terms of the mortgage the action was prematurely brought. This is the only question presented by the appeal.

was payable monthly, remaining due and unpaid, shall be added monthly to the principal and bear interest at the same rate (10 per cent per annum), does not prevent foreclosure of a mortgage securing the same for nonpayment of the monthly interest, under a provision thereof empowering the mortgagee to sell the premises in case default shall be made in the payment of the principal sum, or the interest thereon; nor is the result affected by a stipulation in a subsequent mortgage between the parties that all arrearages of monthly interest "now existing or hereafter to accrue" upon the first-mentioned note and mortgage shall bear interest from the date respectively at which they "have accrued or shall accrue" at 1 per cent per month, the same to be added monthly to the principal thereof. *Brickell v. Batchelder*, 62 Cal. 623.

So, where a mortgage recited that if default should be made in the payment of the interest or any part thereof according to the tenor of the note, then the whole sum of principal and interest should become due, it was held in *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032, that a provision in the note, secured by the mortgage, reciting that the interest was payable quarterly, "and, if not so paid, then to become a part of the principal and bear a like rate of interest till paid," did not prevent the foreclosure of the mortgage upon the nonpayment of the interest at the option of the mortgagor, whose sole right it was to dispose of the interest due and unpaid in the manner described in the note.

A somewhat analogous case is *Yoakum v. White*, 97 Cal. 286, 32 Pac. 238. Here by the terms of the note the principal was payable at the end of five years; the interest annually, and, if not so paid, was

The note for which the mortgage was given as security, and the mortgage, must, of course, be read and construed together in determining the contract of the parties and their relative rights thereunder. By the terms of the note, it is provided that the principal sum is payable on or before five years after date, "with interest from date until paid at the rate of 10 per cent per annum, interest payable annually, and if not so paid to become a part of the principal and bear interest until so paid." The mortgage recites that it is given to secure the payment of \$4,233, "together with interest thereon at the rate of 10 per cent per annum from date until paid, according to the terms and conditions of one certain promissory note, . . . and these presents shall be void if such payment be made according to the terms and conditions thereof. But in case default be made in the payment of the principal or interest of said promissory note or any part thereof, when the same shall become due and payable according to the terms and conditions thereof, then the said party of the second part, her

to be compounded annually and bear the same rate of interest as the principal. Under the mortgage securing the note, the mortgagors promised to pay the same "according to the terms and conditions thereof," and that "in default of payment of the note by its terms the mortgagees or their assigns may foreclose." When default was made in the payment of the interest, the mortgagees, relying upon a statute so authorizing, alleged in their complaint that the mortgaged property could not be sold in portions without injury to the parties, and prayed for a foreclosure of the entire debt. The mortgagors, upon the overruling of a demurrer to the complaint which they had interposed, failed to answer, and their defaults were duly entered. The court, while entirely satisfied that the mortgage could be foreclosed to the extent of the interest due, remitted the solution of the question whether the entire debt might also be foreclosed for default in payment of interest to the trial court.

While there was such a provision in the note in *Bank of San Luis Obispo v. Johnson*, 53 Cal. 99, as would bring the case within the purview of the subject of the present note, no point seems to have been made of the fact in the decision, and the case is, therefore, not set out.

The cases, *Van Loo v. Van Aken*, 104 Cal. 269, 37 Pac. 925; *Wood v. Whisler*, 67 Iowa, 676, 25 N. W. 847; *Motsinger v. Miller*, 59 Kan. 573, 53 Pac. 869,—are distinguishable for the reasons set out in the *CASTOR* opinion.

The decision in *CASTOR v. MURAMOTO* is also sustained in *Meyer v. Graeber*, 19 Kan. 165, which is sufficiently set out in the opinion in the former case.

E. M. S.

executors, administrator, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest, whether the same shall be then due or not, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs or assigns. . . . The above-mentioned note is for \$4,233, with interest at 10 per cent, payable on or before five years, interest payable annually."

The argument in support of the demurrer is that, since the note provides that, in case of default in the payment of interest, the interest shall immediately become a part of the principal and bear like interest until paid, and contains no provision that, in case of a default in the payment of interest, the whole sum shall become due and payable, and the mortgage providing for a sale only in case default be made in the payment of the principal or interest, according to the conditions of the note, there is no time prior to the maturity of the note when foreclosure could be had, and that appellant's only remedy, in case of default in the payment of interest, is to have the same become part of the principal and draw like interest. Such a contention, it seems to us, fails to give due consideration to the terms of the note and mortgage, when read as a whole. It is plain from the note that the interest is payable annually. If, then, it be not so paid, there is a default in the payment of interest according to the terms of the note. The mortgage provides for its foreclosure, in case of any default in the payment of interest, when the same becomes payable under the terms of the note, and the retention out of the moneys arising from the foreclosure sale of the whole of the principal and interest, whether the same shall be then due or not. If respondents' contention be true, this last provision of the mortgage is meaningless, since the only time the mortgage would be subject to foreclosure, irrespective of prior defaults in the payment of interest, would be a default in the payment of the original and the increased principal with the last annual interest at the maturity of the note, when, under all theories, all sums payable under the note and mortgage were subject to default for nonpayment. What need, then, for stipulating that, in case of a foreclosure, "the whole of said principal and interest, whether the same shall be then due or not," shall be retained? If the only foreclosure can take place subsequent to the maturity of the note, what sum is it, not

then due, that is to be retained in case of a sale because of a default in the payment of principal or interest? Manifestly such a clause in this mortgage is indicative of the intention of the parties that the mortgage did stipulate for its foreclosure prior to the maturity of the note, in case of any default in the payment of the annual interest, as such a foreclosure could be the only one when the whole of the principal and interest would not be due, which situation is further illustrated by describing the note as one in which the interest is payable annually. Again, the mortgage provides for its foreclosure in case of any default in the payment of principal or interest, when the same is payable under the note. The note says the interest is payable annually. If the interest be not so paid, it is a default in the payment of interest, and a default subjecting the mortgage to foreclosure.

Respondent relies upon *Bank v. Doherty*, 29 Wash. 233, 92 Am. St. Rep. 903, 69 Pac. 732; *Van Loo v. Van Aken*, 104 Cal. 269, 37 Pac. 925; *Wood v. Whisler*, 67 Iowa, 676, 25 N. W. 847; and *Motsinger v. Miller*, 59 Kan. 573, 53 Pac. 869. None of these cases, nor any other that we have been able to find, supports this contention. In the *Bank Case*, it was held that a mortgage could not be foreclosed for default in the payment of interest, when the only condition for its foreclosure was contained in this provision: "Now, if the said first party shall, on or before maturity, pay or cause to be paid the said note with interest that may be due thereon, then the foregoing conveyance shall be null and void; otherwise to be and remain in full force and virtue,"—which was construed to mean that the debt was permitted to run until the maturity of the note and mortgage, and that the mortgage should stand as security for the principal or interest, and could not be foreclosed until there was a failure to pay the note at its maturity. Manifestly this would be so when the parties fixed the maturity of the note as the only time when a default would subject the mortgage to a foreclosure. The court there says it was within the power of the parties to have provided for a foreclosure in case of any failure to pay interest, but they failed to do so; and that if the mortgage had contained a stipulation providing for its foreclosure in case of any failure "to pay said note, or the interest, or any part thereof, when due," a foreclosure might be had for default in the payment of interest.

Referring to the language of the mortgage under consideration, we find it does contain the very thing the court in the *Bank Case* says is essential to a foreclosure on default in the payment of interest. It says: "In case default be made in the payment of the

principal or interest of said promissory note, or any part thereof, when the same shall become due and payable, according to the terms and conditions thereof." The note providing for the payment of interest annually, the failure to pay the interest when due is a default in the payment of interest, and a default in the payment of interest subjects the mortgage to a foreclosure. And, making this intention still plainer, comes the further stipulation that, in case of any such foreclosure, the whole of the principal and interest represented by the note shall be retained, even though it be not yet due. In order to be any sum "not yet due," the sale must be prior to the maturity of the note and mortgage. The Bank Case, with the authority therein cited, is in direct conflict with the ruling complained of, and is of itself sufficient to support the claim of error. The case, however, having been argued so confidently upon the authority of the Van Loo, Wood, and Motsinger Cases, *supra*, we will review those cases and show them not to support the contention claimed.

*Van Loo v. Van Aken* is a California case, where the note, as in the case at bar, provided for the payment of interest annually, and, if not so paid, to draw interest the same as the principal. The mortgage, however, provided for its foreclosure only in case of default at maturity. The reasoning of the court is that the mortgage is not given to secure the payment of the note according to its terms, but only as security for the payment of the principal sum and interest on the date of the maturity of the note. The mortgage in suit contains the very provision the mortgage in that case failed to contain; and hence that case is of no value to respondent. That the rule he contends for is not the law in California, but that the rule there is as we are attempting to here announce it, is clear from the following authorities: *Brickell v. Batchelder*, 62 Cal. 623; *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838; *Clemens v. Luce*, 101 Cal. 435, 35 Pac. 1032; *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048. In the next case, *Wood v. Whisler*, neither the notes nor mortgage provided for the payment of interest annually. They simply provided that, in case it was not so paid, it should draw interest. Manifestly, unless the notes provided for the payment of interest annually, the failure to so pay would not be a default. In the case before us, as we have before seen, the note does provide that the interest shall be annually. The case is not therefore in point. The next case is *Motsinger v. Miller*, from Kansas, a case similar to the *Wood Case*; the note providing that, if the interest was not paid annually, it should be added to the principal. There was, however, no provision

in the note that the interest should be payable annually, and the court simply holds that the provision, "if interest be not paid annually, to become as principal," cannot be regarded as a promise to pay interest annually. It will thus be seen the case is not controlling when the note, as in the present case, contracts to pay annual interest. The court in its reasoning said: "If the interest was payable annually, the default in the payment of the same makes the whole debt, and entitles Miller to a foreclosure of his mortgage." In other words, if, as in the case at bar, the note made provision for the payment of interest annually, a foreclosure could be had for its nonpayment. That we are in full accord with the Kansas rule is plain from the reasoning of the *Motsinger Case* and from *Meyer v. Graeber*, 19 Kan. 165, where the note provided for the payment of interest, and the mortgage recited that the interest was payable annually, and, if not so paid, to be added to the principal, and that, in case of a default of any payment of principal or interest, foreclosure might be had; and it was held that the interest was to be construed as payable annually, although not as stated in the note, and that, in case of default in its payment, the mortgage might be foreclosed.

The judgment is reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings.

Fullerton, Mount, and Ellis, JJ., concur.

#### NORTH DAKOTA SUPREME COURT.

A. J. PAULSON, Resp't.,

v.

WARD COUNTY, Appt.

(— N. D. —, 137 N. W. 486.)

#### County — claims — payment — presumption.

1. Where unliquidated claims against a county are duly presented to its board of county commissioners for allowance, and the claims are considered together and allowed at a lump sum less than the amount claimed, and a warrant is drawn for the

Headnotes by Goss, J.

*Note.* — *Acceptance of partial allowance of claim by public body as an accord and satisfaction.*

I. Introductory, 112.

II. Claims against the United States.

- a. Where the claim is liquidated, 112.
- b. Unliquidated or disputed claims in general, 113.
- c. Claims for rent of land or vessels, 115.

amount so allowed, which warrant is accepted by the claimant, such acceptance is presumed to be in full payment of the claims presented.

**Same — partial allowance — acceptance — effect.**

2. Claimant cannot accept said warrant and credit the amount thereof upon the total of the claims presented, and then sue for the balance rejected. He must repudiate the allowance and submit his claim as a whole to the courts or accept the warrant in full payment.

(July 24, 1912.)

**A** PPEAL by defendant from an order of the County Court for Ward County overruling a demurrer to the complaint in

an action brought to recover for professional services and supplies furnished by plaintiff for the support of the poor of Ward County. Reversed.

The facts are stated in the opinion.

Messrs. Dudley L. Nash and George L. Ryerson, for appellant:

Where a claim against the county is presented to the board of supervisors and they allow a part of it and reject the rest, a claimant accepting the portion allowed, knowing that the rest has been rejected, cannot recover in an action the portion rejected.

Brick v. Plymouth County, 63 Iowa, 462, 19 N. W. 304; Cleveland County v. Seawell, 3 Okla. 281, 41 Pac. 592; Eakin v. Nez Perces County, 4 Idaho, 131, 36 Pac. 702.

**III. Claims against other bodies.**

**a. Liquidated claims, 116.**

**b. Unliquidated or disputed claims.**

**1. In general—intent, 116.**

**2. Illustrations.**

**(a) Claims against states, 117.**

**(b) Claims against counties.**

**(1) In general, 118.**

**(2) Particular statutes, 119.**

**(c) Claims against cities, etc., 119.**

**IV. Claims for statutory salary or pay, 121.**

**V. Splitting demands, 121.**

**VI. Miscellaneous, 121.**

**I. Introductory.**

In claims against public bodies the same two rules apply as against private debtors:

(1) That in the absence of statute the acceptance of part payment, even when receipted for in full, of the claim, is no satisfaction of a liquidated demand unless the receipt be a general release under seal; and (2) that where the claim is unliquidated or disputed, a payment and acceptance of part in compromise is a sufficient satisfaction of the whole. The main questions are therefore, first, Is the claim liquidated? second, If not, has the acceptance been with a clear understanding of the intent with which the payment was made, or under such circumstances that the receiver is estopped from denying such understanding?

For convenience of arrangement the cases of claims against the United States are treated separately, except the cases upon claims for statutory salary or pay, and upon splitting demands, which will be found in the latter part of the note.

The question of the acceptance of a particular medium of payment as an accord and satisfaction is not included.

For the general subject of accord and satisfaction by part payment, see the note to Fuller v. Kemp, 20 L.R.A. 785.

For payment of part of a liquidated and 42 L.R.A.(N.S.)

undisputed debt as a consideration for the discharge of the whole, see the notes to Melroy v. Kemmerer, 11 L.R.A.(N.S.) 1018, and to Ex parte Zeigler, 21 L.R.A.(N.S.) 1005.

For the effect of acceptance of remittance of part of the amount of an unliquidated or disputed claim accompanied with the statement that it is in full, or words of similar import, as assent to its receipt in full payment, see the notes to Canadian Fish Co. v. McShane, 14 L.R.A.(N.S.) 443, and to Barkam v. Bank of Delight, 27 L.R.A.(N.S.) 439.

For acceptance of principal sum as affecting the right to interest, see the note to Bennett v. Federal Coal & Coke Co. 40 L.R.A.(N.S.) 588.

For cases on agreement in advance to accept less than amount of appropriation, salary, or fee, see the note to Lukens v. Nye, 36 L.R.A.(N.S.) 244.

Upon the right of town, county, or municipality to surrender valid claim upon a partial payment thereof, see the note to Farnsworth v. Wilbur, 19 L.R.A.(N.S.) 320.

**II. Claims against the United States.**

**a. Where the claim is liquidated**

Where a claim against the United States is liquidated or undisputed, a payment of part by the government to the claimant will not be an accord and satisfaction of the part unpaid.

Thus a receipt in full to the government is not a bar to a claim, where there is no dispute, but simply an arbitrary reduction of a part of a legitimate demand of the claimant. Baldwin v. United States, 15 Ct. Cl. 297.

So, where a quartermaster purchased a number of horses at so much per head, and gave vouchers therefor, which, on presentation to the quartermaster general, the latter reduced by lowering the price per head, and paid the claimants the reduced amount, they giving their receipt in full, it was held that they were not concluded from prosecuting a claim against the United



Messrs. George A. McGee and John E. Martin, for respondent:

The unauthorized act of the overseer of the poor, in employing respondent to provide for the county charges in his district outside of the asylum, may be ratified by a subsequent resolution of the board of county commissioners, where they could have authorized him, in the first place, to engage said respondent.

Hughes County v. Ward, 81 Fed. 314.

The allowance of a claim in part only by the board of county commissioners is no bar to an action against said county for the balance, where no appeal has been taken from such action of the board.

Campbell County v. Overby, 20 S. D. 640, 108 N. W. 247.

States for the balance. Wilcox's Case, 7 Ct. Cl. 586.

In Finney v. United States, 32 Ct. Cl. 546, where there was no real dispute upon a claim under a contract to furnish flour, it was held that the receipt of a less sum than that due, not stating that it was in full, did not bar the claimant, and that such was not the intent of the statute, which provides that "any person accepting payment under a settlement by an auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted."

***b. Unliquidated or disputed claims in general.***

The acceptance of part of an unliquidated or disputed claim in payment of the whole will be an accord and satisfaction, discharging the government the same as any ordinary debtor.

This rule obtains whether the claim is adjusted by commissioners of a government department, by the department itself or its head, or by auditing officers or other government officers.

The allowance of part of a contract claim, voluntarily submitted to a commission appointed by the Secretary of War to pass upon claims arising in a certain military district, payment of which had been suspended because of frauds in the administration of the district, together with the receipt of the commission's voucher and acceptance of payment thereunder, pursuant to a joint resolution of Congress making an appropriation for the payments of the amounts allowed by the commission, was held a bar to any further demand, without regard to the terms of the receipt given by the claimant upon receiving the voucher. United States v. Adams, 7 Wall. 463, 19 L. ed. 249.

This case was followed under similar circumstances by United States v. Mowry, 154 U. S. 564, and 19 L. ed. 256, 14 Sup. Ct. Rep. 1213, and United States v. Child, 12 Wall. 232, 20 L. ed. 360. In the latter case the court repudiated the contention

Goss, J., delivered the opinion of the court:

This action is brought by a physician to recover for professional services and supplies furnished by him for the support of the poor of Ward county. The complaint recites the performance of services and the furnishing of supplies of the total reasonable value of \$750, and that "bills in due form of law, duly verified and approved by a commissioner of the board as aforesaid, were presented to the board of county commissioners of Ward county for their consideration, and, after mutilating said bills, said board of county commissioners allowed the plaintiff herein the sum of \$265, and no more. Wherefore plaintiff prays judgment against the defendant for the sum of \$750,

that the government should be held to a different rule than that which applies to private parties.

In Cruger v. United States, 11 Ct. Cl. 766, where the Secretary of the Treasury had referred the claims of a contractor to a commission, which had reported against him and had decided to pay him nothing, on the ground of fraud, and Congress passed an act permitting the officers of the Treasury to go into the claim on a certain basis, and later Congress passed another act appropriating a certain specific amount which should be "in full for the balance due him," which was paid, it was held that he could not claim anything further against the government.

The general theory is stated in Mason v. United States, 17 Wall. 67, 21 L. ed. 564, where the court, in affirming a decision against the claimant, whose contract was modified by a commission of the War Department, requiring him to execute a bond and an amended contract, which he did, said: "Parties having claims against the United States for labor or service, or for personal property or materials furnished, which are disputed by the officers authorized to adjust the accounts, may compromise the claim and may accept a smaller sum than the contract price; and where the claimant voluntarily enters into a compromise, and accepts a smaller sum, and executes a discharge in full for the whole claim, he cannot subsequently recover in the court of claims for any part of the claim voluntarily relinquished in the compromise."

Thus the claimant was held concluded:

—where he had voluntarily submitted his claim for furnishing rifles to a commission appointed by the Secretary of War, and had accepted a warrant for the reduced amount it allowed him. United States v. Justice, 14 Wall. 535, 20 L. ed. 753;

—upon a claim for building an ironclad, on the acceptance of a sum found due by the proper department and a receipt in full. Chouteau v. United States, 95 U. S. 61, 24 L. ed. 371;

—where the Secretary of War reduced a demand for special services and announced

less a credit of \$265." The trial court overruled a demurrer interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action. From this order defendant appeals.

The only deduction to be drawn from the complaint is that the county commissioners allowed \$265 in full for the \$750 of claims presented against the county, and that plaintiff has credited the \$265 so allowed, and brought this action for the balance. This necessarily implies an acceptance by plaintiff of a warrant for county funds for the \$265 allowed. Does the complaint show an executed accord and satisfaction barring plaintiff's recovery in the face of the demurrer? If this action was between private parties, we would have no

hesitancy in holding the demurrer not well taken, as it would not sufficiently appear that the partial payment received was under an agreement that the same should be in full for the claim and so constitute an accord. But where, as in this case, in the payment of claims by counties or municipalities, the law requires the presentation of itemized and verified claims to the board of county commissioners as the administrative and fiscal agents of the county for their approval and determination, upon the fact of whether the services were rendered and goods furnished as charged for, as well as the reasonable value thereof, and consequent approval in whole or in part before allowance, and with the requirement that said board shall order warrant in payment

his willingness to pay a certain sum, and a receipt for it was given in full for the above account. *De Arnaud v. United States*, 151 U. S. 483, 38 L. ed. 244, 14 Sup. Ct. Rep. 374;

—where the Secretary of the Navy adjusted a claim under an excavation contract and the claimant accepted the amount allowed, without objection. *Murphy v. United States*, 104 U. S. 464, 26 L. ed. 833;

—where a claim was examined by the auditing officers of the government and they reported to the claimant what they considered due, with the principles upon which the adjustment had been made, and he accepted the money afterwards without objection. *Baird v. United States*, 96 U. S. 430, 24 L. ed. 703 (but this was a case of split demands).

In *Francis v. United States*, 96 U. S. 354, 24 L. ed. 663, where it was held that, under a contract to deliver wood to the government, by the terms of the contract the wood was to be cut beyond the reservation, it was also held that where the contractor acquiesced in the order of the commander that the wood must be cut beyond the reservation, and thereafter hauled and delivered the wood and received pay therefor in full under the contract, giving receipts in full, it was too late to prefer such a claim against the United States.

**Necessity of actual or constructive intent to compromise.**

But where the payment is made with clear understanding that there is no relinquishment of any part of his claim by the claimant, he will not be concluded. Thus, in *Cape Ann Granite Co. v. United States*, 20 Ct. Cl. 1, where the contract was for the delivery of granite, the claimant gave a receipt and voucher which concluded with the following words: "In full payment of the above account, and in full of all claims that have arisen or may arise under the contracts above specified, and in final and absolute settlement of the same." At the same time, and as a part of the transaction, there was attached and filed with said re-

ceipt, a written protest, in substance that the receipt did not cover certain claims not included in the voucher on file for the amount for which the receipt is given; and stating "that the receipt in full is a receipt for the claims represented by these vouchers only." Later the claimant gave another receipt for a payment for stock supplied under the contract, which was "in full of the above account." Again, later, a voucher was made showing a balance due claimant of a certain sum, and he executed a receipt for said balance, "in full payment of the above account," accompanying it with a written protest "that it does not cover certain claims which the Cape Ann Granite Company has, which are not included in the vouchers on file for the amount of which this receipt is given; that the receipt in full is a receipt for claims represented by this voucher only." And it was held that the claimant was not concluded by these receipts.

So, in *Piatt v. United States* (*Grandin v. United States*) 22 Wall. 496, 22 L. ed. 858, the court, while conceding for the purposes of the case at least, that an appropriation of less than the amount of a disputed claim, but purporting to be in full payment thereof, if accepted may bar any further demand, yet held that the allowance by accounting officers of part of the amount of an unliquidated claim, and its application to the discharge of an amount due from the claimant to the government, pursuant to an act of Congress passed for the benefit of the claimant, which expressly provided that the sum allowed should not exceed the amount claimed by the government and for which suit had been commenced against him, did not bar a further claim for an amount equal to that which the accounting officers arbitrarily deducted in order to reduce the amount of the credit to the sum due from the claimant to the government.

Where contract provides for determination of amounts.

Where the contract provides that a determination is to be made by the govern-

to issue for the full amount, and no more, at which the claim is approved, under the presumption of the regularity of official action, the warrant is issued as the result of a quasi judicial finding by the board on the claim presented. Of all this plaintiff was conclusively presumed to have knowledge before acceptance of the warrant or the cash proceeds thereof, as he is bound to know the law under which he presented his claim and sought its allowance and under which the warrant was issued. And the pleading of the issuance of the warrant and in effect its acceptance amounts to the pleading of an accord and satisfaction, and precludes him from claiming only partial payment and thereunder crediting the amount received as a partial payment on the claim

presented. He was bound to know that a warrant could not be issued and accordingly tendered him as other than full payment of his claims, which he pleads were presented and considered, and for which *in toto* the warrant was issued. With knowledge of the law thus imputed and conclusively presumed, the acceptance of the warrant operated as an accord and satisfaction within the provisions of §§ 5269 and 5271, Rev. Codes 1905. As to necessity of presentation of claims and allowance of payment to the amount allowed, see §§ 3162 to 3166, 2393 and 2398, Rev. Codes 1905. As sustaining our conclusions, see *Perry v. Cheboygan*, 55 Mich. 250, 21 N. W. 333; *Wapello County v. Sinnaman*, 1 G. Greene, 413; *Brick v. Plymouth Coun-*

ment's engineer, acceptance of the amount allowed by him in full concludes the contractor. *Case v. United States*, 11 Ct. Cl. 712; *Newman v. United States*, 81 Fed. 122.

In *United States v. Shrewsbury*, 23 Wall. 508, 23 L. ed. 78, where an agreement to transport government stores provided that a board of survey be called at the place of delivery to examine the quantity and condition of the stores transported, and in case of loss or deficiency, to assess the amount thereof and state whether it was attributable to the neglect of the contractor, and that the decision of such board should determine the payments to be made to the contractor; and such board reported a deficiency to be charged to the contractor, and he accepted their decision and gave a receipt in full for his account, giving notice at time of payment that he should claim a readjustment and full payment,—it was held that he had waived any exception which he might have taken at the proper time, and was, when the payments were made, finally concluded from further claim.

#### Where no express contract.

Where there is an implied contract to pay the reasonable value of supplies furnished, a receipt in full *prima facie* imports that the whole claim has been paid and adjusted. *Kirkham v. United States*, 4 Ct. Cl. 223.

In *St. Louis Hay & Grain Co. v. United States*, 37 Ct. Cl. 281, the court said in dismissing the petition upon a claim for hay delivered to the government: "It has been uniformly held by this court since *Kirkham v. United States*, *supra*, in cases of implied contract where the recovery will be in *quantum meruit* and the price to be paid is undetermined by agreement, that, where the defendant has paid and the contractor has accepted a price as payment in full, it closes the transaction, and the contractor cannot come in and be allowed to allege that his goods were worth more than the price which he consented to take for them. 42 L.R.A. (N.S.)

. . . Acceptance of a smaller sum than the one claimed does not leave the defendants open to further claim, if the acceptance of the smaller sum was voluntary, without intimidation, and with full knowledge of all the circumstances."

In *Comstock v. United States*, 9 Ct. Cl. 141 (a claim for hay seized for government use), the court said: "In the case now before us there was no express contract; there was no stipulated consideration; the payment was not evidenced by a receipt in full. Yet we cannot avoid thinking that it was made as such on the part of the government, and accepted as such on the part of the claimant."

In *Brice v. United States*, 32 Ct. Cl. 23, where a claim was submitted to the Interior Department for depredation by Indians, and the Secretary allowed it in part, which was paid, and four years after a claim was made for the balance, the court held that the payment was received in full satisfaction and discharge of the plaintiff's claim. (It does not appear what receipts were given.)

#### c. Claims for rent of land or vessels.

Where a landlord made a claim against the United States for rent, which was contested and considered exorbitant and reduced, and on that basis settled, and the money paid over and receipted for by the claimant's attorney without protest or complaint at the time, it was held that this concluded the claimant. *Gilman v. United States*, 8 Ct. Cl. 520.

But in *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65, where the United States hired for a year certain premises at so much per month, and paid for the greater part of the year at that rate, but during the latter part of it paid at one half the contract rate, and all that there was to show anything about any new rate was a receipt by the landlord for the period which covered the latter part of the year and a little more, at the lower rate, it was held that, in the absence of proof showing that the reduced rate was part of an agreement

ty, 63 Iowa, 462, 19 N. W. 304; People ex rel. O'Mara v. Cayuga County, 63 Hun, 625, 17 N. Y. Supp. 314; Zirker v. Hughes, 77 Cal. 235, 19 Pac. 423; Rawlins v. Jungquist, 16 Wyo. 403, 84 Pac. 464, and opinion on rehearing in same case, 96 Pac. 144; La Plata County v. Morgan, 28 Colo. 322, 65 Pac. 41; La Plata County v. Durnell, 17 Colo. App. 85, 66 Pac. 1073; Eakin v. Nez Perce County, 4 Idaho, 131, 36 Pac. 702; Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430; Cleveland County v. Seawell, 3 Okla. 281, 41 Pac. 592; Bowman v. Ogden City, 33 Utah, 196, 93 Pac. 561; Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439; United States v. Adams, 7 Wall. 463, 19 L. ed. 249; United States v. Mowry, 154 U. S. 564, and 19 L. ed. 256, 14 Sup. Ct.

to go on beyond the end of the year, that the landlord was entitled to recover of the United States the contract rate to the end of the year.

In *Sweeny v. United States*, 17 Wall. 75, 21 L. ed. 575, where a military officer made a settlement with the owner of a steamer, who received it "as in full of the above account," it was held that as enough appeared to satisfy the court that the original charter party had been superseded by the acts of the parties prior to the adjustment, that it was the proper subject of compromise within the principle of *Mason v. United States*, 17 Wall. 67, 21 L. ed. 564, *supra*.

It has been held where the United States has chartered a vessel at a certain rate per day until returned to a certain port, and after a time has announced that only a smaller sum will be paid, beginning from a time prior to this notification, that a verbal refusal to agree, followed by a final receipt in full on the basis of the reduced figures, will protect the government. *Field v. United States*, 13 Ct. Cl. 41; *United States v. Clyde*, 13 Wall. 35, 20 L. ed. 479, where the total amount paid in each case was more than what was due under the contract at the time of notification.

### III. Claims against other bodies.

#### a. Liquidated claims.

Where the claim is liquidated, part payment is of course not a satisfaction of it.

In *People ex rel. Morrison v. Hamilton County*, 56 Hun, 459, 10 N. Y. Supp. 88, the court, in holding that the acceptance of a check for part of a claim against the county for services in printing and publishing did not conclude the claimant, said: "A further point of the defendant is that the relator has lost his rights by accepting the check, which included part of his claim. We think not. Most of that check was for the rest of his bill. He could not divide the check; and was not bound to lose what was paid him. There was no compromise of a disputed claim. There was only a payment of a part of what was legally due." 42 L.R.A. (N.S.)

Rep. 1213; 1 Cyc. 329, and notes, and Cyc. Annotations. Consult also *Flagg v. Marion County*, 31 Or. 18, 48 Pac. 693; *Rio Grande County v. Hobkirk*, 13 Colo. App. 180, 56 Pac. 993, and *People ex rel. Morrison v. Hamilton County*, 56 Hun, 459, 10 N. Y. Supp. 88, which three cases recognize the doctrine, but turn on the question of pleading.

All the foregoing cases are in point. We give the following excerpts from some of them: "The council audited the claim at \$50. Now, if plaintiff was dissatisfied with this allowance, he should not have applied for and received the warrant on the treasurer and obtained payment thereof. He must be held to have acquiesced in the settlement thus made." "There is no good rea-

. . . If, as we have shown, the board had no judicial discretion to exercise, a part payment does not satisfy the claim."

In *People ex rel. Kinney v. Cortland County*, 58 Barb. 139, where the claimant, on receiving a warrant for part of a liquidated claim, refused to receive it in full, and afterwards tendered it back, but the county refused to receive it, it was held that his later collection and retention of the proceeds of the warrant did not conclude him upon the balance of his claim.

#### b. Unliquidated or disputed claims.

##### 1. In general — intent.

There must be on the part of the receiver a clear understanding that the payment was made with the intent of compromise, or the circumstances must be such that the receiver is estopped from denying such understanding.

Thus, in *Flagg v. Marion County*, 31 Or. 18, 48 Pac. 693, where the complaint averred that the claim which was against a county for printing ballots was presented to the county court, and that subsequently a certain sum, being part of the whole, was paid thereon, it was held that it was error to sustain a demurrer to the complaint, as the averment was not sufficient to create a presumption that the payment was either made or accepted in full of the claim.

So the claimant has been held not concluded:

—where at the time of receiving the money she had reason to suppose that the balance of her claim was under consideration. *Fulton v. Monona County*, 47 Iowa, 622;

—where he did not know that the warrant was issued in full satisfaction, his subsequent appeal not showing such knowledge at the time of acceptance. *Garfield County v. Beardsley*, 18 Colo. App. 55, 70 Pac. 155.

In *Wilson v. Palo Alto County*, 65 Iowa, 18, 21 N. W. 175, where the plaintiff received the amount allowed by the county, but testified that he objected to receiving this in full payment of the account; that the committee stated to him that if he did

son why plaintiff is not estopped, by accepting payment of the amount allowed, from making a further claim for the same services passed upon by the council." *Perry v. Cheboygan*, 55 Mich. 250, 21 N. W. 333. "The acceptance of the part allowed should be considered satisfaction for the whole. If the party desired to bring suit, he should repudiate the allowance, refuse to accept the amount allowed, and bring his action." *Wapello County v. Sinnaman*, 1 G. Greene, 413. "The proposition now made by the learned counsel for the plaintiff is that inasmuch as the board of supervisors did not pass upon the several items of the account rendered by him, but only upon the account as a whole, the case of his client is taken out of the ordinary and well-established

rule. The force of this contention, however, is not apparent. If before accepting the sum of \$412 the relator had ascertained that the board of supervisors had not passed upon the several items, he could undoubtedly, by refusing to accept the money thus offered, require that there should be an examination of and a passing upon the several items of his account. Not having done so, however, he is now, as it seems to us, precluded from making any claim based upon such contention." *People ex rel. O'Mara v. Cayuga County*, 17 N. Y. Supp. 314, which would answer any similar contention of this plaintiff regarding the act of the board in passing jointly upon all bills presented and making a lump allowance therefor. In *Yavapai County v. O'Neill*, 3 Ariz. 363, 29

not accept it as full payment he had his remedy; and that he accepted the amount as part payment only, and receipted for it as such, so stating to the committee at the time,—the court in reversing a judgment against the claimant said that the general principle applicable to this class of cases was that, "unless the party has accepted the amount allowed on his claim, under such circumstances as that a settlement or compromise of matters in dispute between the parties can be inferred therefrom, he is not precluded thereby from maintaining his action for the portion disallowed."

In *Rio Grande County v. Hobkirk*, 13 Colo. App. 180, 56 Pac. 993, where the only evidence of the action of the county board appearing in the record was an indorsement on the back of the account that a certain lower amount named "was allowed on the within account in full payment thereof by order of the board of commissioners," on such a day, and there was no proof that the deduction was called to the claimant's attention, nor that he was tendered the warrant with the agreement and understanding that he should accept it in full payment; nor was any action proved on the part of either the claimant or the board other than this action and the indorsement which had been placed on the account,—a judgment for the claimant for the balance of his claim was affirmed.

In *Wilkinson v. Long Rapids Twp.* 74 Mich. 63, 41 N. W. 861, where a physician sent his claim in to the town board for a much larger sum, and they sent him an order for \$25, the court, in holding that he was entitled to recover the balance, said: "The fact that the township board allowed the plaintiff \$25 on his account, instead of being a ground for verdict against him, furnishes one of the best of reasons why the township should pay him the reasonable worth of his services. He sent his account to them. They did not reject it for the reason that he had never been employed, but allowed it in part, thus recognizing the validity of his employment, and the clerk of the board wrote him a letter, saying that was all the board said they owed him. The

\$25 was deducted by the jury, under the instructions of the court, from the amount they found plaintiff's services to be worth, before verdict. The receiving of the order did not preclude plaintiff from suing for the balance of his services, as he did not accept it in full payment, and the decision of the township board, unlike that of the board of supervisors, is not final and conclusive upon the claimant or upon the courts."

This case was followed in *Pease v. Saginaw*, 126 Mich. 436, 85 N. W. 1082, where it was held that taking an order from a city for part of a claim for professional services as a physician did not conclude the claimant, where he at first refused to take the order, but claimed that he took it upon the assurance of the city clerk, who informed him he could do so and that it would not be a receipt in full for his services.

## 2. Illustrations.

### (a) Claims against states.

Contracts between a state and a citizen are to be considered as those between man and man; and where a claim is disputed, and the state appropriates a sum to be in full for the claim, and this is accepted and the money drawn, the claimant is concluded. *Calkins v. State*, 13 Wis. 389; *Massing v. State*, 14 Wis. 502.

In this connection reference may be made to *Sholes v. State*, 2 Pinney (Wis.) 499, 2 Chand. (Wis.) 182, where the petitioner was appointed to publish the Revised Statutes of the state under a statute providing that the governor should subscribe for a certain number of volumes for the state at not exceeding a certain price; and at the time of delivery of the books to the governor he then subscribed for them at a reduced rate, and the legislature having thereafter, by statute, made an appropriation of the amount of the governor's subscription, which amount the said statute provided was to be in full of the petitioner's claim for the books, and he accepted and drew from the state treasury such amount,—it was held that he was concluded.

Pac. 430, the complaint recites the reception and cashing of the warrant under an agreement between the claimant and the county commissioners that such acts should not foreclose the right to sue for the part of the claim rejected. On demurrer the court held the arrangement to be void, and that the acceptance of the money discharged the claim in full. We quote the following: "That manner of the presentation, allowance, and payment of claims against the county, prescribed by the statute from which we have quoted, being exclusive of any other, the right of the plaintiff to maintain this action is governed thereby and, as well, is the

board of supervisors. It is a salutary rule that requires the claimant, if he be dissatisfied with the allowance by the board, to either forego its part rejected, or submit his claim as a whole to the courts. It would be unfair to the county that he should accept that part of the determination of the board that is to his advantage, and make the other a subject of litigation. The observance of the rule that, when his claim is only partially allowed, the claimant must accept the part so allowed in satisfaction of his whole claim or litigate it as an entirety, would directly tend to the discouragement of the presentation of fictitious and extor-

In *Baxter v. State*, 15 Wis. 489, where the territory had passed a resolution settling the claim of a contractor in a certain sum, and he had further claims, and the territory, without having paid the amount named in the first resolution, passed another resolution several years later that certain bonds should be turned over to the plaintiff provided that he would receive the same in full satisfaction and relinquishment for all unsettled claims, demands, or damages which he might have against the territory, it was held that under the circumstances his reception of these bonds was not an estoppel to claim the amount which had been provided by the earlier resolution of the legislature, and that it was not so intended by the second resolution.

#### (b) *Claims against counties.*

##### (1) *In general.*

The acceptance of a reduced amount allowed by the county upon a disputed claim concludes the claimant. *Butler v. Lawrence County*, — Ind. —, 98 N. E. 185; *Wapello County v. Sinnaman*, 1 G. Greene, 413; *Brick v. Plymouth County*, 63 Iowa, 462, 19 N. W. 304; *Hunt v. Franklin County*, 100 Me. 445, 62 Atl. 213; *Cleveland County v. Seawell*, 3 Okla. 281, 41 Pac. 592; *People ex rel. Brown v. Herkimer County*, 3 How. Pr. N. S. 243, see also *People ex rel. O'Mara v. Cayuga County*, 63 Hun, 625, 17 N. Y. Supp. 314, quoted from in *PAULSON v. WARD COUNTY*.

In *Green v. Lancaster County*, 61 Neb. 473, 85 N. W. 439, cited in the *WARD COUNTY CASE*, there was a dispute, and it was claimed that there was a full settlement and a full accord and satisfaction, and it was found by the jury that the amount received was received in full settlement.

So, also, the claimant was held concluded:

—where the county allowed part of the itemized bill of a physician, and orders were issued and drawn by the claimant without protest. *Browne v. Livingston County*, 126 Mich. 276, 85 N. W. 745;

—where there was an acceptance under protest of the reduced amount allowed by the board of supervisors. *Chase v. Saratoga County*, 33 Barb. 603.  
42 L.R.A. (N.S.)

In *La Plata County v. Morgan*, 28 Colo. 322, 65 Pac. 41, a certain form of blank was in use in the county, for the filing of claims, with which the plaintiff was familiar, and he made use of this form, on the back of which was this language: "The amount of \$. . . . . was allowed on the within account in full payment thereof by the board of county commissioners on the . . . day of . . . . . 189. . Chairman of Board." The board reduced the amount of the claim, and the amount, as allowed, was inserted in the proper blank of the foregoing indorsement, which was filled out and warrants in the amount allowed were issued to the plaintiff and accepted by him, and it was held, distinguishing *Rio Grande County v. Hobkirk*, *supra*, that the plaintiff was estopped to sue for the balance of his claim whether he had protested or not.

But in *La Plata County v. Durnell*, 17 Colo. App. 85, 66 Pac. 1073, where a similar blank was used, and no evidence appeared that the plaintiff knew of any custom of the board, or that he ever saw the voucher or claim after it had been acted on by the board, he expressly notifying the clerk when receiving the warrants that he did not accept them in full, it was held that he was not concluded.

#### The county's decision as a judicial act.

Where the county adopted a resolution for its treasurer to pay a claimant a reduced amount, "being the amount in full due him from Queens county under his contract with said county," and his assignee received this amount from the county treasurer, it was held that this ended the matter. *Pratt, J.*, in his opinion, dwells on the view that the act by the board of supervisors was a judicial act, and adjudicated the amount the relator was entitled to receive, and that their audit was in the nature of a judgment against the county, and that a party could not at the same time accept the benefit of a judgment and appeal from it. *People ex rel. McDonough v. Queens County*, 33 Hun, 306. Followed in *People ex rel. Bliss v. Cortland County*, 39 N. Y. S. R. 313, 15 N. Y. Supp. 748.

See also *PAULSON v. WARD COUNTY*.

tionate claims against the county." This case is quoted and followed in *Eakin v. Nez Perces County*, 4 Idaho, 131, 36 Pac. 702. In *Cleveland County v. Seawell*, 3 Okla. 281, 41 Pac. 592, we read: "It appears that the board of county commissioners allowed in part his claims presented for the use of such rooms. Warrants were drawn in his favor for the sums so allowed, which he accepted. As we find the law, such acceptance is a waiver of any further claim against the county. It is in the nature of an executed agreement to receive less than the amount claimed, and, as acceptance of such sum, will estop the party receiving the

same from asserting his claim to the balance." And such are the holdings generally of all the cases. Some are placed upon the doctrine of estoppel and some upon that of accord and satisfaction; the result is the same in either case, though technically the latter is probably the true doctrine.

We are not unmindful that as a general rule a defense of accord and satisfaction must be specially pleaded by answer to be available, and, under *Webster v. McLaren*, 19 N. D. 751, 123 N. W. 395, proven as pleaded to avail as a defense. But where an accord and satisfaction is alleged in the complaint, in an action against a county, we

### (2) *Particular statutes.*

Where the claimant received part of his claim, as he alleged, only in part payment, and the statute provided that "suit must not be brought against a county until the claim has been presented to the court of county commissioners, and disallowed or reduced by the court, and the reduction refused by the claimant," the court said: "Statutory remedies must be taken and accepted, as the statute may bound and circumscribe them. By the common law, the acceptance by a creditor of a less sum than is justly due him is not a waiver of or a bar to the right to recover all that may be due. The statute deprives the rule of all application to claims against a county which the commissioners' court may reduce, or allow only in part. The acceptance of the sum allowed is a bar to a suit against the county. If the claimant is unwilling to accept the allowance as full payment, he must refuse it absolutely. There is no right reserved or secured to him to accept it as partial payment only." *Looney v. Jackson County*, 105 Ala. 597, 17 So. 105.

In *Yavapai County v. O'Neill*, 3 Ariz. 363, 29 Pac. 430, where the statute provided that when the board of supervisors of the county find that a claim presented is "a proper county charge but greater in amount than is justly due, the board may allow the claim in part and draw a warrant for the portion allowed, on the claimant's signing a receipt in full for his account," it was held that the provision in the statute as to the condition upon which the board would pay accounts in less amount than one presented was one which they were bound to follow, and that they had no authority to make an agreement with a claimant that his receipt of the part of the money which they were willing to pay should not prejudice him, and that he had therefore no right to bring an action based upon such agreement. Followed under a similar statute in *Eakin v. Nez Perces County*, 4 Idaho, 131, 36 Pac. 702.

Statutory appeals from the county board.

In *Pulling v. Columbia County*, 3 Wis. 337, where the statute provided that there might be an appeal from the decision of 42 L.R.A. (N.S.)

the board of supervisors rejecting a claim or part of it, to the circuit court for the same county, and the plaintiff put in a claim which the county board allowed in part, and he appealed to the circuit court, and, pending the appeal, accepted the part allowed, giving a receipt for a county order issued pursuant to the resolution of the board, which receipt gave a copy of the resolution showing the amount allowed on the claim, it was held that the plaintiff was concluded.

So, in *Hamilton County v. Bailey*, 12 Neb. 56, 10 N. W. 539, it was held that "where an account is filed with the board of county commissioners and allowed in part, and a warrant, drawn for the sum thus allowed, is accepted by the claimant, he thereby waives his right of appeal."

But in *Bell v. Waupaca County*, 62 Wis. 214, 22 N. W. 398, where the plaintiff put in a bill to the county, which was allowed in part, and an order was drawn for the amount allowed, which was received and receipted for by the plaintiff, and he then appealed as to the part of the bill disallowed, it was held that this was proper under the statute which provided that "any person whose claim has been allowed in part may receive the county order issued for the part so allowed without prejudice to his right to appeal as to the part disallowed," as the statute was not to be confined to the case of items stated separately.

### (c) *Claims against cities, etc.*

The acceptance of a reduced amount allowed by cities upon a disputed claim concludes the claimant. *King v. New Orleans*, 14 La. Ann. 389; *Davey v. Big Rapids*, 85 Mich. 56, 48 N. W. 178; *Looby v. West Troy*, 24 Hun, 78; see also *Perry v. Cheboygan*, 55 Mich. 250, 21 N. W. 333, quoted from in the opinion in the *WARD COUNTY CASE*.

In *Genung v. Waverly*, 75 App. Div. 610, 77 N. Y. Supp. 581, where the plaintiff claimed a balance from a village on a building contract, and the village had reached the conclusion that only a certain amount was due him, and offered to pay it only upon condition that he would receipt for it in full, and he thereupon stated that he intended to present his claim for the bal-

see no good reason why a demurrer should not be sustained. And some of the foregoing authorities, particularly *Yavapai County v. O'Neill*, supra, decided on demurrer, and *Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, and 90 Pac. 144, on page 147, wherein the defense was held available when defectively pleaded, are authority for our holding on this demurrer. It would seem that, in the absence of a plea of accord and satisfaction, public policy alone would be suffi-

cient grounds for denying plaintiff judgment should he prove all the averments of his complaint, inasmuch as the legality of the disbursement of public money is involved.

Accordingly the order appealed from is reversed, and the trial court will enter an order sustaining the demurrer. Appellant will recover taxable costs on this appeal.

Petition for rehearing denied September 24, 1912.

ance to the village board of trustees, and gave a receipt for the amount, "balance in full on department building contract according to audit of" the architects, it was held that he was concluded by this receipt, except as to one small item which it was found was not intended to be included in the accord and satisfaction.

In *Brockway v. Utica*, 146 App. Div. 170, 130 N. Y. Supp. 1013, where the plaintiff had a contract with the city to remove ashes for a certain gross sum payable monthly, and the contract provided that certain deductions might be made in assessing the same, and the practice was that monthly the plaintiff would present his bill, from which the department would make such deductions as it considered proper, and the warrant would be prepared for the reduced sum, and upon payment, the plaintiff would sign a receipt on the back of the warrant in settlement of the claim, and this continued for some twenty-two months, it was held that there had been an acquiescence and liquidation of these monthly claims and that the plaintiff was barred.

In *Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144, where a claimant made a claim upon a city for damages from change in grade, and the city paid him by warrant a small part only of the amount claimed, it was held that the burden of proof was on him to show that this payment was intended simply as a part payment, and not as a full accord and satisfaction.

#### Town's decision as judicial act.

In *People ex rel. Haerle v. Rockland County*, 31 App. Div. 557, 52 N. Y. Supp. 89, where a justice of the peace put in his claim to the town board, sitting as a board of audit, and they rejected part of the claim, and the part which they allowed he thereafter accepted, the court said: "By such acceptance he precluded himself from insisting upon any further audit of his claim. The action of the board of audit constituted an adjudication of the amount he was entitled to have and receive on account of his claim, and when he accepted the benefits of such adjudication he waived any further right to insist upon any further payment of the bill then presented. . . . The acceptance in this case was in no sense conditional, nor was the claim of such a character as required the board of audit to allow it without reduction, where waiver by 42 L.R.A. (N.S.)

acceptance of the part allowed has been held not to preclude the party. *People ex rel. Morrison v. Hamilton County*, 56 Hun, 459, 10 N. Y. Supp. 88. The board of audit, in the present case, had authority to determine the correctness of the relator's bill, and therefore their action was not only judicial, but a lawful exercise of the judicial power."

#### Claim for personal injuries.

That a payment by a city for personal injuries is presumed to be in full was held in *Bowman v. Ogden City*, 33 Utah, 196, 93 Pac. 561, where the plaintiff having made a claim against the city for personal injuries, the city council considered the matter and recommended that \$5 be paid him, and a warrant for that amount was issued to him, which he took, giving a receipt not put in evidence in the case. The court said: "The plaintiff, having a cause of action against the defendant, unliquidated with respect to amount, for personal injuries claimed to have been caused by its negligence, and having presented a claim for his damage or injury as he was required to do, and having received from the city a stated sum of money on his claim, there being no express agreement that it should be in satisfaction, either in whole or in part, of the cause of action, the presumption is that it was intended by the parties as a full recompense for the injury, and operates as an accord and satisfaction, barring a subsequent action to recover damages for the same injury. . . . If the payment was intended by the parties not to be in settlement of all, but only in part, of plaintiff's demand or claim, it was incumbent on him to show it. . . . If the plaintiff was dissatisfied with the allowance, he was required either to forego the portion rejected, or submit his claim as a whole to the courts. He cannot be permitted to accept that part which is to his advantage, and make the other a subject of litigation. If his claim was only partially allowed, as he claims it was, he was required to accept the part so allowed in satisfaction of his whole claim, or litigate it as an entirety."

Where the contract provides the manner of determination.

Where a contract for constructing sewers for a borough provided that "in any dispute which may arise between the parties," the decision of the engineer shall be final and



conclusive; the parties waiving "any right of action, suit or suits, or other remedy in law or otherwise, . . . so that the decision of the engineer shall, in the nature of an award, be final and conclusive on the rights and claims of the parties," and the plaintiffs gave a receipt in full on the estimate of the the engineer,—it was held that they were concluded although they proved that they protested against giving a receipt in full. *Harlow v. Wilkinsburg*, 189 Pa. 443, 42 Atl. 135.

#### IV. Claims for statutory salary or pay.

For cases on agreement in advance to accept less than amount of appropriation, salary, or fee, see the note to *Lukens v. Nye*, 36 L.R.A.(N.S.) 244.

The acceptance of less than statutory salary or pay is no accord and satisfaction, as it is a plain case of a liquidated demand.

*Adams v. United States*, 20 Ct. Cl. 115; *Whiting v. United States*, 35 Ct. Cl. 291; *People ex rel. Miller v. Board of Auditors*, 41 Mich. 4, 2 N. W. 180; *Kehn v. State*, 93 N. Y. 291.

See also, to the same effect, *Clark v. State*, 142 N. Y. 101, 36 N. E. 817, where, although the statute did not come into force until after the employee had been employed, under the circumstances and the facts of the case, it was held to cover the amount of compensation.

(In view of the foregoing authorities it is not worth while to review at length the trial term decision in *Du Moulin v. Board of Education*, 124 N. Y. Supp. 901, which seems quite at variance with them, nor to do more than refer to the decision in *Callahan v. New York*, 6 Daly, 230, where the common pleas reversed the marine court, and held that acceptance of part of salary claimed was an estoppel, but on appeal it was held in 66 N. Y. 656, that the marine court had no jurisdiction.)

But where the person authorized to employ is also authorized to fix the salary or compensation, the rule is otherwise. *Riley v. New York*, 96 N. Y. 331. See also, to similar effect, *Wilson v. New York*, 31 Misc. 693, 65 N. Y. Supp. 328.

It may be noted in this connection that in *United States v. Garlinger*, 169 U. S. 316, 42 L. ed. 762, 18 Sup. Ct. Rep. 364, the court, in reversing a judgment of the court of claims in favor of an employee of the government who had made a claim for more pay, said, after deciding that there was no authority to pay him more than he had received: "We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of time, and were received without objection or protest, and where there is no pretense of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such a presumption 42 L.R.A.(N.S.)

is very much strengthened by the lapse of two years before the appellee thought fit to make any demand."

In *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128, it was held that the act of Congress making eight hours a day's work for all laborers, workmen, and mechanics in the United States' employ, did not prevent men agreeing to work more than eight hours per day, and that, having done so, they could not recover for the excess hours; but it appeared in the case that, after his discharge, the claimant had put in a claim for the first few months of the time during which he had worked over hours, and had received an amount therefor which he receipted in writing in full for the account, and this was held to bar any claim for the balance of the time, such balance being the claim now presented.

#### V. Splitting demands.

Where a claim has been submitted for a part of an indivisible demand and has been settled, this concludes the matter. *United States v. Martin*, supra; *Baird v. United States*, 96 U. S. 430, 24 L. ed. 703; *Norris v. United States*, 14 Ct. Cl. 354; *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423; *Hancock County v. Binford*, 70 Ind. 208.

In *Harding v. Montgomery County*, 55 Iowa, 41, 7 N. W. 396, where a sheriff had put in a bill for taking prisoners to the penitentiary and it had been paid, and he afterwards put in a bill including, it seems, a charge for returning not covered by the previous bill, it was held that he could not split his demands in this way without some showing of surprise, accident, or mistake; and that the first settlement would be taken as a claim preferred and paid in full satisfaction for the services.

#### VI. Miscellaneous.

Where a state board of commissioners made a settlement with contractors, and paid them a certain sum, and took a receipt in full of all demands, and both parties thereafter agreed to arbitrate the matter generally, and the arbitration fell through, it was held that the contractors were concluded by the receipt and settlement. *Hemingway v. Stansell*, 106 U. S. 399, 27 L. ed. 245, 1 Sup. Ct. Rep. 473.

In *Hughes v. United States*, 25 Ct. Cl. 472, where a contractor supplied laborers for the government and was accustomed to give receipts stating to be in full, which simply reimbursed him what he paid the laborers, it was held that he was not concluded from claiming a commission for his services in procuring the laborers, which was usual in such cases.

In *Merrick v. Giddings* (*Morris v. Giddings*) 115 U. S. 300, 29 L. ed. 403, 6 Sup. Ct. Rep. 65, where certain attorneys were employed by the state of Texas to recover certain bonds and coupons, or the proceeds thereof, their compensation to be a percentage of the amount recovered, it was held that agents subsequently appointed for the

same purpose were not liable upon a promise made to the attorneys to withhold the amount recovered until the attorneys should be paid; such attorneys having, before the money was paid over, entered into a compromise and released the state, giving a receipt in full for all demands against the said state in and about the recovery of the said bonds and coupons or their proceeds.

While the acceptance of a particular medium of payment is beyond the scope of this note, it may be here noted that it was held in *Toledo v. Sanwald*, 13 Ohio C. C. 496, 7 Ohio C. D. 116, where a city had taken certain land in condemnation and issued in payment of the land certain conditional certificates of indebtedness, which the parties received without understanding the nature of these certificates, that the receipt of these certificates was not an accord and satisfaction, and that the city must pay the award.

B. B. B.

### ARKANSAS SUPREME COURT.

T. J. PETTIT, Appt.,

v.

MRS. KATE S. THOMAS.

(— Ark. —, 148 S. W. 501.)

#### Innkeeper — liability — family house — receiving transients.

1. Innkeeper's liability attaches to one who, although keeping a hotel whose principal patrons are families, takes all transients possible, receiving any proper person.

#### Same — loss by fire — liability.

2. An innkeeper is liable for the loss of property of a guest through the destruction of the building by fire.

#### Same — guest — time rate — indefinite period.

3. One who, upon going to a place for

*Note. — Innkeepers: payment of board by week as affecting relation between proprietor of hotel and one who makes no arrangement as to time of his stay.*

The present note supplements a note on the same point appended to *Holstein v. Phillips*, 14 L.R.A. (N.S.) 475.

In *Vigant v. Nelson*, 140 Ill. App. 644, the court holds that one making a contract for board and lodging by the week at a family hotel is a mere boarder, and not a guest. The court was apparently of that opinion even if the house had been technically an inn, but said that though advertised as a hotel, it was not technically an inn. The party had remained at the hotel three weeks, but the facts stated do not show the intended length of stay or that there was an agreement for any definite time except by the week.

In *Clifford v. Stafford*, 145 Ill. App. 247, where there was a contract for a room at 42 L.R.A. (N.S.)

the benefit of his health, engages a room and board at a hotel for an indefinite time, is a guest, for the safety of whose property the keeper is liable, although he contracts for the weekly rate for his entertainment.

(May 27, 1912.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Garland County in plaintiff's favor in an action brought to recover damages for the loss of her property by fire while she was a guest at defendant's hotel. Affirmed.

#### Statement by Kirby, J.:

Appellee sued appellant, the proprietor of the Waverly Hotel, at Hot Springs, for the value of her baggage, wearing apparel, money, and jewelry destroyed by fire when the hotel was burned, alleging that he was an innkeeper, and that she was a guest at the time of the destruction of the property. Appellant denied that he was an innkeeper and that he received appellee as a guest at the inn, alleged that he was the proprietor of a family boarding house, where visitors to the city of Hot Springs for the benefit of the waters were entertained, and that she was a boarder at the hotel at the time of the destruction of the building and her personal effects by fire, denied that the fire was caused by any negligence or carelessness of himself or his servants, and that appellee lost the articles alleged.

Appellee testified: That she lived in Louisville, Kentucky, and went to Hot Springs, Arkansas, on the 9th day of January, 1910. That she had known appellant for a little more than a year, and had been in Hot Springs twice during the winters recently before and once ten years before. On her

a European hotel for a week at a stated price payable at the end of the week, the court held that since the agreement was for a definite time at a fixed price, the party was only a boarder.

In *Grey v. Drexel Arms Hotel*, 146 Ill. App. 604, it was held that one who had engaged a room at a hotel for no definite period, but paid a weekly rental and had lived there about five months, paying for room during an absence of three weeks, and testified that it was her only place of residence from the time she registered, and that she considered it her home, was a boarder, and not a guest.

But in *Moon v. Yarian*, 147 Ill. App. 383, it was held that a native of Korea who had traveled about in this country and finally took a room at a hotel for which he paid by the week was a guest, and not a boarder, although he lived there two months; there being no contract for any definite length of stay, and no evidence that he intended to remain permanently.

R. E. H.

arrival there, she went directly to the Waverly Hotel, having previously written appellant to meet her at the train. That she stayed at the hotel until it was burned, on the 23d of January.

Q. Now, did you go to the hotel to stay any particular length of time?

A. I had come to stay indefinitely.

Q. Did you notify them before you came that you intended to stay indefinitely?

A. Yes, sir; I wrote to Mr. Pettit, and he replied that I could get my old room back, room 31, and when I got there it was all ready for me.

Q. What terms were made for you?

A. Fifteen dollars a week.

Q. For any special length of time?

A. I suppose right straight along all the time I was to be there.

Q. Did you have any definite time to remain?

A. No, sir; I expected to stay indefinitely. I expected to stay until I was cured.

Q. You didn't make any contract for any definite period?

A. No. I had always liked that hotel. I had always been comfortably situated, and expected to stay in one place all the time I was in Hot Springs. . . .

Q. How long did you expect to stay at the Waverly when you went there?

A. Indefinitely; probably until April.

Q. Did you tell Mr. Pettit so?

A. I did.

Q. That you wanted to stay there possibly until April?

A. I told it all around the hotel. I often said to Mr. Pettit that I meant to stay until I was benefited. I suppose he would have kept me as long as I paid my bills, and I expected to stay as long as it was agreeable and the accommodations suited.

Appellant testified: That he was proprietor of the Waverly Hotel on the 9th day of January, 1910, and conducting the place as the New Waverly Hotel, and that he advertised his business as a family hotel. That he had one or two transient guests in one year. That his rates were from \$12.50 a week up to \$21. That he did not advertise day rates. That he gave Mrs. Thomas one of the best rooms in the house. The rate in January for that room was \$21, and he let her have it at \$15 on the statement that she would be there quite a while. That she said she thought she would stay until April, or until she was cured, if she was benefited, if it took a year or more. The day rates for transient guests were \$2 or \$3 or more a day, and for her room would have been \$3 a day for a transient guest. His rates were less in the summer than in the winter, and made relative to the length of time stayed. That the Waverly Hotel trade was all fam-

ily trade, they were long stayers, and as a general rule nice family people, and that Mrs. Thomas was familiar with the room at the time she engaged it. On cross-examination, he stated: That he had owned the Waverly Hotel for a little over a year; that is, the furniture and the lease. His principal patrons were families, and that the only reason he did not take some more transients was because he could not get them. That he was ready to entertain them whenever they came, was ready to receive anyone there who was a proper person, just like any other hotel or boarding house. Mrs. Thomas paid \$17.50 for the room the winter before, and, when she wrote and asked him what the rate would be, he told her \$15. He had no contract for any particular length of time, but just a verbal contract that she would be there until April. "She said: 'I will be here until April, anyway, and longer, if necessary.'"

The fire occurred on January 23d, and destroyed the hotel and all of the plaintiff's baggage, wearing apparel, jewelry, and personal effects, which she testified were of the value of \$2,500, giving an itemized list thereof. There were eighty-three bedrooms in the hotel, a register was kept, day and night clerk, porter, and bell boys, and Mrs. Thomas registered on her arrival and paid her bills weekly.

There was a good deal of testimony as to the origin of the fire, which probably started in the bathhouse adjoining the hotel, which was under a separate lease to another party, although Epperson, the engineer at the heating plant, stated that he saw through the door into the basement the fire blazing at a place about under where the dishwashers stood, and where there was no occasion for any fire to be; that there was some kindling wood, an old boiler, and a few other things stored in the basement. Other witnesses testified that they saw the fire over the bathhouse, and supposed it originated there. There was no night watchman employed at the hotel, but the night clerk's duties comprehended that he should go through the corridors at night and have a general supervision of the hotel, and the engineer of the heating plant was supposed to look out for fires on the outside of the hotel, and guard against prowlers and tramps.

The court instructed the jury, giving, over appellant's objections, instructions numbered 1, 2, and 3, as follows:

No. 1: "You are instructed that the distinction between a boarder and a guest is made by the contract. A boarder is one who contracts for board and entertainment for a definite period and for a fixed sum. One who stays at a hotel for an indefinite period is not a boarder, but a guest."

No. 2: "If you believe from the evidence that the plaintiff resided in Louisville, Kentucky, and, desiring to come to Hot Springs for her health, arranged to stop at the defendant's hotel at so much per week, and that her proposed stay was for an indefinite period subjected to be terminated by the plaintiff at will, and that she was received into the said hotel on these terms and conditions, then you will find that the plaintiff was a guest of the defendant, and was not a boarder."

No. 3: "You are instructed that, if the relation of innkeeper and guest had been established between plaintiff and the defendant, then it was the duty of the defendant, his agents, and servants, to use the utmost care and the highest degree of care and diligence to protect the plaintiff against loss by fire, and, if the plaintiff has suffered such loss, then you are instructed that the defendant is prima facie liable for the same, and the burden is on the defendant to establish such facts as will exonerate or relieve him from such burden, and, unless you believe that the defendant has discharged this burden, you will find for the plaintiff."

The jury returned a verdict for appellee in the sum of \$800, and from the judgment appellant brings this appeal.

Messrs. Rector & Sawyer for appellant.  
Mr. W. H. Martin for appellee.

Kirby, J., delivered the opinion of the court:

It is contended by appellant that he was not an innkeeper, and that appellee was only a boarder at the hotel, and that the court erred in giving said instructions. The common law is in force in this state, and the liability of innkeepers thereunder has not been altered or abridged by our statutes. "An inn has been judicially defined as 'a house where the traveler is furnished with everything which he has occasion for whilst upon his way, . . . but a mere coffee house or eating room or boarding house is not an inn.'" 2 Parsons, Contr. p. 157. Mr. Bishop says: "An inn, hotel, or tavern is a house for the general entertainment of all travelers and strangers applying, ready to make suitable compensation, and it may be or not for the accommodation also of their horses and vehicles." Bishop, Noncontr. Law, § 1165. It is defined in 16 Am. & Eng. Enc. Law, 2d ed. 507, as follows: "An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation. . . . An innkeeper is one who holds out that he will receive all travelers and sojourners who

are willing to pay a price adequate to the sort of accommodation provided."

Appellant, according to his statement, was proprietor of the Waverly Hotel, and, although his principal patrons were families, he received all the transient people he could get, was ready to entertain transient persons whenever they came, and to receive anybody who was a proper person, just like any other hotel, and under the circumstances he was an innkeeper within the meaning of the law.

Being an innkeeper, he was, like a common carrier, an insurer of the property of his guest committed to his care, and liable for any loss thereof, not arising from the act of God, the public enemy, or the neglect or fraud of the owner of the property. It has been so held by the weight of authority that an innkeeper was an insurer of the property of his guest, from the time of the decision in Calye's Case, 8 Coke, 32a, down to now. Parsons states the rule: "Public policy imposes upon an innkeeper a severe liability. The later, and, on the whole, prevailing authorities, make him an insurer of the property committed to his care against everything but the act of God, or the public enemy, or the neglect or fraud of the owner of the property." 2 Parsons, Contr. 158. "He is an insurer of the safety of whatever baggage or other things he receives into his inn from the guest, whether in fact negligent in their keeping or not, except against the two overwhelming forces, termed the acts of God, and of the public enemy. For example, if they are stolen or burned without the fault either of the guest or of the landlord, the latter must pay for them." Bishop, Noncontr. Law, § 1173. See also 2 Kent, Com. p. 594; Beale, Innkeepers & Hotels, §§ 185, 189; Mason v. Thompson, 9 Pick. 280, 20 Am. Dec. 471; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Magee v. Pacific Improv. Co. 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772; Shultz v. Wall, 134 Pa. 263, 8 L.R.A. 97, 19 Am. St. Rep. 686, 19 Atl. 742; Holstein v. Phillips, 146 N. C. 366, 14 L.R.A. (N.S.) 475, 59 S. E. 1057, 14 Ann. Cas. 323; Glenn v. Jackson, 93 Ala. 342, 12 L.R.A. 382, 9 So. 259.

Appellant contends that this rule of liability does not apply to the case presented here, because, as he insists, that appellee is shown to have been a boarder at the hotel, and not a guest at the time of the fire and the destruction of the property. "A guest is a transient person who resorts to and is received at an inn for the purpose of obtaining the accommodations which it purports to afford. . . . But it is essential that a party should be a transient; that is,

that he should come to the inn for a more or less temporary stay. And, if he is a transient, he may become a guest, in the legal sense, . . . notwithstanding an express contract between him and the innkeeper fixing the amount to be paid, though it has been laid down as one of the distinctive features of the relation that a guest is received under an implied contract." 16 Am. & Eng. Enc. Law, 2d ed. 516. In *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657, the court said: "A traveler who enters an inn as a guest does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance . . . [for his board and] entertainment, or paying for what he has occasion for as his wants are supplied." In *Bersshire Woollen Co. v. Proctor*, 7 Cush. 417, the court held: "If a traveler who puts up at an inn and is received there as a guest makes an agreement with the innkeeper for the price of his board by the week, he does not thereby cease to be a guest and become a boarder." In *Neal v. Wilcox*, 49 N. C. (4 Jones, L.) 146, 67 Am. Dec. 266, the court said: "A transient customer at an inn, although he be not a traveler or stranger, is considered as a guest; a lodger who sojourns at an inn and takes a room for a specified time and pays for his lodging on a special agreement, as by the month or week, is a boarder." In *Fay v. Pacific Improv. Co.* 93 Cal. 253, 16 L.R.A. 188, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943, the court said: "The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding house." In *Bostick v. State*, 47 Ark. 126, 14 S. W. 476, the court construing the statute, in which appellant was charged with keeping a public tavern without a license, said: "The testimony tends to prove that her house was a public house, intended for the reception and entertainment of all comers, and not a mere boarding house, where the boarder is selected and received into the house upon an express contract for a certain period of time." Thus it appears that the fact that a person has been at a hotel for more than a week, and paid the reduced weekly rate, does not make him a boarder rather than a guest, in the absence of an agreement as to the time that he would remain in the hotel. Neither does the fact that one makes an arrangement to pay a reduced rate per meal, or per day, or per week take away his character as a guest, 42 L.R.A. (N.S.)

where there is no agreement as to the time he will remain at the hotel. And the question whether one is a boarder or guest is one of fact, to be determined by the jury under proper instructions from the court. The court told the jury that the distinction between a boarder and a guest is made by contract,—that a boarder is one who contracts for board and entertainment for a definite period and for a fixed sum. One who stays at a hotel for an indefinite period is not a boarder, but a guest; and, by instruction numbered 2, that if they should find that plaintiff resided in Louisville, Kentucky, and, desiring to come to Hot Springs for her health, arranged to stop at defendant's hotel at so much per week, and that her proposed stay was for an indefinite period, subject to be terminated by the plaintiff at will, and that she was received into the said hotel on these terms and conditions, they would find she was a guest of the defendant, and not a boarder.

From the authorities already cited, it will be seen that this was a substantially correct declaration of the law, and the testimony, as set out, shows that appellee came to the hotel with the expectation of remaining an indefinite length of time, and, although there was an agreement as to the weekly rate she should pay for entertainment, there was none as to the time of her stay, and she could have departed at any time that suited her whim or convenience, and the jury were warranted in finding that she was a guest of the hotel, and not a boarder.

It follows that no error was committed in the giving of said instructions, and, notwithstanding the court gave an instruction as to the liability of the hotel keeper, No. 3, which was more favorable to appellant than the law warranted, he cannot complain of that.

The judgment is right, and is affirmed.

#### CALIFORNIA SUPREME COURT.

EDWARD BARRON ESTATE COMPANY,  
Appt.,  
v.  
WOODRUFF COMPANY et al.

(—Cal. —, 126 Pac. 351.)

**Fraud — false representations to secure contract — liability.**

1. The deceit of one in securing a con-

*Note. — Architect's underestimate of cost of structure as basis of a claim or defense against him.*

An architect, like a lawyer, physician, or other professional man, is not a guarantor,

tract to prepare plans for a building and supervise its construction, by false representations that he has skill as an architect, permeates the execution of the contract so as to render him liable to the owner in case he suffers loss through absence of knowledge and skill on the part of the one making the representations.

**Same — statement of cost of building.**

2. An architect is guilty of fraud who, to secure the contract for preparing plans and supervising the construction of a building, states positively that the cost of a structure of the general character desired will not exceed a specified sum, when he knows that such is not the fact.

**Estoppel — fraud of architect — failure to require plans.**

3. Failure of architects who undertake to prepare plans and supervise the construc-

tion of a building, to submit the plans as required by contract, does not put the property owner on notice so that his failure to take action to secure fuller information will waive misrepresentations as to ability of the architect and the probable cost of the structure.

**Damages — fraud of architect — measure.**

4. The damages to be recovered from an architect for fraud in securing a contract to plan and supervise the erection of a building, by falsely misrepresenting his ability to do so and by understating the cost, is the commission received by him, which is of no value to the owner, and the cost in excess of the estimate above the amount which could profitably be invested in the building.

(August 20, 1912.)

nor is he liable for errors of judgment. Admittedly it is not possible to be certain in estimates where the work is of an unusual character, or the circumstances are such as to make it impossible to foresee the hazards and difficulties which may arise. So, too, the architect cannot be held responsible for fluctuations in the price of materials or labor.

On the other hand, there seems to be no reason why, like other professional men, he should not be liable for errors due to his negligence. Of course the definition of negligence as applied to the estimates of an architect depends upon the amount of care, skill, and judgment which those who employ him have a right to expect. Thus in *Chapel v. Clark*, 117 Mich. 638, 72 Am. St. Rep. 587, 76 N. W. 62, a case for the recovery of architect's fees, but without the scope of the note, the court said: "The question was, Had plaintiff exercised that degree of care and skill and that judgment which are common to the profession or business?"

That an architect is personally liable for damages to his employer, caused by his grossly underestimating the cost of carrying out his (the architect's) plans, under the circumstances alleged in *EDWARD BARRON ESTATE Co. v. WOODRUFF Co.* would seem to admit of no question, even if the underestimate had been due solely to negligence and unaffected with the fraud which was charged in that case.

But, except in *EDWARD BARRON ESTATE Co. v. WOODRUFF Co.* the question as to the responsibility of an architect for underestimates seems to have arisen only by way of defense to actions by architects for their fees. In these cases the question first arising is as to the construction of the contract of the architect's employment. And where the architect has not substantially performed his contract as to estimates, the question of negligence may be immaterial.

Ordinarily an architect instructed to draw plans for a building limited to a certain cost cannot recover for such plans if the cost of the building substantially ex-

ceeds that specified. *Hogan & Slattery v. New York*, 114 App. Div. 555, 100 N. Y. Supp. 68 (where, however, it was held that inasmuch as the plans of the architect had been used in informing the defendant as to the general cost of the work desired, etc., some compensation should be made to him on this account).

"An architect employed to prepare plans and specifications for a building, and furnish an estimate of the probable cost, is not, upon submitting the same, entitled to his fees, unless the building can be erected at a cost reasonably approximating that stated in such estimate." *Feltham v. Sharp*, 99 Ga. 260, 25 S. E. 619.

See also *Wees v. Warren*, 72 Mo. App. 644, where the court seems to have been of a similar opinion.

So, in *Ada Street M. E. Church v. Garnsey*, 66 Ill. 132, where certain plans were accepted upon condition that the building could be erected according to the plans for a certain definite sum, and it was found that the building could not be so erected for that sum, and there was no finding of any promise to pay for the plans unconditionally, it was held that the person who submitted the plans could not recover for services in preparing them.

In *Williar v. Nagle*, 109 Md. 75, 71 Atl. 427, 16 Ann. Cas. 982, an action by an architect for his fees, the court said: "If the cost of erecting a building is 'reasonably near,' or 'reasonably approximates' (as some of the authorities express it), . . . the owner might very properly be held liable,—certainly in many cases,—for he knows, or as a man of ordinary intelligence may be presumed to know, that there may be some slight variance between the estimate and the actual cost of the building. . . . Ordinarily, that question should be submitted to the jury, unless there be a written contract which has to be entirely construed by the court and has no provision in it which should be submitted to the jury; but in a case like this, where it was contended that the building to be erected was not to exceed \$90,000, while the lowest bid was \$125,000, the

**A**PPEAL by plaintiff from a judgment of the Superior Court for the city and county of San Francisco sustaining a demurrer to the complaint in an action brought to recover damages for fraud and deceit in securing a contract to plan and supervise the construction of a building. Reversed.

The facts are stated in the opinion.

Messrs. Charles S. Wheeler, J. C. McKinstry, and Lillenthal, McKinstry, & Raymond for appellant.

Mr. Walter H. Linforth for respondents.

Henshaw, J., delivered the opinion of the court:

This is an action to recover damages for fraud and deceit. To the complaint a de-

murrer, general and special, was interposed. The demurrer was sustained. Plaintiff declined to amend, and from the judgment which followed prosecutes this appeal.

The sufficiency of the complaint to pass a general demurrer is the matter to which the chief arguments upon either side have been addressed. The allegations and charges in the complaint may be thus epitomized:

Plaintiff is a family corporation, organized to manage the properties of Edward Barron, deceased. Its stockholders are the heirs of the deceased, and none of its officers or stockholders has had any business experience or skill, and, in particular, are they without knowledge or skill in the profession of architecture and in the art of constructing buildings. Plaintiff owned a

court could declare, as a matter of law, that the estimate did not reasonably approximate the cost."

So, of course, where the architect's own estimate shows that the cost will grossly exceed the limit of cost, he cannot recover for his plans. *Emerson v. Kneezell*, — Tex. Civ. App. —, 62 S. W. 551.

But if the owner accepts the plans, with knowledge of the increase in cost, he will be liable to pay for them. See *Hall v. Parry*, 55 Tex. Civ. App. 40, 118 S. W. 562.

It has been held that the architect was not entitled to recover where the cost was not to exceed \$25,000, and the lowest bid was \$35,000 (*Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8); so, where the owner did not wish to exceed \$18,000, and \$25,000 was the lowest bid (*Wilson v. Ward*, 14 B. C. 131).

But where there was evidence that the plans were to be for a building to cost about \$100,000 and the building did cost about \$102,000, and the architect testified that if he had superintended it his fees would have been 5 per cent on the amount, the court said that they did not regard the architect's fees as part of the estimate, but if they were to be so regarded they thought the gross sum was "about \$100,000," and a compliance with the contract. And a judgment for the architect's fees was affirmed. *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049.

And in *Hutchinson v. Conway*, 34 N. S. 554, where an architect was employed to draw plans for a building to cost between \$5,500 and \$6,500, and was to receive therefor a commission of 2 per cent on cost and a further commission for superintendence, and the lowest bid was over \$8,000 (which seems to have been due to increase in cost of material), the court allowed the architect commissions of 2 per cent on a basis of \$6,000, although the building was not proceeded with by the defendant.

In *Grant v. Dupont*, 8 B. C. 7, affirmed in 8 B. C. 223, where the architect sued for balance of fees and the owner alleged negligence in the estimate of the time and cost of construction, the estimate of cost being \$13,000, and the actual cost \$20,665, 42 L.R.A. (N.S.)

the terms of the contract do not appear, nor does it appear how much assurance the architect gave as to the figures. Some of the cost was due to matters not contemplated in the original estimate; there was an advance in the price of labor and material, and the estimates were based in some degree on the amount of old brick that could be used, which could only be guessed at roughly, and it was held that, in the absence of evidence from skilled men, it could not be said that the discrepancy proved negligence as to the cost.

In *Money Penny v. Hartland*, 1 Carr. & P. 352, where the plaintiff was employed by the defendant as architect and engineer to build a bridge, and he took information as to the character of the ground from a third person and made an estimate which was grossly insufficient, owing to an error in the character of the ground, the court nonsuited him. What is apparently a further trial of the same case is reported in 2 Carr. & P. 378, where the charge of the court to the jury seems, in general, to take the same view of the law that the court had taken on the first trial, but left it to the jury to say whether there was not a great want of skill or attention, and whether the defendants would not have abandoned the scheme had they been truly informed, and the jury found a substantial verdict for the plaintiff for his services. It appeared that the person from whom the architect took his information had been employed by the defendant before the architect, and it may be that the theory of the case is that the jury had the right to find that the architect was entitled to take his information, to some extent at least, from such prior employee.

While the decision in *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406, 36 Atl. 104, is correct upon the evidence in the case, the opinion leaves something of clearness to be desired. The court there said as to an instruction that if the plans were restricted to a house of a certain cost no recovery could be had: "We think this instruction was misleading and without evidence upon which it could be reasonably

piece of land on Geary and Taylor streets in San Francisco. The improvements on this land were destroyed by the fire of April, 1906. Thereafter plaintiff desired to erect upon its land a building of a character that would return by way of rental a fair interest upon the value of the land and the building to be constructed thereon. The value of the land was \$300,000. Plaintiff was advised that if a reinforced concrete and tile hotel building of six stories, or six stories with a mezzanine floor, could be erected on the land, at a cost not to exceed \$300,000, the premises could be rented and a fair return received therefrom. In particular, one De Wolfe, a man of good financial standing, would accept a lease of the land with such a building thereon at a rental sum equal to 8 per cent per annum upon the value of the land and the total cost of the building. These facts became known to S. H. Woodruff (defendant herein), who is the sole owner of the stock of the Woodruff Company (defendant herein), a corporation; Woodruff's business opera-

tions being conducted under the designation of the Woodruff Company. S. H. Woodruff, it is charged, made all the representations on behalf of the Woodruff Company, so that hereafter in this statement and in the discussion upon it S. H. Woodruff's name may alone be used. S. H. Woodruff represented that he was an architect and designer of great skill and experience; that he had designed and constructed many buildings in eastern cities. Pictures and plans of certain buildings were exhibited to plaintiff by Woodruff, and it was stated as a fact that Woodruff had as architect designed the buildings shown in the pictures and detailed on the plans.

It is charged that, in truth, Woodruff was not an architect of skill or ability, was not qualified to act as an architect, and had never designed or planned the buildings of which the plans, diagrams, and representations had been shown to plaintiff. All these and other representations hereinafter to be referred to, it is charged, were falsely made by defendant, with the purpose and object

based. It punished the plaintiff for what might be merely an honest mistake or miscalculation. It leaves wholly out of consideration the elements of care and good faith. It does not even require that the plaintiff bound himself to the agreement set up by the defendant. The ruling implies a guaranty or warranty, when none was testified to or really pretended." In the same case the court said further: "The responsibility resting on the architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon anyone to another, where such person pretends to possess some skill and ability in some special employment and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life."

It is not intended to include cases where, as a partial or total defense to the architect's fees, there have been asserted defects in plans, or other negligence, increasing the expense to the owner, as in *Schreiner v. Miller*, 67 Iowa, 91 56 Am. Rep. 339, 42 L.R.A. (N.S.)

24 N. W. 738; *Hubert v. Aitken*, 15 Daly, 237, 2 N. Y. Supp. 711, 5 N. Y. Supp. 839; *Larrimore v. Comanche County*, — Tex. Civ. App. —, 32 S. W. 367; *Pierson v. Tyndall*, — Tex. Civ. App. —, 28 S. W. 232; *Niver v. Nash*, 7 Wash. 558, 35 Pac. 380; *Erskine v. Johnson*, 23 Neb. 261, 36 N. W. 510 (*dictum*); *Columbus Co. v. Clowes* [1903] 1 K. B. 244, 72 L. J. K. B. N. S. 330, 51 Week. Rep. 366 (recovery of part of what had been paid for plans).

In this connection, while without the scope of this note, reference may be made to *Powell v. Markham*, 18 La. Ann. 581, which was an action to recover for building a house for a certain sum, the defense being bad materials and cracked walls, where the court, in holding that the materials were proper and that the defendant refused to have the excavation for the foundation made deep and broad when informed by plaintiff of the possibility that it was insufficient, said: "In contracts of this character the workman or architect is answerable in damages when his work falls to ruin, in whole or in part, on account of the badness of his materials or work, and is not liable for unfitness of soil or for the refusal of the owner to have the excavations in the soil properly prepared for the building. Civil Code 2733."

It may be noted that in *Priestly v. Stone*, 4 Times L. R. 730, where an architect employed a quantity surveyor to estimate the quantity, and then invited tenders to the building, and the plaintiff tendered, it was held that he could not sue the quantity surveyor for a mistake in the quantity, as there was no privity of contract between them, and the quantity surveyor could not tell whether his plans or estimates would be used at all or not.

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of inducing plaintiff to employ the defendants to erect its hotel building for a commission of 15 per cent of the moneys to be expended by plaintiff in its construction. And to like effect it is charged that certain promises, hereinafter to be adverted to, were made by defendants without any intention of performance upon their part, and as a part of the same scheme to induce plaintiff to intrust the construction of its hotel building to defendants. Further, in this connection, it is charged that the defendants positively asserted, stated, and represented to the plaintiff as a fact that the maximum cost of constructing such a building as the plaintiff then desired to erect, including all commissions to the defendant the Woodruff Company, would not exceed the sum of \$300,000; that the building would be complete and suitable and strictly first-class in every particular; that in all probability the actual cost of the building would be much less than the sum of \$300,000; that the defendants would be safe in saying it would only cost \$285,000, but to allow for all contingences they would fix the outside cost at \$300,000; that the defendants could not state how much less the cost would be until plans and specifications were prepared, but in no event would the cost exceed the sum of \$300,000; that this fact could be definitely stated by the defendants without first obtaining plans and specifications, and they did definitely state it, and so assured plaintiff. Further, the defendants stated that if the plaintiff would sign a written contract, which was afterwards signed, the defendants would without delay prepare full and complete plans and specifications of the kind provided for in the contract, and would thereupon forthwith make an actual detailed estimate of the cost of the proposed building, if constructed as planned, "the estimate to be accurate to the last nail thereof;" that plaintiff could then see for itself that defendants' statements were true as to the maximum cost of the building. Defendants further represented that, if the actual cost of the building should by any chance exceed the estimate of \$300,000, the defendants could and would, and their experience would enable them to, so change or modify the plans and specifications as to construct the building of the character which plaintiff desired, and that such building could surely and certainly be constructed for a sum not to exceed \$300,000.

It is charged that these statements and representations, in so far as they were statements and representations of fact, were false and untrue, and in so far as they were statements of defendants' opinion they were not statements of a true opinion held by defend-

ants or either of them, but were designedly false and misleading statements and representations and opinions not actually held by defendants, or either of them, but were falsely asserted to be held by them for the purpose of inducing plaintiff to enter into the contract and to expend moneys for the construction of the building, from which expenditure the defendants would derive the named commission; that so far from believing that such a building could be constructed for the sum of \$300,000, the defendants were of a contrary opinion at the time of making such statements, representations, and expressions of opinion, and believed and knew that the cost of a building of the kind and character referred to would be far in excess of \$300,000. Plaintiff, relying upon the statements of fact, expressions of opinion, and false promises so made by defendants, on the 22d day of September, 1906, entered into a written agreement with the defendant the Woodruff Company, whereby in effect the Woodruff Company was employed as architect, engineer, and contractor to erect the hotel building for a 15 per cent commission on the moneys which plaintiff might expend in its construction; but prior to the date when plaintiff was thus induced to enter into this contract, defendants had employed skilled experts to estimate the cost of constructing the building and had been informed by them that the cost would far exceed the sum of \$300,000. The defendants believed the truth of these statements and the correctness of the opinion so given to them by their own experts, but, nevertheless, they wilfully and falsely and fraudulently, and with the intent and design of involving plaintiff in the expenditure of moneys as aforesaid, concealed this knowledge and made the false representations, expressions, and promises above set forth.

The only provisions of the written contract, which was thus entered into, necessary here to mention, are the following: The Woodruff Company agreed to furnish plans and specifications for a six-story (or six-story and mezzanine story, as required by the owner) reinforced concrete and tile hotel building, such plans to be made under the direction and according to the requirements of the Barron Estate Company. It further agreed to supervise the work of construction, to purchase all necessary material, employ all necessary labor, and incur all other cost necessary, to complete the work according to the plans and specifications and any changes therein, and to furnish to the Barron Estate Company a weekly statement of all material ordered and delivered upon the work, of all labor employed, and every other reasonable state-

ment in connection with the work. The Barron Estate Company agreed to pay the Woodruff Company an amount equal to 15 per cent of the total cost of the work, together with any changes therein, this commission to be computed on the total of each weekly statement of cost, and also to pay weekly the money to carry on the work. The plans and specifications in the contract referred to were to be identified by the signatures of both parties thereto. It is to be noted that this written contract contains no word to indicate the maximum cost of the building.

After the contract was made, the defendants, again representing that the hotel building could be constructed within the limit of \$300,000, further represented that it was advisable and necessary to allow defendants to proceed under the building contract with the clearing of the land and the ordering of such material as was essential for the construction of the building thereon, without waiting for the preparation of detailed plans and specifications; and, inasmuch as the plans and specifications, when prepared, would merely show how much less than \$300,000 the building would cost, it would be safe in permitting the defendants to proceed immediately under the contract before preparing the plans and specifications; that defendants would in no event incur any expense or do any work in advance of the detailed plans and specifications and accurate estimate, other than such as would be absolutely required, whatever plans and specifications were finally adopted. Upon these and other representations of defendants, plaintiff relied, and so allowed and sanctioned the defendants to proceed under the contract, and gave its consent to the commencement of the building. It is charged that in October, 1906, plaintiff exercised its option to have a mezzanine floor, and so informed defendants. Defendants thereupon stated that the mezzanine floor would increase the cost of the building, but that the added cost could not by any possibility exceed the sum of \$50,000, so that the total cost of the building could not by any possibility exceed \$350,000. De Wolfe, the prospective tenant, agreeing to pay a rental, including interest, upon this increased cost, the mezzanine floor was ordered under these representations of defendants. Defendants then prepared working plans and drawings of the exterior of the building, including the mezzanine floor, and again represented that the building, if constructed and completed in accordance with the plans and drawings, would not exceed the sum of \$350,000, and further said that the defendants were preparing detailed plans and specifications,

from which a most accurate estimate of the cost could be made, but that in no event would the cost exceed \$350,000. Again, later, on February 4, 1907, while the building was in process of construction, the defendants stated and represented to plaintiff and to De Wolfe that, owing to certain changes and alterations requested by De Wolfe, it would cost \$400,000 to build the hotel, unless De Wolfe would modify his request for the changes; that as a matter of fact the changes requested were unnecessary for the proper construction of the building, but that with such changes and alterations requested the building could and would be constructed at an outside cost of \$400,000. Plaintiff and De Wolfe, in reliance upon these representations, amended their agreement, and De Wolfe agreed with plaintiff to eliminate from his contract with it the limit cost therein specified, or, in other words, to pay a rental upon an estimated cost of \$400,000.

It is charged that all these statements were untrue, were at the time they were made by defendants known by them and by each of them to be untrue, and that they knew the fact to be that, irrespective of the changes requested by De Wolfe, the actual cost of the building would exceed \$600,000. Plaintiff, however, was entirely ignorant of these facts, and believed in and relied upon the statements and representations of the defendants; that all these representations and statements were so made to induce plaintiff to continue to expend money upon the building far in excess of the sum of \$300,000, and subsequently \$400,000, which they were willing and expected to pay, and so to enable the Woodruff Company to receive its commissions of 15 per cent upon this enhanced and excessive cost. The Woodruff Company proceeded with the construction of the building, and plaintiff continued to make weekly payments until September, 1907. Prior to this date the Woodruff Company had received from plaintiff weekly payments aggregating over \$350,000. When the payments had reached this sum, plaintiff expressed to the defendants the fear that the building would cost more than \$400,000, to complete; whereupon defendants, to allay plaintiff's fears and to lull them into false security, stated that plaintiff would be entitled to receive large credit on account of moneys already expended in extra material ordered by the Woodruff Company, which extra material would not be required in the building. These statements and representations were false, and were known to defendants to be false at the time of their making. About the middle of October, 1907, in response to repeated

demands of plaintiff for an estimate of how much less than \$400,000 the building would cost, defendants for the first time informed plaintiff that the cost of the building would exceed \$400,000, and that the building when completed would cost \$510,000. Thereupon plaintiff stopped work on the building, employed competent and honest experts to make an estimate of the cost of finishing the building, and was by these experts informed that the building completed in a reasonable and proper manner would cost a total sum of not less than \$700,000.

Plaintiff did not discover the falsity of any of the various statements, representations, promises, and expressions of opinion made by defendants until after the defendants had made an oral statement that the total cost of the building when completed would be \$510,000, and at which time plaintiff had already expended \$460,000 in the construction of the building, and to complete the building would be compelled to expend \$230,000 additional. When completed, the total value of the land and building would not exceed \$700,000, while the total cost of the improvements alone would equal, if it did not exceed, \$700,000. Of the \$460,000 so paid out by plaintiff, by reason of the deceit practised by defendants upon the plaintiff, \$70,000 was received by the defendants as commissions. The services of the defendants, for which plaintiff was induced to pay \$70,000, were of no value to plaintiff whatsoever. De Wolfe refused to accept a lease of the land and to pay interest on the actual cost of the building, and no other person will take a lease of the land and pay the plaintiff as rental a sum which will give a reasonable interest upon the value of the land and reasonable interest upon the actual cost of the improvements which, by reason of defendants' deceit, plaintiff was induced and forced to make. Plaintiff has, by reason of its reliance upon the deliberate false representations, promises, and statements, and opinions made by defendants, suffered detriment and damage in the sum of \$300,000, for which it asks judgment.

Logically, the consideration of the case thus presented divides itself into two separate, but intimately related, phases—the first, the deceit practised in inducing plaintiff to enter into the contract; the second, the continuing influence and effect of that deceit, taken with the subsequent false representations and the legal consequences which flow therefrom in the performance of the contract. It is fundamental, of course, that, no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action. Therefore it is but a 42 L.R.A. (N.S.)

truism to say that if one party by fraud has been induced to enter into a contract executory as to both parties, and nothing whatsoever is done under that contract, he has ordinarily suffered no injury therefrom. This contract was, of course, wholly executory. But, upon the other hand, in a contract such as this, it may not be said that the deceit which has induced the making of an executory contract is merged and ends in the contract itself. If the deceit does not end in the making of the contract, but still further influences a party to the contract in his conduct under it, it is obviously a deceit of a continuous nature, of which the injured party may justly complain.

To use a simple illustration: If A has in contemplation the purchase of property which he is told is valuable for mining purposes, and will buy or refuse to buy upon the opinion and report of a mining expert in whom he has confidence, and B represents to A and prevails upon A to believe that he has rare skill and experience as such mining expert, when in fact he has none, and their negotiations end in a written contract wherein B is to inspect and investigate the property and report his opinion as to its value for mining purposes, and the transaction there ends, A has sustained no substantial injury. The deceit of B has but induced the making of an executory contract never executed. But if B, in pursuance of this contract, does make a favorable report upon the property, upon the assurance of which A purchases it, and it proves to be worthless, no one, we think, will question but that B's deceit in securing the employment is a continuous deceit, operating to render him liable for the loss which A has sustained. And this, regardless of the fact whether the opinion upon the value of the property which he gives to A is honest or not. His deceit lies back of the report, and is based upon his false representation of the possession of special skill and knowledge qualifying him to make such a report.

So, in this consideration the contract, though executory, having been in part at least executed, the deceit of defendants in procuring the making of the contract and the placing of themselves in a position to reap advantage therefrom is a deceit which runs concurrently with the execution, and contaminates from beginning to end their dealings with plaintiff. It will not do, therefore, to say that up to the time the contract was entered into plaintiff and defendants were dealing at arm's length. True, they were; but it is equally true that but for the representations made, opinions expressed, and promises given, the contract

would not have been entered into, and, having been entered into, plaintiff was absolutely justified in a continued reliance upon them until charged in some manner with knowledge of the falsity of one or another of them.

The four alleged misrepresentations and falsifications leading up to and inducing the making of the contract are: (1) The representation of S. H. Woodruff's great architectural and structural knowledge and skill, when in truth and in fact he possessed none; (2) the positive assertion as a fact, or as an expression of opinion, that the maximum cost of the building such as plaintiff desired to erect would not exceed \$300,000; (3) the representation that, if plaintiff would sign the contract, the defendants would without delay prepare full and complete plans and specifications of the kind provided for in the contract, and would forthwith make an actual detailed estimate of the cost, such estimate "to be accurate to the last nail thereof;" (4) the representation that if such estimate exceeded \$300,000, by the exercise of their knowledge and skill, defendants could and would change and modify the plans and specifications, so as to reduce the cost of the building to a sum not to exceed \$300,000.

Manifestly the effect of the first of these declarations did not and could not die with the execution of the written contract. Plaintiff employed defendants because of the false representations of the special skill and knowledge of S. H. Woodruff, and not only executed the contract because of its belief in his possession of such special skill and knowledge, but, beyond peradventure, it was, during the period of the execution of the contract, justified in relying upon this representation touching Woodruff's special skill and ability.

The second representation, whether regarded as a representation of fact or as an expression of opinion, was also and obviously of continuous influence and effect. It is, of course, generally speaking, true that an action for deceit cannot be founded upon the mere expression of an opinion. But the qualifications and modifications of this general rule are as important as the rule itself. Those qualifications and modifications are numerous. It is unnecessary to attempt to illustrate them all. But, bearing mind that an expression of an opinion, if honestly made, is an expression of what the speaker believes to be a fact, it becomes apparent that, by the expression of a dishonest opinion to one entitled to rely upon it, deceit is practised, injury may be worked, and an action will lie. Thus the opinion of an expert employed to report upon a

mine would be but the expression of his judgment, and if honestly, though mistakenly, made, of course, no injury cognizable in law, equity, or good morals could result. But instantly that the expert expresses a dishonest opinion, though it still be but an opinion, he has made himself liable in an action for deceit. Again, as pointed out by Pomeroy (2 Pom. Eq. Jur. 3d ed. § 878): "Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation."

These two illustrations of instances in which expressions of opinion may be made the basis of an action for deceit are sufficient for the purposes of this consideration. If for them support by authority be considered necessary, it will be found in our own state in such cases as *Crandall v. Parks*, 152 Cal. 776, 93 Pac. 1018, where Professor Pomeroy's language is quoted with approval, and in such other cases as *Hedin v. Minneapolis Medical & S. Institute*, 62 Minn. 146, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 887; *Watson v. People*, 87 N. Y. 561, 41 Am. Rep. 397; *Simar v. Canady*, 53 N. Y. 298, 13 Am. Rep. 523; *Hickey v. Morrell*, 102 N. Y. 454, 55 Am. Rep. 824, 7 N. E. 321; and *Schumaker v. Mather*, 133 N. Y. 590, 30 N. E. 755. Therefore, touching the second of these alleged false misrepresentations, it is legally a matter of indifference under the pleading whether it be considered the expression of an opinion or the representation of a fact. If the former, then the complaint shows that it was not the expression of an honest opinion, but was dishonestly made with knowledge upon the part of the defendants of its falsity. If the latter, then it was a declaration of a fact which not only was not true, but which defendants, it is charged, knew to be untrue. Treated, then, either as an expression of opinion or as a representation of fact, its influence in inducing plaintiff to employ defendants cannot be denied.

It is, perhaps, however, proper to add for the guidance of the trial court that we think the language thus charged to have been uttered by defendants imports the declaration of a fact, rather than the expression of an opinion. For, while it is true, as is argued on behalf of respondents, that, because of the fact that the plans and

specifications had not been settled upon and agreed to, it was an impossibility for any human being to state in terms of dollars and cents what the exact cost of the building would be, and that therefore the language at the most could be but an expression of defendants' opinion, the answer is that, in this day of architectural skill and business knowledge of construction in connection therewith, any competent architect, while not able to give in advance of accepted bids a dollar and cent estimate of the cost of a building, can name as matter of fact a figure beyond which the cost will not go. Such a statement is a statement of fact, and it is such a statement that defendants are charged with having made.

The third representation requires here no consideration. It is sufficient to say that it is charged that the complete plans and specifications were never presented to plaintiff. Whether defendants were justified in their failure so to do is a subject of later consideration. The fourth representation is manifestly connected with and dependent upon the third, and for the reasons given requires no detailed discussion.

Thus we are brought to the transactions between the parties occurring after the execution of the contract, the history of which transactions has been set forth in the foregoing statement of facts. Respondents' position in this regard is twofold: First, that plaintiff had the means of ascertaining before any damage was sustained that the representations complained of were untrue; that it was guilty of laches in not employing those means, and therefore cannot be heard to complain. Second, that having knowledge that one representation was false, since the plans and specifications were not forthwith furnished and the detailed estimate was not forthwith given, the plaintiff was put upon inquiry whether all representations might not be false, and from that moment was charged with full notice; that having continued with the contract after such knowledge and means of knowledge, it waived all right it might otherwise have had to charge defendants in an action for deceit. As part of their argument herein respondents urge that by its own showing plaintiff did not exercise ordinary care and prudence, and for its failure so to do has barred itself of any right to relief. *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899.

The propositions thus set forth are the most serious and debatable ones in the case. By the complaint it is shown and admitted: (1) That plaintiff paid in excess of \$350,000 before its fears were excited that the contract would not be completed within the 42 L.R.A. (N.S.)

stated figure of \$400,000. (2) It is argued that insistence by plaintiff on the presentation of the plans and specifications, with a detailed estimate of the cost, all as contemplated by the written contract, would have served either to bind defendants or to have established that their statements could not be substantiated. If, therefore, in point of law, it was the duty of plaintiff to have exacted the presentation of these plans, specifications, and estimates, its failure so to do would be a display of a lack of ordinary care and prudence, while, upon the other hand, if these plans and specifications and estimates had been demanded and were not forthcoming, there would be notice of trickery upon the part of the defendants and of a failure to live up to their written agreement. Unquestionably, then, if plaintiff was derelict and culpable in these matters, the inevitable results would be either a waiver of the fraud or estoppel by conduct from charging upon it.

But we think the complete answer to all this is found in the fact that the situation of the parties was changed immediately and in most essential particulars from the moment their contract was entered into. From that instant they ceased to be dealing at arm's length, and from that moment the defendants became, as architects, contractors, and superintendents of construction under the pay of plaintiff, its trusted agents. *Needham v. Chandler*, 8 Cal. App. 126, 96 Pac. 325. Dealing with such trusted agents, plaintiff, as we have said, had the right to rely upon the representations antecedently made and, subsequent to the contract, oft repeated. It had, therefore, the right to rely upon the professed ability and skill of defendants, and upon their statement of fact that, whatever should be finally agreed upon as the plans and specifications, the upset cost of the building would not exceed \$300,000, or, with the accepted modifications, \$400,000. Still further, by virtue of this agency and relationship of trust and confidence, it became the high duty of defendants to make full disclosure of all the knowledge which they possessed and which it was desirable or important that their principal should have. Thus, as charged, defendants knew that S. H. Woodruff was not a skilled architect, contractor, and constructor. Yet they concealed this knowledge from the principal, to whom it was of great moment. They knew, as charged, that the building could not be constructed for \$300,000, and that it would cost a vastly greater sum. This knowledge, likewise, was of the utmost value to plaintiff, and it was knowledge which it was the duty of defendants to disclose to it. *Clark, Contr.* p. 320; 14 Am.

& Eng. Enc. Law, pp. 69 and 70; 2 Kent, Com. p. 582.

The test, then, of plaintiff's conduct,—the determination of the question as to whether or not it acted with ordinary prudence,—is not the test which would be applied between two parties acting at arm's length, each for his own interest. The real test will be found in the answer to the question whether or not plaintiff was guilty of a carelessness such as to bar its right of action for deceit against its trusted agent, dealing with matters peculiarly within the knowledge of the agent and under false representations directly made by that agent, because it did not employ every avenue and means of knowledge open to it to discover that agent's perfidy. Upon reason and authority this question must be answered in favor of plaintiff. Indeed, so plain is the proposition, so strongly must it commend itself to every mind, that we need do no more than cite *Marston v. Simpson*, 54 Cal. 190, 13 Mor. Min. Rep. 36, and to quote briefly the principle as enunciated in 14 Am. & Eng. Enc. of Law, 2d ed. page 123, where it is said: "When one of the parties to a contract places a known trust and confidence in the other, any misrepresentation by the party confided in with respect to a material fact and constituting an inducement to the other party, by which an undue advantage is taken of him, is regarded as a fraud. The same is true where the circumstances are such that one of the parties must necessarily trust in the representations of the other."

So, even if plaintiff could have discovered the falsity of the representations as to upset cost by exacting a delivery of plans and specifications and estimates, since it reposed, and had a right to repose, a special confidence in the integrity and ability of defendants, a confidence induced by the false representations of the defendants themselves, and since under these inducements it entered into a contract involving relationships of trust, it was not guilty of any lack of prudence of which defendants can be heard to complain in not exacting the presentation of these estimates; nor, upon the other hand, did it waive its right of action for the subsequently discovered deceit by having failed to do so. And, finally, in connection with this matter, the payment by plaintiff of an excess over \$350,000 before its fears were excited is explained by the further false representation of defendants that there would be coming to plaintiff large sums by way of rebate upon materials ordered and paid for, but not used.

The last proposition which invites attention is that of damages; respondents con- 42 L.R.A.(N.S.)

tending that plaintiff has shown no detriment which, at law or in equity, could afford a foundation for damages. What has already been said disposes of the contention that any such damages were waived by the conduct of plaintiff. Finding itself with an unfinished building upon its hands, but one of two courses was open to it,—to abandon the unfinished building to the elements, or to complete it at reasonable cost. Either course would have been justifiable. The latter unquestionably was the more prudent. In so doing, under the facts and circumstances here set out, it is idle to contend that plaintiff did, or permitted, procured, connived at, or consented to, anything in the nature of a waiver of its right of action. *Schmidt v. Mesmer*, 116 Cal. 267, 48 Pac. 54. Its procedure under the contract with defendants to its partial performance was, as has been said, justifiable. Its repudiation of defendants and its completion of the building after such repudiation was wholly within its right. *Cooley, Torts*, § 505; *St. John v. Hendrickson*, 81 Ind. 350; 14 Am. & Eng. Enc. Law, pp. 171, 172; 20 Cyc. p. 92.

Coming thus specifically to the question of damages, it is at once apparent that the allegation that defendants received \$70,000, by way of commissions for services procured through fraud and of no value to plaintiff, would, upon adequate proof, entitle it to a recovery in this amount. Still further, upon what may be termed general damages, the averments of the complaint amount to a charge that plaintiff was fraudulently induced and compelled to expend in the construction of a building \$300,000 in excess of the \$400,000 which alone it contemplated expending, and upon which latter sum alone it can receive any fair or adequate return by way of rental. If, in truth, plaintiff has been so damaged, we think it clear that the law affords it redress. To use an extreme case to illustrate the principle: If a man by fraud were induced to erect a \$700,000 building in the heart of the Sahara Desert, for the use of which building there was absolutely no demand, it would not be an answer to say that the building was economically and honestly constructed and represented a legitimate expenditure of \$700,000. So, here we conceive that if plaintiff can establish that, under the circumstances charged, it suffered a loss of \$300,000, or any part thereof, it is justly entitled to recover it, if it further establishes that the loss was occasioned in the manner charged.

Respondents' objection, therefore, we think, goes rather to evidentiary matters, than to the rule of damage. A large and growing city is not the Sahara Desert, and

the burden of proof cast upon plaintiff will necessarily be a heavier one than that which a plaintiff would have to carry in the illustration given. Nevertheless, as we have said, in so far as it can be established that plaintiff was fraudulently induced to expend its moneys for a structure not, as to cost, in accordance with representations, and not capable of returning a fair interest upon the invested capital, respondents have made themselves liable. *Spreckles v. Gorrill*, 152 Cal. 389, 92 Pac. 1011; *Stratton's Independence v. Dines*, 68 C. C. A. 161, 135 Fed. 449. For, as Chief Justice Marshall well said, in *Russell v. Clark*, 7 Cranch, 69, 3 L. ed. 271: "If an act in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed."

The special demurrer does not call for particular consideration. But for the reasons heretofore given the judgment is reversed, with directions to the trial court to overrule the general demurrer to the complaint.

We concur: Sloss, J.; Lorigan, J.; Melvin, J.

Petition for rehearing denied September 19, 1912.

## MAINE SUPREME JUDICIAL COURT.

THOMAS E. GETCHELL

v.

MERCANTILE & MANUFACTURERS' MUTUAL FIRE INSURANCE COMPANY.

(— Me. —, 83 Atl. 801.)

**Insurance — interest of parol lessee.**

1. The interest of one who has a parol

**Note. — Insurable interest of tenant in leased property.**

This note is confined strictly to the question indicated in its title; namely, the existence and extent of an insurable interest in tenant in the leased property. It does not cover his right to insure the lessor's interest; nor any questions that turn upon the sufficiency of the descriptions of the insured interest or the effect of representations, warranties, or conditions in the policy; so, of course, all questions as to the respective rights of the lessor and lessee in the proceeds of insurance, or as to either's duty to insure for the benefit of the other, are excluded.

Cases involving marine insurance, insurance on purely personal property, and all 42 L.R.A. (N.S.)

lease of a building for the life of its owner at one half the rental value, and who has made improvements at his own expense, is insurable.

**Damages — insurance — interest of tenant.**

2. The amount to be awarded to one who has leased a building for the owner's life, under an insurance of his interest therein, upon its destruction by fire, is the present worth of the difference between the rental value of the property and what he has agreed to pay for it for the probable duration of the owner's life.

(June —, 1912.)

**R** EPORT by the Supreme Judicial Court for Somerset County for the determination by the Law Court of an action brought to recover an amount alleged to be due under a fire insurance policy. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. Manson & Coolidge, for plaintiff:

Plaintiff had an insurable interest.

*Cumberland Bone Co. v. Andes Ins. Co.* 64 Me. 466; *Wainer v. Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; *Amsinck v. American Ins. Co.* 129 Mass. 185; *Berry v. American Cent. Ins. Co.* 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; *Schaefer v. Anchor Mut. F. Ins. Co.* 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470.

The plaintiff's agreement with his mother for occupation, though oral, was valid and binding, because he had entered into possession, paid rent, made valuable improvements with her knowledge, and so he was entitled in equity to specific performance.

*Pom. Spec. Perf.* § 101; *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146; *Harrell v. Sonnabend*, 191 Mass. 310, 77 N. E. 764; 36 Cyc. 680; *McGuire v. Murray*, 107 Me. 108, 77 Atl. 692.

The policy covered the plaintiff's interest.

those tenancies not created by lease, are excluded. Cases of insurance on buildings erected on leased ground, but owned by the lessee, are also excluded except where the lessor has some interest, present or prospective, in the building.

Under parol agreement; tenant at will.

A tenant at will, under a verbal agreement to pay the taxes and keep the property insured, who takes an insurance policy in his own name, may be treated as the mere agent of the landlord; and if the insurer, with full knowledge of the fact, issues the policy in the agent's name, it cannot escape liability thereon. *Schaeffer v. Anchor Mut. F. Ins. Co.* 113 Iowa, 652, 85 N. W. 985.

Gilman v. Dwelling-House Ins. Co. 81 Me. 488, 17 Atl. 544; Fowle v. Springfield F. & M. Ins. Co. 122 Mass. 191, 23 Am. Rep. 308; Tabbut v. American Ins. Co. 185 Mass. 419, 102 Am. St. Rep. 353, 70 N. E. 430; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227.

Plaintiff is entitled to recover the full amount of his policy.

Doyle v. American F. Ins. Co. 181 Mass. 139, 63 N. E. 394; Stockwell v. Hunter, 11 Met. 448, 45 Am. Dec. 220; Nashville, C. & St. L. R. Co. v. Heikens, 112 Tenn. 378, 65 L.R.A. 298, 79 S. W. 1038.

The plaintiff's loss is the difference be-

A tenant holding possession under a verbal agreement that he has full power to use, rent, or do anything with the property except sell it, so long as he pays the taxes and insurance, was held in Schaefer v. Anchor Mut. F. Ins. Co. 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470, not to be a tenant at will and to have the same insurable interest therein as a life tenant, his interest being the present value of the aggregate amount which he could realize by renting the building for the full period of the life of such building, deducting the expenses of repairs and taxes, but this is limited by the expectancy of life of the tenant at the time of the fire.

It has been held that a parol agreement under which a tenant is in possession, and is to remain, during the period of his natural life, on condition that he keep the property in repair, pay the taxes, and keep it insured, is at least so far legal as to make the tenant liable to the landlord for the full value of the buildings in case they burn while he is in possession, and his insurable interest is coextensive with his liability, even though the agreement, because not in writing, might not be enforceable against the landlord. Berry v. American Cent. Ins. Co. 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254.

In Schaefer v. Anchor Mut. F. Ins. Co. 133 Iowa, 205, 100 N. W. 857, it was held that, since the laws of Iowa allow a tenant at will thirty days notice before he can be dispossessed, he has an insurable interest in the property. The value of the interest was not decided, that having been agreed upon by the parties. And see *GETCHELL v. MERCANTILE & MFRS. MUT. F. INS. CO.*

#### Tenant for years.

A tenant for years of real property has an insurable interest therein. Hidden v. Slater Mut. F. Ins. Co. 2 Cliff. 266, Fed. Cas. No. 6,463; Sherwood v. Harral, 39 Conn. 333; Ely v. Ely, 80 Ill. 532; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Slobodsky v. Phenix Ins. Co. 53 Neb. 816, 74 N. W. 270.

So, where buildings are erected on leased 42 L.R.A. (N.S.)

tween what the store would cost him and what it was worth, for eight or ten years.

May, Ins. 2d ed. p. 648; Niblo v. North American F. Ins. Co. 1 Sandf. 561; Carey v. London Provincial F. Ins. Co. 33 Hun, 315; Schaefer v. Anchor Mut. F. Ins. Co. 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470.

Mr. W. G. Chapman, for defendant:

Plaintiff had no authority or obligation to insure the property itself. He could insure only "something" in which he had "an interest."

Hidden v. Slater Mut. F. Ins. Co. 2 Cliff. 266, Fed. Cas. No. 6,463; Gilman v. Dwelling-House Ins. Co. 81 Me. 488, 17 Atl. 544; Pope v. Glenn Falls Ins. Co. 136 Ala. 670, 34 So. 29; Essex Sav. Bank v. Meriden F.

ground, with the provision in the lease that they are to become the property of the lessor at the expiration of the term of the lease as payment for rent, both the lessor and the lessee have an insurable interest therein. Clemson v. Trammell, 34 Ill. App. 414.

One who leases a homestead for a term of years from the head of the family, to whom the law gives the control, and makes improvements thereon, has an insurable interest therein, and where he insures that interest in his own name, he alone has the right to the insurance money. Creech v. Richards, 76 Ga. 36.

The lessee of a plantation who builds a ginhouse thereon, under an agreement that the lessor will purchase the same from him at the expiration of the term of the lease at a price to be agreed upon at that time, has an insurable interest to the full value of the building. Allen v. Sun Mut. Ins. Co. 36 La. Ann. 767.

The insurable interest of a sublessee for a term of years, in a building which he has erected in place of one he has removed and which is to become the property of the landlord at the expiration of the term, is the full value of the building, even though he is not bound to replace the building for the landlord. Fowle v. Springfield F. & M. Ins. Co. 122 Mass. 191, 23 Am. Rep. 308.

A sublessee of part of a plantation, having put up a cotton press, made extensive repairs, and accumulated personal property there, has an insurable interest in the leasehold and personal property, even if the lessee has given liens purporting to cover the same and actually surrendered possession of the premises, if the sublessee is left in possession, which he holds at the time of the fire. Georgia Home Ins. Co. v. Jones, 49 Miss. 80.

Where a party had leased a coal breaker, had it in operation, and was bound under the lease to return it in good condition at the expiration of the term of the lease, his insurable interest was the whole value of the breaker, for that was the extent of his liability. Imperial F. Ins. Co. v. Murray, 73 Pa. 13.

The rights of a lessee of a coal breaker for a term of years, bound to return it at



Ins. Co. 57 Conn. 335, 4 L.R.A. 759, 17 Atl. 930, 18 Atl. 324.

Had the plaintiff been the owner, the actual value of the insured property, not exceeding the amount of the policy, would have been the measure of damages.

Hilton v. Phoenix Assur. Co. 92 Me. 272, 42 Atl. 412.

Cornish, J., delivered the opinion of the court:

On February 22, 1910, the defendant issued its policy of fire insurance insuring the plaintiff for one year to the amount of \$1,000 on a two-story, frame building, and additions thereto, etc., situated at Pittsfield village, Maine; the plaintiff paying a pre-

mium of \$3 and giving his premium note for the further sum of \$85. The premises were destroyed by fire on January 9, 1911. The case is before this court on report.

The defendant introduced no evidence, but the following facts are fairly proved by the evidence introduced by the plaintiff: The plaintiff's mother, Amanda R. Brown, was the owner of the building at the time of the fire, and had been the owner for a period of fifteen years prior thereto. She had placed insurance upon the building in her own name to the amount of \$2,000, and received \$1,800 in settlement of her loss after the fire.

The building was occupied by three tenants, the plaintiff occupying the street floor miums to be paid in equal parts by lessee and lessor, in case of loss by fire the insurance money to be divided between them in proportion to the length of the life of the lease, it was held in *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. 13, that the insured could recover the whole loss, as against the contention that he could not recover any amount in excess of his proportion as shown by his agreement with the lessor. The court remarked that the lessee was trustee for the lessor for his share of the recovery, but that did not concern the insurer.

In *Niblo v. North American F. Ins. Co.* 1 Sandf. 551, it was held that the insurable interest of a tenant from year to year was the value of the use of the property to him, less the stipulated rent for the unexpired term, and not the full value of the building.

In *Carey v. London Provincial F. Ins. Co.* 33 Hun, 315, under a policy indemnifying a lessee against loss on his proprietary interest, the court declared that the measure of his loss was the value of the premises subject to rent; and the lessee having subleased the premises at an advanced rent, it was held that such value was established by the rent he was to receive less the rent he was to pay, during the period of suppression of rent on account of the destruction of the building, which was replaced before the expiration of the term.

Under an act of Parliament enabling an insurance company to apply the insurance money, on request of any interested party, to the rebuilding of the destroyed property, a tenant for years has an insurable interest in the building to the extent that he can demand that the property be rebuilt, therefore, where the tenant has taken the policy in his own name and, after the fire, settled with the insurer, having the policy canceled, the landlord cannot, without the request being made before the settlement, compel the insurer to expend any money in rebuilding. *Simpson v. Scottish Union Ins. Co.* 1 Hen. & M. 618, 9 Jur. N. S. 711, 32 L. J. Ch. N. S. 329, 8 L. T. N. S. 112, 1 New Reports, 537, 11 Week. Rep. 459.

J. W. M.

for a hardware store, with rooms in the rear for storage purposes, and the other tenants occupying, respectively, the basement and the tenement in the second story.

About fifteen years ago, the plaintiff's mother was anxious for him to have a business of his own, and agreed orally with the plaintiff to let him have this store 65 by 30, with two back rooms, at a rental of \$15 per month, as long as she should live. Acting under that agreement, the plaintiff entered into possession of the premises and has occupied them ever since. He has made improvements, rearranging the back rooms, changing the shelving, and putting an ell on the back side of the building, at a total cost of \$1,000 or more. A fair rental value of the premises at the time the insurance was placed and also at the time of the fire was \$30 per month. It further appears that the president of the defendant company, who solicited this insurance, fully understood that the title to the premises was in the plaintiff's mother, and what the plaintiff's interest actually was; that the plaintiff's application stated these facts, although its precise terms are not in evidence, because it was not produced by the defendant, although it was filed with the company when the policy was issued, and is referred to by the secretary of the company in a letter written to the plaintiff after the fire, in which he says: "Upon looking up your letter and application, I find that the building you occupy is owned by Mrs. Brown, who you state is your mother, and that the amount placed in our company was simply to take care of any interest which you might have." There is no claim of fraud or false representation in the procurement of the policy by the plaintiff, or in his application.

The plaintiff therefore claims that, under the facts as stated above, he had a pecuniary interest in the preservation of the property to the amount of \$180 a year during the life of his mother, that being the annual difference between the rent charged under the agreement, \$15 per month and the fair rental value of the premises, \$30 per month; that this was an insurable interest; that the defendant insured it, and should now respond in damages to the amount of his pecuniary loss.

The defendant on the other hand, contends that the plaintiff's testimony as to the agreement with his mother is uncertain, unsatisfactory, and in a measure self-contradictory, and that he was, at most, a mere tenant at will, with no other or greater rights than the other tenants in the same building or than tenants at will generally, and that he had no such interest as the law regards as insurable.

It is true that the plaintiff varies some-  
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what as to the terms of the agreement with his mother, but the fair conclusion from his testimony as a whole is, we think, as stated above. Assuming his statement to be true, did he have an insurable interest at the time when the policy was taken and also when the fire occurred?

The term "insurable interest" has been defined in somewhat varying terms, yet with substantially uniform meaning. The scope of the rule that only an insurable interest can be legally insured may be determined in some measure from the reason that created it. It was this. A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss not exceeding an agreed sum. Wagering policies are forbidden as against public policy. A should not be allowed to insure for his own benefit B's property in which A has no concern, and by the loss of which A would not be directly and financially affected. To hold otherwise would be to increase the moral hazard and to permit one man to profit by the losses of another. The crucial question therefore is, Will the insured be directly and financially affected by the loss of the property insured? If so, he has such an interest as the law will recognize. The loss must not be indirect or sentimental, but direct and actual. It is not necessarily an interest in the property in the sense of title, but a concern in the preservation of the property, and such a relation to or connection with it as will necessarily entail a pecuniary loss in case of its injury or destruction. This opens a wide field, and the decisions take an extensive range with a growing tendency to expand, rather than to contract, the scope of the term. It has therefore been held that it is sufficient if the insured has any legal interest whatever, as an owner in fee, a mortgagee, a tenant for life, or a lessee; or an equitable interest, as a mortgagor, even after foreclosure proceedings begun, but not perfected, or a purchaser under a bond for conveyance; or if the insured has a right derivable out of some contract about the thing insured of such a nature that the insured may be benefited by its preservation and prejudiced by its destruction, as a common carrier of goods of others in transportation, or a bargainee of goods who has advanced a portion of the purchase price.

In other words, without attempting to coin a new definition, but reversing the usual order, it may be said that any direct pecuniary loss negatives the idea of a wagering policy and presupposes an insurable interest, and an insurable interest can be insured.

We find, therefore, as we would expect, the term defined in broad and comprehensive

language: "If such a relation exists between the assured and the property that injury to it will, in natural consequence, be a loss to him, he has an insurable interest therein." *Wilson v. Jones*, L. R. 2 Exch. 139, 13 Eng. Rul. Cas. 299. "Any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." *Eastern R. Co. v. Relief F. Ins. Co.* 98 Mass. 423.

"If a person has such an interest in property that he will suffer pecuniary loss by its destruction, he has an insurable interest." *Wainer v. Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877. But no more comprehensive definition has been given than by this court in *Gilman v. Dwelling-House Ins. Co.* 81 Me. 488, 17 Atl. 544, where the language is as follows: "It may be stated as a general proposition, sustained by all the authorities, that whenever a person will suffer a loss by a destruction of the property he has an insurable interest therein."

An application of this test brings the interest of the plaintiff in the case at bar clearly within the rule.

This is not the case of an ordinary tenant at will, whose sole interest in the property or in its preservation could not extend beyond the time which would be required to evict him.

But the supreme court of Iowa has held that even that interest constitutes a right of possession for a definite term of at least thirty days, and is insurable. *Schaeffer v. Anchor Mut. F. Ins. Co.* 113 Iowa, 652, 85 N. W. 985.

The rights of the plaintiff in the case at bar, however, are superior to the rights of the ordinary tenant at will. He had made a contract with the owner for a tenancy to continue during the owner's life, a specific term. It is true that the contract was not reduced to writing, and was therefore voidable under the statute of frauds, but it was not thereby rendered absolutely void and nonenforceable. "Parol leases are not void." *Elliott v. Stone*, 1 Gray, 571. Having entered into possession under the contract and partly performed it, having with the owner's knowledge made valuable improvements and additions, presumably in consequence of the contract, we are not prepared to say that equity would have left him remediless in case the owner had attempted to evict him. He had, in effect, paid the difference between the agreed rent of \$15 per month and the fair rental value of \$30 per month in advance by the making of the improvements, and he could only be made  
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whole by a continuation in occupancy during the agreed term. These facts might have furnished ground for equitable interference had occasion required, and the fact that the agreement was oral would not have deprived the plaintiff of his remedy. Specific performance has been successfully invoked under oral contracts voidable under the statute of frauds, when part performance has been made. *Ash v. Hare*, 73 Me. 401; *Green v. Jones*, 76 Me. 563; *Woodbury v. Gardner*, 77 Me. 68; *Bigelow v. Bigelow*, 95 Me. 17, 49 Atl. 49.

But, whatever the plaintiff's remedy may have been had the owner repudiated the contract, the fact remains in this case that she had never done so. She recognized the lease as existing at the time of the fire and the plaintiff as her tenant under it. The tenancy was admittedly of value to the plaintiff. He derived a profit of \$180 a year under it. His removal to equally good quarters increased his annual rent by that amount. He was interested pecuniarily and directly in the preservation of the property, and its destruction meant to him a personal financial loss. The following cases have a bearing upon the propositions involved: *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078; *Berry v. American Cent. Ins. Co.* 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; *Schaefer v. Anchor Mut. F. Ins. Co.* 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470; *Welch v. Fire Asso. of Philadelphia*, 120 Wis. 456, 98 N. W. 227; *Amsinck v. American Ins. Co.* 129 Mass. 185.

It is therefore the opinion of the court that the plaintiff had such an insurable interest in the property as permitted him to effect the insurance and to recover in case of loss.

This conclusion is reached in this case with less hesitation because the president of the insurance company was fully informed of the situation when he solicited the insurance, and the plaintiff's written application also stated the facts.

With a full knowledge of the plaintiff's relation to the property and of his mother's ownership in fee, the company issued the policy, and received and has since retained the premium and premium note. Under such circumstances, it should require unusual reasons to satisfy the court that the interest insured was not insurable.

The fact that the policy in terms covers the buildings, and does not specify the plaintiff's interest, is immaterial. The company knew the facts, and independent of that, in the absence of any specific inquiry on the part of the insurers, or express stipulation in the policy, no particular description of the nature of the insurable interest is nec-

essayry. *Gilman v. Dwelling-House Ins. Co.* 81 Me. 488, 17 Atl. 544, and cases cited.

The only question remaining is the amount of the plaintiff's loss. The determination of this question is not without difficulty as it is to some extent a matter of estimate, but, while this may require a balancing of probabilities, it is not insurmountable. *Doyle v. American F. Ins. Co.* 181 Mass. 139, 144, 63 N. E. 394. Similar problems often arise in actions for personal injury. The life tables were introduced in evidence in the case at bar, showing that the mother's expectancy of life, her age being seventy-six at the time of the trial, was 5.88 years, and at the time of the fire, a year before, it was 6.88 years. It was also shown that her health is good, and that she comes of a long-lived family on one side at least; her mother living to the age of ninety-three and her maternal grandfather to the age of eighty-three. It would seem, therefore, conservative and just to reckon upon the plaintiff's tenancy continuing for a term of seven years after the date of the fire, and, where a leasehold interest is insured, the value of the unexpired term is the measure of loss. *Niblo v. North American F. Ins. Co.* 1 Sandf. 551; *Carey v. London Provincial F. Ins. Co.* 33 Hun, 315; *May, Ins.* 2d ed. p. 648. In *Schaefer v. Anchor Mut. F. Ins. Co.* 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470, it was held that the loss to the insured from the destruction of a building which he had a right to occupy during his life was determined by the difference between the reasonable rental value and the rental cost to him for the remainder of the term, such term to be computed from the life tables and other material evidence. Reckoning, therefore, on the basis of \$180 a year for seven years from January 9, 1911, a total of \$1,260, the loss is approximately determined by taking the present worth of that amount on May 7, 1911; that being sixty days after proof of loss was received by the company.

The amount so ascertained exceeds slightly the amount of the policy.

Therefore the entry must be:

Judgment for the plaintiff for \$1,000, and costs.

#### MICHIGAN SUPREME COURT.

MARY E. SULLIVAN

v.

MODERN BROTHERHOOD OF AMERICA,  
Plff. in Err.

(167 Mich. 524, 133 N. W. 486.)

Evidence — probability — infection of eye.

1. Testimony that one insured against 42 L.R.A.(N.S.)

accident splashed water from a tub in which she was washing clothes into her eye, and thereby the eye became infected with gonococci and the sight destroyed, is not so improbable that the court can take from the jury the question of the liability of the insurance company for the injury.

Insurance — accident — infection of eye — loss.

2. The infection of an eye with gonococci by splashing water from a tub while washing clothes therein, to its destruction, is within the operation of a policy providing indemnity in case of the permanent loss of the sight of an eye by accident.

(December 8, 1911.)

**E**RROR to the Circuit Court for Houghton County to review a judgment in plaintiff's favor in an action brought to recover indemnity for the total loss of an eye by accident. Affirmed.

The facts are stated in the opinion.

Messrs. Blythe, Markley, Rule, & Smith, with Messrs. MacDonald & Kerr, for plaintiff in error:

No proper testimony was submitted to the jury upon which they could find that plaintiff received the infection of the eye from the splashing of the water from the tub, and therefore a verdict should have been directed for the defendant in accordance with the defendant's request.

*Klumb v. Iowa State Traveling Men's Asso.* 141 Iowa, 519, 120 N. W. 81; *Inglese v. New York, N. H. & H. R. Co.* 133 App. Div. 198, 117 N. Y. Supp. 392; *Smith v. Pullman Co.* 138 Mo. App. 238, 119 S. W. 1072; *Hart v. Neillsville*, 141 Wis. 3, 135 Am. St. Rep. 17, 123 N. W. 129; *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 731; *Cauley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 181; *Asbach v. Chicago, B. & Q. R. Co.* 74 Iowa, 248, 37 N. W. 182; *Philadelphia & R. R. Co. v. Schertle*, 97 Pa. 450; *Tyndale v. Old Colony R. Co.* 156 Mass. 503, 31 N. E. 655; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Hughes v. Cincinnati, N. O. & T. P. R. Co.* 91 Ky. 526, 16 S. W. 275; *Dragoo v. Dragoo*, 50 Mich. 573, 15 N. W. 910; *Marquette County v. Ward*, 50 Mich. 174, 15 N. W. 70.

Even admitting that the disease was

*Note. — Liability under accident policy for condition caused by external infection without cut or abrasion.*

As to liability on accident policy for sickness or death caused by blood poisoning, see note to *Cary v. Preferred Acci. Ins. Co.* 5 L.R.A.(N.S.) 926.

As to death from inhalation of gas as an accident, see note to *Travelers' Ins. Co. v. Ayers*, 2 L.R.A.(N.S.) 168.

For a note on the question of whether

caused by the splashing of water into the eye, the plaintiff's condition is clearly an injury caused by disease, and not by accident, within the meaning of the term as used in the policy.

*Fidelity & C. Co. v. Stacey*, 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; *Bacon v. United States Mut. Acci. Asso.* (*Stedman v. United States Mut. Acci. Asso.*) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; *Sinclair v. Maritime Passengers' Assur. Co.* 3 El. & El. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; *Doxier v. Fidelity & C. Co.* 13 L.R.A. 114, 46 Fed. 446; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252.

death or injury from substance taken internally can be deemed to have been caused by external means, see *Jenkins v. Hawkeys Commercial Men's Asso.* 30 L.R.A. (N.S.) 1181.

The decision in *SULLIVAN v. MODERN BROTHERHOOD*, that the infection of an eye with gonococci by splashing water from a tub while washing clothes, resulting in the destruction of the eye, was within the operation of a policy providing for indemnity in case of the permanent loss of the sight of an eye by accident, seems sound; and recovery has been allowed on accident policies in other cases where injuries have resulted from infection although no cut or abrasion existed.

Thus, in *Dent v. Railway Mail Asso.* 183 Fed. 840, it was held that the insured's death was "accidental" within the meaning of an accident policy, where it resulted from his hand coming in contact with poison ivy while cutting a stick in the woods.

And in *Columbia Paper Stock Co. v. Fidelity & C. Co.* 104 Mo. App. 157, 78 S. W. 320, it was held that kidney disease or dropsy engendered by absorption of poison resulting from handling infected rags or wall paper was an injury "accidentally suffered," within the meaning of an employer's liability policy.

But in *Bacon v. United States Mut. Acci. Asso.* (*Stedman v. United States Mut. Acci. Asso.*) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399, it was held that death resulting from malignant pustule caused by contact with putrid animal matter containing bacteria of the kind known as "bacilli anthrax" was death from disease, and not from accidental means, within the terms of a policy insuring against death from external, violent, and accidental means, and which, it was stipulated, should not cover death caused by disease. The court in this case, however, were divided, the dissenting members being of the opinion that the infliction of animal virus upon the person of the deceased was a bodily injury, "effected through external,

Messrs. Galbraith & McCormack, for defendant in error:

Plaintiff's condition is within the operation of the policy providing indemnity "for the total permanent loss of sight of an eye by accident."

*Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 607, 97 N. W. 91; *Konrad v. Union Casualty & S. Co.* 49 La. Ann. 636, 21 So. 721; *Manufacturer's Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; *McCarthy v. Travelers' Ins. Co.* 8 Bias. 362, Fed. Cas. No. 8,682; *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; *McGlinchey v. Fidelity & C. Co.* 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13; *Smith v. Aetna L. Ins. Co.* 115 Iowa, 217, 56 L.R.A. 271, 91

violent, and accidental means" within the meaning of the policy.

In *Dent v. Railway Mail Asso.* 183 Fed. 840, it was held that a provision of an accident policy excluding liability for injury or death resulting "from poison or other injurious matter taken or administered accidentally or otherwise" contemplated an internal taking, and that death resulting from coming in contact with poison ivy was not excepted by such provision.

In *Preferred Acci. Ins. Co. v. Robinson*, 45 Fla. 525, 61 L.R.A. 145, 33 So. 1005, 3 Ann. Cas. 931, however, under a policy of insurance against the effects of bodily injury caused solely by external, violent, and accidental means, wherein it was provided that the insurance did not cover injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled, it was held that no recovery could be had for an injury resulting from inflammation of the eyes in consequence of accidentally coming in contact with poison ivy, whereby the irritating poison was absorbed into the eye.

And in *Fidelity & C. Co. v. Thompson*, 11 L.R.A. (N.S.) 1069, 83 C. C. A. 324, 154 Fed. 484, 12 Ann. Cas. 181, where an accident policy contained a provision that it covered blood poisoning sustained by physicians or surgeons resulting from septic matter introduced into the system through wounds suffered in professional operations, it was held that it did not cover blood poisoning sustained by an operating dentist by reason of a patient upon whom he was operating suddenly coughing and ejecting septic matter against the membrane of the dentist's eye without abrading, breaking, or rupturing the surface. The court, referring to the provisions of the policy, said: "Plainly, therefore, it refers to such a wound as removes the protection given to the tissues and blood by the skin and mucous membrane, and so permits of the introduction of septic matter capable of poisoning the blood; in other words, it refers to an abrasion, breach, or rupture of the

Am. St. Rep. 153, 88 N. W. 368; *Carnes v. Iowa State Traveling Men's Assn.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683.

Stone, J., delivered the opinion of the court:

The defendant is a fraternal organization, having, among other features, a life and accident insurance for its members. It is organized under the laws of the state of Iowa, but has subordinate lodges in Michigan, where it is authorized to do business. Plaintiff became a member of what is known as Laurium Lodge, one of the subordinate lodges of the defendant in Houghton county, on the 11th day of September, 1907, and remained in good standing until after the time of the occurrence upon which this suit is based. On becoming a member of the order, plaintiff received a certificate or policy entitling her beneficiary to the sum of \$1,000 in the case of death, and, among other things, it provided that "one-fourth ( $\frac{1}{4}$ ) the amount the beneficiary would be entitled to in case of death will be paid to said member should she accidentally lose a hand, at or above the wrist, a foot, at or above the ankle, or for the total permanent loss of the sight of an eye by accident." The plaintiff by this suit claims the loss of the sight of the right eye by accident, and, under the provisions of the policy above quoted, she seeks to recover \$250 therefor.

It was the claim of the plaintiff at the trial that on March 26, 1909, while doing her family washing, with a washtub and washboard, and while washing some flannels,

some water from the tub was accidentally splashed into her right eye; that she rubbed her eye at the time; that it became and continued painful, and that it became much inflamed; that she called a physician, who found the eye badly inflamed, and he advised her that she consult a specialist. The specialist came and took charge of the case, and very soon sent the plaintiff to a hospital, where she remained between two and three weeks, and finally suffered the total loss of the eye. The physician diagnosed the case as inflammation of the mucous membrane of the eye caused by gonorrhea infection.

After proving her membership, about which there is no question, the plaintiff testified, in substance, that on the day named, between 10 and 11 o'clock in the morning while she was washing, some of the suds got into her right eye; that at the time she was washing flannels, underwear; that she did not know how the suds got into her eye, it just splashed as she was washing; that she was not washing with a machine, but by a board; that, when the water splashed into her eye, it burned as soap would naturally do, and that she kept rubbing her eye; that shortly afterwards the eye pained her; that during the afternoon and evening her eye was quite sore, and that it pained worse the next day, which was Saturday; that she called a physician, Dr. Kerr, on Sunday morning. At that time her eye was inflamed. He advised her to get Dr. McNaughton, an eye specialist. The next day she went to Dr. McNaughton's office, and from there to the hospital, where she remained eighteen days, and that she has

natural covering, through which the septic matter may gain entrance. As so employed, it does not embrace such a wound as is described in the latter portion of the definition given in the charge, and does not include the blowing against the eye of that which does not mechanically abrade, break, or rupture the conjunctiva, but merely communicates to it an infectious disease by contact with its outer surface. So far as is disclosed by the evidence, the immediate mechanical effect of the particles blown into the plaintiff's eye was not different from what would have been if they had consisted of so much pure rain water; they did not wound it, but infected it from the exterior, operating in like manner as do some other species of infecting matter when they come in contact with the unbroken skin or mucous membrane of other parts of the body. Indeed, it appears that the pathogenic germs in what was blown into the eye were chiefly pneumococci, which, if carried into the lungs, produce pneumonia; but it would not be said in such a case that the infection of the lungs was through a wound."

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And in *Meehan v. Traders & Travelers Acci. Co.* 34 Misc. 158, 68 N. Y. Supp. 621, it was held that injuries sustained by an insured through having carbolic acid thrown in his face by a woman were occasioned "by poison" or by "contact with poisonous substances" within the meaning of an accident policy excepting injuries caused in such ways.

And it was held that the contention that the word "poison" in such exemption clause contemplated only poison taken internally could not be upheld. *Ibid.*

In *Dent v. Railway Mail Assn.* 183 Fed. 840, where an accident policy provided that no recovery can be had "unless the accident alone results in producing visible external works of injury or violence suffered by the body of the member," but did not say when such marks must be produced, it was held in a case where the insured died as a result of coming in contact with poison ivy while cutting a stick in the woods, that the provision was complied with where visible marks did not appear immediately after contact with the ivy, but appeared a few days afterward.

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no sight remaining in the right eye; and that she was then claiming the amount stated in the policy for the accidental loss of an eye.

Upon cross-examination she testified as follows:

On Friday, March 26, I was washing flannels which belonged to my own family. I had no outside washing. I never took in washing. To my knowledge there was no member of my family afflicted with gonorrhea at that time, nor has any member undergone treatment for gonorrhea since then. If any member of my family at that date had been infected with gonorrhea, I would have known it. I realized that there was something wrong with my eye shortly after the water splashed in it. It commenced to trouble me shortly after, and it pained me more and more. I consulted a physician Sunday morning. I did not consult a physician Saturday morning. Dr. Kerr was the first physician I consulted. At the time I did not know what was wrong with me. I knew it was my eye, but I did not know just what it was. I did not know just what would have caused it. Dr. Kerr did not tell me what was wrong with my eye. He just said it was quite bad, and advised me to see Dr. McNaughton. Dr. McNaughton saw me the same day about 2 o'clock. He never told me what was the matter with my eye. He always said it was a bad eye every time I asked him, and the fourth day I was in the hospital he told me the sight was practically gone. I never found out that I had gonorrhea of the eye, until it was brought up here the other day.

Q. I want to find out when you found out first that you had gonorrhea of the eye?

A. I never found out until it was brought up here the other day. I never heard about it until the other day, because Dr. McNaughton never told me anything of that.

Q. Didn't you sign a sworn statement that you presented to the company stating that you had gonorrhea of the eye?

A. No, sir; I did not.

Q. You just testified to that.

A. I stated I had lost sight of the eye, but not of such a thing.

Q. Then you never knew this until a short time ago that you had gonorrhea of the eye?

A. No, sir; I didn't. That's about all I done that day, except I went out in the afternoon a few blocks from home to Ryckman & Minnear's store. I did not do any other housework that day except getting supper. Nothing else that I know of got in my eye that day. I did not do any

sweeping on that day. I did the day before. Nothing got in my eye then.

Q. Where did this gonorrhea come from that infected your eye?

A. I couldn't say.

Q. If there was no one in your family infected with gonorrhea, where would it come from?

A. I don't know. I couldn't say. I am positive that the injury I received was received by water splashing in my eye. I remember distinctly. I put washing liquid in the water. I am positive of that. I am positive that the injury occurred Friday, March 26. I swear to that positively. I am just as positive that it occurred on March 26 as that it occurred to me. The statement of proof of claim that I made to the Modern Brotherhood of America was correct in all its parts and statements.

Dr. M. M. Kerr, a witness produced and sworn on behalf of the plaintiff, testified as follows: "My name is M. M. Kerr. I am a regular practising physician in Laurium, and I have been a physician about eleven years. I was called to treat professionally Mary E. Sullivan, the lady who was just on the witness stand, the latter part of March, 1909. I don't remember the day of the month. It was on Sunday morning about 7 or 8 o'clock. I found the eye in a condition that we know as hyperemia, a highly inflamed condition of the surface of the eye. I diagnosed the case from a clinical standpoint. I thought I knew what the trouble was. It appeared to me to be a case of gonorrheal ophthalmia or an inflammation due to gonorrhea. I didn't give it any treatment. It seemed too severe for me, and I thought it would be better for a specialist to examine her. I called a specialist over Mrs. Sullivan's telephone. I had nothing further to do with the case except seeing it on one or two other occasions at the hospital. I did not at any time tell Mrs. Sullivan that she was suffering from gonorrheal infection of the eye."

Cross-examination of Mr. Kerr: "I could not tell definitely how long the eye had been suffering from the injury when I examined it, possibly forty-eight hours, possibly longer. Gonorrhea of the eye could not be contracted unless there were gonorrheal germs in the washing water, but the germs would have to be somewhere and brought in contact before the disease could be contracted. Mrs. Sullivan told me that she injured her eye while washing clothing a couple of days before, and that the water in the tub came in contact with her eye, either from splashing or rubbing her hand over the eye. I treated Mrs. Sullivan once before

about eight or ten years ago. I never treated her for gonorrhea."

The foregoing constitutes all of the evidence in the case.

The defendant moved the court to direct a verdict in its favor, for the reason that the injury alleged was a disease, and not an accident, that the plaintiff had failed to establish a case, and that the plaintiff had failed to establish by professional testimony the loss of the sight of the eye. The motion was overruled and the defendant excepted.

The court charged the jury, in substance, as follows:

"The plaintiff having brought this action into court, the burden of proving the case rests upon her, and she is obliged to satisfy you by a fair preponderance of the testimony that she has suffered the loss of an eye by accident. The particular allegation on which the plaintiff rests is that she became afflicted with a disease through an accident which happened at the time that she was doing washing in her own house. Now, the plaintiff must prove by a preponderance of the evidence the fact alleged, that the plaintiff contracted a gonorrheal infection of the right eye while doing the family washing on the date alleged. Unless you believe from the evidence that the plaintiff contracted the gonorrheal infection of the eye by the splashing of the water from the washtub in the eye, you should find for the defendant.

"If you believe the probabilities are as great that the plaintiff received the gonorrheal infection in the eye, as her hand came out of the water in a wet condition, and that she rubbed her eye in the wet condition, then you should find for the defendant. If you believe from the evidence that she contracted the infection by having the germs transmitted to her by an outside agency, such as being transmitted through the air, or coming from any other person infected with such disease, then you should find for the defendant. The question is solely for you, gentlemen, to determine that one question from a fair consideration of this testimony. If you are convinced that the water splashed in the eye, and the infection was received in that way, taking into consideration the circumstances which immediately followed, and the development of the disease as testified to by the plaintiff, you would be justified in finding a verdict for her. If she has not sustained that by a fair preponderance of the evidence, find for the defendant."

The jury returned a verdict for the plaintiff for \$260.40, and a judgment for the plaintiff was entered.

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There was no motion for a new trial, and the defendant has brought the case here for review. There are a number of assignments of error.

In their brief and argument defendant's counsel have presented two propositions that may be said to be covered by the assignments of error: First. The plaintiff's theory, that plaintiff received a gonorrheal infection of the eye by reason of the splashing of the water therein from the washtub during her ordinary occupation of washing clothes for the family, was based wholly upon improbable circumstances, and that there is no proof of such fact, and consequently no question for the jury. Second. That, even admitting the infection of the eye to have been caused by the splashing of water, such infection and accompanying injury to the eye should properly be classed as the effect of disease, and not by accident within the meaning of the clause of the policy under which plaintiff claims indemnity.

1. Referring to the first proposition of counsel, can it be said as claimed that the facts in evidence are as consistent with the theory of the defendant as with the claim of the plaintiff? We should not lose sight of the facts that the defendant offered no evidence, and that no motion for a new trial, claiming that the verdict was contrary to the evidence, was made. The testimony on the part of the plaintiff stands alone. It is to the effect that water was accidentally splashed from the tub in which plaintiff was washing flannel clothing into her eye, that her eye became inflamed immediately thereafter, and that as a result of such inflammation she lost the sight of the eye. Can we say as matter of law that this testimony was so improbable, or that the presence of the germ in the water was so improbable or conjectural that the case should not have been submitted to the jury? We think not. The evidence of the physician was to the effect that the sight of the eye was destroyed by inflammation due to gonorrhea; that gonorrhea of the eye could not be contracted unless there were gonorrheal germs brought in contact with it, and the splashing of the water as testified to by the plaintiff was the only explanation given. We cannot say that the testimony was inconsistent with the theory that the injury was accidental. Nor can we hold that the court should have determined that the germ came into the eye in some way other than as claimed by the plaintiff. *Furbush v. Maryland Casualty Co.* 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 135; *Grimme v. Fraternal Aid Asso.* 167 Mich. 240, 132 N. W. 497. By the testimony of the physician the cause of



the trouble is shown, to wit, the presence of the germ in the eye, and the manner in which this germ was introduced is rendered probable by the testimony of the plaintiff. We think that the case was one for the jury, and that the defendant cannot justly complain of the charge.

2. In support of defendant's second proposition counsel cite the following cases: *Fidelity & C. Co. v. Stacey*, 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; *Bacon v. United States Mut. Acci. Asso. (Stedman v. United States Mut. Acci. Asso.)* 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; *Dozier v. Fidelity & C. Co. (C. C.)* 13 L.R.A. 114, 46 Fed. 446; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 173 N. W. 252. The case of *Fidelity & C. Co. v. Stacey*, supra, was decided in the circuit court of appeals, fourth circuit. There the holder of a policy insuring him against disability or death "resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means," committed an assault and battery on a person who made no resistance, and, in striking such person in the face, injured his hand, and a few days later died from the effects of blood poisoning which developed in the wound. It was held that such injury was not "accidental" within the meaning of the policy, and that plaintiffs could not recover. It clearly appeared there that the injury, which was the direct means causing the death, was the natural result of a voluntary act committed when Stacey was in full possession of his mental faculties. Pritchard, Ch. J., the writer of the opinion, said: "The immediate cause of the insured's death was disease, to wit, blood poisoning. The company did not undertake to insure against blood poisoning or any other disease. But the fact that it had not insured against disease would not be a good defense in this case, if it . . . was the direct result of accidental means. . . . Unless it could be shown that the original cause to which the disease can be traced was 'accidental means,' then the disease from which the insured died would be a subject against which the company did not insure." We think that the case is readily distinguished from the instant case. In *Bacon v. United States Mut. Acci. Asso.* supra, the court was divided, two judges dissenting. The majority opinion distinctly holds that the deceased died from the disease within the meaning of the language used in the policy sued upon, and not from an accident causing the disease. It did not appear how the animal virus (the cause of the malady

known as malignant pustule, came in contact with the body of the deceased. In the majority opinion the court distinctly adheres to its former opinion in *Paul v. Travelers' Ins. Co.* 112 N. Y. 32, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, where the deceased came to his death by accidentally inhaling illuminating gas, and where the plaintiff recovered. We think that the *Bacon* Case is not applicable in the instant case. In *Dozier v. Fidelity & C. Co.* supra, it was held that "sunstroke or heat prostration" contracted by the decedent in the course of his ordinary duty as a supervising architect was a disease, and did not come within the terms of a policy of insurance against bodily injuries, sustained through external, violent, and accidental means, but expressly excepting "any disease or bodily infirmity." The case of *Sinclair v. Maritime Passengers' Assur. Co.* 3 El. & El. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342, is cited with approval. We do not think that these sunstroke cases are in point.

We have also examined the case of *Feder v. Iowa State Traveling Men's Asso.* supra, where it was held that death of the insured will not be held accidental merely because it results from the rupture of an artery, as he reaches to close a window, it not appearing that anything was done or occurred which he had not foreseen and planned, except the rupture. The court said: "The evidence shows that the cause was the ruptured artery; but that was not accidental if it was the natural result of an act voluntarily done by Feder. That he did anything but what he intended to do in attempting to close the shutters is not shown nor claimed. It is not even shown that he made any unusual exertion in what he did. Had the artery been ruptured while the decedent was sitting quietly in his chair, or while walking at a moderate pace, there would be no ground for claiming that the rupture was accidental." While we cannot undertake to reconcile all of the authorities upon this subject, it seems to us that the case last cited differs materially in principle from the instant case. We are of opinion that the position and claim of the plaintiff find support in the case of *Western Commercial Travelers' Asso. v. Smith*, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401. This case was in the United States circuit court of appeals, eighth circuit. The opinion was written by Sanborn, Ch. J. It was there held that an abrasion of the skin of a toe, unexpectedly caused, without design, by unforeseen, unusual, and unexpected friction in the act of wearing a new shoe, is an

accidental injury within the meaning of an insurance policy; and that blood poisoning caused by an accident, and which is a mere link in the chain of causation between the accident and the death which it produces, is not an intervening and independent cause of death which will prevent liability on insurance against accident. This is a well-reasoned opinion, and many cases are cited. We quote the following language appropriate in the instant case: "If the death was caused by bodily injuries effected by external, violent, and accidental means alone, the association was liable to pay the promised indemnity. If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent, and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such a case the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable, not to the disease, but to the *causa causans*, to the accident alone. Travelers' Ins. Co. v. Melick, 27 L.R.A. 629, 12 C. C. A. 544, 552, 27 U. S. App. 547, 560, 65 Fed. 178, 185; Union P. R. Co. v. Callaghan, 6 C. C. A. 205, 210, 12 U. S. App. 541, 550, 56 Fed. 988, 994; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 475, 24 L. ed. 256, 259; National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3-5, 36 U. S. App. 658, 663, 73 Fed. 774, 776." In the following cases it was held that there was liability: In Hamlyn v. Crown Accidental Ins. Co. [1893] 1 Q. B. Div. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663, a person sustained an injury to his knee in attempting to catch a rolling marble, it being found that the injury resulted from an unnatural position or movement of the leg, which was not intended by the person injured. In North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212, the injury was caused by the unintended slipping of a pitchfork in the hands of the person injured, in such a manner that it struck him in the bowels, causing peritonitis. In 4 Cooley's Briefs on the Law of Insurance, p. 3159, there is a collection of cases in which the causes of injury or death have been held to be accidental: Asphyxiation by gas in a well (Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871); blood poisoning resulting from cutting a corn (Nax v. Travelers' Ins. Co. 42 L.R.A. (N.S.)

[C. C.] 130 Fed. 985); blood poisoning from use of hypodermic needle (Bailey v. Interstate Casualty Co. 8 App. Div. 127, 40 N. Y. Supp. 513, affirmed without opinion in 158 N. Y. 723, 53 N. E. 1123); poisoning by sting of insect (Omberg v. United States Mut. Acci. Asso. 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909); poison taken by mistake (Mutual Acci. Asso. v. Tuggle, 39 Ill. App. 509; Hill v. Hartford Acci. Ins. Co. 22 Hun, 187; Pollock v. United States Mut. Acci. Asso. 102 Pa. 230, 48 Am. Rep. 204). See also upon the general subject the following authorities: Fidelity & C. Co. v. Johnson, 72 Miss. 333, 30 L.R.A. 206, 17 So. 2; Equitable Acci. Ins. Co. v. Osborn, 90 Ala. 201, 13 L.R.A. 267, 9 So. 869; 1 Cyc. pp. 249-251, and cases cited; Richards, Insurance Law, §§ 385, 386; Niblack, Accident Insurance, §§ 376 et seq. See note to White v. Standard Life & Acci. Ins. Co. 5 Ann. Cas. 87. See also note to the English case of Brintons v. Turvey, 2 Ann. Cas. 140, 141.

We find no prejudicial error in the record, and the judgment of the Circuit Court is affirmed.

Ostrander, Ch. J., and Steere, Moore, and Brooke, JJ., concur.

#### MINNESOTA SUPREME COURT.

CHARLES N. ORR et al., Respts.,  
v.

WILLIAM SUTTON, Impleaded, etc., Appt.

(119 Minn. 193, 137 N. W. 973.)

**Mortgage — failure to pay registry tax — effect.**

1. A mortgage upon real property, upon which the registry tax imposed by chapter 328, Laws 1907, has not been paid, though erroneously recorded by the register of deeds, furnishes no sufficient legal basis in the mortgagee for the redemption from the foreclosure of a prior mortgage upon the same property, as against the holder of the title under that foreclosure.

**Same — evidence of record.**

2. The record of such a mortgage, being

Headnotes by BROWN, J.

**Note. — Effect of failure to pay registration tax or fee.**

The decision in ORR v. SUTTON, that the record of a mortgage is invalid where the registration tax has not been paid, is supported by the declaration in Martin v. Bates, 20 Ky. L. Rep. 1798, 50 S. W. 38, that under § 520, Kentucky Statutes, the state tax must be paid before a deed acknowledged and left for record will operate

prohibited by the statute and thereby declared invalid for any purpose, is not evidence of the fact that it was duly recorded, or of the validity of the instrument.

**Same — certificate of exemption — effect.**

3. A certificate upon the back of such a mortgage, made by the county treasurer before the same was recorded, that the mortgage was not subject to the tax, held not to conclude the holder of the title to the property under the prior foreclosure.

**Pleading — failure to enact statute.**

4. An answer alleging the failure of the legislature properly to enact the statute held without merit, and the order striking it out is sustained.

(October 18, 1912.)

as notice to creditors or innocent purchasers for value, though, as between the parties and persons having notice of such transfer, the title passes.

But where the law does not provide that the tax shall be paid before the deed is recorded, as in *Bussing v. Crain*, 8 B. Mon. 593, although the clerk is not bound to receive it or permit it to be deposited in his office for record until the tax on it has been paid, yet, if he does permit it to be deposited without a payment of the tax, it is his duty to record it, and look to the individual for whom he records the deed for the payment of the tax. The court said: "The legal presumption [under such circumstances] is that he dispenses with the previous payment of the tax, and, instead thereof, relies for its payment upon the promise of the person whose duty it is to pay it. Such a rule of law is necessary to prevent injury and injustice to persons lodging deeds for record, who, having placed the deed in the possession and custody of the proper officer, which has been received by him without objection, may very reasonably come to the conclusion that it will be duly recorded without the previous performance of any act on their part. The law does not provide that the tax shall be paid before the deed is recorded. But as it is the duty of the clerk to collect the tax, and he is liable therefor, he may refuse to receive the deed for record until it is paid, or he may receive the deed and record it, and collect the tax afterwards."

And in *People use of Farrington v. Bristol*, 35 Mich. 28, where the clerk received the mortgage and indorsed it without demanding his fees, and without any intention of demanding them, it was said: "It in no way concerns anyone else whether he is paid or not. And if he chooses to give credit for fees or to remit them, it cannot invalidate securities which he has accepted and filed. No one is bound, under the terms of this statute, to pursue any further investigations to see whether he does his duty. The statute seems to have required the deposit [of mortgage in clerk's office] not merely for notice to creditors and pur-

**A**PPEAL by defendant Sutton from an order of the District Court for St. Louis County sustaining a demurrer to one of the defenses set up in his answer and striking out another separate defense as sham and frivolous, in an action to quiet title to certain real property. Affirmed.

The facts are stated in the opinion.

Mr. J. N. Searles, for appellant:

The validity of the record of this mortgage cannot be assailed either by the state or the plaintiffs.

*Olmsted County v. Barber*, 31 Minn. 256, 17 N. W. 473, 944; *Redwood County v. Winona & St. P. Land Co.* 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; *State ex rel. Holden v. Lamberton*, 37 Minn. 362, 34 N. W. 336; *Iowa News Co. v. Harris*, 62 Iowa,

chasers, but chiefly to show that transaction to have been actual and genuine, and to prevent secrecy and imposition, and to remove the presumption otherwise arising against good faith."

Where a deed of trust was proved within the prescribed period, and an entry made of the probate and order of registration, but, the fees not being paid, the clerk apprised the person who brought it that it should not be registered unless the fees were paid, and offered it back to him, it was held in *Den ex dem. Ridley v. McGehee*, 13 N. C. (2 Dev. L.) 40, that, while the entry remained, parol evidence was not admissible to contradict it, and that the default of the clerk in not handing it to the register did not affect the right of the vendee. In this case, *Henderson, J.*, said: "If a clerk, upon a deed's being handed in and proved, makes an entry on his docket to that effect, and even indorses the entry on the deed under a belief that the fees would be immediately paid, and should find himself mistaken, upon his mentioning this to the court, the entry would be impugned by their order. By this means the clerk would be protected from impositions. Having failed to do this, but having permitted the entry to remain on the record, and even indorsed on the deed, no matter what words passed, they must, in opposition to the record, be considered as mere idle talk."

Even where the statute provides that "no deed shall be admitted to record until the tax thereon shall be paid to the clerk," it has been held that the provision is directory merely. Thus, in *Lucas v. Claffin*, 76 Va. 269, where there was just such a provision, it was said: "The clerk is liable for the tax if he records the deed. The law is directory to him, and gives him authority to demand and receive the tax before he can be required to admit the deed to record. If he chooses to admit it to record without receiving prepayment of the tax, he thereby assumes the liability for it, just as if it had actually been paid to him. The government loses nothing, for his liability for it is the same as if he had actually received it, so that is only a ques-

501, 17 N. W. 745; *Darling v. Boesch*, 67 Iowa, 702, 25 N. W. 887.

The treasurer's indorsement of "exempt from registration tax" on the defendant's mortgage, and the validity of the record of the mortgage thus indorsed, cannot be attacked in this collateral action.

7 Cyc. 278; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Schneider v. Sellers*, 25 Tex. Civ. App. 226, 61 S. W. 541; *State v. Shevlin-Carpenter Co.* 62 Minn. 99, 64 N. W. 81; *State v. Crookston Lumber Co.* 85 Minn. 405, 89 N. W. 173; *Blanchard v. Powers*, 42 Mich. 619, 4 N. W. 542; *Tompkins v. Johnson*, 75 Mich. 181, 42 N. W. 800; *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71; *White River Bank v. Downer*, 29 Vt. 332; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Bolles v. Bowen*, 45 N. H. 124; *Eastman v. Bennett*, 6 Wis. 232; *Reeves v. Reeves*, 33 Mo. 28; *Wheeler v. Lampman*, 14 Johns. 481; *Putnam v. Man*, 3 Wend. 202; *Case v. Redfield*, 7 Wend. 398; *McArthur v. Pease*, 46 Barb. 428; *Eastabrook v. Hapgood*, 10 Mass. 313; *Bean v. Parker*, 17 Mass. 591; *Thayer v. Stearns*, 1 Pick. 109; *Martin v. Barney*, 20 Ala. 369; *Gaither v. Green*, 40 La. Ann. 362, 4 So. 210.

tion with him whether he will waive the actual prepayment, and trust the party who is chargeable with it, and assume liability for it himself, just as if he had actually received it. If he admits the deed to record without prepayment of the tax, and thereby becomes liable for it, just as if he had received it, the recordation does not thereby become void. The statute does not so declare, and there is no reason why it should be."

In *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637, it was held that the omission of the recorder to indorse upon the deed the time when it was left with him for record, because his fees were not paid, he having assented that the grantor might leave the deed for record, on the remark that the grantee would call for it and pay the recording fee, cannot be allowed to defeat the title as between grantees and subsequent judgment creditors of the grantor; for the recorder ought to have made that objection when the deed was left with him, and, not having made it then, it is too late for him to make it afterward.

But it seems that deeds shipped to a county clerk to be recorded, but which, being unaccompanied with his fees for recordation, are "pigeonholed" instead, are not "lodged" with him within the meaning of the statute, so as to be notice to a subsequent bona fide creditor of the vendor. *Dickerson v. Bowers*, 42 N. J. Eq. 295, 11 Atl. 142, wherein it was said: "I am not satisfied that the deeds were 'lodged' with the clerk for record within the true mean-

*Mr. Theodore Hollister, with Mr. William G. White, for respondents:*

Since the passage of chapter 328, General Laws of 1907, a mortgage is not valid as a mortgage, either as between the parties or as a lien upon the land, until the registration tax has been paid.

*Mutual Ben. L. Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572; *State v. Farmers' & M. Sav. Bank*, 114 Minn. 95, — L.R.A.(N.S.) —, 130 N. W. 445, 851; *State ex rel. Hilderbrandt v. Fitzgerald*, 117 Minn. 192, 134 N. W. 728.

Since the passage of chapter 328, General Laws of 1907, a mortgage has no validity as against third parties, either as a mortgage or as a lien on the land, until the registration tax has been paid.

*Martin v. Baldwin*, 30 Minn. 537, 16 N. W. 449; *White v. Leeds Importing Co.* 72 Minn. 352, 71 Am. St. Rep. 488, 75 N. W. 595, 761; *Brady v. Gilman*, 96 Minn. 234, 1 L.R.A.(N.S.) 835, 113 Am. St. Rep. 622, 104 N. W. 897; *Maurin v. Carnes*, 71 Minn. 308, 74 N. W. 139.

Respondents are entitled to attack appellant's mortgage and to show that it is not valid, and that he had no lien upon the land, and that, by reason thereof, he was

ing of the act; and yet there are very good grounds for holding that they were so lodged, and that the clerk had no right, without more, to put them in a private place. It is the duty of the clerk to record the deeds lodged with him for that purpose, and it is the duty of the grantee to pay him therefor the fees allowed by law. I do not discover by the act that the clerk can refuse to record until the fees are paid. The obligation of the respective parties is not fixed in order of time by the law. But it would seem reasonable to require the payment of the fees in the first instance, since the statute imposes a penalty on the clerk for any neglect, and subjects him to a liability for all damages which any party may sustain for the nonperformance of any duty."

In *Branham v. Beatty*, 4 Ky. L. Rep. 537 (abstract), it is said: "No mortgage is valid against purchasers without notice or creditors until . . . lodged for record; and it cannot be legally lodged for record until the tax is paid. The tax belongs to the commonwealth and must be actually paid to some officer authorized to collect the same, and when the county clerk is the mortgagor and promises to pay tax, the deed cannot be considered as lodged for record unless he has paid it, or charged himself with it in his official accounts. The holders of mortgages not legally lodged for record are the owners of mere equities, and, as between them, that which is prior in time takes precedence."

E. M. S.

not entitled as against respondents to make the redemption in question.

New England Mut. L. Ins. Co. v. Capehart, 63 Minn. 120, 65 N. W. 258; Brady v. Gilman, 96 Minn. 234, 1 L.R.A.(N.S.) 835, 113 Am. St. Rep. 622, 104 N. W. 897; Hughes v. Olson, 74 Minn. 237, 73 Am. St. Rep. 343, 77 N. W. 42; Maurin v. Carnes, 71 Minn. 308, 74 N. W. 139.

Chapter 328, General Laws 1907, is not unconstitutional.

Mutual Ben. L. Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572; State v. Farmers' & M. Sav. Bank, 114 Minn. 95, — L.R.A.(N.S.) —, 130 N. W. 445, 851; State ex rel. Hilderbrandt v. Fitzgerald, 117 Minn. 192, 134 N. W. 728.

Brown, J., delivered the opinion of the court:

Action to quiet title to certain real property. It comes to this court on defendant Sutton's appeal from an order sustaining a demurrer to one of the defenses set up in his answer, and an order striking out another separate defense as sham and frivolous.

The facts, so far as necessary to an understanding of the questions presented, are as follows: William Sauntry was the owner of an undivided interest in the property, and mortgaged the same to Weyerhauser & Rutledge to secure the payment of an indebtedness amounting to \$30,000. The mortgage was duly recorded, and was subsequently assigned, and by the assignee duly foreclosed; the sale on foreclosure taking place on September 20, 1910. During the period of redemption several judgments were recovered and docketed against Sauntry, the mortgagor, one of which was assigned to plaintiffs in this action, under which they duly redeemed from the mortgage foreclosure. Plaintiffs' title to the land is founded upon this redemption.

The facts relating to the title asserted by defendant Sutton, as appears from the pleadings, are as follows: The period of redemption from the mortgage sale expired September 20, 1911. Late in the evening of that day Sauntry, the mortgagor, executed to defendant Sutton a mortgage upon the property to secure the payment of the sum of \$50. The mortgage was filed for record in the office of the register of deeds at 10:05 o'clock P. M. of that day. Immediately thereafter Sutton filed a notice of intention to redeem from the prior foreclosure. He thereafter paid to the sheriff of the county an amount claimed to be sufficient to effect redemption, and the

sheriff in turn executed and delivered to him a certificate of redemption. Defendant Sutton claims title to the property under and by virtue of this redemption.

To overcome this claim plaintiffs allege in their complaint that the Sutton mortgage, as well as the record thereof, was invalid and a nullity, furnishing no sufficient basis for Sutton's attempted redemption, for the reason that the registry tax imposed by chapter 328, Laws 1907, was never paid. In response to this charge in the complaint, defendant Sutton answered as follows: "Further answering, this defendant avers that the mortgage aforesaid so executed and delivered by said Sauntry to this defendant on the 20th day of September, 1911, was duly presented to the treasurer of St. Louis county, Minnesota, for his indorsement, as required by the so-called law of this state, being chapter 328, General Laws of 1907, and said officer duly indorsed the same with the words, 'Exempt from registry tax,' and duly attached thereto his official signature as such treasurer, and thereupon said mortgage was duly recorded in the office of the register of deeds in and for said county as aforesaid, but no registry tax was paid to said treasurer, although this defendant was ready and willing to have paid such tax, had such treasurer demanded the same, or declined to have indorsed said mortgage without such payment." To these allegations plaintiffs demurred, as not constituting a defense.

Defendant Sutton also alleged in his answer: "Moreover, this defendant avers that said so-called law, being chapter 328, General Laws 1907, was not then or ever a valid law of this state, for the reason that the same was never voted upon or read in the senate of this state, when the same—being known as House File No. 561—was under consideration in the legislature of this state." These allegations were stricken out on motion.

1. The question presented by the demurrer involves the legal right of defendant Sutton to redeem from the prior foreclosure, and the effect of his attempt to do so. If the mortgage registry tax statute be construed in harmony with its plain language, and force and effect given it accordingly, the question is not at all difficult to answer. The right of redemption after foreclosure is purely statutory, and the conditions prescribed as essential to the right as granted to a junior mortgagee or other creditor having a lien upon the property must appear of record before it may be exercised. Our statutes provide (Rev.

Laws 1905, § 4481) that, if the mortgagor makes no redemption, the creditors of the mortgagor having a lien upon the property, or some part thereof, legal or equitable, may redeem in the order stated therein. To entitle a creditor to redeem as a matter of legal right, it is necessary that he have some interest in or lien upon the land, which, either at law or in equity, gives him the right to protect his interest in the specific property, or to have it appropriated in satisfaction of his claim to the exclusion of all others. *Nelson v. Rogers*, 65 Minn. 246, 68 N. W. 18; *Whitney v. Burd*, 29 Minn. 203, 12 N. W. 530. Section 4482 contemplates that such lien, when in the form of a subsequent mortgage, shall be of record, and the provisions thereof require the production to the officer to whom the redemption money is paid of a certified copy of the record, and either the original mortgage or a certified copy of the same. Sutton was the holder of a subsequent mortgage, and as such claimed the right to redeem. If his mortgage was a legal and valid instrument, and was properly recorded, beyond question he was in position to exercise the asserted right. If it was not a valid instrument, or properly recorded, he had no vested right to have the mortgaged property applied to its payment, to the exclusion of those who had valid liens of record. The question turns, then, upon the validity or invalidity of the mortgage and the record of the same.

It is insisted by plaintiff that, because the registry tax was not paid, neither the mortgage nor the record thereof, though filed and recorded under the mistaken impression that the registry tax statute had no application to mortgages under \$100, was of any validity for any purpose, and furnished no foundation for the Sutton redemption. This brings us to that statute, and the force and effect to be given its provisions. It imposes upon every mortgage executed upon real property in this state a tax of 50 cents for each \$100, or major fraction thereof, of the principal debt or obligation secured. Section 7 of the act provides: "No such mortgage, no papers relating to its foreclosure, nor any assignment or satisfaction thereof shall be recorded or registered . . . unless said tax shall have been paid; nor shall any such document or any record thereof be received in evidence in any court, or have any validity as notice or otherwise." Under the rule heretofore adverted to, the Sutton mortgage, to constitute a sufficient basis for the right of redemption, must appear

to have been valid as a matter of law, and properly of record, and such as to clothe Sutton with the right to resort to the specific property for the enforcement of his debt against all others. In other words, it must appear to have been a lien upon the property which all other creditors were bound to respect. Did his mortgage constitute such a lien? The question must be answered in the negative.

Defendant contends: (1) That, though the tax was not paid, the mortgage nevertheless was valid between the parties, vesting in Sutton a lien upon the property; and (2) since it was recorded in fact, though prohibited by law, the validity of the record cannot be questioned by plaintiffs. Neither of these contentions can be sustained. In our view of the principal question, it is not material whether the mortgage was valid as between the parties or not. The mere existence of a valid mortgage does not give the holder thereof the right of redemption as against prior or subsequent lien holders. To complete the right as against third persons, the mortgage must be of record, and evidence thereof produced to the officer when redemption is made. Sutton's mortgage was recorded in fact, but in violation of law. It was not entitled to record, and the statute declares that such a record "shall have no validity as notice or otherwise." Neither the mortgage nor the record thereof could be received in evidence to establish the right of redemption, for the statute further expressly provides: "Nor shall any such document or the record thereof be received in evidence in any court." Clearly Sutton had no lien upon the property which he could enforce as against third persons, and his attempted redemption was invalid and of no effect. *Tweto v. Horton*, 90 Minn. 451, 97 N. W. 128; *Cogan v. Cook*, 22 Minn. 137. That one who has redeemed from such a foreclosure may contest the validity of a lien under which a subsequent redemptioner claims the right to redeem has often been decided by this court. *Brady v. Gilman*, 96 Minn. 234, 1 L.R.A. (N.S.) 835, 113 Am. St. Rep. 622, 104 N. W. 897; *Hughes v. Olson*, 74 Minn. 237, 73 Am. St. Rep. 343, 77 N. W. 42. So that, since Sutton had no lien upon the property, valid as to third persons, it is not important that his mortgage may have been valid as against the mortgagor.

Nor does the indorsement made by the county treasurer upon the mortgage, that it was not subject to the tax, change the legal aspect of the case. Such certificate

does not conclude either the state or plaintiffs. The statute must be construed as a revenue law, and force and effect given to all its provisions. The tax thereby imposed is definite and certain; the amount in each particular case being a matter of computation. Nothing is left to the decision of the county treasurer, and his conclusion that a particular mortgage is not subject to the tax is of no force or effect. His indorsement on the mortgage in question, "Exempt from taxation," in no way changes the rights or liabilities of the parties. *Thorp v. Merrill*, 21 Minn. 336. The case of *Forest Lake State Bank v. Ekstrand*, 112 Minn. 412, 128 N. W. 455, was an equitable proceeding not involving the rights of third persons, and is not here in point.

This covers all that need be said upon this branch of the case. We have treated the questions presented from the standpoint of the legal rights of the parties, and have passed without consideration counsel's argument dealing with asserted equitable features of the case. If there be any equitable matters of a nature to relieve Sutton, they may be presented on the trial of the action; but they are not here involved.

2. The statute was held constitutional in *Mutual Ben. L. Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572, and was held to apply to mortgages of less than \$100 in *State ex rel. Hilderbrandt v. Fitzgerald*, 117 Minn. 192, 134 N. W. 728. The questions involved were fully considered in those cases, which we follow and apply without further discussion. The additional point made in the case at bar, namely, that the statute is unconstitutional because it does not impose the tax uniformly upon all members of the class of mortgagees included within its provisions, or assess the tax in accord with the actual value of the security, is not sustained. The reasoning of the court in the Martin County Case sufficiently covers the point, and requires no further discussion.

3. We are of opinion, and so hold, that the allegations of the answer to the effect that the statute was not legally enacted were properly stricken out. Our examination of the legislative journals, of which the court takes notice, discloses nothing fairly tending to sustain the claim that the statute was not read in the senate before passage, as required by the Constitution, or to overcome the presumption that it was regularly enacted. *State ex rel. Minnesota R. Constr. Co. v. Hastings*, 24 Minn. 78; *Miesen v. Canfield*, 64 Minn. 513, 67 N. W. 632.

Orders affirmed.  
42 L.R.A.(N.S.)

MISSOURI SUPREME COURT.  
(Division No. 2.)

J. B. WHITE, Respt.,

v.

HIMMELBERGER-HARRISON LUMBER  
COMPANY, Appt.

(240 Mo. 13, 139 S. W. 553.)

**Tax — sale — publication against record owner — effect.**

1. The rule that a judgment in a suit for taxes against the record owner, with notice by publication to him, is good against his heirs, applies where the name of the grantee in the deed is, by mistake of the officer, incorrectly recorded, so that the record owner appears to be other than the true owner, and the name in the published notice follows the record, although the statute provides that the deed shall be notice from the time the same is filed for record, since this must be interpreted to mean that it shall be notice until the record is made, after which the record, and the record alone, imparts notice.

**Estoppel — illegible name in deed — disputing record.**

2. A grantee of land who permits his name to appear in the deed so illegibly that a mistake may easily be made in copying it into the record is estopped to deny that a mistaken name so copied is the true one, in favor of a purchaser at a tax sale after publication of notice in the name appearing in the record.

**Name — initials — publication of notice — first correct.**

3. Where the grantee of a deed adopts initials in place of Christian names by which the title shall be conveyed to him, the rule applies that if, in a published notice of a suit, the first name is correctly given, incorrect initials are immaterial, so that the notice will be binding in case three initials

**Note. — Effect of summons or notice to person by wrong initial.**

This is a continuation of note to *Illinois C. R. Co. v. Hasenwinkle*, 15 L.R.A.(N.S.) 129.

As to certainty and accuracy as to Christian names or initials in record or index relied on as imparting constructive notice, see notes to *Burns v. Ross*, 7 L.R.A.(N.S.) 415, and *Prouty v. Marshall*, 25 L.R.A.(N.S.) 1211.

As to use of initial instead of Christian name in publication of process, see note to *Butler v. Smith*, 28 L.R.A.(N.S.) 436.

On the ground that the middle initial is no part of a name, it is held in *Beckner v. McLinn*, 107 Mo. 277, 17 S. W. 819, that an order of publication in a partition suit describing "Many Ann Byers" as "Mary E. Byers," the widow of Jacob Byers, is sufficient. It appeared in this case, however, that independently of the publication, the defendant knew that the suit was pending,

appear in place of Christian names, and the first is correct, although one of the others may be incorrect.

**Real property — record — attached receipt as notice.**

4. That a receipt for the consideration of a deed is attached thereto and made a part of the record, with the initials of the name of the grantee correctly stated, does not, since it is no part of the record proper, charge subsequent purchasers with notice that different initials in the body of the instrument are incorrectly recorded.

(May 23, 1911.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Stoddard County in plaintiff's favor in an action brought to quiet title to certain land. Reversed.

The facts are stated in the opinion.

Messrs. Ralph Wammack and Oliver & Oliver, for appellant:

The tax collector, in instituting suits for the enforcement of the lien for delinquent taxes, in the absence of notice to the con-

trary, may look to and rely upon the record of deeds to see who the owner of the property is; and the purchaser under the judgment in such suits will be protected in his purchase against the holder of an unrecorded deed.

Vance v. Corrigan, 78 Mo. 97; State ex rel. Hunt v. Sack, 79 Mo. 663; Payne v. Lott, 90 Mo. 680, 3 S. W. 402; Evans v. Robberson, 92 Mo. 200, 1 Am. St. Rep. 701, 4 S. W. 941; Allen v. Ray, 96 Mo. 546, 10 S. W. 153; Nolan v. Taylor, 131 Mo. 227, 32 S. W. 1144; Weir v. Cordz-Fisher Lumber Co. 186 Mo. 395, 85 S. W. 341; Schnitger v. Rankin, 192 Mo. 42, 91 S. W. 122; Everts v. Missouri Lumber & Min. Co. 193 Mo. 444, 92 S. W. 372; Wood v. Smith, 193 Mo. 490, 91 S. W. 85; Stuart v. Ramsey, 196 Mo. 414, 95 S. W. 382; McDermott v. Gray, 198 Mo. 286, 95 S. W. 431; Harrison Mach. Works v. Bowers, 200 Mo. 232, 98 S. W. 770; Charter Oak Land & Lumber Co. v. Bippus, 200 Mo. 697, 98 S. W. 546.

The same record that notifies the collector who the owner of the land is, for the purpose of enforcing the state's lien for

engaged counsel to protect her interest, and before final distribution of the proceeds of the partition sale she filed a motion in the case, claiming her share.

So, where a juror was summoned by initials only, a variation in the middle initial was, in Noel v. State, 161 Ala. 25, 49 So. 824, held not to constitute a mistake in name within the meaning of the statute which requires the names of such persons to be discarded and others forthwith summoned to supply their places.

In Howard v. Brown, 197 Mo. 36, 95 S. W. 191, the court said that where a defendant is sued by the insertion of a wrong initial, if the writ has been personally served on the right party, the mistake in the name is of no consequence; but when the jurisdiction of the court over the person of the defendant depends on notice by publication, the question is not so free from doubt, and it becomes necessary to look into the circumstances. And speaking specifically, the court added that it would be going farther than any of its previous decisions to hold valid a judgment by default against "Henry P. P. Brown," upon publication against "Henry T. Brown," if there had been nothing else to identify the person intended; but such judgment was held valid, as against a specific attack on this ground, made for the first time on appeal in a collateral suit, it appearing that the name in question was placed in a group comprising members of defendant's family.

In D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A. (N.S.) 237, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114, it is held that the publication of a summons to "Geo. H. Leslie" confers no jurisdiction on "Geo. W. Leslie," the court laying down the rule

that, although the failure to insert the middle initial of the defendant's name in a summons, where service is made by publication, might not be fatal error, a use of the wrong initial will not confer jurisdiction over the real party defendant.

So, in a suit to quiet title, a publication to "Mollie H. Leman" and "Birdie E. Stone" confers no jurisdiction over "Mary A. Leman" and "Hattie E. Stone." Keaton v. Jorndt, 220 Mo. 117, 119 S. W. 629.

But, recognizing the rule laid down in D'Autremont v. Anderson Iron Co. supra, and distinguishing that case as one involving a question of jurisdiction, it is held in Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508, that notice to a creditor that "Geo. A. Hartke" had been adjudged a bankrupt was notice to it as to the note it held, signed by "G. C. Hartke," and that the latter's discharge in bankruptcy releases him from the obligation of such note, although the middle initial of the bankrupt's name upon the note, as listed in his schedule of indebtedness, is different from that given in the bankruptcy proceedings.

So, publication of notice in tax proceedings against "J. G. Carney" will not support a foreclosure against "J. E. Curney," the true name of the owner. Carney v. Bigham, 19 L.R.A. (N.S.) 905. The court said that at common law a legal name consisted of one given name and one surname or family name, and mistakes in a middle initial or a middle name were regarded as of no consequence; but that since the use of initials instead of a given name, before a surname, has become a common practice, these initials must be all given and correctly given in court proceedings.

J. D. C.



taxes, likewise notifies the owner how he holds title of record.

*Bishop v. Schneider*, 46 Mo. 477, 2 Am. Rep. 533; *Terrell v. Andrew County*, 44 Mo. 309; *Hilton v. Smith*, 134 Mo. 508, 33 S. W. 464, 35 S. W. 1137; *Schnitger v. Rankin*, 192 Mo. 41, 91 S. W. 122.

The duty to make inquiry *dehors* the record, and of acquiring actual knowledge from private sources of information, that each man's deed has been correctly recorded, rests upon the recorder and the grantee in the deed or instrument recorded.

*Ritchie v. Griffiths*, 1 Wash. 429, 12 L.R.A. 384, 22 Am. St. Rep. 155, 25 Pac. 341.

When a landowner reads a published notice addressed to him by the same initials he has advised the public to be his initials, describing the land, and informing him that the taxes thereon are delinquent, his identity is sufficiently indicated to require him to plead to the action, or be estopped to question the validity of a judgment thereon, when raised collaterally.

*Elting v. Gould*, 96 Mo. 535, 9 S. W. 922; *Mosely v. Reily*, 126 Mo. 129, 26 L.R.A. 721, 28 S. W. 895; *Nolan v. Taylor*, 131 Mo. 227, 32 S. W. 1144; *Hilton v. Smith*, 134 Mo. 508, 33 S. W. 464, 35 S. W. 1137; *Turner v. Gregory*, 151 Mo. 105, 52 S. W. 234; *Vincent v. Means*, 184 Mo. 344, 82 S. W. 96; *Schnitger v. Rankin*, 192 Mo. 43, 91 S. W. 122.

The middle letter is no part of the name. Its absence or misrecital does not affect the question of identity one way or the other.

*Orme v. Shephard*, 7 Mo. 606; *State v. Martin*, 10 Mo. 391; *Phillips v. Evans*, 64 Mo. 23; *Beckner v. McLinn*, 107 Mo. 288, 17 S. W. 819; *Lucas v. Current River Land & Cattle Co.* 186 Mo. 453, 85 S. W. 359; *Howard v. Brown*, 197 Mo. 46, 95 S. W. 191.

Messrs. C. D. Corum and Martin L. Clardy also for appellant.

Messrs. Louis F. Dinning and Keaton & Keaton, for respondent:

While it is true no personal judgment can be rendered in a tax suit, and that the suit is authorized against the record owner, yet the purchaser only gets the title of the party made defendant, and if he has no title, the purchaser gets none.

*Moore v. Woodruff*, 146 Mo. 601, 48 S. W. 489; *Holladay-Klotz Land & Lumber Co. v. T. J. Moss Tie Co.* 87 Mo. App. 176; *Harrison Mach. Works v. Bowers*, 200 Mo. 219, 98 S. W. 770.

When the grantee of a deed properly acknowledged files the same with the recorder for record, and pays the fees therefor, he has complied with the law, and done all required of him to be done to protect a subsequent purchaser.

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20 Am. & Eng. Enc. Law, 2d ed. 162; *Webb, Record of Title*, § 16; *Polk v. Cosgrove*, 4 Biss. 440, Fed. Cas. No. 11,248; *Fouche v. Swaim*, 80 Ala. 153; *Case v. Hargadine*, 43 Ark. 144; *Meherin v. Oaks*, 67 Cal. 57, 7 Pac. 47; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143; *Kiser v. Heuston*, 38 Ill. 252; *Chandler v. Scott*, 127 Ind. 226, 10 L.R.A. 374, 26 N. E. 797; *Lee v. Birmingham*, 30 Kan. 312, 1 Pac. 73; *Gillespie v. Rogers*, 146 Mass. 610, 16 N. E. 711; *People use of Farrington v. Bristol*, 35 Mich. 28; *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84; *Clader v. Thomas*, 89 Pa. 343; *Williams v. Butterfield*, 214 Mo. 424, 114 S. W. 13.

Williams took his deed by the initials of his name; but when he is sued by the initials of his Christian name, he must be sued by his correct initials in the deed by which he took the land; not by what the recorder placed on the record, if sued by publication.

*Turner v. Gregory*, 151 Mo. 105, 52 S. W. 234; *Spore v. Ozark Land Co.* 186 Mo. 659, 85 S. W. 556; *Howard v. Brown*, 197 Mo. 46, 95 S. W. 191; *Vincent v. Means*, 184 Mo. 344, 82 S. W. 96; *Burkham v. Manewal*, 195 Mo. 506, 94 S. W. 520; *Parker v. Parker*, 146 Mass. 321, 15 N. E. 902; *State v. Higgins*, 60 Minn. 1, 27 L.R.A. 74, 51 Am. St. Rep. 490, 61 N. W. 816; *Massillon Engine & Thresher Co. v. Holdridge*, 68 Minn. 394, 71 N. W. 399; *Price v. State*, 19 Ohio, 424.

Ferriss, J., delivered the opinion of the court:

Suit to quiet title. William Burns, the common source of title, on November 19, 1869, deeded the property in controversy to Oliver Hazard Perry Williams, giving the initials only of his first names, so that in the body of the deed the granting clause was to O. H. P. Williams. This deed was written upon a Pennsylvania form, the grantors living in Pittsburgh, and upon this form, in the lower left-hand corner, opposite the certificate of the notary, is a blank which was filled in and signed by the grantor, Burns, reciting that he had received from the grantee, O. H. P. Williams, the consideration mentioned in the deed. The deed was filed by Williams with the recorder on May 7, 1870. In due time he received back the deed from the recorder, with the usual certificate, stating that the deed had been duly recorded in Book M, giving the pages. This deed was copied by the recorder into the records, but in place of the initials "O. H. P." in the body of the deed, the recorder by mistake wrote the initials "O. N. P.," changing the middle initial from "H." to "N." The recorder also

copied the receipt above mentioned, which was included in the form of the deed, and in copying that receipt he correctly copied the initials as "O. H. P." The property becoming delinquent for taxes, the collector of the county brought suit against the record owner, O. N. P. Williams, and service was had by publication by such initials. The suit resulted in a judgment against O. N. P. Williams, sale under the execution, and purchase at such sale by defendant's grantor, who received the sheriff's deed dated March 8, 1881, and who had no notice of the mistake in the record. Subsequently, and before the institution of this suit, the heirs of O. H. P. Williams conveyed the property to plaintiff, who filed this suit. Judgment was rendered for the plaintiff, the court rejecting the sheriff's deed and subsequent deeds to the defendant on the ground that the judgment against O. N. P. Williams was void as against the heirs and grantees of the true owner, O. H. P. Williams. Defendant also pleaded title by adverse possession. The defendant's offer of proof under the defense of adverse possession was objected to as being insufficient, and the objection was sustained by the court. Urging the reversal of this judgment, the defendant asserts (1) that the sheriff's deed to its grantor conveyed a good title, because the judgment in the suit for taxes was against the record owner, O. N. P. Williams, and was binding on the true owner notwithstanding the mistake made by the recorder; (2) that the mistake in the middle initial was unimportant, and the judgment upon notice by publication against O. N. P. Williams was good as against O. H. P. Williams; (3) that the offer of proof to sustain title by adverse possession should have been admitted by the court. On the other hand, plaintiff contends that the mistake in the middle initial was fatal; also, that the record was not controlling as against the true owner because of the mistake made by the recorder in changing the letter "H" to "N." Plaintiff also contends that, as the record showed the initials to be "O. H. P." in the receipt attached to the deed and copied correctly into the record, the subsequent purchaser was put upon notice of the mistake in copying the initials in the body of the deed into the record. In addition to the above, it may be necessary to advert to other facts in the course of the opinion.

I. (a) Numerous decisions of this court hold that a judgment in a suit for taxes against the record owner, with notice by publication to such record owner, is good against the holder of an unrecorded deed. The leading case is *Vance v. Corrigan*, 78 Mo. 94, in which this court said: "We are

of opinion that the provision of the charter requiring the suit to be brought against the owner of the land does not mean that it must, in order to render the judgment valid, be brought against the real owner, although holding by an unrecorded conveyance; but it means that suit must be brought against the person appearing by the registry of deeds to be the owner, in the absence of notice to the contrary. The proceeding is really against the land, although a personal defendant is necessary to the validity of the proceeding, but no personal judgment can be rendered in the suit, and it is sufficient to proceed against the record title when the true owner is unknown. We are also of opinion that a purchaser at a regular execution sale under a judgment duly rendered in such suit will acquire the same rights which he would acquire by purchase from the execution defendant. If Corrigan had notice of the Vance title, the burden was on the plaintiffs to show it." The foregoing decision is cited with approval in many subsequent cases, down to and including *Charter Oak Land & Lumber Co. v. Bippus*, 200 Mo. 688, 98 S. W. 546, where Fox, J., speaking for the court, says: "It is no longer an open question in this state that the officers in suits wherein it is sought to enforce the lien of the state for taxes, in the absence of notice to the contrary, may look to the record of deeds to see who the owner of the property is, and a purchaser under the judgment in such suits against the record owner, in the absence of notice that such person against whom the suit was brought was not the true owner, would be protected in his purchase against the holder of an unrecorded deed from such apparent record owner." The doctrine of these cases agrees with the common understanding of the people, and has become a fixed rule of property.

We are now called upon to decide whether this rule applies where the name of the grantee in the deed has been by mistake of the officer incorrectly recorded, so that the record owner appears to be other than the true owner. In such case is the purchaser at the tax sale protected in his title, the suit being against the record owner on notice by publication to such record owner? It is claimed by the defendant that if we would protect the integrity of our registry system we must answer this question in the affirmative. The defendant contends that the recorder acts as the agent of the person who files his deed for record. The plaintiff claims that when the holder of the deed files the instrument with the recorder and pays the filing fee, his duty is done, and he is under no obligation to see that the recorder performs his duty, and that a failure

by the recorder to perform his duty will not endanger his title. With reference to the filing and recording of deeds and other instruments in writing, § 2810, Rev. Stat. 1909, provides as follows: "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice." This section does no more than say that notice is imparted by the record back to the date of filing; so that during the interval between the filing and the copying into the record the deed itself will impart notice. After the deed has been copied into the record, subsequent purchasers must look to the record alone, the deed itself having been returned presumably to the owner. If the officer should return the deed to the owner, certifying that it has been recorded, but should fail to make any record thereof, it could hardly be claimed that a subsequent purchaser would be bound to take notice of the filing of the deed and of its contents. It is claimed in effect by plaintiff that the filing of the deed imparts to subsequent purchasers notice of its contents, even if it be incorrectly recorded, and that the subsequent purchaser is bound to take notice of the contents of the instrument notwithstanding the imperfect record. On this point Wagner, J., in *Terrell v. Andrew County*, 44 Mo., loc. cit. 312, says: "The statute says that when the deed is certified and recorded it shall impart notice of the contents from the time of filing. Certainly; but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. It never was intended to impose upon the purchaser the burden of entering into a long and laborious search to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests on the party holding the title. If he fails in his duty, he must suffer the consequences. If his duty is but imperfectly performed, he cannot claim all the advantages and lay the fault at the door of an innocent purchaser."

In the above case Andrew county loaned \$400 to one Holt, and took from him a mortgage for that amount and filed the same for record. By mistake of the recorder the record recital of the amount was \$200. The court held that, as against a subsequent encumbrancer, the county could claim only \$200, the amount shown by the record. The court says: "The county deposited the deed with the recorder, and paid him 42 L.R.A. (N.S.)

for recording it. Through his negligence and inattention he did his work inaccurately, so that it imparted notice for only half the consideration, and the county suffered loss and injury in consequence thereof. The privity springs and exists between the county and the recorder, and the county is the proper party to proceed against him to recover the loss." In this case Judge Wagner clearly sustains the doctrine for which defendant contends.

In *Troyer v. Wood*, 96 Mo. 478, 9 Am. St. Rep. 367, 10 S. W. 42, a deed to Daniel Troyer was recorded in the name of Daniel Tragar, and tax proceedings were had in such record name, with service by notice of publication, upon which there was a judgment and sale. The circuit court held the tax proceedings void upon the ground that the affidavit of nonresidence was defective. Apparently no point was made either in the circuit court or in this court on the change of name. Sherwood, J., however, speaking for the court, ignored the question of the sufficiency of the affidavit, which was the question passed upon by the court below, and held the proceeding void as against the heirs of Troyer, on the ground that Troyer was not a party thereto, nor in privity with the record owner, Tragar. The decision refers to *Terrell v. Andrew County*, supra, and concedes the doctrine therein laid down, but holds that the notice of publication should be directed either to the true owner or to one in privity with the true owner. The limitations placed by this decision upon the doctrine so frequently announced by this court, that the subsequent purchaser may rely upon the record, cannot now be recognized.

The case of *Williams v. Butterfield*, 214 Mo. 412, 114 S. W. 13, also relied upon by plaintiff, is a case of spoliation of the record, and not in point here.

In *Whinnery v. Missouri Lumber & Min. Co.* 231 Mo. 262, 132 S. W. 661, the doctrine of the *Troyer Case* was not controverted by the parties, who stood upon the proposition that in point of fact there had been no mistake in copying the deed into the record, and the court found the facts to be as claimed in this respect. The court was not called upon to pass upon the effect of a mistake in the record, nor upon the proposition involved in the *Troyer Case*.

We think that the case of *Terrell v. Andrew County* and the case of *Vance v. Corrigan*, taken together, correctly expound the law, and that the doctrine of these cases has never been overturned by any later decision of this court.

The authorities in other jurisdictions are in conflict on this question, but the cases

holding to the contrary of the conclusion reached by us are based largely upon the statutory provision to the effect that the deed shall, from the time of its filing, impart notice of its contents. On this point, we approve the doctrine announced by Wagner, J., in *Terrell v. Andrew County*, as quoted above, and which, so far as we are advised, has not since been criticized by this court. Obviously one cannot be required to learn from the record facts which are not in the record. When the statute says that the filing of the deed for record imparts notice of its contents from and after the time of filing, it must mean that the deed itself imparts notice until copied into the record, and that after it is so copied, the record and the record only imparts notice. In this we think we are in line with the greater weight of authority. See *Ritchie v. Griffiths*, 1 Wash. 429, 12 L.R.A. 384, 22 Am. St. Rep. 155, 25 Pac. 341, and note thereto in 12 L.R.A. 384.

(b) The doctrine of estoppel may also be invoked by the defendant. The rule respecting two innocent parties is thus expressed in 16 Cyc. 773: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." This rule in its practical application usually, if not always, involves something of negligence or remissness on the part of the one who enables the third person to commit the wrong. It may be justly argued that there is not the slightest negligence on the part of the owner in failing to see that a deed is not properly copied into the record by the official designated by law for that purpose. On the other hand, it must be conceded that one who files a deed for record is responsible for its contents and condition when it leaves his hands, and that the duty is upon him to see that the instrument is susceptible of a fair copy. In this case the original deed to O. H. P. Williams was submitted for our inspection. It was argued on behalf of the defendant that the middle initial therein shown is the letter "N," and not "H." The appearance of the initial in the body of the deed so strongly resembles an "N" that it could easily pass for that letter; and the writer does not hesitate to say that until he compared the initial with the letter "N" in the words "November" and "Number," in the same page, he agreed with defendant's contention. The writer of this deed evidently wrote the letter "H" in a form not now in frequent use. The letter used by him lacks the lower left-hand loop which was so familiar in copy books, and, as written, the letter could easily be taken for an "N." The subsequent mistake by the recorder was due to the act of Williams in

filing a deed with the said initial so written that such mistake could easily happen. Doubtless the recorder should, if in doubt as to the identity of a letter, make careful comparison with other parts of the deed. In this case, however, the recorder made a mistake which he probably would not have made had the grantee seen to it, as he should have done, that his name was so clearly written that no mistake by the copyist was likely to occur.

We hold, upon both grounds above stated, that the sheriff's deed conveyed a good title to the purchaser at the tax sale.

II. In discussing the question whether suit with notice by publication against O. N. P. Williams will bind the owner, O. H. P. Williams, it will be proper to first notice some propositions which have been established by the decisions of this court: (a) Where there are two given names in the record, service by the middle name alone by publication is bad. *Corrigan v. Schmidt*, 126 Mo. 304, 28 S. W. 874; *Turner v. Gregory*, 151 Mo. 100, 52 S. W. 234. (b) When the first name is correctly given in the suit and notice of publication, an omission of or mistake in the middle initial is unimportant. *Howard v. Brown*, 197 Mo., loc. cit. 46, 95 S. W. 191, and cases cited; *Nolan v. Taylor*, 131 Mo. 229, 32 S. W. 1144. (c) Suit and substituted service by the initials only of the first names, where the full first name appears in the record, is not good. *Shuck v. Moore*, 232 Mo. 649, 135 S. W. 59 (Division 1), where the cases are cited by *Lamm, J.* (d) Where the record title shows the initials only of the given name, suit and notice by publication by such initials will bind the record owner, on the theory of estoppel. *Elting v. Gould*, 96 Mo. 535, 9 S. W. 922; *Ohlmann v. Clarkson Saw Mill Co.* 222 Mo., loc. cit. 66, 28 L.R.A.(N.S.) 432, 133 Am. St. Rep. 506, 120 S. W. 1155.

In the case at bar we have a new question, viz.: When the grantee takes a deed by his initials, three in number, will a suit by substituted service against him be good, when a mistake is made in the middle initial? As applied to this case, the question is, Will a judgment upon substituted services for taxes against O. N. P. Williams be good against O. H. P. Williams, who is the true owner? No man can be deprived of his property by suit without due notice. In regarding notice by publication as effective against the owner of the property, we must indulge the presumption that he sees such notice. We have, then, this situation: O. H. P. Williams, residing outside the state, sees a notice that suit has been brought against O. N. P. Williams for delinquent taxes, which he knows are de-

linquent, and upon property described in the notice which he knows belongs to him. He cannot object that the notice names him by his initials, as he took the deed by his initials, and, under the doctrine above stated, he is estopped. Had the notice read "Oliver N. P. Williams," clearly he could not object under another doctrine above set out. Can he object because in place of "Oliver," his first name, his first name is given as "O"? In other words, is the initial "O" to be regarded as a name? Ordinarily, for purposes of notice by publication, as we have shown above, initial letters are not regarded as the equivalents for the names for which they stand. But if the owner of the name sees fit to adopt the initials as and for the names for which they stand, and is held bound by them to the same extent as if the names themselves were inserted in the deed, why should not the same reasoning apply to each initial letter. If it does, then the owner, Williams, has adopted the letter "O" as his first name, and he must be held to the rules that apply when the full Christian name is used. In such case the rule is that a mistake in the middle initial is not important. In this case there are three initials, the first and third of which are correct. It is urged by the plaintiff that the doctrine of immateriality of the middle initial does not apply where the owner's name is set out by initials, even though he took the deed by his initials. No case is cited to support this proposition. The cases cited from other states are not in point. Massachusetts repudiates the Missouri doctrine, and holds that a mistake in a middle initial is fatal. In *State v. Higgins*, 60 Minn. 1, 27 L.R.A. 74, 51 Am. St. Rep. 490, 61 N. W. 816, cited by plaintiff, a divided court held that under a charge of forgery, the changing of the name "Marion F. Higgins" to "Marion J. Higgins" was material when it was a question of identity between two people. In *Marssillon Engine & Thresher Co. v. Holdridge*, 68 Minn. 394, 71 N. W. 399, the court held that where "C. S. Holdridge" was sued on a contract, it was not competent to introduce as his a contract signed by "S. Holdridge," without proof of identity. The same principle controlled the decision in *Price v. State*, 19 Ohio, 424.

The decisions of this court, cited by plaintiff, throw no light upon this immediate question. They simply support the rule announced above, that, where the record of the deed gives the full name, suit with substituted service by initials is bad. The real question is, Does substituted service on O. N. P. Williams comply with the statute, and properly and fairly notify O. H. P. Williams? 42 L.R.A. (N.S.)

Williams of the suit? Upon the theory that such notices are rarely seen by the defendant, and are permitted only upon the ground of necessity, and result often in great hardship, it might be insisted that the statute should be rigidly construed and followed. On this theory much might be said against allowing any departure from the true and complete name of the defendant. Yet this reasoning will apply with the same force when the mistake is in the middle initial, whether the first name be given in full or by initial only. Upon the theory that the object of giving notice by publication is to fairly notify the owner and identify him, it is proper to consider whether the notice by publication duly and fairly apprises the owner that the state is proceeding against his land for taxes. This court, by a recent decision, has adopted the latter theory. In *Howard v. Brown*, 197 Mo. 36, 95 S. W. 191, a tax suit was filed against Henry T. Brown, the owner, his real name being Henry P. P. Brown. This court, speaking through Valliant, J., pointed out the fact that both names "Henry" and "Brown," were usual names, and said that if there were two persons bearing the name "Henry Brown" in the same community, it would be going beyond our former decisions to hold that a publication of notice to Henry T. Brown would justify a judgment by default against Henry P. P. Brown. The court, however, held that inasmuch as defendant's name was placed in a group composed of his mother's sisters and other members of his family, the publication was sufficient. It is obvious that the grouping of the names together bears only upon the question of identity, and cannot affect the question of rigid compliance with and construction of the statute. We must assume that O. H. P. Williams read this notice by publication. It advised him that the suit for delinquent taxes had been filed against O. N. P. Williams; the lands, which were correctly described in the notice, belonging to him, O. H. P. Williams. He saw that the initials of his name, three in number, unusual in this respect, were correctly given except as to the middle initial. It is impossible to escape the conclusion that he knew that the notice was intended for him and that the suit was against him.

We are constrained to hold: (1) That inasmuch as the owner, Williams, took the deed by his initials, the rule that a mistake in the middle initial is immaterial applies; (2) that the published notice addressed to O. N. P. Williams, stating that suit had been filed to enforce the state's lien for taxes on land owned by O. N. P. Williams, such notice properly describing the land, was a sufficient notice to O. H. P. Williams.

of his identity with the defendant in the suit.

III. We cannot sustain the contention of plaintiff that the correct record of the initials "O. H. P." in the receipt recorded with the deed put the subsequent purchaser upon notice of the mistake in the name in the body of the deed as recorded. This receipt was no part of the instrument, was not required by law to be recorded, and the examiner of titles was not bound to notice or read it. As a matter of fact, there is no proof that this receipt was brought to the attention of the subsequent purchaser. There is no proof that he had any knowledge that would put him upon inquiry as to whether or not the name was correctly copied in the record of the deed. One who examines the records is not required, as a matter of law, to read what is not required to be recorded.

IV. As the foregoing discussion finally disposes of the case, it is unnecessary to notice other points suggested by counsel.

In accordance with the views herein expressed, it becomes the duty of this court to reverse the judgment, and direct the Circuit Court to enter up judgment vesting the title to the land in controversy in the defendant. It is so ordered.

Kennish, P. J., concurs, Brown, J., not sitting.

Petition for rehearing denied July 1, 1911.

Motion to transfer to court in banc overruled February 6, 1912.

## NEW YORK COURT OF APPEALS.

GEORGE F. AVERY, Resp't.,

v.

NEW YORK, ONTARIO, & WESTERN RAILWAY COMPANY, Appt.

(205 N. Y. 502, 99 N. E. 86.)

### Railroad — crossing — duty of bicyclist.

A bicyclist must approach a railroad crossing with his machine under such com-

*Note. — Liability for injury to bicyclist at railroad crossing.*

The earlier cases on this subject are given in a note on "Bicycle Law," in 47 L.R.A. 301.

This note is not concerned with those cases involving liability for injuries to bicyclists crossing street railways.

For "Liability for collision of automobile with bicyclist," see 28 L.R.A. (N.S.) 944.

As stated in AVERY v. NEW YORK, O. 42 L.R.A. (N.S.)

plete control that he can stop within a reasonable time, if by so doing he may escape injury.

(June 4, 1912.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of the Trial Term for Madison County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. Charles L. Andrus, with Mr. J. T. Durham, for appellant:

The plaintiff was grossly negligent in releasing his brake and so relinquishing control of his bicycle, when he was still on a steep descent, about 18 feet from the foot of the grade, and was guilty of contributory negligence as matter of law.

Coleman v. New York C. & H. R. R. Co. 98 App. Div. 349, 90 N. Y. Supp. 264; Havens v. Erie R. Co. 41 N. Y. 298; Cullen v. Delaware & H. Canal Co. 113 N. Y. 667, 21 N. E. 716; Spencer v. New York C. & H. R. R. Co. 123 App. Div. 789, 108 N. Y. Supp. 245; McGrath v. New York C. & H. R. R. Co. 59 N. Y. 472, 17 Am. Rep. 359, 63 N. Y. 522; Dolfini v. Erie R. Co. 178 N. Y. 3, 70 N. E. 68; Keller v. Erie R. Co. 183 N. Y. 70, 75 N. E. 965; Young v. New York, L. E. & W. R. Co. 107 N. Y. 505, 14 N. E. 434; Woodward v. New York, L. E. & W. R. Co. 106 N. Y. 375, 13 N. E. 424; Mastin v. New York, 201 N. Y. 83, 33 L.R.A. (N.S.) 784, 94 N. E. 611; Bonert v. Long Island R. Co. 145 App. Div. 552, 130 N. Y. Supp. 271.

Messrs. Coville & Moore, for respondent:

The court instructed the jury properly as to the vigilance required of the plaintiff in approaching this crossing.

Kane v. New York, N. H. & H. R. Co. 132 N. Y. 160, 30 N. E. 256; McNamara v. New York C. & H. R. R. Co. 136 N. Y. 650, 32 N. E. 765; Palmer v. New York C. & H. R. R. Co. 112 N. Y. 234, 19 N. E. 678; Ernst v. Hudson River R. Co. 35 N. Y. 9, 90 Am. Dec. 761.

& W. R. Co. a bicyclist must approach a railroad crossing with his machine under such complete control that he can stop, when by so doing he may escape injury. Waddell v. New York C. & H. R. R. Co. 98 App. Div. 343, 90 N. Y. Supp. 239. While this decision was reversed in 184 N. Y. 530, 76 N. E. 1111, upon the ground that, under all the circumstances, the question of contributory negligence was for the jury, the reversal does not necessarily affect this proposition.

The law requires of him practically the

Gray, J., delivered the opinion of the court:

The plaintiff, while riding his bicycle over the tracks of the defendant, in the city of Oneida, was struck by a hand car and received injuries, for which this action was brought. He recovered a verdict, and the judgment thereon has been affirmed by the appellate division, but not by unanimous vote. Upon this appeal by the defendant, we assume that there was evidence upon which the jury might have found the defendant negligent, and we disregard certain assignments of error in rulings by the trial court as without substance. The question to be discussed upon the evidence is whether the plaintiff did not contribute to the result by his own negligent conduct, and the discus-

sion will be based upon his statements of the facts.

The defendant's railroad crosses Seneca avenue, in the city of Oneida, with its main track and with a side track, practically in a northerly and southerly direction. The plaintiff, early on a clear morning in August, was proceeding to his work upon his bicycle, and was upon the sidewalk of Seneca avenue. Seneca avenue crosses the defendant's railroad nearly at right angles, and the plaintiff was coming from the west. There was a descent in the grade of the street until within a few feet of the tracks, of which the main track, upon which the accident happened, was the easternmost. The plaintiff was familiar with the crossing and was proceeding at a rate of from 8

same reasonable care as is required of a pedestrian; and on approaching a crossing where the view is in any way obstructed he is required to dismount, or at least bring his wheel to such a stop as will enable him to look up and down the track and listen before attempting to cross. *Passman v. West Jersey & Seashore R. Co.* 68 N. J. L. 719, 61 L.R.A. 609, 96 Am. St. Rep. 573, 54 Atl. 809; *Lau v. Lake Shore & M. S. R. Co.* 120 Mich. 115, 79 N. W. 13.

So, a bicyclist, on approaching a railroad crossing where signal bells are maintained, may presume from the silence of such bells that no train is approaching; but he is not thereby excused from ascertaining for himself whether a train is in fact approaching. *Cleveland, C. C. & St. L. R. Co. v. Heine*, 28 Ind. App. 163, 62 N. E. 455.

And the fact that a train of cars on a side track has been cut, leaving some on one side and some on the other of a highway, partly obscuring the view of other tracks, does not excuse a bicyclist from using ordinary precaution to ascertain whether or not a crossing can be safely made. *Passman v. West Jersey & Seashore R. Co.* supra.

That signal bells maintained by a railroad company at a crossing failed to ring when the bicyclist attempted to cross the tracks is a question to be considered by the jury in determining the ultimate question of negligence. *Cleveland, C. C. & St. L. R. Co. v. Heine*, supra.

And it is not gross negligence for the engineer of a train going upwards of 20 miles an hour to fail to stop or to gain complete control of his train merely because he sees a bicyclist approaching a crossing. *Knickerbocker v. Detroit, G. H. & M. R. Co.* infra.

In *Smith v. Detroit & M. R. Co.* infra, it was contended that the deceased, having been signaled by her husband to hurry up, at the instance of the defendant's conductor, who was holding his train for her, was thereby put in the custody of the railroad company, and notified by it that the way from where she was to the station

was safe; but there being no evidence to base a finding that she was acting upon the signal, or that she had even seen it, the court said that she was an ordinary traveler, chargeable with the same notice that she was approaching a dangerous place, and with the same duty to look and protect herself, as would be imposed on any traveler.

The duty enjoined by the charter of a railroad company which requires it "to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses, and cattle across the said railway shall not be impeded thereby," is one to the public lawfully using the highway, for a breach of which, resulting in the injury of a bicyclist lawfully on the track, the company is liable in damages. *Sonn v. Erie R. Co.* 66 N. J. L. 428, 49 Atl. 458, affirmed in 67 N. J. L. 350, 51 Atl. 1109.

Most of the cases within the scope of this note, however, have been decided upon the question of contributory negligence, and many of them apparently without reference to any duty peculiar to that class of travelers of which we are now treating. So the bicyclist was held to have contributed to his own injury;

—where she was familiar with the rules of the road, and had only to look in order to avoid injury, but failed to do so, and stopped so near the track that a backing engine struck and killed her. *Smith v. Detroit & M. R. Co.* 136 Mich. 282, 99 N. W. 15;

—where he rapidly approached the crossing in full view of an approaching train, which was sounding its bell, and arriving there at the same time the train did, turned down the track to avoid collision, but, after going a short distance, fell or was thrown on the track, and killed by the train. *Seaboard & R. R. Co. v. Vaughan*, 104 Va. 113, 51 S. E. 452;

—where he rode a distance of at least 40 feet across three tracks and onto a fourth, upon which he knew trains were

to 10 miles an hour. His bicycle had no mechanical brake upon it, but, by placing his foot or toe back of the fork of the frame and on the tire of the front wheel, he was able to exert the most effective control of the movement. As he testified, he could stop "within 2 feet," "almost instantly." Proceeding thus, with his left foot upon the front wheel, down the walk eastwardly, he reached a point within from 22 to 24 feet of the first of the tracks. He saw no flagman at the crossing, and he heard no train. He looked to the south and saw no train. He then took his foot from the wheel and placed it upon the pedal, in which position his progress was more rapid. Proceeding a few feet further, he saw a hand car coming from the north at a rate of 8 or 9 miles an hour, on the main track, on which were several workmen. The plaintiff said: "I tried to back pedal and swung to the right in trying to escape the car. . . . I left the sidewalk between the rails of the first track. I went over one rail. I tried to keep to my wheel.

. . . and I went with my wheel over the first rail of the next track, . . . and there I was struck . . . and went down with my bicycle." At the point where he released his foot from the tire of the wheel, which was from 22 to 24 feet from the first and from 33 to 34 feet from the second of the defendant's tracks, the descent of the path was continuing for 16 to 18 feet before it became level. The view to the north upon the defendant's road was cut off for some distance by an embankment, so that, while the plaintiff could see to the south, his vision to the north, from which the car was coming, was obstructed, until he reached a point within about 6 or 7 feet of the first track. The plaintiff, when asked why he released the control of his wheel when he did, said: "Because I thought my way was clear and that there was no train or anything coming. There was no flagman out there." He stated that when he "released the brake he put his left on the right pedal and went forward more rapidly." When asked, "Were

liable to pass at any time, without taking any precaution to ascertain whether or not a train was approaching, when, had he looked or listened when only 12 feet from the fourth track, he could have discovered the train and avoided the accident. *Coleman v. New York C. & H. R. R. Co.* 98 App. Div. 349, 90 N. Y. Supp. 264. It was said in this case that the burden is on the plaintiff to prove freedom from contributory negligence by a fair preponderance of evidence; but this rule it will be observed, applies only in those jurisdictions requiring the plaintiff to negative contributory negligence in his pleadings;

—where he attempted a crossing on a wet, cloudy day, when the view of the track for some distance in either direction was wholly obscured by a dense smoke. *Spila v. New York C. & H. R. R. Co.* 147 App. Div. 666, 132 N. Y. Supp. 151, affirmed on rehearing in 149 App. Div. 961, 134 N. Y. Supp. 1147;

—where he, before riding his wheel upon the track, the view of which was partially obscured by a train of cars on a side track, failed to make reasonable use of his senses to ascertain if a crossing could be made in safety. *Passman v. West Jersey & Seashore R. Co.* 68 N. J. L. 719, 61 L.R.A. 609, 96 Am. St. Rep. 573, 54 Atl. 809;

—where the view of the track on which he received injuries was wholly obstructed in one direction, and he rode thereon without dismounting to look and listen. *Lau v. Lake Shore & M. S. R. Co.* 120 Mich. 115, 79 N. W. 13 (rehearing denied);

—where he, relying solely upon the absence of warning bells which the defendant was under no legal duty to maintain, rode upon the track, the view of which was obstructed by cars on another track, without stopping to look and listen

after passing these cars, when by so doing he could have seen and heard the train which struck him, in time to avoid the injury. *Cleveland, C. C. & St. L. R. Co. v. Heine*, 28 Ind. App. 163, 62 N. E. 455;

—where he, a thirteen-year-old boy, after looking for an approaching train, rode onto the track, and, his bicycle being stopped by the rails, attempted to propel it over them without again looking for a train. *Gehring v. Atlantic City R. Co.* 75 N. J. L. 490, 14 L.R.A.(N.S.) 312, 68 Atl. 61. It is also stated in this case that the failure of a bicyclist approaching a railroad crossing to see an approaching train, which is in view, when he looks along the track prior to crossing, is such negligence that he cannot hold the railroad company liable for injuries received while on the crossing;

—where he, a ten-year-old boy, with ability to appreciate and avoid the danger confronting him, went upon the track, the view of which, in the direction from which the train came, for a space of 70 feet before the rear rail was reached, was unobstructed for half a mile or more, without exercising any degree of care for his own safety. *Knickerbocker v. Detroit, G. H. & M. R. Co.* 167 Mich. 596, 133 N. W. 504 (new trial denied);

—where, with full knowledge that he was approaching a railroad crossing, he admittedly took no precautions whatever to ascertain whether or not he might cross in safety. *Grand Trunk R. Co. v. Sims*, 8 Can. Ry. Cas. 61.

In *Waddell v. New York C. & H. R. R. Co.* 184 N. Y. 530, 76 N. E. 1111, the court of appeals of New York, without rendering an opinion, reversed the decision of the appellate division (98 App. Div. 343, 90 N. Y. Supp. 239), finding the plaintiff



you going too fast to jump off your wheel?" he answered, "Yes, in going that distance. Of course the effect of releasing the brake is naturally to accelerate the speed of the machine. I know that to be so. This was quite a sharp decline there, just a trifle less than 8 inches in 10 feet."

According to the plaintiff he approached the crossing upon his bicycle at a rate of speed of from 8 to 10 miles an hour, and, when within 16 to 18 feet of the level, when he could see but in one direction over the defendant's road, he released a control of his wheel, which would have enabled him to stop within a space of 2 feet. Naturally and admittedly the speed of his progress was increased, so that, when he came near to the tracks, where the view either way was open, he was unable to stop. Indeed, such was his rate of speed that it carried his bicycle over a rail of the main track. What was the question of fact? It was whether the plaintiff acted as a prudent man should act when approaching such a place of danger, under the circumstances

stated. I think there can be but one answer, —that he was heedless of those ordinary precautions which were within his ability to take, and which should reasonably be expected of everyone in such a situation. There was no question for the jury to pass upon. As matter of law, the plaintiff was shown to have contributed to the accident through a failure to observe those ordinary rules which the common experience and common sense of men teach them their conduct should be governed by when approaching a railroad crossing. The flagman's absence from the crossing did not dispense with the necessity of vigilance on the plaintiff's part. The rule has long been settled that negligence on the part of the railroad company, in omitting to give warning of the approach of trains, by signals or by a flagman, does not excuse persons from exercising ordinary care and prudence on their part when crossing its tracks. *Wilcox v. Rome, W. & O. R. Co.* 39 N. Y. 358, 305, 100 Am. Dec. 440; *McGrath v. New York C. & H. R. R. Co.* 59 N. Y. 468, 472, 17 Am. Rep.

guilty of contributory negligence where, for some distance from the track, he had practically an unobstructed view of the same in both directions, although two unloaded hay wagons were in his line of vision to the west, but failed to look and listen after passing the point at which he could have seen trains coming from the west, until he reached a point so near the track on which a train from the west was approaching that he could not avoid colliding with it, and affirmed the judgment of the trial court on the ground that, under the circumstances, the contributory negligence of the plaintiff was a question of fact for the jury.

But in *Sonn v. Erie R. Co.* supra, considering the dangerous character of the crossing and the duty of travelers to look for approaching trains, the failure of a bicyclist to notice a gap in the bridging was considered not to be indisputably negligent, and the railroad company was held liable for the injuries complained of.

And again, where it appeared that the plaintiff, while attempting a crossing within less than 3 feet of a freight car which projected over the sidewalk, was injured by that car being bumped against her by another which was "kicked" against it by an engine more than a block away; that, as she was approaching the crossing slowly, looking and listening, her view was so obstructed that she could not see the moving car which set in motion the one that struck her, but did see the engine about a square away, going from the crossing; that the moving car made no noise, and no warning of any kind was given of its approach,—the court, in *Cleveland, C. C. & St. L. R. Co. v. Penketh*, 27 Ind. App. 210, 60 N. E. 1095, refused to say as a matter of law that the plaintiff's failure to stop and alight was 42 L.R.A. (N.S.)

negligence, and, affirming the judgment of the trial court, held that the question as to plaintiff's negligence was properly submitted to the jury as a question of fact.

So, in *Houston, B. & G. N. R. Co. v. Polard*, 28 Tex. Civ. App. 172, 66 S. W. 851, a railway company which tore up a street pavement where it intersected with its road, and left stones lying at the place in a way dangerous to persons passing, and unmarked by a signal light, as required by city ordinance, was held liable for injuries received by a bicyclist who ran into such obstruction.

An instruction in effect that a bicyclist crossing railroad tracks is not guilty of contributory negligence when confronted by sudden peril which causes him to act wildly and madly was held erroneous in *Louisville & N. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562, on the ground that, under such circumstances, contributory negligence is a question of fact for the jury.

That defendant's watchman invited plaintiff to cross is a fact for the consideration of the jury in passing on the question of plaintiff's negligence. *Ibid.*

An instruction to the jury that, "considering the ease of dismounting and the control of the rider over his instrument, a bicyclist must, under all ordinary circumstances, be treated as subject to the same rules as a pedestrian; he must stop, look, and listen before attempting to cross a railroad track,"—is properly refused, as the term "ordinary circumstances" is calculated to mislead the jury, since it might be understood to include the giving of signals to cross tracks, which may, in the absence of apparent danger, absolve a traveler whether on foot or on a bicycle from the duty of stopping and listening. *Ibid.*

W. W. A.

359; Cullen v. Delaware & H. Canal Co. 113 N. Y. 667, 21 N. E. 716; Wallace v. Central Vermont R. Co. 138 N. Y. 302, 305, 33 N. E. 1069. It is a rule of reason, for it simply requires of travelers on the highway that they shall be attentive to their safety under circumstances which admonish them of the possibility of injury. They should be vigilant in the use of their faculties upon such an occasion, as well because of being out of their ordinary surroundings, and in a place of some danger, as in order to guard against the result of some neglect on the part of the corporate servants. The omission on the part of the railroad company of some usual act, purposed to give warning to travelers on the highway, may tend to throw one off his guard, but it does not justify the nonobservance of ordinary care on his part. We have held, where gates are maintained at highway crossings, that, however their being open may be deemed to furnish an affirmative assurance of safety to the traveler, nevertheless it does not dispense with the necessity of vigilance on his part. *Scaggs v. Delaware & H. Canal Co.* 145 N. Y. 201, 207, 39 N. E. 716.

I think that the defendant's motion for the dismissal of the complaint, on the ground of the plaintiff's contributory negligence, should have been granted, and the exception to its denial was well taken.

At the close of the evidence, the trial court was requested by the defendant to charge the jurors that "it is the duty of the person riding a bicycle upon a highway, in approaching a railroad crossing, to keep the bicycle under complete control and be prepared to stop." This request was refused, and I think the ruling was grave error. There was as much propriety in that instruction as though it had been requested with respect to the driving of a horse; and how can there be any doubt as to the need of control being as great in the one case as in the other? The rider of a bicycle should have it under full control, and especially when the circumstances are such as, within human probability, to make his control a reasonable assurance against danger, as well to himself as to others. A person driving a horse, or driving a bicycle, would in neither case be required to get down at a railroad track in order to look before crossing, for that would be requiring extraordinary care, rarely exercised by the most prudent. But he must approach with ordinary care and with horse or wheel under such complete control as to permit of stopping within a reasonable time, if by so doing injury could be averted.

I advise that the judgment be reversed, 42 L.R.A. (N.S.)

and that a new trial be ordered; with costs to abide the event.

Chase and Collin, JJ., concur. Cullen, Ch. J., and Willard Bartlett, J., concur on second ground stated in opinion. Hiscock, J., concurs in result. Vann, J., absent.

#### OKLAHOMA SUPREME COURT.

TYLER COMMERCIAL COLLEGE, Plff. in Err.,  
v.

ALTA Z. STAPLETON.

(— Okla. —, 125 Pac. 443.)

Landlord and tenant — parol assignment of lease — recognition — validity.

1. The owner of a building leased same to a corporation for a period of three years at a stipulated rental of \$75 per month. The lessee, after the expiration of about one year, by parol agreement, assigned the lease. The assignee took possession of the demised premises, paid the purchase price of the lease, and performed the covenants thereof by paying for a time the monthly rentals to the lessor, as provided in the lease contract; but before the expiration of the lease, plaintiff abandoned the premises and refused to pay the rents for the unexpired term. Held that the assignment of the lease was in violation of the statute of frauds, and void (§ 1089, Comp. Laws 1909), but that the acts of the assignee relieved it from the operation of the statute, and that the assignee was liable to the lessor for the full term of the lease.

Same — liability of assignee — privity.

2. The assignee of a lease is liable to the lessor by reason of privity of estate for rents on the demised premises, so long as the privity of estate continues.

Same — abandonment — effect.

3. An assignee cannot, by mere abandonment of possession of the premises, without an assignment of the lease, avoid liability for rents.

(July 23, 1912.)

Headnotes by HAYES, J.

*Note.* — Effect of performance to take parol assignment of lease out of statute of frauds.

The question under annotation presupposes that the assignment of the lease was within the statute of frauds unless taken out by part performance. As to necessity that assignment be in writing, see note in 15 L.R.A. 754.

This note does not purport to cover the subject of the rights and remedies of the

**E**RROR to the District Court for Logan County to review a judgment in plaintiff's favor in an action brought to recover a balance alleged to be due for rent. Affirmed.

The facts are stated in the opinion.

Messrs. Tibbetts & Green, for plaintiff in error:

A lease or the assignment thereof creates an interest in real estate, and, if for a period of more than one year, must be in writing and signed by the party to be charged.

Welsh v. Schuyler, 6 Daly, 412; Durand v. Curtis, 57 N. Y. 7; Polk v. Reynolds, 31

Md. 106; Chicago Attachment Co. v. Davis Sewing Mach. Co. 142 Ill. 171, 15 L.R.A. 754, 31 N. E. 438; Johnson v. Reading, 36 Mo. App. 306; Taylor, Land. & T. § 427; Browne, Stat. Fr. § 230.

As between the lessor and the assignee of the lease, in the absence of express contract to the contrary, there exists only a privity of estate, binding the assignee to the payment of rent only during his occupancy of the premises.

1 McAdam, Land. & T. 3d ed. § 242; Jones, Land. & T. §§ 455, 456; Dolph v. White, 12 N. Y. 296; Frank v. New York, L. E. & W. R. Co. 122 N. Y. 197, 25 N. E.

various parties as affected by a parol assignment, but only the question as to the applicability of the doctrine of part performance to such an assignment. Some cases which apparently rest upon other considerations are, however, incidentally referred to.

The apparent conflict on the question under annotation, as indicated in the opinion in *TYLER COMMERCIAL COLLEGE v. STAPLETON*, is due mainly to the fact that in some jurisdictions the doctrine of part performance remains purely an equitable doctrine, and is available only in suits in equity, whereas, in other jurisdictions, where the distinction between actions at law and suits in equity has been abrogated, the doctrine, if otherwise applicable, is available either in a suit in equity or an action at law. In this connection, see note in 3 L.R.A. (N.S.) 793.

The decision in *TYLER COMMERCIAL COLLEGE v. STAPLETON*, that the taking of possession of premises under a parol assignment, and the payment of rent during the period of occupancy, constitute such part performance as to take the assignment out of the statute of frauds and sustain an action by the lessor against the assignee for rent after the abandonment of the premises by the latter, but without an assignment by him, is sustained by *Dewey v. Payne*, 19 Neb. 540, 26 N. W. 248, presenting a substantially identical state of facts, and reaching the same conclusion.

A parol assignment of a lease for a term of years, accompanied by actual possession, delivered and accepted according to the terms of the lease, followed by payment of rent to the lessor by the assignee and the acceptance thereof by the lessor, passes title to the assignee, so as to support an action in equity by the lessor against the assignee for an accounting and other equitable relief. *Webster v. Nichols*, 104 Ill. 160. But see, *infra*, *Chicago Attachment Co. v. Davis Mach. Co.* as to actions at law.

In *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443, an action by the lessor against the assignee for rent after the latter had ceased to occupy the premises, it was contended by the defendant that the assignment was void because it was executed in the name of a firm, and not signed by the individual members thereof; but the court 42 L.R.A. (N.S.)

said that the defendant, having accepted the assignment of the lease in writing and agreed to pay the rent, and having taken possession of the premises under the assignment and paid the rent while in possession, had placed himself in a position where he could have enforced a specific performance of the contract to assign against the firm, and the firm could have enforced the same against him, and therefore the contract was taken out of the statute of frauds, and the defendant was not in a position to resist a recovery upon the contention that the contract was void under that statute.

In *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495, 2 N. E. 325, an action by the lessor against the assignee, the objection that the parol assignment was within the statute of frauds because it was a contract not to be performed within one year was disposed of upon the ground that, while the doctrine of part performance does not apply to such a contract, yet the case was taken out of that provision of the statute by the fact that possession had been taken under the assignment, and therefore on one side there had been full performance. The court said that it was unnecessary to decide whether the doctrine of part performance is applicable to the assignment considered as a conveyance of an interest in real property, but intimated that it saw no reason why it should not be so applied.

In *Marks v. Chumos*, 82 Kan. 562, 109 Pac. 397, the court declares in effect that if the lessee, with the knowledge and consent of the lessor, sells and assigns by parol his unexpired term, and the assignee receives the written lease, and enters into possession of the premises thereunder, and pays rent in accordance with the terms of the lease for months, the lease becomes a contract in writing between the landlord and the assignee for the unexpired term. This proposition, however, does not seem to rest on the doctrine of part performance, but rather upon the ground that the transaction between the lessor and the assignee, amounted to an adoption of the lease by the latter; and the court relied upon the case of *Barhyte v. New Hampshire Real-Estate Co.* 66 Kan. 390, 71 Pac. 837, where the lease was for a year, and there was no question as to the statute of frauds; but

332; *Holsman v. DeGray*, 6 Abb. Pr. 79; *Hoagland v. Hall*, 38 N. J. L. 350; *Kimbriel v. Montgomery*, 28 Okla. 743, 115 Pac. 1013; *Durand v. Curtis*, 57 N. Y. 7; *Welsh v. Schuyler*, 6 Daly, 412; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Higgins v. Street*, 19 Okla. 45, 13 L.R.A. (N.S.) 398, 92 Pac. 153.

An assignee may terminate his liability for payment of rent by another assignment of the lease, even though assigned to a beggar, and for the express purpose of ridding himself of liability.

1 *McAdam, Land. & T.* 3d ed. § 242; *Jones, Land. & T.* §§ 455, 456; *Wood, Land. & T.* §§ 307, 339, 340, 349; *Dengler v.*

*Michelssen*, 76 Cal. 125, 18 Pac. 138; *Dolph v. White*, 12 N. Y. 296; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197, 25 N. E. 332; *Holsman v. De Gray*, 6 Abb. Pr. 79; *Reid v. John F. Wiessner Brewing Co.* 88 Md. 234, 40 Atl. 877.

Mr. C. G. Horner, for defendant in error:

Having had the benefit of the lease, and having claimed the benefit of it, defendant will not now be permitted to repudiate it. He cannot enjoy the benefits and reject the burdens.

*Bigelow, Estoppel*, 5th ed. 679, 684; *Robinson v. Peabworth*, 71 Ala. 240.

When the Tyler company took over the

it was held that by such a transaction as that embraced by the above proposition, the assignee made the lease his own and thereby became subject to a stipulation thereof waiving exemption laws.

So, the decision in *Baker v. J. Maier & B. Brewery*, 140 Cal. 530, 74 Pac. 22, an action by the lessor against the assignee for rent, that when the assignee went into possession under the lease and paid the monthly rental at the rate prescribed therein, he thereupon became a tenant under the lease, even if the assignment was void under the statute of frauds, seems to rest on the principle of assignment by operation of law and attornment, rather than on the doctrine of part performance.

The decision in *B. Rolf Tool Co. v. Champ Spring Co.* 93 Mo. App. 530, 67 S. W. 967, that the defense of the statute of frauds was not available to the lessor in a suit against him by the assignee under a parol assignment, for equitable relief, was not on the ground of part performance, but upon the ground that the statute of frauds is not available to invalidate a contract by one not a party to it. And that seems to be the ground of the decision in *Bliss v. Gardner*, 2 Ill. App. 423, that a parol assignment of a lease having been executed, and the lessor having accepted the assignee as a tenant, the lessor could not avail himself of the statute of frauds for the purpose of obviating the effect of the assignment as a defense to an action of debt against the lessee for rent. And also of the decision in *Wiley's Estate*, 12 Phila. 152, that a second and parol assignment of a lease having been executed by the payment of the consideration and the delivery and retention of possession, and the lessor having recognized its validity, he could not, in an action for rent against the sureties of the assignor (the first assignee), deny its effect to put an end to the privity of the estate between himself and the assignor, which was essential to sustain his action for rent accruing after the second assignment.

In jurisdictions where the distinction between actions at law and suits in equity is still preserved, the doctrine of part performance is not available to sustain an ac-

tion at law, either by the lessor or the lessee, against the assignee. And that was the ground of the decision in *Chicago Attachment Co. v. Davis Sewing Mach. Co.* 142 Ill. 171, 15 L.R.A. 754, 31 N. E. 438, holding that possession by an assignee under parol assignment of a lease which has more than a year to run, and the lessor's recognition of him and acceptance of the rent from him, are not sufficient to take the case out of the statute of frauds, so as to enable the lessor to maintain an action against the assignee for rent falling due after the latter had abandoned the premises. And that was also the ground of the decision in *Nally v. Reading*, 107 Mo. 350, 17 S. W. 978, affirming *Johnson v. Reading*, 38 Mo. App. 306, holding that the fact that the assignee under a parol lease for an unexpired term exceeding one year took possession of the land, and paid a portion of the rent to the original lessor, would not take the contract out of the statute of frauds, so as to sustain an action at law by the assignor against the assignee to recover rent accruing subsequent to the assignment, which the former had been obliged to pay to the lessor. That would also seem to account for the result reached in *Tiefenbrun v. Tiefenbrun*, 65 Mo. App. 253, holding that the assignee under a parol assignment of a freehold interest, although he had been put in possession thereunder, could not rely upon the assignment as a defense to an action for unlawful detainer by the assignor. The court, however, disposed of the point simply by holding that the assignment was within the statute of frauds, and did not discuss the question of part performance.

The decision in *Hunt v. Coe*, 15 Iowa, 197, that part performance cannot be relied upon in an action at law to take a parol assignment of a lease out of the statute of frauds, was upon the ground that in an action at law—and the court said it was not called upon to determine what a court of equity would do under the circumstances—only the exceptions allowed by the statute itself were available, and that the transfer of leasehold estates for years was not within the provision of the statute to the effect that the requirement of a written con-

property of the local company, the local company went out of business, and practically ceased to exist. Of course, technically, its corporate existence was not terminated, but *de facto* it had ceased to exist.

Thomp. Corp. § 6547; Harrison v. Arkansas Valley R. Co. 4 McCrary, 268, 13 Fed. 522; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 4 McCrary, 438, 13 Fed. 516.

There was an express agreement to pay the rent made directly with Mrs. Stapleton, and the circumstances were such that an agreement of this kind would be implied, even though without an express promise.

Clark & M. Priv. Corp. § 335; Dewey v. Payne, 19 Neb. 540, 26 N. W. 248; Davis Provision Co. v. Fowler Bros. 20 App. Div. 628, 47 N. Y. Supp. 205.

Hayes, J., delivered the opinion of the court:

Defendant in error, hereinafter called plaintiff, brought this action in the court below against plaintiff in error, hereinafter called defendant, to recover the balance due her as rents on a certain building located in the city of Guthrie. She alleges in her petition and amendments thereto that she leased to the Capital City Business College, a corporation, certain rooms in her building, in the city of Guthrie, for a period of

three years, beginning on January 1, 1904, and expiring January 1, 1907; that the Capital City Business College took possession of said rooms under the lease, and retained them and paid the rents thereon until the month of October, 1904, at which time it sold, assigned, and delivered to defendant said lease contract and possession of said rooms. She further alleges that defendant assumed said lease contract, and agreed with the Capital City Business College, for a good and valuable consideration, to pay the rent thereunder to the plaintiff in the sum of \$75 per month for the full, unexpired term of said contract. She alleges that defendant occupied said premises and paid the rents thereon until September 27, 1905, at which time it vacated the premises and thereafter refused to pay the rents. She alleges that after the premises had been vacated by defendant, and it had refused to pay further rents thereon, she took possession of the premises, and, after making certain repairs, was able to rerent the premises only at a reduced rent. She prays judgment for the amount of the rents at the rate of \$75 per month, as stipulated in the contract, for the time the building stood vacant after the same was vacated by defendant, and for the difference in the rental provided for in the contract and the amount she was

tract "shall not apply where the purchase money or any portion thereof has been received by the vendor, or when the vendee has taken and held possession thereof under and by virtue of the contract,"—as that provision related only to freehold estates.

In Culver v. VanValkenburgh, 60 Or. 447, 119 Pac. 753, the court, speaking with reference to the oral transfer of a leasehold interest, said that, in order that one may be liable on the covenants as the assignee of the leasehold, there must be a legal assignment to him; that it is not sufficient that he be in possession. This is followed by a statement to the effect that the statute of frauds in relation to the transfer of an estate in real property includes an assignment of a leasehold interest in lands for a term of more than one year. The court, however, does not discuss the effect of part performance to take the case out of the statute of frauds.

Cases, like Moskowitz v. Eastern Brewing Co. 117 N. Y. Supp. 1017, upon the question whether the presumption that one other than the lessee in possession of premises is there by virtue of a valid assignment may be overcome by proof that he entered under an assignment not in writing, are not in point, as they do not discuss the effect of possession as part performance which will take the assignment out of the statute of frauds. And there are other cases not included in this note, for the rea-

son that the question of part performance is not discussed, in which it would seem from the facts that there would have been an opportunity to raise that question. For example, in Durand v. Curtis, 57 N. Y. 7, where rent which accrued after the dissolution of a copartnership formed between the holder of the lease and the defendant was held not to have become a firm indebtedness within an agreement to assume such indebtedness, by virtue of a parol agreement that, in consideration of putting the lease into the firm's business, the rent should be a firm indebtedness, since the balance of the term could be transferred only by writing, and the agreement to pay the rent could not be performed within a year,—there was no suggestion of the possibility of taking the case out of the statute of frauds upon the ground of part performance, although the firm was for a time in possession of the property, and it appeared that, at the time of the formation of the partnership, the defendant paid the holder of the lease one half of a month's rent, which the latter had paid in advance, and it would seem that upon such facts the question of part performance might have been raised. But see Wolke v. Fleming, 103 Ind. 105, 53 Am. Rep. 495, 2 N. E. 325, to the effect that that doctrine is not available as against the provision as to contracts not to be performed in a year. J. W. M.

able to rerent the building for, after the same was vacated by defendant, for the remainder of the term.

After answer of defendant, admitting several of the allegations of the petition, but denying that it assumed the lease, or that it agreed to pay the rents to plaintiff thereunder for the remainder of the term, the cause was tried to the court without a jury, who made findings of fact and conclusions of law in part as follows:

"(1) Upon a consideration of the evidence, the court finds that on and prior to the 28th day of November, 1903, the plaintiff was the owner of the real estate described in her petition and the lease attached thereto, and that on said date she executed and delivered to the Capital City Business College, a corporation, a lease for said premises to continue for the term of three years from the 1st day of January, 1904, until the 1st day of January, 1907, and for which said corporation was to pay her the sum of \$2,700, payable in monthly instalments of \$75 each at the beginning of each month.

"(2) That on or about the 1st of November, 1904, the Capital City Business College sold out all of its assets to certain individuals, who immediately transferred the same to the defendant, the Tyler Commercial College, a corporation, and that the Capital City Business College was by said transfer of all of its assets in effect dissolved, and it ceased to exist as a corporation thereafter, and that the defendant, Tyler Commercial College, succeeded to all of its assets, property, contracts, rights, and good will.

"(3) That the defendant, the Tyler Commercial College, continued to carry on business in the city of Guthrie under the name of the Capital City Business College, and continued to operate the business college and to occupy the premises of the plaintiff up until the 30th day of September, 1905, and paid to her the rent stipulated in the lease.

"(4) That on the 17th day of August, 1905, the defendant served a written notice upon the plaintiff that it would terminate its tenancy and would vacate the premises on or about the 30th day of September, 1905, and that it did vacate the premises described on the 30th day of September, 1905.

"(5) That in payment of the September, 1905, rent, the defendant sent to the plaintiff a check, upon which was written in small letters, 'House rent, in full of implied contract;' and the court also finds that the plaintiff did not see or observe the same before cashing the check.

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"(6) That after said premises were vacated by the defendant, the plaintiff expended the sum of \$500 in rearranging the interior of the building for another tenant.

"(7) That on the 15th day of December, 1905, the plaintiff rerented said premises to another tenant for the sum of \$40 per month, and has continued to receive from such other tenant the sum of \$40 per month on and through the remainder of the term fixed in the lease."

#### Conclusions of law.

"(1) From which the court concludes that the original lease from the plaintiff to the Capital City Business College was a valid lease, and binding upon the Capital City Business College, and that the defendant, Tyler Commercial College, in succeeding to all of the assets, property, and good will of the Capital City Business College, and under its rights under the lease, became liable for its contracts, and liable to perform its contract to pay the rent stipulated under this lease."

Other conclusions of law were made by the trial court, but it is not necessary to set them out here. The judgment was for the plaintiff, as prayed for, except that she was not allowed for money expended in repairing the building and remodeling it, in order to rent it after it had been vacated by defendant.

There was a motion for a new trial by defendant, urging as one of the grounds for a new trial that the findings of the court were not supported by the evidence; and the overruling of this motion is assigned as error in the petition in error. But in defendant's brief this assignment is not set out; nor is it pointed out in the brief what findings of the court are without sufficient evidence to support them. It therefore must be taken by this court that the finding of the court upon the facts is correct.

There is no specific finding of the court that the Capital City Business College, by any written contract, ever assigned the lease to defendant; and there is absence of any evidence in the record to that effect. Nor is there any separate, specific finding that the Capital City Business College otherwise sold and assigned the lease to defendant; but we construe finding of the court numbered 2, in which it is found that all the assets of the Capital City Business College were transferred to certain persons, and that those persons transferred same to defendant, to be in effect a finding that there was a parol assignment of said contract; and counsel for defendant, in their brief, have dealt with the case upon the theory that there was a parol assignment

to defendant by the Capital City Business College of its lease with plaintiff. Defendant contends, first, that such parol assignment is within the statute of frauds, and therefore void; second, that the taking of possession of the demised premises by defendant, and the payment of rents thereon for the portion of the term defendant occupied the premises, does not relieve the parol assignment of the operation of the statute of frauds; and, third, that if such performance does relieve the parol assignment of the statute, an assignee of a leasehold interest is liable for the rents only for the time he occupied the premises; and that, as it has paid all rents maturing before it vacated the premises, no recovery by plaintiff can be had against it.

Some of the cases support the last of defendant's foregoing contentions; but the decided weight of authority, consisting both of decided cases and the text-books, does not support this rule. At page 1087, vol. 2, Underhill on Landlord & Tenant, it is said: "Where the lessee makes an absolute assignment of the whole term, the assignee thereby becomes responsible, after he has accepted the assignment, for rent subsequently accruing, and for the subsequent breach of covenants running with the land, though he never takes possession of the premises. The assignee of a lease becomes liable for rent by reason of privity of estate, and not by reason of occupation of premises. This is the general rule, and is well supported by the authorities. The apparent exceptions to it, which make the liability of the assignee of the lease to the lessor depend upon the possession, are usually distinguished by some other element than the possession."

The liability of the assignee to the lessor is based upon privity of estate, and, so long as that privity of estate continues to exist, the assignee's liability continues; and it cannot be terminated by removal from the premises and refusal to pay rents. It may be terminated by a valid assignment of the entire unexpired term to any other person; for a valid assignment terminates the privity of estate between the first assignee and the lessor. *Bonetti v. Treat*, 91 Cal. 223, 14 L.R.A. 151, 27 Pac. 612, where the cases supporting this doctrine are well collected in a note. See also § 181b, and § 158c, *Tiffany on Landlord & Tenant*.

*Kimbriel v. Montgomery*, 28 Okla. 743, 115 Pac. 1013, is relied upon by defendant as deciding favorably to its contention that it is not liable to the plaintiff lessor for the rents; but that case has no application. One of the questions decided in that case was that the lessor could not recover from the sublessee the rents, and that the lessor must look to the original lessee. 42 L.R.A. (N.S.)

The distinction between the relation and liability of an assignee and a sublessee to the lessor is well defined by the authorities. There is neither privity of estate nor privity of contract between the sublessee and the lessor; but between the assignee and the lessor there is privity of estate, and the assignee is liable upon the covenants that run with the land. *Taylor, Land. & T.* § 449; *Underhill, Land. & T.* § 651.

It follows in the instant case that, if any valid assignment was made to defendant by the Capital City Business College, defendant is liable; for the privity of estate created by such assignment was never terminated before the expiration of the term.

Section 780, subdiv. 5, *Wilson's Rev. & Anno. Stat.* (§ 1089, subdiv. 5, *Comp. Laws 1909*), provides: "An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, . . . is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Section 880, *Id.*, provides: "No deed, mortgage, or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors. . . ."

Whether, under the foregoing statutes, a lease for a term of less than one year may be assigned otherwise than in writing need not be determined; for in this case both the original term of the lease and the unexpired term at the time of the transfer of the lease to defendant were for a longer period than one year; and these statutes include such an assignment and require it to be in writing. 20 Cyc. 218; *Taylor, Land. & T.* § 427. There was no written assignment to defendant, and the parol assignment and transfer to it of the lease is therefore void, unless the doctrine of part performance applies and takes the contract out of the operation of the statute. This exact question has not often been considered by the courts of this country.

*Welsh v. Schuyler*, 6 Daly, 412; *Polk v. Reynolds*, 31 Md. 106; *Nally v. Reading*, 107 Mo. 350, 17 S. W. 978; *Chicago Attachment Co. v. Davis Sewing Mach. Co.* 142 Ill. 171, 15 L.R.A. 754, 31 N. E. 438, have been cited by defendant as supporting the rule that part performance does not take a parol assignment of a lease out of the statute of frauds, so as to authorize a lessor to recover rents in an action at law against the assignee. Neither *Polk v. Reynolds*, *supra*, nor *Welsh v. Schuyler*, *supra*, are in point. All that was decided in the

Polk Case was that a verbal agreement or understanding to transfer a leasehold interest in land falls within the statute of frauds, and is therefore void. In *Welsh v. Schuyler*, the plaintiff lessor sought to recover rents from a person who had occupied the demised premises with the permission of the original lessee, and had paid a part of the rents to the plaintiff lessor. It was held by the court that defendant being in possession and paying rents to the lessor was presumptive evidence that he had accepted and held an assignment of the lease, but that he was not estopped to show that he never accepted a valid assignment of the lease; and that, where the lease was for a period greater than three years, an assignment not in writing is invalid, because in violation of the statute of frauds. The rule of part performance was not invoked by plaintiff nor considered by the court. The other two cases cited by defendant, however, are in point, and hold that the doctrine of part performance has no application in an action for rents by the landlord against the assignee under a parol assignment; but the court in each of those cases based its decision upon the rule prevailing in the respective states in which those cases arose, that, whatever might be the rule in equity as to such doctrine, it has no place in an action at law. That plaintiff may invoke the doctrine of part performance in this action is supported by the following cases: *Dewey v. Payne*, 19 Neb. 540, 26 N. W. 248; *Baker v. J. Maier & Z. Brewery*, 140 Cal. 530, 74 Pac. 22; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Grant v. Ramsey*, 7 Ohio St. 158; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264.

The rule supported by these last-mentioned cases, we believe to be based upon the sounder reason, and more conducive to justice under the Code of Procedure in force in this state. The contract here involved, and which, it is charged, infracts the statute, does not create any estate in real estate, as does the lease contract. Whether the contract of assignment stands or falls does not affect the leasehold estate, which was granted by the original lease contract to the lessee; for that contract was in writing, and is valid. What was undertaken by the parol assignment was not to create an estate, but to convey an interest in real estate that had been created by the original lease contract and held by the lessee. This contract of assignment was capable of immediate performance by the execution thereof by the lessee, and acceptance thereof by the assignee and payment of the consideration. The consideration was paid by the assignee to the extent that he paid for all the assets transferred by the Capital

City Business College, the original lessee, to it, including the lease in controversy; and it had also performed the covenants of the lease for part of a time thereafter by payment of the rents, and had been in possession of the property, using and enjoying same. By our Code the distinction between actions at law and suits in equity is abolished, and all actions in which a civil remedy is sought are denominated civil actions. Section 5542, Comp. Laws 1909. Plaintiff, in his petition, is required to set up therein only a statement of the facts constituting his cause of action in ordinary and concise language, and make demand for the relief to which he thinks himself entitled (§ 5627, Comp. Laws 1909); and defendant may set forth in his answer as many grounds of defense as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Comp. Laws 1909, § 5634. Under these provisions of the Code, defendant in the instant case could plead, in any action of ejectment that might be brought against it either by the lessor or the original lessee, any equitable defenses he may have. *Meadors v. Johnson*, 27 Okla. 544, 112 Pac. 1121; *Talley v. Kingfisher Improv. Co.* 24 Okla. 472, 103 Pac. 591, 20 Ann. Cas. 352. And an equitable estate in land may, under our Code, be made the basis of an action for possession. *Shy v. Brockhause*, 7 Okla. 35, 54 Pac. 306; *McClung v. Penny*, 12 Okla. 303, 70 Pac. 404.

It would therefore follow, if the doctrine of part performance cannot be applied in the case at bar, that under the procedure in this state, if plaintiff, or if the lessee, brought an action to eject defendant from the premises, defendant could set up its equitable defense, its right to a specific performance of the contract, to defeat the action of ejectment, and secure the performance of the assignment to the extent that it could enjoy the full unexpired term of the original lease. This protection would be given to defendant in an action that, in the absence of our Code provisions, would be denominated an action at law; and yet, in a similar action, the court would refuse to enforce the covenants of the contract against defendant by requiring him to pay the rents. There is nothing in the statute that requires such a construction as will permit this inconsistent and inequitable administration of the law. In *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565, from which state our Code was adopted, a plaintiff lessor sought, by an action of forcible entry and detainer, to eject his lessee under a parol lease for a term of six years, from the demised premises. The lessee had been in possession of the land for a period of five



years, had planted and cultivated crops thereon, built fences and houses, and made other improvements, and, in addition thereto, had paid the rents and taxes thereon. The court held that defendant might invoke the doctrine of part performance in his defense to the action, and that his acts had been sufficient to take the contract out of the statute and make it valid for the full term of the lease. In the opinion, written by Mr. Justice Valentine, concurred in by Mr. Justice Brewer, it was said: "Mere possession or mere payment of rent will not, as a general rule, make a parol lease for more than one year valid for the full term. But parol leases exceeding one year, as well as other parol contracts with regard to real estate, may sometimes be taken out of the statute of frauds by a part performance of the contract, and by such part performance be made valid to their full extent. Taylor, Land. & T. § 32; Grant v. Ramsey, 7 Ohio St. 157. But parol leases for more than one year, in order to become valid by a part performance, should generally be such as would, by such part performance, become substantially a purchase of an interest in the real estate."

In *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608, there was a parol agreement to execute a written lease of land for a term of more than one year. After the lessee had gone into possession, expended labor, money, and material in making improvements on the land, and getting it into condition to enjoy, the landlord refused to execute the lease and ousted the lessee from possession. In an action by the lessee against the landlord to recover damages, it was held that the lessee's acts constituted such a part performance of the contract as to take it out of the statute sufficiently to enable him to recover for the time, labor, money, and material expended thereon as his damages.

In *Bard v. Elston*, *supra*, the equitable doctrine of part performance was invoked by the defendant; while in *Deisher v. Stein*, *supra*, it was invoked by the plaintiff, and constituted a part of his cause of action. In the latter case, it was said by the court in the opinion: "It must be remembered that in Kansas all the old forms of action, and all distinctions between actions at law and suits in equity, are abolished, and in their stead only one form of action is recognized, called a civil action; and in this form of action all that a plaintiff needs to do in stating his cause of action is to state the facts of his case; and if such facts would entitle him to recover in any form of action, either at law or in equity, he will be entitled to recover under such statement."

Speaking of what performance is neces-

sary to relieve a contract for the sale of real estate or interest therein of the operation of the statute, this court, in *Collins v. Lackey*, 31 Okla. 776, 40 L.R.A. (N.S.) 883, 123 Pac. 1118, said: "The authorities are practically unanimous that payment of the purchase price and taking possession under the contract and making valuable improvements on the granted premises constitute such a performance of the contract as will warrant a decree of specific performance. There is some division in both the English and the American authorities as to whether taking possession alone under the contract, without making valuable improvements, is sufficient to take the contract out of the operation of the statute. The weight of authority, both in England and in this country, however, supports the rule that possession alone of land under a verbal contract, when delivered to the vendee, is sufficient performance to take the case out of the statute of frauds, without the additional circumstances of payment of consideration, or the making of valuable improvements." See also *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; and *Sutherland v. Taintor*, 17 Okla. 427, 87 Pac. 900.

Defendant had gone into possession, paid the purchase price, and performed on its part every obligation of the contract of assignment, except the covenant of the original lease to pay rents, part of which, however, he had paid.

It follows from the foregoing views that plaintiff was entitled to recover, and the judgment of the trial court should be affirmed.

After the first hearing in this cause, this court prepared and filed an opinion affirming the judgment of the trial court upon a question of practice; but after a rehearing upon a petition therefor, it appears to the court that the question considered in the first opinion was not presented by the briefs of plaintiff in error sufficiently in compliance with the rules of the court so as to entitle it to consideration; and without at this time determining whether we were correct in our conclusion on the question then decided, we have considered the case upon its merits, and on a theory upon which it was presented to the trial court. The trial court appears to have held the defendant liable because the assignment to it by the Capital City Business College of all of its assets effectually worked a dissolution of the latter corporation. We entertain some doubts whether, under the facts found by the court, and under the facts which the evidence in the record in any way tends to support, liability of defendant can be sustained upon this theory; but the theory

upon which we have sustained the judgment of the trial court was one of the theories presented by the pleadings, and upon which the case was tried; and if the trial court gave a wrong reason for the judgment rendered, such fact constitutes no ground for reversal.

The judgment of the trial court is affirmed.

Turner, Ch. J., and Williams and Kane, JJ., concur. Dunn, J., not participating.

## PENNSYLVANIA SUPREME COURT.

RE ESTATE OF CHARLES O. SKEER,  
Deceased.

CHARLES O. SKEER et al., Appts.

(236 Pa. 404, 84 Atl. 787.)

**Executors and administrators — loss of assets — surcharging accounts.**

An administratrix of the surviving member of an inactive partnership whose affairs are under process of settlement, who permits representatives of the deceased partner to act without bond under her power of attorney in the settlement of the partnership affairs, for a period of nine years without accounting, when the surviving attorney proves bankrupt and largely indebted to the estate, will be surcharged with the amount lost by his defalcation.

(May 13, 1912.)

**A**PPEAL by exceptants from a decree of the Orphans' Court for Carbon County dismissing exceptions to the auditor's report in a proceeding for the settlement of the estate of Charles O. Skeer, deceased. Reversed.

The facts are stated in the opinion.

Mesrs. John G. Johnson, Freyman & Nothstein, C. Willson Roberts, and H. Montgomery Smith for appellants.

Messrs. A. H. Wintersteen and Laird H. Barber for appellee:

Potter, J., delivered the opinion of the court:

This proceeding was the adjudication of the fourth and final account of Ellen B. Skeer, administratrix of the estate of Charles O. Skeer, deceased. Exceptions to the account were filed by the collateral heirs

**Note.** — The general subject of the duties and liabilities arising from the carrying on of business by a personal representative, testamentary trustee, or guardian is considered in the note to *Swaine v. Hemphill*, 40 L.R.A.(N.S.) 201. 42 L.R.A.(N.S.)

of the decedent, in which they alleged that the administratrix was guilty of gross negligence in failing to collect a large amount of money due to the estate from those who were charged with the settlement of the affairs of the firm of Linderman & Skeer.

The court below appointed an auditor to consider the exceptions and to report a schedule of distribution. The only exceptions which are here brought in question are those relating to the interest of the decedent in the firm of Linderman & Skeer. This interest, as shown by a trial balance taken shortly after the death of decedent, was valued at \$161,876.34; but in the inventory and appraisal filed in the register's office it was appraised at \$57,211.96. The auditor, however, refused to surcharge the accountant with any part of this sum, and dismissed the exceptions relating to the failure of the administratrix to realize upon this asset. The court below overruled the exceptions to the auditor's report, and confirmed it absolutely. The exceptants have appealed, and contend that the evidence showed that the accountant was guilty of gross negligence in failing to collect the amount due to the estate from the firm of Linderman & Skeer, and that she is liable for the amount collected and embezzled by her agent and attorney in fact, Garret B. Linderman.

From the facts found by the auditor, it appears that Charles O. Skeer, who resided in Mauch Chunk, died March 13, 1898, intestate, leaving a widow and collateral heirs. Letters of administration were granted to the widow, who filed an inventory and appraisal, showing personal property of the appraised value of \$850,427.53; the interest of decedent in the firm of Linderman & Skeer being appraised at \$57,211.96. The firm was originally composed of Dr. G. B. Linderman, of South Bethlehem, Pennsylvania, and Charles O. Skeer; the interest of the latter in the partnership being nine twenty-eighths. The firm was originally engaged in the operation of certain leased coal mines; but prior to Skeer's death it had ceased to operate mines or to engage in active business. At the time of Skeer's death, the winding up of the firm's business was in the hands of Robert P. Linderman, a son and one of the executors of Dr. G. B. Linderman. Mrs. Skeer, as executrix of her husband, gave a power of attorney to R. P. Linderman, authorizing him to act for her in the settlement of the business. Up to July, 1902, Mrs. Skeer received the sum of \$31,000 on account of the interest of Skeer's estate in the firm. She received nothing more during the lifetime of R. P. Linderman, who died in 1903. On December 8, 1903, Mrs. Skeer, as administratrix,

gave to Garret B. Linderman, another son of Dr. Linderman and a brother of R. P. Linderman, a power of attorney to represent her in the settlement of the firm's business. It seems that this was done without the knowledge or consent of any of the collateral heirs of C. O. Skeer; nor does it appear that any of them were informed of the existence of the power of attorney. On October 8, 1906, she received from Garret B. Linderman \$10,000, making an aggregate of \$41,000 paid her on account of the interest of her husband's estate in the firm. On May 16, 1903, the book value of that interest was stated as \$130,876.34.

Garret B. Linderman continued in charge of the settlement of the firm business, with Mrs. Skeer's consent, until January, 1908, when he was adjudicated a bankrupt, and it then transpired that he had collected and appropriated to his own use moneys of the firm, of which the share of the Skeer estate was \$126,734.43. Deducting the sum of \$7,500 paid by a surety company, the loss of the estate by reason of Linderman's defalcation was \$119,234.43. No action of any kind was ever brought by Mrs. Skeer to compel a settlement of the Linderman & Skeer partnership business, or to secure an accounting from either R. P. Linderman or Garret B. Linderman. The record shows that after the death of C. O. Skeer the estate of Mr. Linderman collected from the firm of Linderman & Skeer a total sum of \$239,000, of which \$157,000 was paid during the years 1906 and 1907. During the same period Mrs. Skeer, as stated above, received only \$41,000; whereas her proportionate share would have been some \$90,000.

The question of accountant's liability is to be determined by inferences to be drawn from facts which are not disputed, and by the application to these facts of sound and established principles of law. The rule as to the liability for failure to collect assets of the estate is well settled. In Calhoun's Estate, 6 Watts. 185, 188, Mr. Justice Rogers said: "All that a court of equity requires from trustees is common skill, common prudence, and common caution. Executors, administrators, or guardians are not liable beyond what they actually receive, unless in case of gross negligence; for when they act as others do with their own goods and with good faith, and not guilty of gross negligence, they are not liable." The language above quoted was repeated by Mr. Justice Sharswood in Neff's Appeal, 57 Pa. 91, 96, and by Mr. Justice Green in Webb's Estate, 165 Pa. 330, 336, 30 Atl. 827, Bartol's Estate, 182 Pa. 407, 410, 38 Atl. 527, and Re Semple, 189 Pa. 385, 390, 42 Atl. 28. In Webb's Estate, 165 Pa. 330, 42 L.R.A. (N.S.)

336, 30 Atl. 827, 828, Calhoun's Estate, 6 Watts, 185, is referred to as "the leading case in Pennsylvania on this subject."

Did the accountant here use common prudence and exercise common caution, or was she grossly negligent? She took charge of the estate on May 21, 1898. At that time, as stated above, the firm of Linderman & Skeer was not actively engaged in business. Its affairs were being closed up by Robert P. Linderman, acting under powers of attorney from the executors of his father and from C. O. Skeer. After the death of the latter, his administratrix, the present accountant, permitted R. P. Linderman to remain in charge of the settlement of the affairs of the firm. This arrangement continued for some five years, when R. P. Linderman died, prior to December 8, 1903, without having made settlement of the business of Linderman & Skeer, and without submitting any account to the administratrix. At that time, December 8, 1903, Mrs. Skeer, as administratrix, gave a power of attorney to Garret B. Linderman, authorizing him, as her representative, to settle the affairs of the firm. No final settlement of the firm's business was made; and some four years later, in 1907, it was discovered that Linderman had appropriated to his own use funds of the Skeer estate amounting to \$126,734.43. No suit for an accounting was brought by Mrs. Skeer, though more than nine years elapsed between the grant of her letters of administration and the discovery of Garret B. Linderman's embezzlement. It appears from the testimony that Mrs. Skeer and her attorney frequently discussed the advisability of bringing suit for an accounting, and it was agreed that it ought to be done. But it was not done because of promises of adjustment made by the Lindermans, and because of Mrs. Skeer's personal and social relations with them. After the defalcation of Garret B. Linderman became known, Mrs. Skeer brought no suit against him beyond filing proof of the debt with the referee in bankruptcy. Mrs. Skeer testified that when she gave the power of attorney to Garret B. Linderman she did it with hesitation, although the executors of the Linderman estate requested it and her own attorney advised it. She said she never trusted him, and thought that he was cunning. But in spite of this feeling she did not consider taking a bond from him, as security for the faithful discharge of his duties, because she thought it would have been considered an insult to ask it of him. It appeared that, among other assets, the firm of Linderman & Skeer owned valuable real estate in Hartford, Connecticut. In 1906, upon the petition of Mrs. Skeer, Garret B. Linderman was appointed ancillary

administrator of C. O. Skeer, at Hartford, and as such sold the interest of the Skeer estate in the real estate there, from which a net balance of \$19,524.09 was realized, all of which was embezzled by Linderman. The surety company which was upon his bond as administrator paid \$7,500 as a compromise settlement, and this amount is included in the present account. Linderman had previously sold personal property of the firm at Hartford for \$50,045.67. As above noted, the books of Linderman & Skeer showed that after the appointment of the appellee as administratrix there was paid to the estate of G. B. Linderman \$239,000, while the Skeer estate received only \$41,000. This was far below the amount to which the Skeer estate was entitled. The only excuse given for the failure to settle the partnership business during this long period of nine years was the alleged inability to dispose of the Hartford property and the pendency of two lawsuits. It appears, however, that the Hartford property was entirely independent of the other business; and no reason was shown why it should have interfered with the settlement of the remainder of the firm's affairs. One of the lawsuits in question was settled soon after Mr. Skeer's death, and the other involved a liability at the most of \$25,000.

We cannot regard the conduct of the administratrix in permitting this long delay in the settlement of the interest of the estate in the partnership as being anything else than gross negligence. It was her duty, as was said in *Chambersburg Sav. Fund Assn's Appeal*, 76 Pa. 203, 228, "within a reasonable time, to make proper efforts to convert all the assets and securities into money for distribution." And if she failed to make such efforts she "was guilty of gross negligence, and became liable for any loss thereby sustained." In *Johnston's Estate*, 9 Watts & S. 107, 109, Mr. Justice Rogers said: "It is a case, not of ordinary care, but of gross negligence; for he has failed to show that he made any efforts whatever in proper time to recover the money. A mere application for payment, without more, would not have availed him. To entitle him to a credit, he must, in addition, prove that he took legal steps to recover the sum due, or that, from the notorious insolvency of the debtors, a suit would have been useless. But, so far from this being true, the probability is that if ordinary diligence had been used the money would have been recovered." This language fits accurately the facts of the present case. The record shows that while Mrs. Skeer and her counsel frequently discussed the bringing of suit, and were convinced of the propriety of so doing, yet for reasons which

were largely personal and social this obviously prudent step to protect the estate was not taken. The delay in the settlement of the partnership affairs was unreasonable, even at the date of R. P. Linderman's death, as more than five years had then elapsed. The demands of ordinary prudence certainly required sharp insistence upon a settlement at that time. The administratrix, however, apparently made no investigation as to the condition of the firm affairs, but proceeded to give another power of attorney to Garret B. Linderman, whom, at the time, she said she distrusted. Notwithstanding her suspicions, she left the control of the matter in his hands, exercising very little, if any, oversight of his conduct in representing her. Only one instance appears in which she had an examination of the books made, and that was in 1904, when she employed an audit company to investigate the accounts of the firm. Their report shows that a large amount of cash and negotiable securities was then on hand, which should have been properly distributed. That report also showed that in eight years salaries amounting to \$25,446.70 had been drawn from the firm for services which "were only nominal, and could not have required more than two to three days annually." This report in itself should have been enough to have placed any reasonably competent person on guard. As noted above, a simple inspection of the books of the firm in the year 1906 would have shown that the agent and attorney in fact of the administratrix was paying large sums of money out of the firm to the estate of his father, in which he was interested, and at the same time was failing to distribute anything like a proportionate amount to the Skeer estate. This fact would have appeared from such an examination of the books as ordinary prudence would have suggested.

We can see nothing in the evidence to justify the inference which the auditor drew from the facts that the conduct of the administratrix should be excused. No reasonable explanation of the long delay in compelling a settlement was given. The evidence points unmistakably to negligence in this respect. The delay of five years, until the death of R. P. Linderman, was not justified. And the conduct of Mrs. Skeer in making no investigation at that time, and in proceeding to give another power of attorney to a brother of R. P. Linderman, and in permitting him to continue for years the same careless and unbusinesslike course of procedure, without requiring any security, and without compelling prompt or reasonable settlements at his hands, can only be properly characterized as gross negligence upon the part of the administratrix.

The record discloses nothing which affords any adequate excuse for a delay of nine years in securing to the estate the amount of its interest in a business which was in course of settlement, and whose assets were admittedly good, and whose conversion called for nothing but the exercise of reasonable business caution and activity. We are convinced that the failure of the administratrix to exercise common skill, common prudence, and ordinary business caution resulted in the loss of the interest of the estate in the assets of the firm of Linderman & Skeer. To the extent of the value of this interest, which the administratrix failed to collect, and which was lost through the defalcation of her agent and attorney in fact, Garret B. Linderman, the administratrix must be surcharged.

The fourth, fifth, sixth, ninth, twelfth, fourteenth, fifteenth, sixteenth, and twenty-second assignments of error are sustained. The decree of the Orphans' Court is reversed, and the record is remitted for further proceedings in accordance with this opinion.

#### SOUTH DAKOTA SUPREME COURT.

HUGH SMITH, Trustee, Appt.,  
v.

RETAIL MERCHANTS' FIRE INSURANCE COMPANY, Resp't.

L. J. WALKER, Intervener, Appt.

(— S. D. —, 137 N. W. 47.)

**Insurance — assignment as collateral — consent — effect.**

The assignment of property and the insurance thereon as security for a debt

*Note. — Variance between assignment or transfer of insured property or insurance policy, and the insurer's consent thereto.*

The general principle seems to be that an insurer cannot take advantage of a variance between assignment or transfer of insured property or policy thereon and the insurer's consent thereto, where the assignment actually contemplated is not prohibited by the policy or by-laws of the insurer, and the rights of the insurer are not materially affected thereby. *SMITH v. RETAIL MERCHANTS' F. INS. CO.* finds support in the cases collected in this note which held that where the transfer contemplated by the assignor is within a prohibition contained in the policy, the policy is void.

**Assignment or transfer of property.**

In *Farmers' Ins. Co. v. Ashton*, 31 Ohio St. 477, it was held that the insurer having assented to the sale of the property 42 L.R.A. (N.S.)

renders the policy void under a provision in the policy making it void if the interest of insured is other than unconditional ownership or if any change takes place in his interest, title, or possession; and it is immaterial that the insurer consents to assignment of the property to the trustee for the creditor, if the consent is based upon ownership by the assignee, and not upon the fact that he is trustee for a creditor.

(June 25, 1912.)

**A** PPEALS by plaintiff trustee and intervener from a judgment of the Circuit Court for Minnehaha County in defendant's favor in an action brought to recover an amount alleged to be due under a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. Joe Kirby for appellant Smith.

Mr. F. L. Rowland for appellant Walker.

Mr. Sam H. Wright, for respondent:

Smith and Walker not being sole and unconditional owners of the property insured as stipulated in the policy of insurance, the policy is absolutely void.

*Spare v. Home Mut. Ins. Co.* 9 Sawy. 142, 17 Fed. 568; *Re Hamilton*, 102 Fed. 683; *Virginia-Carolina Chemical Co. v. Sundry Ins. Cos.* (C. C.) 108 Fed. 451; *Manchester F. Assur. Co. v. Glenn*, 13 Ind. App. 365, 55 Am. St. Rep. 225, 40 N. E. 926, 41 N. E. 847; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Bullman v. North British & M. Ins. Co.* 159 Mass. 118, 34 N. E. 169; *New England Loan & T. Co. v. Kenneally*, 38 Neb. 895, 57 N. W. 759; *Kase v. Hartford F. Ins. Co.* 58 N. J. L. 34, 32 Atl. 1057; *Hayes v. Saratoga & W. F. Ins. Co.* 179 N. Y. 535, 71 N. E. 1131; *Imperial F. Ins. Co.*

covered by the policy, it assented to the terms of the sale, although they were not in fact known to it, and so the policy was not avoided by the fact that the transferee gave back a purchase-money mortgage, especially as the assent given was in no wise qualified or conditioned on a sale for ready money, and it was not claimed to have been fraudulently induced or procured.

And in *King v. Cox*, 63 Ark. 204, 37 S. W. 877, it was held that the reservation of a vendor's lien by the transferrer of property, without the knowledge of the insurer, will not avoid the policy where the insurer assented to the sale, citing *Farmers' Ins. Co. v. Ashton*, supra.

**Assignment or transfer of policy.**

In *Wall v. Commercial Ins. Co.* 7 Ohio Dec. Reprint, 323, 2 Ohio L. J. 113, a mortgagee who had procured insurance on his interest, with the consent of the insurer assigned the policy to a purchaser of the

v. Dunham, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668.

A contract of insurance is a personal one, based upon the character, credit, and conduct of all the parties; therefore, any change of title, by operation of law or otherwise, without the consent of the insurance company, renders the policy absolutely null and void.

Dadmum Mfg. Co. v. Worcester Mut. F. Ins. Co. 11 Met. 429; Young v. Eagle F. Ins. Co. 14 Gray, 150, 74 Am. Dec. 673; Orr v. Hanover F. Ins. Co. 158 Ill. 149, 49 Am. St. Rep. 146, 41 N. E. 854; Orr v. National F. Ins. Co. 158 Ill. 431, 41 N. E. 1009; Little v. Eureka Ins. Co. 5 Ohio Dec. Re-

print, 285, 4 Am. L. Rec. 228; Ohio Farmers' Ins. Co. v. Waters, 65 Ohio St. 157, 61 N. E. 711; Campbell v. German Ins. Co. — Tex. Civ. App. —, 31 S. W. 310; Guenzburger v. Home Ins. Co. 4 Ohio S. & C. P. Dec. 220, 3 Ohio N. P. 140; Milwaukee Trust Co. v. Lancashire Ins. Co. 95 Wis. 192, 70 N. W. 81; Re West Norfolk Lumber Co. 7 Am. Bankr. Rep. 648; Re Hamilton, 102 Fed. 683; Starkweather v. Cleveland Ins. Co. Fed. Cas. No. 13,309, reversing 2 Abb. U. S. 67, Fed. Cas. No. 13,308; Dean v. Equitable F. Ins. Co. 4 Cliff. 575, Fed. Cas. No. 3,705; Adams v. Rockingham Mut. F. Ins. Co. 29 Me. 292; Perry v. Lorillard F. Ins. Co. 61 N. Y. 214, 19 Am. Rep. 272.

property, who had paid off the mortgage, without notifying the company that the assignee had procured the fee, and not merely the mortgagee's interest; and it was held that the policy could not be enforced, as it made material difference whether they insured the assignee as owner or as mortgagee; since if they insured him as owner they could have no right of subrogation over against the mortgagor, while if they insured him as they had previously insured the mortgagee they would have the right to collect from the original mortgagor the debt due to the mortgagee.

And in Phenix Ins. Co. v. Willis, 70 Tex. 12, 8 Am. St. Rep. 566, 6 S. W. 825, where the insurer was induced to consent to a transfer of a policy by the representation that the assignee had become the owner of the property insured, where, as the proof showed, the transfer was for the purpose of enabling the assignor to affect a favorable compromise with his creditors, it was held that there could be no recovery notwithstanding such consent, as the assignment being invalid as to the assignor's creditors, instead of being valid as to all persons, as the insurer understood, it created such confusion and doubt as to the ownership of the policy as rendered it hazardous to pay the loss to anyone, which was to the disadvantage and detriment of the company and calculated to provoke litigation; and further, having been induced by false representations, the assignment was within the provision of the policy "that all fraud or attempt at fraud by false swearing or otherwise shall be a complete bar to any recovery for loss under it."

— absolute in form, but intended as collateral security.

In Lynde v. Newark F. Ins. Co. 129 Mass. 57, 29 N. E. 222, the insurer having assented to an assignment of a policy, absolute in form, in the belief that it was an absolute transfer of all assignor's title and interest in the property, whereas in fact it was made as collateral security for a debt, it was held that by reason of a provision in the policy prohibiting the assignment thereof for purposes of collateral

security, there could be no recovery by the assignee.

But in Merrill v. Colonial Mut. F. Ins. Co. 169 Mass. 10, 61 Am. St. Rep. 268, 47 N. E. 439, where assignment of an insurance policy was assented to by the insurer in the belief that the assignment was an absolute one, though in fact it was merely as collateral security, it was held (distinguishing Lynde v. Newark F. Ins. Co. supra), that as there was no prohibition in the policy or by-laws against the assignment of the policy as collateral security, neither the assignor nor the assignee was estopped from relying upon the assent to prevent the avoidance of the policy. The basis of the decision seems to be that the assignment, being in fact merely as collateral security, left the assignor still interested in the contract, and the whole indemnity insured to his benefit though payable to another upon his debt. As to the use of an absolute assignment under the circumstances it was said that the company had provided only one way of making an assignment, and that form was applicable to all circumstances, as there was nothing to show that any other form was provided or expected to be used in case the assignment was intended merely as collateral security. Nor did the insurer give any notice, either expressly or by implication, that it was to be informed of the purpose or nature of such assignment as might be brought for its consent, and so there having been no inquiry by the insurer nor any misrepresentation by assignor, the assent would be good for an assignment according to the intention of the assignor or assignee so far as that intention is within the legal meaning of the words used by them when explained by competent oral evidence.

And in Imperial Ins. Co. v. Wolf, 21 Ohio C. C. 202, 11 Ohio C. D. 815, it was held that a policy is not invalidated by an assignment absolute in form, but intended as collateral security for a debt, where such an assignment is not prohibited by the policy or by-laws of the company, and the assent is given without inquiry and no misrepresentations of fact are made.

J. H. B.

McCoy, P. J., delivered the opinion of the court:

The complaint of plaintiff, in so far as is material to a consideration of the questions presented on this appeal, in substance, states that on the 25th day of September, 1909, defendant issued to one Satter a certain policy of fire insurance for \$1,000 upon a certain stock of merchandise then owned by Satter at Carthage, South Dakota, and thereby insured said merchandise against loss by fire for the period of one year; that on May 31, 1910, said Satter was adjudged an involuntary bankrupt, and plaintiff appointed and qualified as trustee in said bankruptcy proceeding; that on the 6th day of June, 1910, said stock of merchandise was wholly destroyed by fire. Thereafter plaintiff, as said trustee in bankruptcy, commenced this action to recover upon said policy for the benefit of the creditors of said Satter. Defendant demurred to said complaint upon the ground that the same failed to state facts sufficient to constitute a cause of action against defendant. The said demurrer was sustained, and plaintiff appealed, and now urges said ruling of the court as error. We are of the opinion that the demurrer was properly sustained. *Smith v. Security Mut. F. Ins. Co.* — S. D. —, 136 N. W. 46, decided by this court, involving a similar complaint by the same plaintiff upon another policy issued by another company upon the same stock of merchandise.

The intervener, by his complaint in intervention, in substance, states that on the 25th day of September, 1909, defendant issued to said Satter said policy of fire insurance for \$1,000 on said stock of merchandise then owned by Satter at Carthage, and thereby insured the same against loss by fire for the period of one year; that on January 27, 1910, Satter, being indebted to the State Bank of Carthage, assigned said stock of merchandise to the intervener, L. J. Walker, cashier of said bank, as security for the said indebtedness, and also assigned to said Walker said insurance policy by words as follows: "The interest of M. A. Satter as owner of property covered by this policy is hereby assigned to L. J. Walker, subject to the consent of the Retail Merchants' Fire Insurance Company of South Dakota." The consent of defendant indorsed upon said policy is also in words as follows: "The Retail Merchants' Fire Insurance Company of South Dakota hereby consents that the interest of M. A. Satter as owner of the property covered by this policy be assigned to L. J. Walker." On the 6th day of June, 1910, the said stock of merchandise was wholly destroyed by fire. Intervener, as said assignee of said

policy, sought by said complaint in intervention to recover of defendant the sum of \$1,000 by reason of the said destruction of said merchandise by fire. Defendant interposed a demurrer to said complaint in intervention on the ground that the same failed to state facts sufficient to constitute a cause of action against defendant. The demurrer was sustained, and intervener also appeals to this court, urging the sustaining of said demurrer as error. We are of the opinion that this demurrer was also properly sustained. The policy sued upon is the South Dakota standard form prescribed by § 2, chap. 164, Laws 1909, which, among others, contains two clauses we deem material to the issues involved in this case, either of which, by the terms of said policy, rendered the same void: (1) "If the interest of the insured be other than unconditional ownership;" (2) "if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment or by the voluntary act of the insured or otherwise." Provisions of this character are generally construed to be valid and proper subjects of fire insurance contracts. The assignment of a fire insurance policy with the consent of the insurer has the effect of creating a new contract between the assignee and the insurer, subject to all the original terms of the policy. 19 Cyc. 635; *Ostrander, Fire Ins. p. 23*. The assignment to Walker, not as trustee for the bank, but to Walker in his own individual capacity, would seem to contemplate him as the owner of the property insured in his own right, when, as shown by the complaint, he was not owner, but was in truth and in fact a trustee for the bank, who was not the owner, but only had a lien thereon as security for a debt. There is nothing in the complaint of intervener that would indicate that defendant had any knowledge that Walker was such a trustee, or any knowledge that Walker had any other or different title or interest than that of absolute ownership. By the very terms of the assignment itself Walker was assigned "the interest of M. A. Satter as owner of the property covered by this policy," which was the interest of unconditional ownership. What interest Walker in fact had was very material to defendant, and of which it had the right to be truly informed. One who insures property as owner in case of loss cannot recover under such policy for property held by him as trustee, in the absence of some special provision therefor in the policy. 19 Cyc. 669-696; *Corkery v. Security F. Ins. Co.* 90 Iowa, 382, 68 N. W. 792; *Fuller v. Phoenix Ins. Co.* 61 Iowa, 350, 16

N. W. 273; McCormick v. Springfield F. & M. Ins. Co. 66 Cal. 361, 5 Pac. 617; Mt. Leonard Milling Co. v. Liverpool & L. & G. Ins. Co. 25 Mo. App. 259; Bradley v. German-American Ins. Co. 90 Mo. App. 369. The assignment of said stock of merchandise to the Bank of Carthage, without the consent of defendant, had the effect of changing the interest and title of the subject of insurance so as to render the policy void. When Satter assigned the policy to Walker by an unqualified assignment, and when defendant consented to an unqualified assignment only, Satter ceased to have any interest in said policy so far as defendant was concerned; and, the fact of having made an unqualified assignment of the interest of Satter as absolute owner, when Walker was as a matter of fact not the owner of the insured property at all, rendered the contract of insurance as between Walker and defendant void. Satter parted with his interest in the policy by the assignment to Walker, and Walker took his place in the contract. At the time of the appointment of plaintiff as trustee in bankruptcy, Satter had no interest in the insurance policy to go to plaintiff as trustee, unless the provisions of the Federal bankruptcy act rendered the assignment to Walker void because made within four months of the adjudication of Satter as a bankrupt. It is not every transfer or encumbrance made by a person within four months of the time when such person becomes an adjudicated bankrupt that is void. Section 67, bankr. act (act July 1, 1898, chap. 541, 30 Stat. at L. 564, U. S. Comp. Stat. 1901, p. 3449). There are no facts alleged in either the complaint of plaintiff or intervener that would render the said assignment to Walker void under the bankruptcy laws.

The orders and judgments appealed from are affirmed.

**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

THEODORE ANDERSON, Resp.,  
v.  
CHARLES P. SPIESTERSBACH and  
Wife, Appts.

(69 Wash. 393, 125 Pac. 166.)

**Abstracter — Liability — stranger.**

One preparing an abstract of title to real estate at the instance of the owner of property, which, at his instance, is delivered to a stranger whom the abstractor knows will rely upon it in dealing with the property, is liable to him for losses resulting from a material error or omission in the abstract.

(July 29, 1912.)

42 L.R.A. (N.S.)

**A**PPÉAL by defendants from a judgment of the Superior Court for Snohomish County in plaintiff's favor in an action brought to recover the price of certain abstracts made by plaintiff for defendants. Reversed.

The facts are stated in the opinion.

Messrs. Cooley & Horan and R. Mulvihill for appellants.

Messrs. Coleman, Fogarty & Anderson, for respondent:

The liability of an abstractor is based on contract.

1 Cyc. 215; Niblack, Abstracters & Title Ins. § 18; Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co. 118 Tenn. 678, 12 L.R.A. (N.S.) 449, 102 S. W. 901, 12 Ann. Cas. 407; Thomas v. Guarantee Title & T. Co. 81 Ohio St. 432, 26 L.R.A. (N.S.) 1210, 91 N. E. 183; National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Mallory v. Ferguson, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 410; Symms v. Cutter, 9 Kan. App. 210, 59 Pac. 671; Talpey v. Wright, 61 Ark. 275, 54 Am. St. Rep. 206, 32 S. W. 1072; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073; Dundee Mortg. & Trust Invest. Co. v. Hughes, 20 Fed. 39; Kahl v. Love, 37 N. J. L. 8.

Appellants cannot recover because they failed to inform respondent of the defect in the certificate.

Roberts v. Leon Loan & Abstract Co. 63 Iowa, 76, 18 N. W. 702.

Chadwick, J., delivered the opinion of the court:

This action was brought to recover the sum of \$463.50, the price of certain abstracts made by plaintiff for defendants. The defendants answered, setting up a counterclaim for damages. A further statement of the facts is unnecessary at the present time. The legal question to be resolved is whether an abstractor, knowing that the party to whom he delivers an abstract at

**Note. — Liability of title abstractor.**

Preceding authorities upon this subject are collected in the notes to Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co. 12 L.R.A. (N.S.) 449, and Stephenson v. Cone, 26 L.R.A. (N.S.) 1207.

The duty and liability of abstract companies are stated in general terms in the second headnote to Hillock v. Idaho Title & T. Co. post, 178.

Where an abstract company is retained by one party to extend a search which it has previously made for other parties, and by reference and adoption it makes those former certificates a part and parcel of the later one, it is liable to the party for whom the extension is made for damage accruing



the instance of the owner, who ordered and paid for it, will rely upon it in making a trade or purchase of the property described therein, is liable in damages for a loss resulting from a material error or omission. The trial judge applied the rule as laid down in 1 Cyc. 215: "By the weight of authority, an abstractor is liable only to the person ordering and paying for the abstract; and, where this view obtains, the fact that an abstractor has knowledge that his abstract is to be used in a sale or loan to advise a purchaser, or person about to lend money, does not affect the rule as to his liability." This rule is sustained by the weight, considered in numbers, of authority; but we are not willing to apply it, unless it is plain that there was no duty on the part of the abstractor to the party injured. In this case the abstractor not only knew the purpose of the abstract, but became the agent of the other party to the transaction, out of which the loss resulted, to deliver it to defendant. He knew that the trade, if made at all, would be made upon the faith of his certificate.

What is called the general rule has not been allowed to stand without strong and persistent challenge. In one of the leading cases (*National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621) the doctrine was denied by Chief Justice Waite, dissenting, with whom Justices Swayne and Bradley concurred. He said: "The circumstances were such as ought to have satisfied him that his certificate was to be used by Chapman in some transaction with another person as evidence of the facts certified to. . . . It seems to me that under these circumstances Ward is liable to the bank for any loss it may sustain by reason of his erroneous certificate." Like expressions are to be found in many of the cases. In some states the injustice of the rule invoked by plaintiff has been recognized by the legisla-

ture and abrogated by statute. We are not now prepared—indeed, it is not necessary—to hold that an abstractor is liable to a third party to whom his customer presents an abstract in the procurement of money or property. The general rule was recognized, if not expressly affirmed, in *Bremerton Development Co. v. Title Trust Co.* 67 Wash. 268, 121 Pac. 69, where a recovery was allowed upon our finding of strict privity of contract; but it does not follow that there are no exceptions to the rule. Indeed, they have been recognized, and, in our judgment, are as securely established as the rule itself. So where, as in this case, the facts warrant us in saying that there was a republication of the abstract to the defendant, or that it was made in his behalf, we have no hesitation in asserting that the abstractor is responsible under his certificate for the loss sustained.

"It is very well known that the owner of real estate seldom incurs the expense of procuring an abstract of the title from an abstractor, except for the purpose of thereby furnishing information to some third person or persons, who are to be influenced by the information thus provided. If the abstractor in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless. Where the abstractor has no knowledge that some person other than his employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained. How far exceptions ought to be countenanced we will not now undertake to say; but, confining ourselves to the case before us, we are of the opinion that the facts stated in the complaint are sufficient to put the defendant to his answer. Here there was actual communication be-

to him by reason of a material omission in the abstract, although the omission occurs not in the extension, but in the previous certificate. Here the liability is considered contractual, and recovery is allowed upon a finding of strict privity of contract. *Bremerton Development Co. v. Title Trust Co.* 67 Wash. 268, 121 Pac. 69.

And in *Marston v. Catterlin*, 239 Mo. 390, 144 S. W. 475, where the abstractor was also agent of a company which made a loan upon the property the title of which he searched, and a security deed of which the company took, relying upon his abstract furnished to them, and where he later bought in the property at foreclosure sale under a prior deed of trust which he had omitted to set out in the abstract, he was held to be estopped from asserting any title as against his principal, the loan company. 42 L.R.A. (N.S.)

But in *Lockwood v. Title Ins. Co.* 73 Misc. 296, 130 N. Y. Supp. 824, which involved the validity of a subsequent agreement by the title company, based upon the promise of the plaintiffs (and its fulfilment), to refrain from instituting a suit against said company for a material error in the abstract of title of plaintiffs' premises, furnished to grade crossing commissioners in condemnation proceedings, it is said that the title company was not legally liable to plaintiffs for this injurious error for the reason that it did not furnish the search or abstract to them.

As to the running of the statute of limitations against an action to hold a title abstractor liable, see note to *Aachen & M. F. Ins. Co. v. Morton*, 15 L.R.A. (N.S.) 156, and *Hillock v. Idaho Title & T. Co.* post. 178.

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tween the abstractor and the person for whose information the abstract was prepared. The appellant had refused to make the loan until he should be furnished with an abstract; and the abstractor was informed that his abstract was to be used for the particular purpose of inducing the plaintiff to make a loan, secured by mortgage, on this real estate. He delivered the abstract to the appellant for his use, and certified it to be a correct and true abstract of title. . . . We think it cannot properly be said that the appellee did not owe a duty to the appellant arising under the contract; the attending circumstances indicating that it was the understanding of all the parties that the service was to be rendered for the use and benefit of the appellant, the particular person who was to loan his money in reliance upon what the abstractor should do and represent in the premises. If such a duty did arise, the appellee was bound to the person to whom he owed the duty to perform it with reasonable care and skill. However broad and inclusive the statements of the general doctrine in the decided cases, we think that when the facts involved and the reasons stated in the opinions, to some of which we have referred, are considered, it must be concluded that the view we take of the pleading before us is sustained by the authorities." *Brown v. Sims*, 22 Ind. App. 317, 72 Am. St. Rep. 308, 53 N. E. 779.

"The defendant knew that the abstract was made for the exclusive benefit and use of the plaintiff, and knew that the plaintiff would rely thereon, and the abstract was delivered by the defendant to the plaintiff. Under this state of facts, there can be no doubt as to the liability of the defendant." *Western Loan & Sav. Co. v. Silver Bow Abstract Co.* 31 Mont. 448, 107 Am. St. Rep. 435, 78 Pac. 774.

It is inferentially held, in *National Sav. Bank v. Ward*, that, had the abstractor had "any knowledge as to the purposes for which the abstract was obtained," he would have been liable to one acting upon its credit; while in other cases it has been squarely held that, where the abstractor has notice that the abstract is procured for a particular person or use, he will be held liable to such person for damages caused by his negligence or omission. *Dickle v. Nashville Abstract Co.* 89 Tenn. 431, 24 Am. St. Rep. 616, 14 S. W. 896; *Peabody Bldg. & L. Asso. v. Houseman*, 89 Pa. 261, 33 Am. Rep. 757; *Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co.* 118 Tenn. 678, 102 S. W. 901, 12 L.R.A.(N.S.) 449, and note, 12 Ann. Cas. 407; *Warvelle, Abstracts of Title*, 3d ed. § 9.

Other questions are raised; but, in our 42 L.R.A.(N.S.)

judgment, they rest upon disputed facts, and the case will be sent back for further proceedings in conformity with this opinion.

Judgment reversed.

Mount, Gose, Parker, and Crow, JJ., concur.

## IDAHO SUPREME COURT.

CHARLES HILLOCK et al., Appts.,

v.

IDAHO TITLE & TRUST COMPANY, Limited, Resp't.

(— Idaho, —, 126 Pac. 612.)

Limitation of action — mistake in abstract of title.

1. Where a prospective purchaser of a tract of land purchased from an abstract company an abstract of title to such property, accompanied by certificate to the effect that such abstract contained a notation of all instruments of record affecting the title, including tax certificates and tax deeds, and, relying upon the correctness of the abstract and the truth of the certificate annexed thereto, the purchaser of the abstract subsequently purchased the land therein described, and it thereafter developed that at the time of the making and delivery of such abstract there was an outstanding tax deed to such property which was not disclosed by the abstract, and the purchaser of the abstract and land therein described was obliged to expend money to procure a cancellation and release and satisfaction of the tax deed, and thereafter commenced an action against the abstract company to recover damages sustained on account of the mistake and false representation made by the abstract and certificate thereto,—held, that the limitation of such action is governed by subdivision 4 of § 4054 of the Revised Codes, and that the cause of action in such case does not accrue until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Abstract of title — liability for mistake.

2. An abstract company, duly and regularly authorized to transact business under the laws of this state, which engages in the

Headnotes by AILSHIE, J.

Note. — The question as to the liability of title abstractors is considered in the note to *Anderson v. Spriestersbach*, ante, 176, and the earlier notes there referred to. As to whether the statute of limitations begins to run against an action to hold an abstractor liable, at the time of the breach of the contract or at the time the actual damages are sustained, is considered in the note to *Aachen & M. F. Ins. Co. v. Morton*, 15 L.R.A.(N.S.) 160.

business of making and selling abstracts of title, thereby represents to the purchasers of such abstracts that its employees are competent and qualified to make examinations of the records and to furnish such abstracts, and that they are expert therein, and that the purchaser of such abstract may safely rely upon the statements and representations contained in the abstract and certificate thereto.

**Limitation of action — mistake in abstract of title.**

3. One who sustains damage by reason of the mistake and false and fraudulent representation contained in an abstract may, under the provisions of subdivision 4 of § 4054 of the Rev. Codes, commence his action to recover damages within three years after discovering the fraud or mistake.

(September 12, 1912.)

**A**PPPEAL by plaintiffs from a judgment of the District Court for Ada County sustaining a demurrer to the complaint in an action brought to recover damages for the sale and delivery by defendant to plaintiffs of an incomplete abstract of title to a certain tract of land accompanied by a false certificate. Reversed.

The facts are stated in the opinion.

Mr. J. C. Johnston, for appellants:

In all actions for relief upon the ground of fraud or mistake, the cause of action shall not be deemed to have accrued until the aggrieved party discovers the facts constituting the fraud or mistake.

Shain v. Sresovich, 104 Cal. 405, 38 Pac. 52; Christensen v. Jessen, — Cal. —, 40 Pac. 747; Duff v. Duff, 71 Cal. 529, 12 Pac. 570; People v. Blankenship, 52 Cal. 619; Moore v. Moore, 56 Cal. 90; Sublette v. Tinney, 9 Cal. 423; Smith v. Irving, — Cal. —, 22 Pac. 170; Hayes v. Los Angeles County, 99 Cal. 81, 33 Pac. 769; Tarke v. Bingham, 123 Cal. 163, 55 Pac. 760; Manatt v. Starr, 72 Iowa, 677, 34 N. W. 784.

The statute of limitations begins to run from the time when the plaintiff's cause of action accrues, unless some recognized exception postpones its operation.

19 Am. & Eng. Enc. Law, 2d ed. 193, 212; Smith v. Irving, — Cal. —, 22 Pac. 170; Russell & Co. v. Polk County Abstract Co. 87 Iowa, 233, 43 Am. St. Rep. 381, 54 N. W. 212; Owen v. Western Sav. Fund, 97 Pa. 47, 39 Am. Rep. 794; Rankin v. Schaeffer, 4 Mo. App. 108.

Messrs. Wyman & Wyman, for respondent:

An action against an abstractor of titles for damages for giving a wrong certificate of title is not one on the bond which he has given pursuant to statute, nor on an agreement in writing, but on a contract not

in writing, and is hence barred in three years.

Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 47 Pac. 8.

The right of action against an abstractor for damages resulting from an incorrect abstract accrues at the time the examination is made and reported, and not when the error is discovered or damages result therefrom.

Lattin v. Gillette, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545; Russell & Co. v. Polk County Abstract Co. 87 Iowa, 233, 43 Am. St. Rep. 381, 54 N. W. 212; Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 47 Pac. 8; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Rankin v. Schaeffer, 4 Mo. App. 108; 1 Am. & Eng. Enc. Law, 2d ed. 221; Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co. 118 Tenn. 678, 12 L.R.A. (N.S.) 454, 102 S. W. 901, 12 Ann. Cas. 407; Warvelle, Abstracts of Title, pp. 9, 10.

Allshie, J., delivered the opinion of the court:

This action was instituted against the Idaho Title & Trust Company to recover damages for selling and delivering to the appellants herein in the month of April, 1907, an incomplete abstract of title to a certain tract of land, accompanied by a false certificate. It was alleged in the complaint that the plaintiffs about the month of April, 1907, applied to the defendant, which was engaged in making abstracts, for a full and perfect abstract of title to a certain tract of land, and that they thereafter prepared, made, and certified an abstract of title for which plaintiffs paid the required compensation, and that, relying on the truth and correctness of the certificate and abstract, the plaintiffs purchased the land, and that thereafter and about the 16th of September, 1911, they discovered for the first time that there had been a mistake made in compiling the abstract, and that, in truth and in fact, the land had been sold for taxes for the year 1894, and a tax deed had been issued therefor, and that the abstract which the plaintiffs purchased from defendant failed to show these facts; and they alleged that the certificate of abstract was false and untrue, in that it failed to disclose this outstanding tax deed, and that plaintiffs suffered damages in the sum of \$500, which sum they had to pay out in order to remove the tax deed and clear the title to the land covered by the abstract.

This action was commenced on the 12th of January, 1912. The abstract of title was sold and delivered to the appellants on the 15th day of April, 1907. The defendant company filed a demurrer to the complaint, on the grounds that the cause of action

was barred by the statute of limitations as prescribed by §§ 4050 and 4053 of the Rev. Codes. The court sustained the demurrer, and this appeal has been prosecuted.

The trial court held, and the respondent contends here, that the cause of action pleaded is governed by §§ 4050 and 4053 of the Rev. Codes, and that at the time of the filing of the complaint the cause of action was barred by the provision of these sections of the statute. Appellants contend that the cause of action pleaded is governed by 4054 of the Rev. Codes, and was not barred by the statute of limitations. Sections 4050 and 4053 of the Rev. Codes are as follows: Section 4050: "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows." Section 4053: "Within four years: An action upon a contract, obligation, or liability not founded upon an instrument of writing." That portion of § 4054 which is involved in this case, and on which appellants rely, reads as follows: "Within three years: . . .

(4) An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." It will be seen, therefore, that the appellant contends that this is an action for relief on the ground of mistake, or the constructive fraud resulting therefrom, and that the cause of action did not accrue until the discovery of the fraud or mistake which caused the injury. The respondent, on the other hand, contends that it is an action upon contract, not founded upon an instrument of writing. The courts appear to have considered this question in other states, some of them upon statutes similar to ours, and others independent of statute. The concrete cases against abstract companies seem to be generally with the position taken by respondent. *Russell & Co. v. Polk County Abstract Co.* 87 Iowa, 233, 43 Am. St. Rep. 381, 54 N. W. 212, was an action against an abstract company for negligence in making an abstract and damages arising on account of such negligence. It was held by the court in that case that the cause of action accrued when the abstract was delivered by the abstract company to the purchaser thereof, and that there was a breach of the contract immediately upon the delivery, and not when the injury occurred or the error was discovered. *Provident Loan Trust Co. v. Wolcott*, 5 Kan. App. 473, 47 Pac. 8, is an action against an abstractor for giving an incorrect certificate of title, and it was held that the cause of action arose at the date of the delivery of the abstract, and not at the time of the consequential damages.

*Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545, was an action against an abstractor for negligence in certifying that a party was the owner, when, in fact, he only had a half interest in the title to the property. It was held that the cause of action accrued at the time of the delivery of the abstract, and that the statute of limitations began to run at that time, notwithstanding the fact that the purchaser of the abstract did not discover the defect or error until after the statute of limitations had run, at which time he had to surrender one-half interest in the property. The Missouri courts have reached the same conclusion in *Rankin v. Schaeffer*, 4 Mo. App. 108, and *Schade v. Gehner*, 133 Mo. 252, 34 S. W. 576. See also note to *Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co.* 12 L.R.A.(N.S.) 454.

The case at bar differs from some, if not all, of the foregoing cases, in that it not only alleges the contract and purchase of the abstract and certificate, but it also alleges that through and by the mistake of the respondent the certificate to the abstract was false and untrue, and that, relying on the truth and correctness of the certificate, appellants made the purchase of the land, and subsequently sustained the injury and damage complained of. While this specific question is not dealt with at any length in the cases, it was recognized in the case of *Russell & Co. v. Polk County Abstract Co.* supra, wherein the court said: "The statute of limitations commences to run from the time a cause of action accrues. Code, § 2529. By § 2530 it is provided that in actions for relief on the ground of fraud or mistake the cause shall not be deemed to have accrued until the fraud or mistake has been discovered. The petition is without allegations to bring the case within the provisions of the latter section, and hence we are to inquire when the cause of action accrued without reference to its being grounded on fraud or mistake." Similar expressions are to be found in other decisions, which tend to indicate that the writers of the opinions did not want to unalterably commit themselves in such cases so as to be precluded from holding to a different rule as to the limitation of such actions where they were grounded in fraud or mistake. It seems to us, however, that the authorities dealing with the specific question of the furnishing of a false certificate of abstract fall somewhat short of the real and vital question involved in these transactions. The contract in fact is only partially made when a man applies to an abstract company for an abstract of title to a certain tract of land. The contract is not then consummated. It simply amounts to an application to

purchase an abstract of title covering all instruments and conveyances and encumbrances affecting the title to the property, or all such instruments and records affecting the title in some given particular, as, for instance, encumbrances, tax titles, or judgment liens, or mechanics' and laboring men's liens. On the other hand, the extent of the representation and liability of the abstract company is measured by the statements contained in the abstract and the terms of the certificate accompanying the same. The certificate annexed thereto may be of such a nature that it would attach little or no liability to the abstract company, and be of as little use to the one who applied for it, and would not meet the requirements and terms of the application made to the company to purchase an abstract of title to the specific piece of property. In any event, the abstract and certificate furnished the unmistakable evidence of the representations made by the abstract company, and of its part of the contract. If those representations are untrue, whether they be caused by mistake or actual fraud, it amounts in law to a fraud upon the purchaser of the abstract, and, if he suffers damage in consequence thereof, it seems to us he would have his action for false or fraudulent misrepresentation as to the character of the property the company sold him when it sold him such an abstract, and as to the condition and nature of the title to the property abstracted. *Renkert v. Title Guaranty Trust Co.* 102 Mo. App. 267, 76 S. W. 641. It was false in this,—that in the case at bar, while the abstract company represented to the purchaser of the abstract that the abstract included all tax deeds and certificates, in truth and in fact, it failed to disclose and report an outstanding tax deed, and was therefore not the kind of an abstract it purported to be,—a full and complete abstract of title,—nor was the title to the property abstracted such as the abstract represented it to be. There was no occasion for the purchaser of this abstract to go and examine the records, because that was the very reason why he purchased the abstract; and the abstract company had notice that the party applying for an abstract did not desire or intend to examine the records himself, but that he wanted an abstracter to do so, and that he expected to rely on the abstract and certificate thereto, rather than examine the records himself.

The authorities above cited hold that the cause of action in these cases arises upon the delivery to the purchaser of the abstract, and not when the mistake or fraud is discovered or the damage is sustained. This statement cannot be wholly true. A man might purchase an abstract of title to a

piece of property, and yet not purchase the property or finally consummate the deal for weeks, months, or even years, and his delay or failure to purchase not be caused by any representation contained in the abstract. In such case he would certainly have no cause of action against the abstracter if he never purchased the property or sustained any damage, nor would he have a cause of action against the abstracter if he should discover the mistake before purchasing the property. If the purchaser of a false and incorrect abstract should discover the mistake before consummating the deal and paying the money for the land, he would not be entitled to recover damages against the abstract company on account of an outstanding mortgage or encumbrance which he learned of before he made the purchase. If this be true, and it undoubtedly is, then no cause of action accrued to the purchaser of the abstract upon the delivery to him of the abstract. Bishop in his work on Noncontract Law, §§ 32, 33, 34, says: "Where there is not even a technical disturbance of a right, though there is a wrong, there is nothing to redress. In such a case, until the wrong has progressed to actual damage, the tort is incomplete, and no action for it can be maintained. Thus, though fraud is a wrong, one on whom it is practised can recover nothing therefor until it has injured him, or disturbed some right of his, and negligence gives no action to one menaced thereby, until he has suffered." See also 21 Am. & Eng. Enc. Law, p. 498; *Wabash County v. Pearson*, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134; *Power v. Munger*, 3 C. C. A. 261, 10 U. S. App. 289, 52 Fed. 705; *Freeman v. Venner*, 120 Mass. 424. As said by the supreme court of Massachusetts in *Freeman v. Venner*, supra, there must be a "concurrence of damages with fraud" in order to be actionable.

Now, taking the case at bar, the respondent held itself out as an expert in the examination of titles to real estate and in making and certifying the same, and was in the business for hire. *Chase v. Heaney*, 70 Ill. 268. The appellants made application for, and in return received, an abstract and certificate representing the condition of the title of certain land, and paid to respondent the price demanded. If appellants had never acted upon the representations contained in this abstract and certificate, or had never purchased the property, they would never have sustained any damage, and would have had no cause of action. We fail, therefore, to see how any cause of action accrued to them upon the mere delivery to them of the abstract and certificate. When, however, they acted upon the representations contained in this abstract and purchased the proper-

ty described therein, relying upon the abstract, a cause of action accrued to them as soon as they learned of the mistake and consequent misrepresentation made thereby. It seems to us, therefore, that no cause of action accrued until the appellants were called upon to pay some valid claim held against the property and not shown by the abstract, or had notice of the claim and the falsity of the representation. The abstract of title was true and correct, according to the pleadings, but the whole trouble arose out of the falsity of the certificate attached thereto in certifying that all conveyances, etc., affecting the title to the property were shown on the abstract. It seems to us that it is for just these reasons and for such cases as this that the legislature provided the exception contained in § 4054, to the effect that "the cause of action in such case"—that is, of fraud or mistake—shall "not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." As said by the supreme court of California in *Sublette v. Tinney*, 9 Cal. 423: "The policy of the law is that actions on this ground should be commenced within three years; but, that innocent parties may not suffer whilst in ignorance of their rights, the statute excepts them from the limitation until a discovery of the fraud." A man who buys land on the faith of an abstract furnished by a legally authorized company may have no occasion to examine the county records for years, and although a mortgage omitted from the abstract might not mature for some years after the abstract is made and delivered, and would then not be barred by the statute for five years after maturity, and the purchaser of the abstract and the land therein described might not learn of such mortgage until the commencement of an action to foreclose, still, if the statute runs in favor of the abstracter from the delivery of the abstract, the company would be released long before the falsity of the abstract could reasonably be discovered by the purchaser. This would not be justice, and ought not to be the law.

Stress seems to be placed by some of the courts on the fact that these actions primarily arise out of contract, and that the breach occurs and the cause of action accrues at the time of the delivery of the certificate. This was peculiarly the reasoning of the Iowa court in *Russell & Co. v. Polk County Abstract Co.* 87 Iowa, 233, 43 Am. St. Rep. 381, 54 N. W. 212, and other cases above cited seem to pursue substantially the same course of reasoning. Addison in his work on Torts, p. 17, says: "A tort may be dependent upon or independent of contract. If a contract imposes a legal duty upon a

person, the neglect of that duty is a tort founded on contract, so that an action *ex contractu* for the breach of contract or an action *ex delicto* for the breach of duty may be brought at the option of the plaintiff." It occurs to us that, while the course of reasoning adopted in some of the cases is primarily true, it does not disclose the whole truth of the situation. For example, many, if not most, torts arise out of preceding contracts. The breach, however, is not in pursuance of the contract, but in violation thereof. The tort upon which the action is founded may be the result of a violation of a contract duty or of a legal duty, and so it may be said with reference to the running of the statute of limitations under the provisions of §§ 4053 and 4054 of our Revised Codes. Under § 4053, the action, in order to be barred within four years, must have been founded upon a contract not in writing. On the other hand, subdivision 4 of § 4054, fixing the limitation at three years upon actions for relief on the ground of fraud or mistake, has no more reference to a fraud or mistake arising independent of contract than it has to a fraud or mistake occurring in or arising out of a contract. Indeed, the mistake referred to in this provision of the statute will ordinarily occur in a contract of some kind or other. The test, therefore, under subdivision 4 of § 4054 is not whether the fraud or mistake occurred in a contract or independently of contract, but the test rather is whether the action seeks relief from or on account of a fraud or mistake.

In this case the allegations are that a false certificate was delivered, and that the certificate was false by reason of a mistake made on the part of the abstracter. The whole transaction and consequent damage sustained harks back to the contract, but is no less a mistake and fraudulent representation. Although a misrepresentation is made through mistake of the facts as they actually exist, when such misrepresentation is made by one whose duty it is to know the facts and who represents himself as possessing all the facts with reference to the matter, the misrepresentation is in law equally as fraudulent and actionable as if it had been knowingly made. *Fisher v. Mellen*, 103 Mass. 503; *Smith, Frauds*, § 2. We conclude that the cause of action pleaded in this case falls within the purview and meaning of subdivision 4 of § 4054, and that the demurrer should not have been sustained.

In the face of the authorities above cited stating a somewhat different view, we have had some hesitancy in reaching the conclusion herein announced, not because we have any doubt whatever as to the soundness of

the course of reasoning we have adopted, but rather out of respect for the opinions of courts of distinction and high standing. The question, however, confronting us is a new one in this state, and we feel that we would rather announce a rule and place a construction on a statute which to us seems reasonable and at the same time is in consonance with the plainest dictates of justice, even though in doing so we may subject ourselves to the charge of holding against the weight of the adjudicated cases. What has been said herein with reference to the representations and liability of the company is predicated on the proposition that the demurrer admits the truth of all the material allegations of the complaint.

The judgment is reversed and the cause remanded, with directions to the trial court to overrule the demurrer, and hear the case on its merits. Costs awarded in favor of appellant.

Stewart, Ch. J., and Sullivan, J., concur.

#### OKLAHOMA SUPREME COURT.

LEWIS C. LAWSON, Receiver, et al., Plffs.  
in Err.,  
v.

FRANK L. WARREN.

('— Okla. —, 124 Pac. 46.)

**Mortgage — assignment of one note — priority.**

1. Where a person holding all of a series of notes secured by mortgage assigns one

Headnotes by ROSSER, C.

**Note. — Priority as between holders of different notes secured by the same mortgage.**

- I. In general, 183.
- II. The *pro rata* rule, 185.
- III. The earlier maturity rule, 199.
- IV. The prior assignment rule, 205.

##### I. In general.

This note includes cases of bonds secured by the same mortgage where the bonds have all the characteristics of notes, but not where the bonds can be distinguished therefrom, such as corporation coupon bonds intended to be sold to the public generally, etc. It also includes cases where notes are secured by a trust deed in the nature of a mortgage, or by a vendor's lien in case it has been treated by the court as a mortgage.

It is here assumed that the priority of notes secured by the same mortgage can be made the subject of contract between the parties interested, and that general rules apply only in the absence of contract. Cases 42 L.R.A. (N.S.)

of them, the assignee is entitled to be preferred to the assignor and the receiver of the assignor in the distribution of the proceeds of the mortgaged property.

**Receiver — title — liens.**

2. A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment.

(March 10, 1912.)

**ERROR** to the District Court for Logan County to review a judgment in plaintiff's favor in an action brought to enforce a purchase money note and to foreclose a vendor's lien on certain property. Affirmed.

The facts are stated in the opinion.

Mr. C. Dale Wolfe, for plaintiffs in error:

The proceeds of the mortgaged property should be distributed between the two notes *pro rata*.

Jones, Mortg. 6th ed. §§ 822, 1701a; Penzel v. Brookmire, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15; Donley v. Hays, 17 Serg. & R. 400; Mohler's Appeal, 5 Pa. 418, 47 Am. Dec. 413; Perry's Appeal, 22 Pa. 43, 60 Am. Dec. 63; Patrick's Appeal, 105 Pa. 356; Phelan v. Olney, 6 Cal. 478; State Bank v. Mathews, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; First Nat. Bank v. Andrews, 7 Wash. 261, 38 Am. St. Rep. 885, 34 Pac. 913; Bartlett v. Wade, 66 Vt. 629, 30 Atl. 4; Keyes v. Wood, 21 Atl. 860; Dixon v. Clayville, 44 Md. 573; McCurdy v. Clark, 27 Mich. 445; Jennings v. Moore, 83 Mich. 231, 21 Am. St. Rep. 601, 47 N. W. 127; Davidson v. Allen, 36 Miss. 421; Pugh v. Holt, 27 Miss. 461;

involving this feature are therefore not included in this note, except where the contract is incidental to the decision, or is inferred from facts creating an equity so as to affect the general rule.

There are three general rules, any one of which may govern the priority of notes secured by the same mortgage and in the possession of different holders: (1) The notes may have no priority, and share *pro rata* the insufficient proceeds of the mortgaged property. (2) The notes may have priority in the order in which they fall due. (3) The notes may have priority in the order in which they have been assigned.

The first of these rules is the only one capable of universal application. The second presupposes different dates of maturity, and the third different dates of assignment. But a great majority of cases involve the facts necessary to bring them within these two rules, so that the courts and the text-books, have treated them as general rules, rather than as exceptions to the first rule.

Batesville Institute v. Kauffman, 18 Wall. 151, 21 L. ed. 775.

Messrs. Warren & Miller, for defendant in error:

The notes shall be preferred in the order in which they mature.

Colebrooke, Collateral Securities, § 158; 20 Am. & Eng. Enc. Law, p. 1048; 27 Cyc. 1167; McVay v. Bloodgood, 9 Port. (Ala.) 547; Wilson v. Hayward, 6 Fla. 171; Funk v. McReynolds, 33 Ill. 481; Chandler v. O'Neil, 62 Ill. App. 418; Sargent v. Howe, 21 Ill. 148; Vansant v. Allmon, 23 Ill. 30; Koester v. Burke, 81 Ill. 436; Herrington v. McCollum, 73 Ill. 476; Horn v. Bennett, 135 Ind. 158, 24 L.R.A. 800, 34 N. E. 321, 956; Gerber v. Sharp, 72 Ind. 553; Murdock v. Ford, 17 Ind. 52; Harris v. Harlan, 14

Ind. 439; Hough v. Osborne, 7 Ind. 140; State Bank v. Tweedy, 8 Blackf. 447, 46 Am. Dec. 486; Doss v. Ditmars, 70 Ind. 451; Parkhurst v. Watertown Steam Engine Co. 107 Ind. 596, 8 N. E. 635; Minor v. Hill, 58 Ind. 180, 26 Am. Rep. 71; Davis v. Langsdale, 41 Ind. 403; Leavitt v. Reynolds, 79 Iowa, 348, 7 L.R.A. 365, 44 N. W. 567; Walker v. Schreiber, 47 Iowa, 529; Sangster v. Love, 11 Iowa, 580; Hinds v. Mooers, 11 Iowa, 211; Richardson v. McKim, 20 Kan. 346; Aultman-Taylor Co. v. McGeorge, 31 Kan. 329, 2 Pac. 778; Larabee v. Lumbert, 32 Me. 97; Mitchell v. Ladew, 36 Mo. 526, 88 Am. Dec. 156; Thompson v. Field, 38 Mo. 320; Speer v. Whitfield, 10 N. J. Eq. 107; Hunt v. Stiles, 10 N. H. 466; Bridenbecker v. Lowell, 32

The principles upon which each rule is based are stated in the opinion in the case above reported.

The earlier decisions are classified under these rules in the note to Horn v. Bennett, 24 L.R.A. 800.

But these, being general rules, cannot be applied rigidly. No court has hesitated to modify, abandon, or wholly reverse the rule it has adopted, where intervening equities demand it. The same facts constitute greater equities in the minds of some courts than in others. Hence, the decisions in one jurisdiction do not always agree with the decisions in another jurisdiction applying the same general rule. Each court has, however, been consistent with itself, so that, with the great number of reported cases, we have a distinct line of decisions for almost every jurisdiction. Each line of decisions differs in detail from almost every other line, so that a classification by general rules alone seems inadequate at present.

This note is a classification of the lines of decisions, each line placed under its general rule without separating the individual case from the line in which it belongs. The variations, with special reference to those caused by the equities arising out of the capacity in which the notes are held, are shown in the statement of the individual cases, and in the general statement at the head of each line of decisions.

It will be observed that in jurisdictions committed to the rule of early assignment, there is no occasion for invoking an exception in cases where the question of priority arises between an assignee and an assignor who retains one or more of the notes, as the general rule itself establishes the priority of the assignee.

But the early maturity rule, if applied without exception, would operate in some cases to give an assignor a priority over assignee; and the *pro rata* rule, if applied without exception, would always place the assignor and assignee upon the same footing as to priorities. As a matter of fact, however, many of the jurisdictions committed either to the rule of early maturity or the *pro rata* rule either refuse to apply

that rule at all as between assignor and assignee, or refuse to apply it where the assignor is liable as guarantor or indorser. There are also other equities that occasionally affect the operation of the general rule.

The courts in a few states have made decisions bearing somewhat remotely upon the subject of priority, but not sufficiently in point to indicate which rule would be followed. These decisions are here cited without classification.

Several notes held by different assignees and secured by the same deed of trust, which deed directs the trustee, after paying the costs, etc., to apply the residue "to the amount remaining unpaid upon said note or notes with interest accrued," and the balance to the debtor, have no priority, and the proceeds of sale should be applied *pro rata* in case of a deficiency. *Kitchin v. Grandy*, 101 N. C. 86, 7 S. E. 663.

*Kitchin v. Grandy*, supra, was cited and followed in *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 894, the mortgage containing a similar provision and the notes being held by assignees; but the court said: "In the absence of such provision in the mortgage, a very different case might be presented, though the courts of different states differ as to this." And though the question of priority between the payee and his assignee was not before the court, the remark was made: "If the payee himself held the later bonds unassigned, in a contest between him and the holder of the earlier bonds assigned by him, the assignees of the earlier bonds would be entitled to be paid in full by virtue of the liability by reason of the indorsement."

In *Passumpsic Sav. Bank v. Weeks*, 59 N. H. 239, it was held that giving up a first lien upon land, and accepting part of the mortgage notes later issued instead thereof, all at the request and for the benefit of the mortgagor, was a circumstance from which an agreement to give such notes priority over the other mortgage notes might be inferred.

A trust deed securing coupon bonds may provide that future advances made to the



Barb. 9; Kyle v. Thompson, 11 Ohio St. 616; Winters v. Franklin Bank, 33 Ohio St. 250; Wohlgenuth v. Standard Drug Co. 8 Ohio C. D. 9, 14 Ohio C. C. 316; Anderson v. Sharp, 44 Ohio St. 268, 6 N. E. 900; Gwathmey v. Ragland, 1 Rand. (Va.) 466; McClintic v. Wise, 25 Gratt. 448, 18 Am. Rep. 694; Marine Bank v. International Bank, 9 Wis. 57; Lyman v. Smith, 21 Wis. 674; Wood v. Trask, 7 Wis. 566, 76 Am. Dec. 230.

Rosser, C., filed the following opinion:

This suit was brought by Frank L. Warren against Robert M. Lee, Guy Gamble, E. E. Nolen, and Lewis C. Lawson as receiver of certain assets of the Arnold Mercantile Company, to recover on a certain

grantor by the trustee shall have priority in payment over the bonds and interest coupons, and notes in the hands of the trustee evidencing such advances will be preferred, on foreclosure, to the bonds in the hands of the owners thereof. Coon v. Bosque Bonita Land & Cattle Co. 8 N. M. 123, 42 Pac. 77.

No New Jersey cases directly in point as to facts have been reported. As bearing more or less upon the question, reference may be made to Stevenson v. Black, 1 N. J. Eq. 338; Collier v. Huson, 34 N. J. Eq. 38; and West End Trust Co. v. Wetherill, 77 N. J. Eq. 590, 78 Atl. 756.

## II. The *pro rata* rule.

Louisiana, Pennsylvania, and Michigan are three jurisdictions in which the courts of each take a different position in regard to the application of the *pro rata* rule as between the assignor and his assignee. As representative of three classes of cases, they are here taken out of their alphabetical order and placed immediately after the comments on the reported case.

### Oklahoma.

The case of LAWSON v. WARREN, here reported, fairly places Oklahoma under the *pro rata* rule generally. But the equity arising out of the fact that the holder of one note is the assignee of the holder of the other is held to be strong enough to take the case out of the general rule. Therefore, neither the assignor nor another having only his rights is allowed to compete with the assignee. The question of the assignor's liability on the indorsement is not commented upon, evidently for the reason that the court considered the assignee's equity strong enough to take the case out of the rule without such liability on the part of the assignor.

### Louisiana.

The decisions of the courts in this state, taken as a whole, support the Oklahoma case, both as to the general rule and as 42 L.R.A. (N.S.)

note for the sum of \$1,500, secured by vendor's lien on certain property in the town of Coyle, Oklahoma. The petition alleges that Robert M. Lee bought the property in Coyle from Gamble and Nolen, paying therefor \$2,000 in cash, and giving two notes for the sum of \$1,500 each, due respectively, October 1, 1908, and October 1, 1909; that the notes were assigned to the Arnold Mercantile Company, of Yeager, Oklahoma, before maturity; and that the Arnold Mercantile Company indorsed the note due October 1, 1908, to Frank L. Warren, the plaintiff. It is further alleged that Lewis C. Lawson, as receiver of certain assets of the Arnold Mercantile Company, holds the other note. A foreclosure of the vendor's lien is prayed for, and also judg-

to the strength of the equity arising between the assignor and assignee.

Where two parties owning land jointly give a joint mortgage thereon, securing notes, one half of which are made by each and indorsed by the other, the different holders of all of the notes share *pro rata* the proceeds of the sale of the undivided one-half interest. Gordon v. His Creditors, 5 Rob. (La.) 47.

All notes secured by the same mortgage and in the hands of assignees share *pro rata* in the proceeds regardless of the dates of the assignments. Adams v. Lear, 3 La. Ann. 144.

As between assignees of notes secured by the same mortgage, there is no preference but all share *pro rata* in the mortgage fund. Ventress v. His Creditors, 20 La. Ann. 359.

Different assignees of notes secured by the same mortgage share *pro rata* in the proceeds arising from the sale of the mortgaged property, without regard to the date of maturity of the notes or the date of assignments. Perot v. Levasseur, 21 La. Ann. 529.

Where one note is assigned before its maturity, and another after its maturity, both notes being secured by the same mortgage, the assignees share *pro rata* in the proceeds of the sale of the mortgaged property, for the date of transfer does not determine the rights of the holders. Begnaud v. Roy, 21 La. Ann. 624.

The fact that an assignee of one of the several notes secured by the same mortgage obtained the transfer after the note became due does not prevent him from sharing ratably with the assignees of the other notes, for all assignees take *pro rata* without regard to the dates of the transfers. Reine v. Jack, 31 La. Ann. 859.

But while the different owners of several notes generally share *pro rata* in the proceeds of a sale of the mortgaged property, yet, as between the assignee of one such note and his assignor, who retains another note, the assignee has priority. Salzman v. His Creditors, 2 Rob. (La.) 241.

The assignor of part of the notes secured by the same mortgage, who retains the other

ment against Robert M. Lee, the maker of the note for \$1,500, and that the proceeds of the property upon which the vendor's lien was obtained be applied, first, to the note held by plaintiff, and, second, to the second note held by Lewis C. Lawson.

The evidence shows that the note sued upon was the first of the two notes coming due, and was assigned by the Arnold Mercantile Company to Frank L. Warren before maturity, as collateral security for claims which he had for collection against that company. Within a few days after the assignment of the note to Warren, Lewis C. Lawson was appointed receiver to collect the second of the two notes. Judgment was rendered for plaintiff against Lee for the amount of the note with inter-

est and attorney fee, and also foreclosing the vendor's lien on the property in Coyle, and ordering it sold, and ordering that the proceeds be applied, first, to the payment of the note held by Warren, upon which judgment had been entered, and the balance upon the note held by the defendant Lawson.

The sole question presented in this case is as to whether or not the first of the two notes, which was assigned to Warren, upon which suit was brought, is entitled to priority, or to be first paid out of the proceeds of the property for the price for which it was given.

The question of priority of a series of notes secured by one mortgage or vendor's lien, when in the hands of different parties,

notes so secured, cannot come into competition with his assignees, and his assignment of a note after the insolvency and surrender of the maker of the notes cannot give such assignee any better standing than the assignor had. *Ventress v. His Creditors*, supra.

A mortgagee assigning one note, and retaining another secured by the same mortgage, cannot compete with his assignee for the proceeds of the mortgaged property, where there are not sufficient funds to pay both. *Barkdull v. Herwig*, 30 La. Ann. 618.

The fact that a mortgagee made a donation of one of the several notes secured by the same mortgage, to a person who later assigned it for value, will not change the rule of priority, so as to allow him, as the holder of the remaining notes so secured, to compete with the assignee for the proceeds of the mortgaged property. *Abney v. Walmsley*, 33 La. Ann. 589.

The fact that a mortgagee, in transferring one of several notes secured by the same mortgage, stipulated that he would not be held liable for the payment of the note, does not change the rule of priority, so as to enable him, as holder of the other notes, to share *pro rata* with the assignee in the proceeds. *Ibid*.

But a mortgagee assigning one of the three notes secured by the same mortgage may, by a definite written stipulation in the assignment, reserve to himself, as the holder of the two notes retained, the right to share *pro rata* in the proceeds of the sale of the mortgaged property as against the holder of the note assigned, and such stipulation will exempt him from being excluded under the rule that the assignor cannot compete with his assignees. *Howard v. Schmidt*, 29 La. Ann. 129.

An agreement to the effect that the mortgagee waives her mortgage in favor of a party lending to the mortgagor sufficient money to pay one of the two notes secured by the mortgage does not constitute that note a superior lien, for the reason that it would not affect the other note in the hands of an assignee, but could affect it only while it remained in the hands of the assignor. 42 L.R.A. (N.S.)

*Laplace v. Laplace*, 43 La. Ann. 284, 8 So. 914.

Where two or more notes secured by the same mortgage are made payable to different payees originally, it was held in *Herman v. Pfister*, 2 La. 455, that the assignees of one payee share the fund *pro rata* with the other payee, regardless of the dates of maturity of the notes.

As between five holders of as many notes, all of even date and like amount, and all purporting to be secured by the same mortgage, which mortgage secures only the amount of one note, it is held in *Garvey v. Conner*, 128 La. 489, 54 So. 968, that if, from an inspection of the notes and mortgage and from the testimony, it appears that the notes were actually issued at different dates, the note actually issued first will have priority.

It was held in *Gumbel v. Boyer*, 46 La. Ann. 1499, 16 So. 465, that a party paying one of several notes secured by the same mortgage, with subrogation to the rights of the mortgagee, cannot, by taking a formal, "without recourse" assignment thereof, invoke the rule which forbids the assignor, as the holder of the other notes, to compete with the assignee in the distribution; but it would be otherwise if he had taken a simple assignment.

A factor having a running account with the mortgagor and maker of several notes secured by the mortgage, who, as an accommodation to the mortgagor, has bought from the mortgagee one of the notes, will, it is held in *Gumbel v. Boyer*, supra, be treated as one who has paid the note with the rights of subrogation, rather than as an assignee of the note, even though the note has been formally assigned to him.

In *Moore v. Rogers*, 29 C. C. A. 636, 52 U. S. App. 699, 85 Fed. 920, in applying the law of Louisiana, the court held that, as between the surety on the earliest maturing of several notes secured by the same mortgage, and the mortgagee as holder of the indorsed note as well as the other notes, the proceeds of a sale on foreclosure should be applied *pro rata*, even if it was the intention of the maker and the payee to add the

is a question upon which there is great diversity of opinion among the courts, and it would not serve any good purpose to undertake to collect and weigh all the authorities bearing upon this question. The following extract from the case of Penzel v. Brookmire, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15, will show the extent of the divergency of views upon this subject, and also the reasons given for the various views maintained by the courts. "In the absence of such a stipulation or agreement, or special equities, the authorities are not agreed as to how the proceeds of the sale of property mortgaged to secure the payment of several notes, and sold under the mortgage, shall be appropriated, when the notes secured mature at different times, have been

assigned to different persons, and the proceeds are not sufficient to pay all of them. One class holds that the notes shall be paid in the order of their assignment. *McClintic v. Wise*, 25 Gratt. 488, 18 Am. Rep. 694; *Cullum v. Erwin*, 4 Ala. 452; *Griggsby v. Hair*, 25 Ala. 327; *Waterman v. Hunt*, 2 R. I. 298. Another, that the notes should take precedence in the order of their maturity. *Mitchell v. Ladew*, 36 Mo. 520, 530, 88 Am. Dec. 161; *Sargent v. Howe*, 21 Ill. 148; *Vansant v. Allmon*, 23 Ill. 30; *Koester v. Burke*, 81 Ill. 436; *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486; *Doss v. Ditmars*, 70 Ind. 451; *Marine Bank v. International Bank*, 9 Wis. 57, 64; *McVay v. Bloodgood*, 9 Port. (Ala.) 547; *Richardson v. McKim*, 20 Kan. 346, 350; *Hinds v.*

surety as additional security for the whole mortgage debt, the surety not being a party to such understanding.

#### Pennsylvania.

The line of cases decided by the Pennsylvania courts sustains the *pro rata* rule generally. The equity arising out of the fact that the holder of one note is the assignee of the holder of the other is held not to be strong enough to take the case out of the general rule, unless the assignor is liable on the indorsement. But where that liability exists, the same rule is applied as is applied in the Oklahoma case. Thus, this line of decisions supports the reported case generally, but is opposed to it only in the view taken with respect to the strength of the equity.

The case of *Donley v. Hays*, 17 S. & R. 400, is the earliest decision on this subject. The court was divided upon the question, the majority opinion holding that there is no priority among bonds made payable to the same payee, secured by the same mortgage, and falling due at different dates, so that the mortgagee retaining even the later maturing bonds is entitled to his *pro rata* share of the proceeds, provided there is no guaranty more than is implied in the mere assignments. The dissenting opinion was filed by Gibson, Ch. J., and held that there should be priority in the order in which the bonds were assigned. The case has been freely discussed pro and con in later decisions, but the majority opinion has prevailed and become the established law in the state.

In *Perry's Appeal*, 22 Pa. 43, 60 Am. Dec. 63, which was a case of four mortgages, each securing part of the purchase money, executed at the same time to the same mortgagee, the court, in applying to these facts the principles decided in *Donley v. Hays*, says of that case: "Mr. Justice Tod supported these conclusions in a clear and well-stated opinion, which, however, was somewhat shaken by the dissenting opinion of Chief Justice Gibson, and afterwards almost overthrown by the formidable assault 42 L.R.A. (N.S.)

made upon it by Mr. Justice Kennedy in *Cowden's Estate*, 1 Pa. St. 278. But in *Mohler's Appeal*, 5 Pa. 420, 47 Am. Dec. 413, Mr. Justice Rogers said, with the acquiescence of the whole court, that upon further examination and consideration they were persuaded *Donley v. Hays* was correctly ruled, and they adopted it as the law of the case they were considering. It has moreover been recognized in a variety of other cases, and implicitly followed in some of them. *Betz v. Heebner*, 1 Penr. & W. 280; *Carneghan v. Brewster*, 2 Pa. St. 43; *Yarnal's Appeal*, 3 Pa. St. 364; *West Branch Bank v. Chester*, 11 Pa. 290, 51 Am. Dec. 547. . . . We consider it settled law that there is no right of priority among them." This case, like some cited therein, is not in point here as to facts, but is so in principle, and in Pennsylvania it practically ended the contention over *Donley v. Hays*.

The facts in *Betz v. Heebner*, *supra*, are the same as *Donley v. Hays*, except the later maturing bonds together with the mortgage had been assigned by the mortgagee, he holding none, and the prior assignment of the earlier maturing bonds had been made without knowledge on the part of the assignees of the existence of the mortgage. That case was cited and followed irrespective of these differences.

A personal guaranty of payment in the assignment of one of several bonds secured by the same mortgage, made by the owner of all the bonds, will not give the bond so assigned priority over the other bonds subsequently assigned to assignees who had no notice of the guaranty; and it was further held in *Hancock's Appeal*, 34 Pa. 155, that parol evidence is not admissible to show a verbal agreement made at the time of the assignment, giving the bond priority, when no such priority is included in, or inferable from, the terms expressed in the assignment.

All of the bonds secured by the same mortgage are entitled to share the proceeds *pro rata*; and it was held in *Hodge's Appeal*, 84 Pa. 359, that if the holder of a bond is entitled to its proceeds, the holder of other bonds cannot set up against him

Mooers, 11 Iowa, 211; Walker v. Schreiber, 47 Iowa, 529; Wilson v. Hayward, 6 Fla. 171, 190; Kyle v. Thompson, 11 Ohio St. 616; Winters v. Franklin Bank, 33 Ohio St. 250. And a third class, that the proceeds should be applied *pro rata* in part payment of the several notes, irrespective of their dates of maturity or assignment. Donley v. Hays, 17 Serg. & R. 400, 404; Cowden's Estate, 1 Pa. St. 278; Mohler's Appeal, 5 Pa. 418, 420, 47 Am. Dec. 413; Perry's Appeal, 22 Pa. 43, 45, 60 Am. Dec. 63; Grattan v. Wiggins, 23 Cal. 16; Dixon v. Clayville, 44 Md. 573, 578; English v. Carney, 25 Mich. 178, 181; McCurdy v. Clark, 27 Mich. 445, 448; Parker v. Mercer, 6 How. (Miss.) 320, 324, 38 Am. Dec. 438; Cage v. Iler, 5 Smedes & M. 410, 43 Am.

Dec. 521; Pugh v. Holt, 27 Miss. 461; Andrews v. Hobgood, 1 Lea, 693; Paris Exch. Bank v. Beard, 49 Tex. 363; Delespine v. Campbell, 52 Tex. 4; Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. 907. The authorities which hold that the notes should be paid in the order in which they were assigned do so upon the ground that the debt secured was the principal, and the mortgage an accessory, and that the transfer of a part of the debt carried with it the assignment of so much of the lien created by the mortgage as is necessary to pay the part assigned as effectually as it existed in the mortgage, and that no second assignment can divest the first assignee of his lien and preference. The courts adhering to the doctrine that the notes should be paid in the order

mere informalities in the manner of its acquisition; the time and manner of its transfer, and the question of equitable or legal ownership are immaterial.

Where two sets of bonds are secured by the same mortgage, one set being paid in full by the mortgagor and delivered to him, but later, at his request, assigned by the mortgagee to a third party as security for a note of the mortgagor previously given, with the understanding that the assignment was to resuscitate the bonds and keep them alive only as to the mortgagor, but not as to the mortgagee, that intention of the parties will be given effect and the mortgagee will have priority. Zimmerman v. Raup, 162 Pa. 112, 29 Atl. 352.

Neither an assignor of notes, nor another whose equity rises no higher, can compete, as the holder of other notes secured by the same mortgage, with the assignee, if the assignor has indorsed the assigned notes so as to become liable thereon; and in Fourth Nat. Bank's Appeal, 123 Pa. 473, 10 Am. St. Rep. 538, 16 Atl. 779, this rule was applied so as to give priority to notes in the hands of assignees over those in the hands of either the attaching creditor of the assignor, or of his general assignee for the benefit of creditors. It was here pointed out that in Donley v. Hays, *supra*, the assignor was not liable on his indorsements.

#### Michigan.

The courts of this state apply the *pro rata* rule somewhat rigidly. They hold that the equity arising between the assignor and the assignee, if any there be, is not sufficient to take the case out of the general rule. In the latter position, this line of cases is not in complete harmony with either the Oklahoma case or the Pennsylvania decisions.

Michigan Stat. subdiv. 4, § 8498, provides that, in instalment mortgages, each note after the first shall be deemed to be a separate and independent mortgage. This includes instalments of interest as well as of the principal (see Edgar v. Beck, 96 42 L.R.A. (N.S.)

Mich. 419, 56 N. W. 15), but it does not change the rule of priority. This statute is referred to in McCurdy v. Clark, and Jennings v. Moore, *infra*.

In Cooper v. Ulmann, Walk. Ch. (Mich.) 251, the court cites with approval Donley v. Hays, 17 Serg. & R. 400, and decides that, as between the mortgagee retaining some of the notes and his assignee of the others, secured by the same mortgage, the law gives no preference, and that, regardless of the dates of maturity, they will share *pro rata* where the proceeds are insufficient to pay all.

But a mortgagee holding all of the notes secured by the same mortgage may agree, in assigning one, that the one assigned shall have the preference, and in that case the assignee shall be paid in full out of the proceeds before the mortgagee can share. Cooper v. Ulmann, *supra*.

Where the mortgagee assigned both of the two notes secured by the same mortgage, the one in blank and the other without recourse, together with the mortgage, and upon foreclosure and sale by the assignee a deficiency appeared, it was held in English v. Carney, 25 Mich. 178, that the two notes must share *pro rata* in the proceeds, and the mortgagee be held, on his indorsement, only for the deficiency on the indorsed note, and not for the whole deficiency.

All the notes secured by the same mortgage should share *pro rata* in the proceeds of sale, regardless of their dates of maturity and of who the holders are. *Ibid*.

Where several distinct payments (whether represented by one or more notes) are secured by the same mortgage, all are entitled, regardless of the dates of maturity, to share *pro rata* in the proceeds. McCurdy v. Clark, 27 Mich. 448.

As between the mortgagee as holder of some, and his assignee of one, of several notes secured by the same mortgage, there is no priority. Although the mortgagee may be liable to the assignee for the original debt, to pay which the note was assigned, yet it is error to give, on a foreclosure decree, priority to such note for

of their maturity say that the debt is the principal thing, and the mortgage to secure it is only an incident; that the assignment of the debt passes the mortgage without being referred to in the assignment; that 'the assignee of the debt takes the security by the assignment in the same condition and to the same extent as it was held by the payee at the time of the assignment, as security for the debt assigned, and succeeds under it to all the rights of the assignor;' that the assignor, the payee, in the absence of a stipulation to the contrary, had the right to foreclose the mortgage when default should be made in the payment of the notes first falling due, and as each one should fall due, and satisfy them out of the proceeds in the order of their

maturity, so far as the proceeds would extend, although there should not be enough to pay all; and that, therefore, inasmuch as the assignee, by the assignment of any one of the notes, succeeded to the rights which his assignor had, he has the right, in the event there is not enough to pay all, to be paid out of the mortgaged property so far as it will extend, according to the order in which his note stands in the line of maturity with the others secured by the mortgage, and that 'the different instalments in a mortgage, when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming payable.' . . . We do not think that either of the doctrines laid down by the

that reason. *Wilcox v. Allen*, 36 Mich. 160.

As between assignees of different notes secured by the same mortgage, there is no priority, and this rule will not be changed in favor of one assignee because he was induced to postpone foreclosure by incorrect representations made by the other, without showing to what extent he was damaged. *Burhans v. Mitchell*, 42 Mich. 417, 4 N. W. 178.

As between the mortgagee retaining the last maturing note and his assignee holding the earlier maturing ones, there is no priority, and parol testimony tending to show an agreement outside of the written assignment, to the effect that the assignee was to have priority, is not admissible. *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601, 47 N. W. 127.

A mortgage securing several notes may be so worded as to create two classes, and to give one class of notes priority over the other class; and where the language used is not ambiguous, parol evidence is not admissible to vary its terms so as to destroy that priority. *Dunham v. W. Steele Packing & Provision Co.* 100 Mich. 75, 58 N. W. 627.

An assignee for value of one of several notes secured by the same mortgage, which note is, by the terms of the mortgage, given priority over the others, cannot be deprived of that preference by any reformation of the mortgage, even though a case for reformation, as between the mortgagee and the holders of the other notes, be made out. *Ibid.*

#### Arkansas.

All notes secured by the same mortgage, which contains no stipulations as to the order in which they should be paid, and transferred to different assignees by the mortgagee, will, in the absence of any special equities arising out of the assignments, share *pro rata* in the proceeds arising from the sale of the mortgaged premises, regardless of their dates of maturity or assignment. *Penzel v. Brookmire*, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15, 42 I.R.A. (N.S.)

Several notes representing purchase money for land, and secured by a reservation in the deed (said to be equivalent to a mortgage), share *pro rata* the fund derived from the security, without regard to the dates of maturity of the notes. This rule was, in *Smith v. Butler*, 72 Ark. 350, 80 S. W. 580, applied between the assignee of two of the notes and a creditor of the mortgagee, who had a judgment against the maker of the notes as garnishee in attachment of the proceeds of another of the notes. An assignment of the attached note made by the mortgagee after service of the attachment on the maker was held to be null and void.

#### California.

The opinions here seem to approve the *pro rata* rule.

It was held in *Phelan v. Olney*, 6 Cal. 479, that the assignment by the mortgagee of one of two notes secured by the same mortgage carried with it a *pro rata* portion of the security, so that the assignee could foreclose the mortgage after it had been marked "satisfied" by an assignee of the other note.

*Phelan v. Olney*, is cited with approval and followed in *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883, and it is there held that a provision in the mortgage to the effect that default in payment of any instalment or of interest gives the mortgagee the option to declare the whole principal sum due, and to foreclose, inures to the benefit of any assignee of a note secured by the mortgage, for his *pro rata* share.

The priority of each of several notes secured by the same mortgage may be fixed by the mortgagee by agreement with his assignees of the several notes, and such an agreement may be implied from the circumstances of the transfer. *Grattan v. Wiggins*, 23 Cal. 16. While this case was decided according to the implied agreement, the court uses language that seems to indicate that the *pro rata* rule would be applied in the absence of such agreement.

The assignment and delivery of a mort-

two classes of decisions first mentioned is sustained by reason or equity. The notes are secured by one mortgage, executed for the equal benefit of all. It does not provide that one note shall be preferred to the others, but secures all equally or *pro rata*. The legal title to the property mortgaged is conveyed and held for the benefit of all. The rights and interests acquired in the property begin with the date of the mortgage, and not from the maturity or assignment of the notes, or the time when the cause of action arises. There can be no priority of rights in favor of one against the others, as the mortgage is one. The simple assignment of the notes does not change the mortgage and make it any less security for any of the notes than it was

before the assignment. The mortgage security in following the transfer of the notes as an incident does not pass by the assignment any farther than it was an incident at the time the transfer was made. The holders of the notes therefore stand *æquale jure*, and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all." See also *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 27 L.R.A. 663, 45 Am. St. Rep. 748, 29 S. W. 903; in which a number of authorities are cited, and which contains a lengthy discussion of the questions involved.

But these authorities do not apply to the facts of this case. This is not a conflict between two assignees, but is a conflict be-

gage with one of several notes secured thereby, to the assignee of the note, is a sufficient agreement to give the note priority over the other notes later assigned by the mortgagees to other persons. *Ibid*.

#### Connecticut.

The two decisions here are based upon the principles underlying the *pro rata* rule.

*Lewis v. DeForest*, 20 Conn. 427, was a case where a mortgagee had taken a mortgage to indemnify himself on indorsements he had made for the mortgagor, his liabilities on the indorsements greatly exceeding the value of the mortgaged property. He had taken another mortgage jointly with his son from the same mortgagor covering different property, this mortgage jointly securing a book account owed by the mortgagor to the son, and indemnifying the father on the same indorsements as were secured by the other mortgage. The mortgagee did, without selling the property, pay notes so indorsed in amount greatly exceeding the value of the property, and then became insolvent. The proceeds of the joint mortgage were applied by the court to the payment of the son's account *pro rata* with the total amount of the father's indorsements. The proceeds of the other mortgage were applied *pro rata* among all of the unpaid notes upon which the mortgagee was indorser, including some that had been paid by the mortgagee's coindorser, who had indorsed subsequent to the indorsement of the mortgagee.

In *Smith v. Stevens*, 49 Conn. 181, it was held that the assignment of two of the notes secured by the same mortgage and payable to the same payee carried with them a proportionate part of the mortgage security, and that the assignor could not, by a subsequent assignment of the other notes and mortgage, deprive the first assignee of his proportionate part of the security. The question of division of proceeds was not before the court. The notes matured at different times, those of the first assignee maturing last, but no point was made of that fact.

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#### Georgia.

The courts in Georgia hold to the *pro rata* rule, with a strong intimation that the rule would not be applied between the assignor and his assignee.

Where a mortgagee holds, secured by the mortgage, several notes and items of indebtedness of the mortgagor, among which is an accommodation note of a third party indorsed by the mortgagor and made wholly for the accommodation of the mortgagor, to the knowledge of the mortgagee, such note must be given its *pro rata* share of the proceeds realized upon the mortgage, and the nominal maker of the note can be held only for the difference between the amount of the note and the amount of its *pro rata* share of the proceeds, the mortgagee being trustee for all protected by the mortgage. *Kyle v. Chattahoochee Nat. Bank*, 96 Ga. 693, 24 S. E. 149.

Where a mortgage secures a note for the principal debt as well as several notes representing the interest thereon, it was held in *Berrie v. Smith*, 97 Ga. 782, 25 S. E. 757, that the interest notes in the hands of an assignee for value will at least share *pro rata* in the proceeds of the sale, with the principal note in the hands of the assignor, who is also the assignee of the mortgagee. Though not passed upon directly, it is strongly intimated that the assignee of the interest notes should have the priority. The court mentions the fact that the assignor was an indorser for value.

In *Roberts v. Mansfield*, 32 Ga. 228, it was intimated that an assignee of one of two notes secured by a mortgage will have priority over the mortgagee, who retains the other note, although it matures earlier than the one assigned; but that question was not before the court.

A mortgagee, in assigning one of two notes secured by his mortgage, may stipulate that the note retained by himself shall have priority over the one assigned, but he must prove that he actually made such a stipulation, and that the present holder of the note had notice thereof. *Ibid*.

In *Smith v. Bowne*, 60 Ga. 484, the court

tween the assignee of the first note and the receiver holding the second note, and as such standing in the shoes of Arnold Mercantile Company. In this case the second note was retained by the Arnold Mercantile Company, and, as between it and Warren, its assignee, equity would require that its assignee be first paid out of the mortgage fund. "An assignee of the mortgage with part of the debt is generally entitled to payment in preference to the mortgagee who retains one of the notes; while, as between different assignees of mortgage bonds or notes, priority of assignment generally gives no preference, though the cases are not in harmony. . . . Where a holder of a mortgage assigns a part of it, although he warrants only the existence of the debt

at the time of the transfer, it would be contrary to good faith to permit him, after receiving the money for this part of the claim, to come into competition with his assignee, if the property prove insufficient to pay the claims of both. Unless the intention be plainly declared on the face of the assignment that the assignee is to share *pro rata* in the security with the assignor, the equitable construction of it is that it must in the first place be applied for the payment of the part of the debt which was assigned." Jones, *Mortg.* 6th ed. § 1701. See *Bryant v. Damon*, 6 Gray, 564; *Knight v. Ray*, 75 Ala. 383; *Parkhurst v. Watertown Steam Engine Co.* 107 Ind. 594, 8 N. E. 635; *Cullum v. Erwin*, 4 Ala. 452. "When the mortgagee assigns one or more

indirectly holds that all the assignees of notes secured by the same mortgage should share *pro rata* in the proceeds arising from the sale, whether or not they have reduced their claims to judgment.

#### Indiana.

The courts in this state apply the *pro rata* rule only where the notes are made originally payable to different payees. The earlier maturity rule is applied where the notes are originally made payable to the same payees. See "Indiana," under that rule, *infra*.

Where a single mortgage is given to secure separate obligations to different parties, evidenced by notes maturing at different dates, no priority prevails, and the holders of the notes share *pro rata*. *Shaw v. Newsom*, 78 Ind. 335.

As a subordinate question to the main decision, it was held in *Moffitt v. Roche*, 76 Ind. 75; *Moffitt v. Roche*, 77 Ind. 48, and *O'Brien v. Moffitt*, 133 Ind. 660, 36 Am. St. Rep. 566, 33 N. E. 616, that there is no priority among several notes of even date, maturing at the same time, secured by the same mortgage, and payable to different persons.

Where one mortgage secures two notes identical in date, amount, and time of maturity, but payable to different persons, there is no priority, and each takes *pro rata* if there is not sufficient for both. *Chaplin v. Sullivan*, 128 Ind. 50, 27 N. E. 425.

Where several notes payable to different persons, matured at different times, and were secured by the same mortgages, all of the payees being also mortgagees, the rule of priority according to maturity has no application. *Goodall v. Mopley*, 45 Ind. 355.

#### Kentucky.

All notes secured by the same mortgage should, as between different assignees, share *pro rata* in the proceeds of the sale of the mortgaged property, and any general equitable offset that the mortgagor has against

the mortgagee should be deducted ratably from the amount of the respective notes. *Campbell v. Johnston*, 4 Dana, 178.

#### Louisiana.

See *supra*.

#### Maine.

The courts in Maine have adopted the *pro rata* rule, and intimated that it would be applied between assignor and assignees.

In *Moore v. Ware*, 38 Me. 496, it was intimated, though not definitely decided, that the mortgagee holding some, and his assignee the others, of several notes secured by the same mortgage, were to share the proceeds *pro rata*.

The holder of each of several notes secured by the same mortgage is entitled to a proportionate share of the property, and the mortgagee or the legal holder of the mortgage holds the same in trust for the holders of the notes secured thereby. *Johnson v. Candage*, 31 Me. 28.

In *Holway v. Gilman*, 81 Me. 185, 16 Atl. 543, it appeared that the mortgagee sold the first maturing of three notes secured by the same mortgage, agreeing to assign part at least of the mortgage, delivered the note without assignment, and refused to execute and deliver the assignment of the mortgage. He took possession of and sold the mortgaged personal property, which was of sufficient value to pay all the notes. The court ordered specific performance of the contract, stating that the three notes should share *pro rata* in the proceeds.

#### Maryland.

The position taken by the courts in this state is exactly the same as that of the Pennsylvania courts.

The priority of notes secured by the same mortgage may be fixed by agreement, express or implied, between the mortgagee and his assignee, and such an agreement will apply to notes subsequently assigned. *Chew v. Buchanan*, 30 Md. 367.

And where a mortgagee assigns the first

of the notes, and retains the remainder of a series, it is generally held that the assignee is entitled to a priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature." 3 Pom. Eq. Jur. 3d ed. § 1203. Alden v. White, 32 Ind. App. 671, 102 Am. St. Rep. 261, 66 N. E. 509, 67 N. E. 949; Whitehead v. Fisher, 64 Tex. 639; Douglass v. Blount, 22 Tex. Civ. App. 493, 55 S. W. 526. The syllabus in Anderson v. Sharp, 44 Ohio St. 260, 6 N. E. 900, is as follows: "K. executed and delivered to T. three notes, payable to T.'s order, due in one, two, and three years from date, and a mortgage to secure their payment. Before either note

became due, T. indorsed the notes, waiving demand and notice, and delivered both to A. with an assignment of the mortgage. The note maturing in one year, not being paid when due, was put in judgment against K. as maker and T. as indorser. K. being insolvent, T. paid the judgment. He then commenced suit to foreclose the mortgage, claiming the benefit of the mortgage security and a lien prior to the lien of A., who held the remaining two notes, which were then past due. A., by answer and cross petition, alleged facts showing T.'s liability as indorser upon the two notes, that K. was insolvent, that the lands would prove insufficient to satisfy the whole mortgage debt, claiming priority of lien, praying foreclosure and full relief. Later S., on his mo-

maturing of several notes secured by the same mortgage, together with the mortgage, using language intimating that such note is to have priority over the others, an agreement to that effect will be inferred, and the note so assigned will have priority over the others subsequently assigned in practically the same way. Ibid.

As between the mortgagee holding notes and his assignee of other notes secured by the same mortgage, there is no priority, if the assignment is such that the mortgagee is not liable as indorser, and they share *pro rata*; but if he is liable on the indorsement, then the assignee will be preferred. Dixon v. Clayville, 44 Md. 573.

As between the different assignees of the several notes secured by the same mortgage, there is no preference, and where the proceeds of the sale are insufficient to pay all, they will take *pro rata*. Ibid.

But parol testimony as to the intention of the parties, to qualify or change the legal effect of the assignment of one of several notes secured by the same mortgage, is incompetent, where the note has the written indorsement of the assignor. Ibid.

Under a mortgage executed for the purposes of securing the payment of all and every sum or sums of money then owing or which might thereafter be due and owing from the mortgagor to the mortgagee, upon any promissory note, or notes negotiated or to be negotiated with the mortgagee, of which the mortgagor might be drawer or indorser or otherwise howsoever, it was held in Union Bank v. Edwards, 1 Gill & J. 346, that where the proceeds of sale of the mortgaged property were insufficient to cover the amount of the mortgagor's otherwise unsecured notes in the hands of the mortgagee, equity would not compel a ratable application of the fund for the benefit of the surety on other notes of the mortgagor, discounted by the mortgagee after the execution of the mortgage, but before the sale.

#### Massachusetts.

The *pro rata* rule is here adopted, but no 42 L.R.A. (N.S.)

case has arisen involving the equity arising between assignor and assignee.

In Burnett v. Pratt, 22 Pick. 556, it was said that where a joint mortgage is given to two or more mortgagees, securing notes each payable to an individual mortgagee, the notes share *pro rata*; but this exact question was not before the court.

The rule of priority between notes secured by the same mortgage may be changed by agreement between the holder of all of the notes and his assignee of part of them, and, by recording the assignment containing the agreement, constructive notice thereof is given to all subsequent assignees of the other notes. Bryant v. Damon, 6 Gray, 564.

An assignment of the later maturing of two notes secured by the same mortgage, accompanied by an assignment of the mortgage together with all of the mortgagee's right, title, and interest therein, so far as the same is intended to secure the payment of the note assigned, with a covenant of warranty against all persons claiming under the mortgage, and saving only the mortgagor's right of redemption, was held in Bryant v. Damon, supra, to give that note priority over the earlier maturing note then in the mortgagee's possession, and, upon the recording of the assignment, all assignees of the other note are affected with notice of this priority.

A transfer by the mortgagee of the earlier maturing of two notes secured by the same mortgage, accompanied by an assignment of the mortgage "and the real estate thereby conveyed, so far as the same is security for the said note thereby secured," gives the note assigned priority over the one retained and subsequently assigned. Foley v. Rose, 123 Mass. 557.

But where the mortgagee made a transfer of part of the notes secured by the same mortgage, accompanied by an assignment of the mortgage "to the extent" of the amount of the notes assigned, and provided that his security under the mortgage should not thereby be impaired as to the two notes retained by him, which notes he subsequently assigned, it was held in Lane v. Davis,



tion, became plaintiff, and filed supplemental petition averring purchase from T., and assignment of all his rights and interest in the mortgage and as plaintiff in the suit, and claiming priority of lien. The land was sold. The sum realized was not sufficient to satisfy the whole indebtedness. Held that A. was entitled to payment in full from the proceeds before application of the money to the claim of S." And the same rule applies where a person to whom all of a series of notes have been assigned assigns one of the series to a third person. *Jenkins v. Hawkins*, 34 W. Va. 799, 12 S. E. 1090.

The reason the assignee is to be preferred is founded on the plainest principle of equity. When two notes are assigned to differ-

ent persons, they are both presumed to have paid value, and they must share equally in the proceeds of the mortgaged property in order to preserve the equality which is equity. But to apply the same rule between the mortgagee and a person to whom he had transferred one of the notes would lead to inequality. For illustration, say that the mortgagee holds two notes for \$1,000 each. He assigns one of them for value. The property securing their payment only brings \$1,000, or enough to pay one note. If the mortgagee shares in the proceeds he will get out of the debt \$1,500, the \$1,000 he received for the first note and the \$500 he receives from the proceeds of the mortgaged property, while the assignee for half the debt only receives \$500.

14 Allen, 225, that the first assignee took only a portion of the security and had no authority to foreclose the whole mortgage, therefore, after he had foreclosed for his share, and sold the interest in the land thereby acquired; he was not liable to the second assignee for any part of the proceeds.

Where one was surety on several notes, and had taken a mortgage from the maker of the notes indemnifying himself against loss on the indorsements, it was held in *Eastman v. Foster*, 8 Met. 19, that the payees of the notes had a lien on the mortgaged property in preference to other creditors of the mortgagor, and as among themselves they shared ratably in the proceeds. But since the indorser was liable on only one of the notes, because of the statute of limitations, that note had priority over the others, because the primary object of the mortgage was to indemnify the surety.

#### Michigan.

See *supra*.

#### Minnesota.

The *pro rata* rule prevails in this state, apparently without reference to the capacity in which the notes are held.

Minnesota Gen. Stat. chap. 81, §§ 3 and 4, require all instalments to be treated as separate mortgages, and this statute is construed in *Watkins v. Hackett*, 20 Minn. 106, Gil. 92; *Fowler v. Johnson*, 26 Minn. 338, 3 N. W. 986, 6 N. W. 486; and *Stan-dish v. Vosberg*, 27 Minn. 175, 6 N. W. 489. But it does not change the rule of priority (see *Wilson v. Eigenbrodt*, *infra*), hence it is not within the scope of this note.

Minnesota Gen. Stat. 1878, chap. 81, § 4, which provides that in case of foreclosure for an instalment, the proceeds of the sale, after satisfying the instalment due, shall be applied towards the payment of the residue of the sum secured and not yet due, does not change the rule that all notes secured by the same mortgage share *pro rata* in the proceeds of sale, regardless of their respective dates of maturity or of assign-

ment. *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907.

As between two assignees holding notes secured by the same mortgage, there is no priority, and each takes *pro rata*, regardless of the dates of maturity or of assignment. *Ibid*.

In *Hall v. McCormick*, 31 Minn. 280, 17 N. W. 620, the court cites and follows *Wilson v. Eigenbrodt*, *supra* but it does not appear in what capacity the different parties held the notes.

It is competent for a mortgagee, while owner of both of the two notes secured by the same mortgage, to sell either note in such a manner as to give priority to it over the one retained, and his agreement will be binding upon the subsequent assignee of the note retained, the record of the agreement being constructive notice to all subsequent purchasers. *Solberg v. Wright*, 33 Minn. 224, 22 N. W. 381.

The assignment of the later maturing of two notes secured by the same mortgage, with an assignment of the mortgage "to secure the payment of said note," made by the mortgagee, who owns both notes, the assignment being duly recorded, gives the assigned note priority over the other note, subsequently assigned, accompanied by the mortgage without any written assignment thereof. *Ibid*.

#### Mississippi.

Here the courts have applied the *pro rata* rule generally, but it must be noted that in each decision a point seems to be made of the fact that all of the notes were due at the time of foreclosure. This might be intended to leave the court free to apply a different rule where some of the notes are not due at that time. If so, such a rule would be different from that of any other state. Here, the equity arising between the assignor and the assignee is not strong enough to take the case out of the general rule, at least where the assignor is not liable on the indorsement.

Where the earliest maturing of three notes secured by the same mortgage is in-

The mortgagee would thus receive more than if he had kept both notes. This is not right. The same illustration applies to the case of a person to whom all of a series of notes have been assigned, and who afterwards assigns one of the series.

The receiver stands in the shoes of the Arnold Mercantile Company. His right is not greater than theirs. If the plaintiff had priority as against the Arnold Mercantile Company, he has the same right against the receiver. In *American Trust & Sav. Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 345, 52 N. E. 793, the court said: "It is well established that, when a court takes possession of the property of an insolvent corporation, and appoints a receiver, such receiver 'is the arm of the

court,' by which it administers the trust for the benefit of the creditors. But the court receives such property impressed with all existing rights and equities of creditors, and the relative rank of claims, and the standing of liens remains unaffected by a receivership. Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it. *Gluck & B. Receivers*, § 6; 20 Am. & Eng. Enc. Law, p. 407; *Woerishoffer v. North River Constr. Co.* 99 N. Y. 398-402, 2 N. E. 407; *Hubbard v. Hamilton Bank*, 7 Met. 340; *Minchin v. Second Nat. Bank*, 36 N. J. Eq. 436; *Snow v. Winslow*, 54 Iowa, 200, 6 N. W. 191; *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419. And it is as much the duty of a receiver, in administering an estate, to pro-

ceeded by a third party, all notes being due at the time of foreclosure, it was held in *Parker v. Mercer*, 6 How. (Miss.) 320, 38 Am. Dec. 438, that, as against the mortgagee, the mortgagor cannot, to protect the surety on the first note, have it paid first, but that all the notes shall share ratably in the proceeds.

The proceeds of the sale of property under a deed of trust securing several notes, all of which are due, should be applied ratably to the payment of the notes, regardless of when they became due. *Cage v. Iler*, 5 Smedes & M. 410, 43 Am. Dec. 521.

As between the assignee of one of several notes secured by the same mortgage, and the mortgagee as holder of the others, the court in *Terry v. Wood*, 6 Smedes & M. 139, 45 Am. Dec. 274, refused to reverse a decree made on foreclosure proceedings at the suit of the assignee, finding the amount due the assignee, appointing a commissioner to sell the property or enough of it to pay the sum due the assignee, to make deeds to the purchaser, and to bring the proceeds of the sale into court, where it did not appear by the pleadings or proof that the mortgaged estate was insufficient to pay all claims.

The lien of the assignee of one of several notes secured by the same mortgage is not divested as against the mortgagee holding the other notes, by the fact that before maturity he had assigned the note, but had been compelled to take it up after maturity because of nonpayment; nor by the fact that he had reduced his note to judgment, arrested the maker on mesne process, but later, out of clemency, discharged him. But it would have been otherwise if the arrest had been on final process. *Ibid.*

Nor is such lien divested as to the mortgagee holding the other notes, by the fact that the assignee accepted collateral security from the debtor, and later, in good faith, exchanged it for notes which proved to be worthless. *Ibid.*

As between two assignees of notes secured by the same mortgage, both assignments being made before the first note was due, there

is no priority, and they share ratably in the proceeds of sale. *Henderson v. Herrod*, 10 Smedes & M. 631.

The assignment of the earlier maturing of two notes secured by the same mortgage, accompanied by a written instrument by which the assignee is empowered to use the mortgage in the collection of the note, this instrument being unrecorded, will not change the *pro rata*, rule of distribution, so as to give that note priority over the other one subsequently assigned. *Ibid.*

All notes secured by the same mortgage, and due at the date of the foreclosure, whether the controversy be between the surety of the mortgagor and the mortgagee, or between the different assignees of the mortgagee, should be paid *pro rata*, where the fund is insufficient to pay all, but a preference may be given to some of them by the terms of the mortgage, or the mortgagee in assigning them may design to impart a prior right of satisfaction to one or more of the assignees. *Bank of England v. Tarleton*, 23 Miss. 173.

And an agreement to change the *pro rata* rule of distribution among notes secured by the same mortgage, so as to give some priority, need not be expressed, but may be implied from the circumstances showing the intention of the parties. *Ibid.*

And the parties will be held to have intended to give priority of payment to notes in the hands of a holder who formerly held a prior and exclusive mortgage upon the same property, but, in order to permit the mortgagor to sell the mortgaged property, consented to and did satisfy his mortgage, accepting, in lieu thereof, part of the notes secured by a new mortgage made by the vendee of the former mortgagor. *Ibid.*

As between the mortgagee and his assignee of one of two notes secured by the same mortgage (a deed having all the incidents of a mortgage), there is no priority, and in the absence of an agreement, the proceeds should be divided *pro rata*. *Pugh v. Holt*, 27 Miss. 461.

The different assignees of two notes secured by the same mortgage, and both due

fect valid preferences and priorities, as it is to make a just distribution among the general creditors." In *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111, 45 S. E. 404, the court said: "Assignees, trustees in bankruptcy, and receivers are not purchasers for value, and take the estate of the insolvent subject to all set-offs, liens, and encumbrances and in the plight existing at the date to which his title is ultimately referred. *Powers v. Central Bank*, 18 Ga. 658; *Georgia Seed Co. v. Talmadge*, 96 Ga. 255, 22 S. E. 1001." In *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919, in a suit against a receiver to reform a mortgage given by the firm of which he was appointed receiver, the court said: "As such receiver he took the property of the partnership, subject to

the equity of the complainant to have the mortgage reformed. We do not see that he occupies any better position with reference to the property to be included in the mortgage as reformed than that of an assignee under a general assignment for the benefit of creditors in respect to property conveyed by an unrecorded mortgage. . . . We understand it to be the established doctrine, both in England and in this country, that assignees in insolvency or bankruptcy, whose rights as representing the general creditors are certainly as great as those of a receiver of a partnership, in the absence of fraud and of statutory regulations, take only the debtor's rights, and consequently are affected with all claims, liens, and equities which would affect the debtor if he

at the time of foreclosure, should share the proceeds *pro rata*, unless by agreement, express or implied, one is given priority; and the fact that the mortgagee has assigned one in a way to become liable upon the indorsement, and the other without recourse, is not a circumstance upon which such an agreement can be inferred. *Jefferson College v. Prentiss*, 29 Miss. 46.

In the case of *Wooten v. Buchanan*, 49 Miss. 386, there was no mortgage given, but the court cites with approval the *pro rata* rule as stated in *Parker v. Mercer and Cage v. Iler*, *supra*, and applies the principle to the case before it.

In *Goar v. McCanless*, 60 Miss. 244, the court cites *Bank of England v. Tarleton*, *supra*, with approval, to the effect that an agreement giving part of the notes secured by the same mortgage priority may be inferred from circumstances, and holds that a division of the security into as many trust deeds as there are notes, and a sale of the notes at different times and recording the corresponding mortgages, constitute, such a circumstance. There were different mortgages, but the case is here cited because of the particular manner in which it is viewed by the court.

#### Nebraska.

The *pro rata* rule prevails in this state, but it is not applied between assignor and assignee, at least where the former is liable on the indorsement.

In *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500, 30 N. W. 686, the court adopts the rule that two assignees holding separate notes maturing at different times, and secured by the same mortgage, will be paid from the proceeds of sale *pro rata*, where the same is not sufficient to pay both, no matter who holds the mortgage or an assignment thereof.

In *Todd v. Cremer*, 36 Neb. 430, 54 N. W. 674, the court cites with approval and follows *Studebaker Bros. Mfg. Co. v. McCargur*, *supra*.

It was held in *State Bank v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930, 42 L.R.A. (N.S.)

that notes secured by the same mortgage, in the hands of different assignees, take *pro rata*, regardless of their dates of maturity or dates of assignment, and without regard to the fact that some were indorsed in blank and others without recourse. It was here strongly intimated that the assignor of part of such notes would not be allowed, as holder of the others, to compete with his assignees, if the assignment was in blank.

A mortgagee holding several notes secured by the same mortgage may, by agreement with the assignees as he assigns the notes, change the *pro rata* rule so as to give priority to some of the notes; and such an agreement may be implied from the circumstances of the transfer. *Preston v. Morsman*, 75 Neb. 358, 106 N. W. 320.

And where the mortgagee assigns some of the notes as collateral security for his personal note, it will be inferred that he intended to give his assignee priority to the extent of the debt, over the note he retains secured by the same mortgage. *Ibid*.

Again, under such circumstances, equity would, in avoiding circuity of action, refuse to allow him to share *pro rata* with the assignee and compel the assignee to recover from him on the note secured. *Ibid*.

As between assignees of notes secured by the same mortgage, one of whom holds the note as collateral security for the note of the mortgagee, and the other by subsequent assignment from the mortgagee after the terms of the mortgage had brought the note to maturity because of default, the former has priority, for the reason that the latter purchased a matured note, hence took no higher right than the mortgagee had. *Ibid*.

In *Harman v. Barhydt*, 20 Neb. 625, 31 N. W. 488, the court says that a transfer of some of the notes secured by a mortgage is a transfer of the mortgage *pro tanto*, which would seem to indicate a priority in the order of assignment, but for authority the court cites *Studebaker Mfg. Co. v. McCargur*, *supra*, where the same expression is used, and in that case the proceeds were distributed *pro rata*; likewise the court

himself were asserting his interest in the property. *Mitford v. Mitford*, 9 Ves. Jr. 87; *Sherrington v. Yates*, 12 Mees. & W. 855, 1 Dowl. & L. 1032, 13 L. J. Exch. N. S. 249; *Brown v. Heathcote*, 1 Atk. 160; *Winsor v. McLellan*, 2 Story, 492, Fed. Cas. No. 17,887; *Fletcher v. Morey*, 2 Story, 555, Fed. Cas. No. 4,864; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,873; *Re Griffiths*, 1 Low. Dec. 431, Fed. Cas. No. 3,540; *Re Dow*, 6 Nat. Bankr. Reg. 10; *Coggeshall v. Potter*, *Holmes*, 75, Fed. Cas. No. 2,955; *Johnson v. Patterson*, 2 Woods, 443, Fed. Cas. No. 7,403; *Goddard v. Weaver*, 1 Woods, 257, 260, Fed. Cas.

No. 5,495; *Re Collins*, 12 Nat. Bankr. Reg. 379, 12 Blatchf. 548, Fed. Cas. No. 3,007; *Platt v. Preston* (D. C.) 3 Fed. 394; *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Stewart v. Platt*, 101 U. S. 731, 739, 25 L. ed. 816, 818; *Hauselt v. Harrison*, 105 U. S. 401, 406, 26 L. ed. 1075, 1076; *Adams v. Collier*, 122 U. S. 382, 30 L. ed. 1207, 7 Sup. Ct. Rep. 1208; *Brown v. Brabb*, 67 Mich. 17, 22-32, 11 Am. St. Rep. 549, 34 N. W. 403; *Jones, Chat. Mortg. § 241.*" In *Miller v. Savage*, 60 N. J. Eq. 204, 46 Atl. 632, the court said: "His [the receiver's] title to the property of the debtor is exactly the same as the

uses the same expression in *Todd v. Cremer*, supra, and there holds to the *pro rata* rule.

#### New York.

' As among different indorsers, and as between indorsers and the mortgagee, all the notes being secured by the same mortgage, there is no priority, and the fund from sale on foreclosure should be applied *pro rata*, where it is not sufficient to pay all. *Bridenbecker v. Lowell*, 32 Barb. 9.

In *Re Preston*, 54 Hun, 10, 7 N. Y. Supp. 92, it was held that where a mortgage was given to secure several notes of the mortgagor previously given to the mortgagee, but at the time of the execution of the mortgage, unknown to the mortgagor, all but one of the notes had been assigned to different persons, all of the notes shared *pro rata* in the proceeds; and the fact that the mortgagee had made a general assignment prior to the execution of the mortgage (the mortgage being made to his assignee), in which general assignment he had directed that the unassigned note should have first preference, and notes in the hands of a certain creditor should have second preference, can make no difference. There is no reference made to the date of maturity or date of assignment of the notes, and no point is made of the fact that the mortgagee's general assignee held one note. That note shared equally with the others.

In *Mechanics' Bank v. Bank of Niagara*, 9 Wend. 410, no general rule was followed; the case did not involve notes, the contest being between the mortgagee and his assignee of a part of the indebtedness named in the bond, and the decision was controlled by the terms of the assignment. Again, in *Granger v. Crouch*, 86 N. Y. 494, the court expressed an unwillingness to follow the prior maturity rule; but that was a case of concurrent mortgages, and the court pointed out this fact as distinguishing it from cases in other states holding to that rule.

Where a mortgage secured a note and a draft upon which the mortgagor was the principal debtor and a third party was accommodation indorser, also a note upon which the mortgagor was accommodation indorser for an insolvent maker, all in the 42 L.R.A. (N.S.)

hands of the mortgagee, it was held in *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543, 3 L.R.A. 302, 8 Am. St. Rep. 775, 20 N. E. 357, that, as between the mortgagee and the accommodation indorser for the mortgagor, the proceeds, on foreclosure, should be applied *pro rata* to all of the items.

*Re Georgi*, 21 Misc. 419, 47 N. Y. Supp. 1061, was another contest between the surety on a note and the mortgagees, who held the indorsed note as well as another note of the mortgagor, both notes being secured by the mortgage. The case of *Orleans County Nat. Bank v. Moore*, supra, was here cited and followed, and the same point is indirectly passed upon in *Cory v. Leonard*, 56 N. Y. 494.

#### Ohio.

The Ohio courts make the same distinction as those of Indiana. See Ohio under "Earlier maturity rule," infra.

In *Coons v. Clifford*, 58 Ohio St. 480, 51 N. E. 39, it was held that the rule of priority according to date of maturity is not applicable to a case where the mortgage is given to secure conditional liabilities upon notes due to different parties, made at different dates, and maturing at different times. Such notes share *pro rata*. The court cites *Shaw v. Newsom*, 78 Ind. 335, supra, with approval.

Where a single mortgage is given to secure notes payable to different parties, maturing at different dates, there is no priority, and all the notes share the proceeds *pro rata*. And in *Cromwell v. Brinton*, 4 Ohio C. C. 261, 2 Ohio C. D. 535, the case was held to be within this rule where the two notes and the mortgage were made payable to the same mortgagee, it appearing later that he was acting for two undisclosed principals, to whom he later assigned the respective notes.

#### Oklahoma.

See supra.

#### Oregon.

In *Wilson v. Allen*, 11 Or. 154, 2 Pac. 91, the court indicates that it would probably

title of the debtor himself at the moment when it goes into the receiver's hands." The general principle is sustained by the following cases: Kittredge v. Osgood, 161 Mass. 384, 37 N. E. 369; Cramer v. Iler, 63 Kan. 579, 66 Pac. 617; Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108; Smith v. Sioux City Nursery & Seed Co. 109 Iowa, 51, 79 N. W. 457; Gillam v. Nussbaum, 95 Ill. App. 277; Link Belt Machinery Co. v. Hughes, 174 Ill. 155, 51 N. E. 179; Arnold v. Weimer, 40 Neb. 216, 58 N. W. 709; State, New Jersey S. R. Co., Prosecutors, v. Railroad Comrs. 41 N. J. L. 235; Commercial Pub. Co. v. Beckwith, 167 N. Y. 329,

apply the *pro rata* rule as between assignees of notes secured by the same mortgage and maturing at different dates, but refuses to apply that rule as between the mortgagee, as the holder of all the notes, and the surety on one note only.

#### Pennsylvania.

See *supra*.

#### Rhode Island.

Where a note is indorsed by the assignor to one assignee, and another maturing later is indorsed to another assignee, who also takes an assignment of the mortgage securing both notes, they are equally entitled to the benefit of the mortgage security to the extent of their respective debts, and neither the assignor nor another holding only his equities can compete with the assignees. *Waterman v. Hunt*, 2 R. I. 298.

#### South Carolina.

As between the mortgagee and the accommodation indorser of one of the two notes secured by the same mortgage, the proceeds should be applied *pro rata* to the payment of the notes. *Graham v. Jones*, 24 S. C. 241.

Separate bonds falling due at different dates, payable to the same payee, secured by the same mortgage, and in the hands of different assignees, have no priority, and should share *pro rata* in the proceeds, regardless of their dates of maturity or of the assignments. *Gordon v. Hazzard*, 32 S. C. 351, 17 Am. St. Rep. 857, 11 S. E. 100.

In *Muller v. Wadlington*, 5 S. C. 342, which was a suit by the assignee of one of seven bonds secured by the same mortgage, against the surety on the bond, it was held that the mortgagee held the legal title to the mortgage, but the assignee had an equitable interest in it to the extent of the debt due him, and could compel the application of its proceeds to the satisfaction of the bond, in the proportion which it bore to the total amount of all the bonds secured by the mortgage. And it was further held that the surety was not released by the fact that the mortgagee, after he had assigned the bond, entered of record a release or discharge of the entire mortgage. 42 L.R.A. (N.S.)

60 N. E. 642; *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461; *Pelletier v. Greenville Lumber Co.* 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *Southern Granite Co. v. Wadsworth*, 115 Ala. 570, 22 So. 157; *Crine v. Davis*, 68 Ga. 138; *Shinkle v. Knoll*, 99 Ill. App. 274; *Brownson v. Roy*, 133 Mich. 617, 95 N. W. 710; *Avery v. Ladd*, 26 Or. 579, 38 Pac. 1088; *Kidder v. Beavers*, 33 Wash. 635, 74 Pac. 819.

The evidence shows that the plaintiff received the note sued upon as collateral se-

The defendant, surety, in the case of *Muller v. Wadlington*, *supra*, paid the bond in full after judgment against him, taking an assignment of the same; and in *Lynch v. Hancock*, 14 S. C. 66, the court, after reaffirming the *pro rata* principle established in the former case, held that, since the lien of the other bonds was released, and the surety had been subrogated to the rights of the assignee, his bond was a lien for its full amount upon the property in the hands of subsequent purchasers, who had no other notice of its lien than what the record disclosed.

#### Tennessee.

The *pro rata* rule is adopted in Tennessee, and the courts seem to apply it between assignor and assignee, at least where there is no liability on the indorsement.

It was conceded in *Ellis v. Roscoe*, 4 Baxt. 418, that where three notes of even date, maturing at different times, were secured by the same lien in the nature of a mortgage, they should share *pro rata*, while severally in the hands of the equitable owners thereof; but it was contended that the rule did not apply where one note had been assigned, reduced to judgment, and payment forced from one who had become surety for a stay of execution, but the contention was not sustained.

Several notes secured by the same lien in the nature of a mortgage share the proceeds of the sale *pro rata*, regardless of the respective dates of maturity or of assignment; and in *Andrews v. Hobgood*, 1 Lea, 693, this rule was applied as between assignees, the assignor having an interest in one of the assigned notes.

In *McDermott v. Bank of Tennessee*, 9 Humph. 123, it was held that, as between the indorsers upon different notes secured by the same trust deed, they are entitled to have the proceeds of sale applied *pro rata* to the notes. While in this case there was a contract so to apply the proceeds, the court held that the rule would apply on general principles in the absence of such contract.

Generally notes given to the same payee, maturing at different dates and secured by the same trust deed, should share the *pro*-

curity for accounts of other indebtedness of the Arnold Mercantile Company, which he had in his hands for collection, and, in consideration of the note, that he forebore to bring attachment to collect the indebtedness. This was a valuable consideration, and entitled him to all the rights of any other holder of a note for value. *Barton v. Ferguson*, 1 Ind. Terr. 263, 37 S. W. 49; *Farmers' Nat. Bank v. McCall*, 25 Okla.

600, 26 L.R.A.(N.S.) 217, 106 Pac. 866, and authorities there cited.

It follows that the judgment of the lower court was correct, and should be affirmed.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied June 4, 1912.

ceeds of sale *pro rata*. *Smith v. Cunningham*, 2 Tenn. Ch. 565. In this case the notes were given to a partnership firm, later divided among the members of the firm, and some assigned by the owner to assignees outside the firm.

*Graham v. McCampbell*, Meigs, 52, 33 Am. Dec. 126, and *Ewing v. Arthur*, 1 Humph. 537, are in harmony with those cases here cited, but involve purchase money liens, and not mortgages. *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 27 L.R.A. 663, 45 Am. St. Rep. 748, 29 S. W. 903, is also a case of notes secured by a vendor's lien, but the court states that it is the same as a mortgage. Here it was decided that, as between an assignee of notes with a written agreement that they shall have priority, and a subsequent assignee of other notes secured by the same vendor's lien, without actual notice of the preference, the former would have priority according to the agreement.

In *Christian v. Clark*, 10 Lea, 630, the court held that one of the notes secured by a purchase money lien had, by reason of an implied contract arising out of the conduct of the parties, priority over the other notes secured by the same lien, but remarked that ordinarily all notes given for the purchase money of land stand upon an equality.

In *Shields v. Dyer*, 86 Tenn. 41, 5 S. W. 439, although the question was only indirectly before the court, it was held that all notes secured by the same deed of trust are entitled to equality of satisfaction, without reference to their time of maturity or assignment.

#### Texas.

The *pro rata* rule prevails in Texas, but is not applied between assignor and assignee, at least where the former has guaranteed the payment of the assigned note.

In *Delespine v. Campbell*, 52 Tex. 4, where several notes were secured by the same mortgage, it was held, on the authority of *Paris Exch. Bank v. Beard*, 49 Tex. 358, and *Robertson v. Guerin*, 50 Tex. 317, that priority of maturity did not, of itself, entitle one note to priority in payment over the others, but only to equality. The two cases cited adopt the *pro rata* rule, but the notes were secured by vendor's lien, and not by mortgage.

The fact that a deed of trust securing two notes in the hands of different persons provides that one note shall have priority 42 L.R.A.(N.S.)

in payment does not give that note a preference to be paid out of the proceeds of an insurance policy on the property, wherein it is stipulated that it is payable to the owner of the notes. *Parker v. Ross*, 73 Tex. 633, 11 S. W. 865.

It is held in *Cannon v. McDaniel*, 46 Tex. 503, that an assignor who has guaranteed the payment of the note cannot, as holder of another note secured by the same mortgage, compete with his assignee for the proceeds of the sale.

It was held in *Ellis v. Singletary*, 45 Tex. 27, that the holder of notes secured by a vendor's lien cannot, by purchasing the legal title to the land, defeat the enforcement of the lien by another holder of another note secured by the same lien, both holders having equal standing, and, unless he asks by appropriate pleadings to have the land sold and a *pro rata* division of the proceeds made, such a decree cannot be made.

#### Vermont.

The *pro rata* rule prevails in Vermont, and is applied between assignor and assignee, at least in the absence of liability on indorsement by the assignor.

An assignment of part of the notes secured by the same mortgage, without any reference to the mortgage, carries a *pro rata* portion of the security, and the holders of the notes share the mortgaged property *pro rata*. *Keyes v. Wood*, 21 Vt. 331.

The priority of notes in the hands of different assignees, secured by the same mortgage, may be fixed by the terms of the assignment. *Wright v. Parker*, 2 Atk. (Vt.) 212; *Langdon v. Keith*, 9 Vt. 300.

Two assignees, the one holding the first maturing note, and the other holding the other note and an assignment of the mortgage securing both notes, are equally entitled to the mortgage security; but it was further held in *Belding v. Manly*, 21 Vt. 550, that if the former makes a tender to the latter of the amount of his note, demanding a transfer of the mortgage to him, he will be held to have admitted a priority for the other's note.

There is no priority between notes assigned and those retained by the assignor, all being secured by the same mortgage and falling due at different dates. *Blair v. White*, 61 Vt. 110, 17 Atl. 49.

An assignment of some of the several notes secured by a mortgage carries a *pro rata* portion of the security, without regard

to the dates of maturity of the notes. Bartlett v. Wade, 66 Vt. 629, 30 Atl. 4.

#### Washington.

The assignment of the mortgage with the later maturing of two notes secured by the same, after the earlier maturing note, in the hands of the mortgagee, has matured, is sufficient to indicate that it was the intention to give the later maturing note priority, and a subsequent assignee of the earlier note has no higher equity than the mortgagee had. Miller v. Washington Sav. Bank, 5 Wash. 200, 31 Pac. 712.

In First Nat. Bank v. Andrews, 7 Wash. 261, 38 Am. St. Rep. 885, 34 Pac. 913, it was held that, as between two assignees of two different notes maturing at different dates and secured by the same mortgage, there is no priority, and each should share *pro rata*. The court refers to Miller v. Washington Sav. Bank, *supra*, and says that no rule of priority was there established, but that the case was decided upon the particular circumstances of the case.

#### III. The earlier maturity rule.

All decisions applying this rule are, of course, opposed to the Oklahoma case, so far as the choice of a general rule is concerned, but the equity between the assignor and his assignee may be considered strong enough to take the case out of this general rule, so that the adoption of this general rule does not necessarily imply opposition to the conclusion reached in that case.

#### Florida.

Where a note both matures and is assigned before the maturity and assignment respectively of another note secured by the same mortgage, the former has priority in the distribution of the funds arising from a sale of the mortgaged property, in the absence of some peculiar equity attached changing the rights of the holders. Wilson v. Hayward, 6 Fla. 171. While both prior maturity and prior assignment existed in favor of the same note, the court indicates quite clearly that the date of maturity is the controlling factor in the decision.

#### Illinois.

The courts in this state apply the earlier maturity rule, making no exception of cases between the assignor and the assignee.

In Gardner v. Diederichs, 41 Ill. 158, it is said that the decisions are not based upon any special equity of the assignee, but upon the ground that the holder of the earlier maturing note may foreclose the mortgage and satisfy his note in full before the others are due.

It was held in Sargent v. Howe, 21 Ill. 148, that the assignee of the earlier maturing notes, they with the others being secured by the same trust deed, has a right, upon the maturity of his notes and default in payment thereof, to insist upon a sale of

all or so much of the trust property as may be necessary for their payment. This principle is the ground upon which the rule of priority according to maturity is based, and this case is cited as the earliest Illinois case on that subject by most of the decisions in that state. For these reasons it is here cited, although the question of priority was not directly before the court.

And in Flower v. Elwood, 66 Ill. 438, it was held that of a series of notes secured by the same mortgage, the one first falling due was a first and superior lien on the mortgaged premises, and should be satisfied out of the proceeds of the sale before the notes later maturing could participate.

The priority of several notes secured by the same mortgage, in the hands of different persons, is determined by their respective dates of maturity, the earliest having the preference, etc. This suit was between the mortgagee and his assignee of one note, but it happened that the assignee held the earliest maturing note. Vansant v. Allmon, 23 Ill. 30.

The dates of maturity of all notes in the hands of different assignees, secured by the same mortgage, determine their priority upon the funds arising from the sale of the mortgaged premises, the earliest having preference; and if any of the notes have been reduced to judgment, the judgment takes the place of the note. Funk v. McReynolds, 33 Ill. 481.

Each note secured by a separate installment of the same mortgage has priority according to its time of becoming due. The different instalments are to be regarded as so many successive mortgages. Chandler v. O'Neil, 62 Ill. App. 418.

In Gardner v. Diederichs, *supra*, it was held that notes given directly to different payees, and secured by one deed of trust, have preference according to their respective dates of maturity, the earliest first, etc.; but if interest on the later maturing notes is made payable at the time of maturity of the earlier notes, such interest should take *pro rata* with the earlier notes.

A mortgagee holding several notes secured by the mortgage may change the rule of priority by assigning those notes last maturing, and at the same time agreeing with the assignee that the notes so assigned shall have preference over the earlier maturing notes retained by the mortgagee; and that agreement will be enforced against a later assignee for value of the earlier maturing notes, since the subsequent assignee is chargeable with constructive notice of the prior agreement. Walker v. Dement, 42 Ill. 272.

The owner of a note with interest coupons attached, secured by a deed of trust or mortgage, may, on assigning an interest coupon, stipulate and agree with the assignee that the note securing the principal debt and all later interest coupons shall have priority to the coupon assigned, and such an agreement is binding. Romberg v. McCormick, 194 Ill. 205, 62 N. E. 537.

But the rule of priority will not be changed by an agreement to the effect that the two notes maturing earliest are to be assigned, when, by mistake, the first and third are actually assigned, and later the second is assigned to another party. *Herrington v. McCollum*, 73 Ill. 476.

And where the mortgage sets out the secured notes in the order in which they fall due, parol evidence showing a verbal agreement between the mortgagee and the mortgagor changing the rule of priority for the benefit of an accommodation indorser on one of the later notes is not admissible, since the mortgage and notes constitute a written contract, and its terms cannot be changed by parol evidence of a verbal agreement made at the same time. *Schultz v. Plankinton Bank*, 141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346.

The rule that the note first falling due has priority over other notes secured by the same deed of trust cannot be changed by the trustee's making two sales of the property, the sale on the later maturing notes first in point of time, and delivering deeds to the purchasers. Such sales should be set aside, and one sale ordered for all claims. *Koester v. Burke*, 81 Ill. 436.

But where interest coupons on a note secured by the same trust deed are, when due, paid by a bank out of its own funds, under circumstances such as would lead the owner to believe that the maker of the note had paid them, and he does so believe, the lien of the coupons in the hands of the bank will be postponed, giving priority to the principal note and all later maturing interest coupons. *Ball v. Serum*, 85 Ill. App. 560.

The rule that the earlier maturing notes are preferred in the distribution to those maturing later, where all are secured by the same mortgage, does not apply where interest-bearing bonds all maturing at the same time are secured by a deed of trust; nor does it apply to unpaid interest on the bonds, some holders having been paid more than others, even if the deed provides that upon default of payment of interest on any of the bonds, the whole principal sum represented by the bonds shall become due and payable, and the trust property be sold because of failure to pay interest. In such a case, each debt represented by the bond and its unpaid interest is entitled to its *pro rata* share. *Humphreys v. Morton*, 100 Ill. 592.

Genuine notes secured by a deed of trust, delivered by the owner thereof to a third party as security for a loan, with the statement that the deed is at the recorder's office being recorded, have priority over similar but forged notes previously delivered to another party by the same owner, together with the trust deed, as security for a loan from the other party, who had the deed recorded and kept possession thereof, since the forged notes passed no title to the security, even though accompanied by the

deed. *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 373.

#### Indiana.

The general rule of priority in the order of maturity applies in this state to notes given to secure the same debt. But it is held that the equity arising in favor of an assignee against the assignor will take the case out of the rule, and give the assignee the preference. The Oklahoma case is thus supported as to result, but not as to the general rule.

The first Indiana case directly in point was *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486, where it was held that priority of maturity among several notes payable to the mortgagee, held by different parties and secured by the same mortgage, gives priority in the participation in the fund arising from a sale of the mortgaged premises, regardless of the order of assignment. This decision was based upon the principle that a mortgage securing a debt payable by instalments may be foreclosed on default of the payment of the first instalment, and the mortgaged property sold for the payment of that instalment. *Andrews v. Jones*, 3 Blackf. 440, and *Youse v. M'Creary*, 2 Blackf. 243, are cited as authority for the principle, and the court says: "The different instalments in a mortgage, when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming payable." But this latter principle is cited here only as giving the reason for the rule, and is not strictly within the scope of this note.

*State Bank v. Tweedy*, supra, is cited and followed in *Stanley v. Beatty*, 4 Ind. 134.

On the authority of the two foregoing cases, the rule of priority according to maturity is reaffirmed in *Hough v. Osborne*, 7 Ind. 140, the rule being applied to notes in the hands of assignees, where the assignments are without recourse; and it is further held that the rule cannot be changed so as to give the holder of a later maturing note priority, by the mortgagee's assigning the mortgage to him.

The rule of priority according to date of maturity will not be changed by the fact that the notes represent purchase money, and are therefore secured by a vendor's lien as well as by the mortgage, for the reason that by taking a mortgage to secure the unpaid purchase money, the vendor waives his implied equitable lien on the property and creates an express lien. *Harris v. Harlan*, 14 Ind. 439.

And because the holder of the earlier maturing of two notes made to the same party and secured by the same mortgage has a prior lien upon the mortgaged property, he may foreclose the mortgage when his note is due and unpaid, without making the holder of the other note a party to the suit. *Ibid*.

But where the holder of the latest matur-



ing of several notes made payable to the same person and secured by the same mortgage has a lien upon the mortgaged property, second only to that of the earlier maturing notes, and he will not be affected by the foreclosure of the mortgage on the other notes, unless he is made a party to the suit. *Murdock v. Ford*, 17 Ind. 52.

Where several notes payable to the mortgagee are secured by the same mortgage, and the earliest maturing note assigned, the assignee has priority over the mortgagee, who holds the later maturing notes. *Langedale v. Mills*, 32 Ind. 380, and *Davis v. Langedale*, 41 Ind. 399.

But if the note maturing earliest of several notes secured by the same mortgage and payable to the same person is reduced to a personal judgment by the payee or his indorsee, without any foreclosure of the mortgage, and the judgment is replevied and paid off by the replevin bail, it loses its priority to the extent that, if the mortgaged property is sold on a foreclosure of the mortgage for the payment of the other notes, the replevin bail, who has paid the judgment, cannot, as against the purchaser or his successors in title, claim under the mortgage and have it foreclosed and the property sold for his repayment. *Zook v. Clemmer*, 44 Ind. 15.

In *Minor v. Hill*, 58 Ind. 180, 26 Am. Rep. 71, the question of priority was not directly before the court, but the court affirmed, as a subsidiary question, the rule that notes given to the mortgagee and secured by the same mortgage have priority in the hands of assignees according to the date of maturity.

The priority of the holder of the first maturing note of several made payable to the mortgagee and secured by the same mortgage is not lost by his extending, for a valuable consideration, the time of payment of such note to a time beyond the maturity of the other notes. *People's Sav. Bank v. Finney*, 63 Ind. 460.

Where there is a senior mortgage on property, and a junior mortgage is given to secure several notes payable to the mortgagee in the junior mortgage, the senior mortgage has the first lien, and after its satisfaction each note in the hands of different assignees has priority according to the date of its maturity. *Doss v. Ditmars*, 70 Ind. 451.

Where the surety on the earlier maturing of two notes secured by the same mortgage and payable to the mortgagee is compelled to pay the note, he is subrogated to the remedies in the mortgage, and hence has priority over the holder of the later maturing note. *Gerber v. Sharp*, 72 Ind. 553.

But in *Wilber v. Buchanan*, 85 Ind. 42, it was held that the widow of the mortgagee, holding by specific legacy from him the later maturing of several notes payable to him and secured by the same mortgage, had priority over the administrator holding the earlier maturing ones for the estate, to the extent that any deductions caused by partial failure of consideration must be made from those belonging to the estate. This 42 L.R.A. (N.S.)

decision was based upon the ground that she was an assignee and, as such, entitled to priority over the assignor, even though her notes matured later.

The rule of priority according to date of maturity will apply where the earliest maturing of several notes payable to the mortgagee and secured by the same mortgage has been purchased by and assigned to the widow of the mortgagor, even though she had joined her husband in the execution of the mortgage on his property, and at his death obtained, by inheritance, the widow's interest in the mortgaged property. *Carithers v. Stuart*, 87 Ind. 424.

But if it appears that the note had not been assigned to her, but that she had paid the same after maturity, the doctrine of subrogation, while protecting her right against the other heirs, will not give the note she has paid priority over later maturing ones in the hands of the mortgagee or his assignees. *Ibid*.

The first maturing note of several payable to the mortgagee and secured by the same mortgage, if retained by the mortgagee, does not have priority in the distribution over the later maturing ones in the hands of assignees, but as between the assignees of the other notes the rule of priority according to maturity prevails, the note held by the mortgagee being postponed to the last. *Parkhurst v. Watertown Steam Engine Co.* 107 Ind. 596, 8 N. E. 635.

As between assignees of several notes payable to the mortgagee and secured by the same mortgage, the notes have priority in the order of their maturity, and a clause in the mortgage to the effect that upon failure to pay any one of said notes at maturity, all the notes become due and payable and the mortgage may be foreclosed, will not make them due in such sense as to give them a *pro rata* share. *Horn v. Bennett*, 135 Ind. 158, 24 L.R.A. 800, 34 N. E. 321, 956.

In *Alden v. White*, 32 Ind. App. 671, 102 Am. St. Rep. 261, 66 N. E. 509, 67 N. E. 949, the question before the court was the priority of portions of the same judgment owned by different persons, and attention is here called to the case only because it contains a clear statement of the Indiana rule as to the priority of notes secured by the same mortgage, and many decisions of the courts of that state on notes are reviewed.

#### Iowa.

In Iowa the earlier maturity rule is applied quite rigidly, and no exception is made of cases between assignor and assignee.

Notes given to the mortgagee maturing at different dates and secured by the same mortgage have, in the hands of different assignees, priority according to their respective dates of maturity. *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336.

Notes payable to the same person, secured by the same mortgage, have priority, as between the assignees thereof, in the order

in which they fall due. *Sangster v. Love*, 11 Iowa, 580.

In *Reeder v. Carey*, 13 Iowa, 274, the court reaffirmed the principle of the two foregoing cases, but in this case no notes had been executed.

Two notes made payable to the same party and secured by the same mortgage have priority whether both are assigned or not, according to priority of maturity, and the same is true if secured by two separate mortgages executed at the same time. *Isett v. Lucas*, 17 Iowa, 503, 85 Am. Dec. 572.

And parol testimony tending to prove an agreement between the mortgagee and an assignee of one of the notes secured by one of the mortgages, that would alter the legal effect of the mortgages, so as to give priority to neither note, is inadmissible. *Ibid.*

And where the note last falling due has been assigned, and later the other note reduced to a judgment of foreclosure and the judgment assigned, the case does not come within the rule that a judgment is a chose in action which the assignee takes subject to and charged with all the equities which could be asserted against it in the hands of the assignor, so as to permit its priority over the other note to be changed by a parol agreement between the mortgagee and the assignee of the other note. *Ibid.*

Notes secured by the same mortgage and in the hands of assignees have priority according to the priority of the dates on which they are, by their terms, made payable, and default, under a provision in the mortgage to the effect that the whole sum secured shall become due on any default in payment, will not change the rule of priority. *Leavitt v. Reynolds*, 79 Iowa, 348, 7 L.R.A. 365, 44 N. W. 567.

The lien of the earlier maturing notes of a series, secured by the same mortgage, may be postponed to that of the later maturing ones, by a stipulation to that effect in the assignment, indorsed upon the earlier maturing notes by the mortgagee, and the assignee cannot claim the benefits of any prior agreements whereby his notes have been given preference because of their prior maturity. *Anglo-American Land, Mortg. & Agency Co. v. Bush*, 84 Iowa, 272, 50 N. W. 1063.

In *Gilman v. Heitman*, 137 Iowa, 336, 113 N. W. 932, it was held that where several notes are secured by the same mortgage, the liens of the notes in the hands of assignees are in the order of the maturity of the notes, and that the lien of the earliest maturing note cannot be divested by the holder of the other notes securing title to the mortgaged property directly from the mortgagors in consideration of the cancellation of his claim, and perfecting the same by a tax deed for taxes accrued while he held the notes.

Where one of two notes payable to the mortgagee and secured by the same mortgage is assigned by him, and the other retained, the notes have priority in the order in which they mature. *Rankin v. Major*, 9 Iowa, 297. In this case the assignee held 42 L.R.A. (N.S.)

the later maturing note, but the priority of the holders was not the question directly before the court.

It was held in *Hinds v. Mooers*, 11 Iowa, 211, that an earlier maturing note retained by the mortgagee has priority over a later maturing one in the hands of his assignee, where both are secured by the same mortgage, as against the contention that the mortgagee's liability on the indorsement of the assigned note would change the rule of priority to favor the assignee.

Notes maturing at different dates, made payable to the same person and secured by the same mortgage, have priority in the order of their maturity, even where the mortgagee retains the earliest maturing one, assigning the other six. *Massie v. Sharpe*, 13 Iowa, 542.

The earliest maturing of the notes remaining unpaid, of several given to the mortgagee and secured by the same mortgage, which is a junior mortgage, has, in the hands of an assignee, subject to the lien of the senior mortgage, the first lien upon the mortgaged property. *Walker v. Schreiber*, 47 Iowa, 529.

It was held in *Bailey v. Malvin*, 53 Iowa, 371, 5 N. W. 515, that where the first maturing of a series of notes secured by the same mortgage is paid by the mortgagor, and then, without the knowledge of the mortgagee, transferred to the party who furnished the money, in compliance with an understanding, also unknown to the mortgagee, between the mortgagor and said party, it loses its priority over the other unpaid notes of the series.

The later maturing notes of a series secured by the same mortgage may be given priority over the earlier maturing ones, by a written assignment of the later maturing notes duly executed and recorded, containing a stipulation to that effect, without the consent of or notice to the mortgagor, where the mortgagee, at the time of making the assignment, is owner of all of the earlier maturing notes. *Morgan v. Kline*, 77 Iowa, 681, 42 N. W. 558.

It was held in *Wilhelmi v. Leonard*, 13 Iowa, 330, that where the payee of the earlier maturing of two notes secured by the same mortgage gives up his note, taking a new one different in amount, without any agreement to show that the new note was to be secured by the mortgage, he loses his mortgage security so far as it affects the payee of the later maturing note.

The payee of one of the notes secured by the same mortgage loses his priority under the mortgage over the payee of the other note, by attacking the validity of the mortgage. *Ibid.*

Where the mortgagee held the individual note of the mortgagor, also a joint note signed by him and a third party, both notes being secured by the same mortgages, it was held in *Small v. Older*, 57 Iowa, 326, 10 N. W. 734, that he might appropriate the proceeds of the sale of the mortgaged property so as to give priority to the individual note, and collect from the third

party any balance remaining unpaid on the joint note; and that this was allowable even had the third party been surety on the one note instead of joint maker thereof. The question of date of maturity does not seem to have been raised.

#### Kansas.

The earlier maturity rule is adopted in Kansas, and is applied to cases between assignor and assignee, at least when the former is not liable as indorser.

As between different assignees of two or more notes secured by the same mortgage, the priority of the notes is in the order of their maturity, in the absence of an agreement or some paramount equity shown in favor of either party, and under this rule, all notes maturing together will share *pro rata*. *Aultman-Taylor Co. v. McGeorge*, 31 Kan. 329, 2 Pac. 778.

And this same rule applies as between the mortgagee retaining some of the notes, and his assignees of other notes secured by the same mortgage. *Ibid*.

It was held in *Noyes v. White*, 9 Kan. 640, that an assignment of the mortgage with all of the mortgagee's right, title, and interest in and to the same, accompanying a transfer of the later maturing notes secured thereby, is a sufficient agreement to give such notes priority over the earlier maturing notes so secured, belonging to the mortgagee at the time, although subsequently assigned; but not over those assigned prior to the assignment of the mortgage.

Two or more notes secured by the same mortgage and in the hands of different assignees take priority, in the absence of an agreement to the contrary, in the order in which they are to become due and payable. *Ibid*.

As between different assignees of two notes secured by the same mortgage, the one holding the note falling due first has the priority. While, in this case, the earlier maturing note had been assigned first, and there were other equities in its favor, the rule as to maturity seems to have been the decisive factor in the decision. *Richardson v. McKim*, 20 Kan. 346.

While the exact question of priority between notes secured by the same mortgage was not before the court in *Corbin v. Kincaid*, 33 Kan. 649, 7 Pac. 145, the court does there affirm that priority of such notes is in the order of their maturity, and makes that rule the basis of the decision.

Where the mortgagee assigned the mortgage and all the notes secured thereby to the same person, the three later maturing notes being assigned "without recourse," and the other two indorsed by the mortgagee, the indorsements being intended to add security to all the notes transferred as an inducement to the purchase, it was held in *Robinson v. Waddell*, 53 Kan. 402, 36 Pac. 730, that this was an agreement sufficient to reverse the rule of priority, so as to give the later maturing notes the preference out of the mortgage fund, so that the deficiency 42 L.R.A. (N.S.)

would fall on the indorser, and not on the assignee.

#### Missouri.

The courts in Missouri have adopted the earlier maturing rule.

In *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156, it was held that, as between assignees of different notes secured by the same mortgage, even though all the notes are due at the time action is commenced, the notes have priority, and are to be paid out of the fund, in the order in which they fall due. Especially is this the rule where the mortgage provides that in default of payment of any of the notes or the interest on any of them, as the same becomes due, the property may be sold, etc. The court suggests that the case might be materially changed, had the mortgage provided that all the notes would become due and payable upon default on the payment of any one of them. But as to this suggestion, see *Hurek v. Erskine*, *infra*.

Several notes falling due at different times and secured by the same mortgage, in the hands of different assignees, are to be paid out of the proceeds of sale in the order in which they fall due. Especially is this the rule where the mortgage contains language apparently directing that this rule be followed. *Thompson v. Field*, 38 Mo. 320.

The rule, as established in *Mitchell v. Ladew*, *supra*, that notes secured by the same deed of trust have priority in the order in which they fall due, it was held in *Ellis v. Lamme*, 42 Mo. 153, may be completely reversed by a provision in the deed that the later maturing shall be first paid out of the proceeds of sale of the property; and a further provision, that the first maturing note may be paid at any time by the maker with money raised independently of the trust property, is not inconsistent with the former provision, which shows that the primary object of the deed was to protect the independent sureties on the later maturing note.

A provision in a trust deed securing several notes, to the effect that all the notes become due and payable upon default in the payment of any one note, will not change the rule of priority which makes the notes payable out of the proceeds in the order in which, according to the terms of the notes themselves, they become due; and it was further held in *Hurek v. Erskine*, 45 Mo. 485, that the assignee of the earlier maturing note was entitled, as against the mortgagee holding the other notes, to priority in the proceeds of the trust property, even though the latter's notes had become due by their own terms before action was commenced.

As between a mortgagee holding two notes secured by the same deed of trust and maturing at different dates, and one bound as surety on the notes, it was held in *Owings v. McKenzie*, 133 Mo. 323, 40 L.R.A. 154, 33 S. W. 802, that an extension of time on

the first note, so as to release the surety thereon, does not change the rule of priority between the two notes, and the proceeds of the sale will be applied first to the earlier maturing note.

The presumption as to notes secured by the same mortgage and in the hands of different assignees is that they have priority in the order in which they mature, and to overthrow this presumption, one has the onus of showing an agreement to the contrary, or circumstances that work an estoppel of the claim of priority. *Weary v. Wittmer*, 77 Mo. App. 546.

In *Freeman v. Elliott*, 48 Mo. App. 74, it is held that the rule of priority in the order of maturity will be applied to two notes made payable to two separate payees, if secured by the same deed of trust; and this rule will apply notwithstanding the terms of the deed to the effect that both notes become due on default in payment of either.

In *New York Security & T. Co. v. Lombard Invest. Co.* 65 Fed. 271, the circuit court, applying the laws of the state of Missouri, held that, where two notes had both been assigned, together with the mortgage securing them, to the same assignee, and later the earlier maturing note was reassigned formally (although the owner thought it was being taken up, on the indorsement), as between the creditors of the party holding the earlier maturing note and the assignee holding the other note and mortgage, the former should be preferred.

#### Ohio.

The courts in Ohio have adopted the earlier maturity rule if the notes are all given for the same debt, and seem to apply the rule between assignor and assignee, unless the assignor is liable on the indorsement.

The second paragraph of the syllabus in *Swartz v. Leist*, 13 Ohio St. 419, is quoted in many places as upholding the *pro rata* rule, but it has no such force when read with a knowledge of the question before the court. There was no question of priority before the court, or even commented upon, so that the case is not in point here.

The priority of notes secured by the same mortgage and held by different assignees is in the order in which they fall due, regardless of their date of assignment or of the fact that they are negotiable. *Bank of United States v. Covert*, 13 Ohio, 240.

But a provision in the mortgage to the effect that a later maturing note shall, upon default in payment of any one of the notes, be considered due and collectable, is sufficient to give that note equal priority with the one upon which the first default was made. *Ibid*.

And upon the authority of *Bank of United States v. Covert*, it was, in *Bushfield v. Meyer*, 10 Ohio St. 334, held that where the terms of the mortgage make all notes secured thereby due upon default on any 42 L.R.A. (N.S.)

one, there is no priority, and all share the proceeds *pro rata*, regardless of the date of maturity expressed in the notes.

An assignor of notes indorsed by him in blank is not prohibited from competing, as the holder of another note secured by the same mortgage, with his assignees for the proceeds of the sale; and he is not so prohibited by the fact that he also assigned the mortgage with all his rights and interest thereunder, provided he expressly reserved and excepted from the operation of the assignment all his rights and property as to the note retained. *Ibid*.

Where a mortgagee had assigned all of the notes and the mortgage securing them, indorsing the notes so as to become liable thereon, and later had paid the judgment obtained against him and the insolvent mortgagor on the note first maturing, it was held in *Anderson v. Sharp*, 44 Ohio St. 260, 6 N. E. 900, that the later maturing notes in the hands of the assignee have priority over his claim represented by the judgment, and that the one who purchased the judgment after suit commenced to determine its priority had no higher claim. The decision as to the result was unanimous, but the court was equally divided as to the ground of the decision. One opinion places it upon the ground of avoiding circuity of action, while the other bases it upon the superior equity of the assignee over his assignor. The former ground would seem to be more in harmony with *Bushfield v. Meyer*, supra.

In *Beresford v. Ward*, 1 Disney (Ohio) 170, it was held that where several notes payable to different payees (but for the same debt), secured by the same mortgage, fall due on different dates, but the interest on all is due at the same periods, the priority is according to date of maturity, and each sum falling due, whether interest or principal, shares equally with every other sum falling due at the same time.

And where the mortgage implies an equality between the payees, but one has in fact a superior equity, he is estopped from asserting that equity against the other's assignee, who had no notice thereof, although it would have been good against the payee himself. *Ibid*.

In *Kyle v. Thompson*, 11 Ohio St. 616, it was held that since the earlier maturing of two notes made payable to the same payee and secured by the same mortgage is entitled to priority, equities existing in favor of the maker against the insolvent payee were properly deducted from the later maturing note, both being held by assignees without indorsement by the payee.

All notes of even date falling due at the same time and secured by the same mortgage should share *pro rata* in the proceeds of sale, although the contest is between the mortgagee holding all the notes, and the mortgagors, who have each given a separate note. *Towne v. Wolfe*, 26 Ohio St. 491.

Notes secured by the same mortgage and in the hands of different assignees have pri-

ority in the order in which they fall due. *Lockwood v. Robbins*, 1 Cleveland, L. Rep. 101, 4 Ohio Dec. Reprint, 192.

Notes in the hands of different assignees and secured by the same mortgage have priority in the order of their maturity, unless the party contending for a different rule shows affirmatively facts and circumstances sufficient to show that the parties intended some other order of priority. *Winters v. Franklin Bank*, 33 Ohio St. 250.

Where an assignor of a series of notes secured by the same mortgage and falling due at different times has indorsed them all, only the last maturing being "without recourse," and has taken up the two earlier maturing ones on his indorsement, his creditors, on a bill to subject his interests to the payment of judgments, cannot claim priority for the notes thus taken up as against the assignee holding the last note. *Exchange Bank v. Eddy*, 9 Ohio Dec. Reprint, 85, 10 Ohio L. J. 389.

A parol agreement between the mortgagee and the mortgagor, to the effect that the notes secured by the mortgage shall share *pro rata*, even though they mature at different dates, will not affect the notes in the hands of assignees without notice of the agreement, so that, as to such assignees, the notes will take priority in the order of their maturity. *Wohlgemuth v. Standard Drug Co.* 14 Ohio C. C. 316, 8 Ohio C. D. 9.

#### Wisconsin.

Wisconsin is governed by the rule of priority in the order of maturity, and the rule is applied between the assignor and assignee, as well as between assignees only, at least where the assignor is not liable on the indorsement.

Two notes payable jointly to two payees, falling due at different times, and secured by the same mortgage, have priority in the order in which they fall due; and it was further held in *Wood v. Trask*, 7 Wis. 566, 76 Am. Dec. 230, that this rule would apply where one of the payees had assigned his interest in the later maturing note, so that, as against the payee the assignee took nothing until the first note was paid, and then only his share of what could be appropriated on the second.

On the authority of *Wood v. Trask*, supra, it was held in *Marine Bank v. International Bank*, 9 Wis. 57, that, as between assignees of different notes secured by the same mortgage, the order of priority is according to the date of maturity; and it was further held that an assignment of the mortgage with the later maturing notes does not change this order of priority.

And it was held in the same case, *Marine Bank v. International Bank*, that a provision in a mortgage securing several notes, to the effect that the failure to pay any interest or principal or any taxes for the space of thirty days after the same shall become due gives the option to the mortgagees or their assigns to declare the whole principal sum due, does not give the holder

of the later maturing notes the right to declare his notes due on such failure (the failure being on a note not held by him), where the earlier maturing notes are held by another party who does not join in the notice, and such a notice cannot have the effect of destroying the priority of the earlier maturing notes. The court cites and approves, but distinguishes, this case from *Bank of United States v. Covert*, 13 Ohio, 240, in which case the later notes became due automatically on default.

And it was further held in *Lyman v. Smith*, 21 Wis. 674, that, as between such assignees, the failure to bring foreclosure proceedings until the later notes mature would not change the priority, but the first maturing note would have priority.

But in *Pierce v. Shaw*, 51 Wis. 316, 8 N. W. 209, it was held that a provision in the mortgage making the whole principal sum, upon default, due automatically, without any action on the part of the mortgagee, would operate to place all of the notes on an equality, and enable the holders to participate *pro rata*. A distinction is drawn between the terms of the mortgage in this case and that in *Marine Bank v. International Bank*, supra, and the court cites and follows *Bank of United States v. Covert*, supra. As a matter of fact, the notes were not all payable originally to the same payee, and the contest was between one payee and the assignee of the other, but no point is made of these facts.

In *Shaw v. Crandon State Bank*, 145 Wis. 639, 129 N. W. 794, the court says that the rule of priority as stated in the four foregoing cases is subject to an intervening special equity that may give precedence to later maturing notes, and holds that if the holder of the first maturing note acted in a fiduciary relation with the other holder, and had that holder give up prior claims and accept secondary claim, even though he acted in perfect good faith and actually paid his own money for his note, he cannot claim the priority that he otherwise could have claimed for his note, and the precedence which the holder of the second note formerly had will be given to the note he now holds.

#### IV. The prior assignment rule.

This rule fixes the priority of notes in the hands of assignees over those retained by the assignor, so that decisions under it have no bearing upon the question decided in the *Oklahoma* case, except that the courts in these cases have chosen a different general rule. The rule applies without regard to date of maturing of the notes, or the capacity in which they are held.

#### Alabama.

In *Brewer v. Atkeison*, 121 Ala. 410, 77 Am. St. Rep. 64, 25 So. 992, it was held that since an assignment by the mortgagee of one of the notes secured by the mortgage operates as an assignment *pro tanto* of the lien upon the lands, and entitles the

assignee to payment in priority over the note retained by the mortgagee, out of the funds arising out of the mortgaged property,—the lien extending through the property mortgaged to the money for which it may have been sold,—therefore the mortgagee is not liable to his assignee of one of the mortgage notes in an action for money received for the use of the assignee, where he, the mortgagee, upon receipt of payment from the mortgagor of the unassigned notes, marked the mortgage satisfied, and executed to the mortgagor a quitclaim deed for the land covered by the mortgage, the assigned note remaining unpaid.

Where a mortgage is given to secure notes, and the mortgagee assigns one of the notes for value, it becomes a prior lien upon a fund arising from a sale of the mortgaged premises, as to those notes retained by the mortgagee. *Knight v. Ray*, 75 Ala. 383.

It was held in *Fielder v. Varner*, 45 Ala. 429, that since all of the notes secured by a single mortgage, given to and remaining in the hands of the mortgagee, share equally in the proceeds of the sale of the mortgaged property, without regard to their date of maturity, the accommodation indorser on any one such note is, by the sale, released from his liability thereon to the amount to which that particular note is entitled to share in the proceeds.

This case was cited with approval and followed in *Bostick v. Jacobs*, 133 Ala. 344, 91 Am. St. Rep. 36, 32 So. 136.

Where two notes are secured by the same title bond, the bond having all the equitable incidents of a mortgage, and are assigned at different times, the assignment of each note is *pro tanto* an assignment of the security, and the liens of the assignees have preference according to the priority of the assignments, without reference to the maturity of the notes. *Griggsby v. Hair*, 25 Ala. 327.

But it has been held that notes maturing at different times, secured by deed of trust of personal property, the deed stipulating that the property is liable to be sold for the payment of the notes as they severally fall due, will have preference, when assigned to different assignees, according to the terms of the deed of trust, *i. e.*, in the order of their maturity. *McVay v. Bloodgood*, 9 Port. (Ala.) 547. This case has been frequently cited in favor of the earlier maturity rule, but it will not bear that construction. The decision is controlled by the terms of the contract.

Several notes secured by the same mortgage, in the hands of different assignees of the original mortgagee, will, in the absence of any stipulation in the mortgage to the contrary, take priority according to the dates of their assignments, without regard to their dates of maturity. *Alabama Gold L. Ins. Co. v. Hall*, 58 Ala. 1.

A mortgage or other like instrument providing that all of the notes secured thereby shall have priority according to their dates of maturity does not provide for the priority, as among themselves, of several notes falling due on the same date; hence all such 42 L.R.A. (N.S.)

notes in the hands of different assignees will have priority, as among themselves, according to the dates of assignment. *Ibid.*

Notes secured by the same deed of trust have priority, in the hands of different assignees, according to the priority of the assignments, and the maker of the notes cannot claim equitable offsets against one holding the prior lien, to the advantage of one whose lien is secondary. *Nelson v. Dunn*, 15 Ala. 501.

Where a mortgagee assigns notes secured by his mortgage, to different assignees, they have priority according to the priority of assignment, regardless of the date of maturity, unless he has stipulated to the contrary in the assignments. *Cullum v. Erwin*, 4 Ala. 462.

"But there can be no doubt that one, on assigning one of several notes secured by a mortgage, could, by a stipulation to that effect, reserve the mortgage as a security for the remainder of the debt; or on transferring several notes thus secured, he might determine which should have priority, if the property mortgaged was insufficient to pay all. *Ibid.*

This same case was before the court in *Bank of Mobile v. Planters' & M. Bank*, 9 Ala. 645, on the contention that the prior assignee held his note as collateral; but it appeared that he also had the right to apply the proceeds of the note to the extinguishment of the debt due him from his assignor, and the same rule as in *Cullum v. Erwin*, *supra*, was reaffirmed.

#### Virginia.

It was held in *Gwathmey v. Ragland*, 1 Rand. (Va.) 466, that, as between the assignee of the earlier maturing note, and the assignee of both the later maturing note and the trust deed by which both notes were secured, the earlier maturing note had priority. But the language of the court seems to indicate that the trust deed specifically provided for this order of priority. This case is sometimes improperly cited as sustaining the earlier maturity rule. See *McClintic v. Wise*, *infra*.

And in *McClintic v. Wise*, 25 Gratt. 448, 18 Am. Rep. 694, which was an issue between two bonds secured by a vendor's lien, the earlier maturing one held by the payee and the other by his assignee, the court, in deciding that the assignee had the priority, says that the decision in *Gwathmey v. Ragland*, *supra*, is based upon the fact of prior assignment as well as upon the terms of the deed, and not upon the earlier maturity. The instant decision, while not involving a mortgage in form, is said by the court to be upon the same principle, and is based upon the rule of prior assignment. *Griggsby v. Hair*, 25 Ala. 327, and several other cases to the same effect, and involving mortgages, are cited.

In *Taylor v. Spindle*, 2 Gratt. 44, where bonds in the hands of different assignees had originally been given for purchase money, and an abatement was claimed be-

cause of a shortage in the acreage, the court held that the bond last assigned should stand the loss, regardless of their dates of maturity.

As between the surety (for a stay of execution, also for an injunction which later was dissolved, which execution, with levy upon defendant's personal property, had been issued from a judgment obtained upon the first maturing of three bonds secured by the same trust deed, which deed stipulated against the enforcement of the trust until all the bonds were due) and the payee of all of the bonds, it was held in *Vance v. Monroe*, 4 Gratt. 52, that the latter, holding the other bonds, would have priority, leaving the judgment previously obtained against the surety and maker in full force for the deficiency.

Where a deed of trust secured eleven bonds falling due at different times, the fifth, sixth, and seventh bonds being assigned, the first two being paid and a sum sufficient to more than pay the third and fourth having been paid, generally, by the maker to the payee, and the property having been sold for a prior encumbrance satisfying the same and leaving a balance, it was held in *Schofield v. Cox*, 8 Gratt. 533, that, as between the assignee of the three bonds and the assignor or his attaching creditor, the assignee should have priority.

In *Gordon v. Fitzhugh*, 27 Gratt. 835, it was held that notes falling due on different dates, all given as evidence of the same debt, secured by the same deed of trust, and assigned at different dates, have priority in the order in which they were assigned. It is further held that Code §§ 5 & 6, chap. 117 (Code 1860), providing for a *pro rata* distribution, applies only to notes for different debts to different persons secured by the same mortgage.

A note in the hands of one who thought he was purchasing the same, and who paid for it, but under circumstances which should have put him on inquiry as to the authority of the agent selling it to him, it afterwards appearing that the agent held the note for collection, will be postponed in payment to the other later maturing notes in the hands of the owner, for whom the agent acted, that owner having been under the impression that the earlier note was paid, and for that reason deferred action on his notes. *Cussen v. Brandt*, 97 Va. 1, 75 Am. St. Rep. 762, 32 S. E. 791.

#### West Virginia.

In *Jenkins v. Hawkins*, 34 W. Va. 799, 12 S. E. 1090, it was held that an assignor who had the same standing as the mortgagee or payee, as the holder of some of the notes secured by a deed of trust, had an inferior lien to a subassignee of other notes secured by the same deed, although the indorsement was without recourse. It was stated as a ground of the decision that the assignment not only implies a guaranty, but it carries with it sufficient of the security to pay the whole of the notes assigned. It is also 42 L.R.A. (N.S.)

stated that a subsequent assignee of the other notes would take subject to the prior lien of the first assignee, but this last question was not before the court.

#### KENTUCKY COURT OF APPEALS.

BETHEL TRAMWILL, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(148 Ky. 624, 147 S. W. 36.)

#### Robbery — horse stealing — interstate — venue.

One who induces another to steal a horse and take it to another state, where he takes possession of and sells it, giving the other a portion of the proceeds, may be convicted of horse stealing in the state where the sale was made.

(May 31, 1912.)

**A**PPPEAL by defendant from a judgment of the Circuit Court for Christian County, convicting him of horse stealing. Affirmed.

The facts are stated in the opinion.

Messrs. Ira D. Smith and J. Stanley Bassett for appellant.

Messrs. James Garnett, Attorney General, and Charles H. Morris, Assistant Attorney General, for the Commonwealth.

Hobson, Ch. J., delivered the opinion of the court:

Bethel Tramwill was indicted in the Christian circuit court for the offense of horse stealing. On a trial of the case he was found guilty, and sentenced to confinement in the penitentiary from two to ten years. He appeals.

The proof in the case was in substance as follows: W. D. Tramwill lives in Tennessee, not far from Clarksville. His horse, buggy, and harness were stolen from his stable one night. The next morning Bethel Tramwill had the horse, buggy, and harness

*Note. — Prosecution for larceny of one who receives or sells within the state property actually stolen with his connivance by another in another state.*

As to prosecution for receiving stolen property where the property in question was stolen in a foreign state or country, see note to *Ex parte Sullivan*, 28 L.R.A. (N.S.) 750.

The decision in *TRAMWILL v. COM.* that one who induces another to steal a horse

in Hopkinsville, and sold them to a man named Veach for \$25. W. D. Tramwill telephoned about the loss of his horse and buggy, and the police, finding it at Veach's stable, arrested Bethel Tramwill. He said when arrested that he stole the horse in Tennessee, and brought him over and sold him to Veach. He said that he had worked for W. D. Tramwill, who was his uncle, and his uncle had not paid him, and that he had put up a note on the stable door, telling his uncle not to worry; that he would either return him the horse or \$100 in two days. His uncle came over, and he told his uncle that he thought he would drive the horse over and get some whisky, and, being asked how he came to sell him, said he got drunk, and thus accounted for his having sold him. This was in substance the evidence for the commonwealth.

Bethel Tramwill, testifying in his own behalf, said that he and a man named Parker, when at Guthrie together, had made an agreement that Parker should go down to his uncle's house, get the horse and buggy, and bring him into Hopkinsville the next morning, and that the understanding was

that he was to go on to Hopkinsville, and Parker was to go and get the horse, bring him to Hopkinsville, and turn the horse over to him, and, if he would not sell him, Parker would; that he went to Hopkinsville, and Parker brought the horse there, and delivered it to him, and he thereupon sold the horse and buggy to Veach for \$25, and gave Parker \$4 of the money. On this evidence the defendant moved the court to instruct the jury, in substance, that, if the transaction was as he had stated it, they should find him not guilty. The court refused to so instruct the jury, and instructed them that, if the transaction was as stated by the defendant, they should find him guilty. The propriety of this ruling is the chief question made on the appeal.

In *Able v. Com.* 5 Bush, 698, Able was indicted in Jefferson county for stealing \$2,600 of gold coin, the property of James Gibson. The proof on the trial showed that Gibson had living with him a grandson about fifteen years of age; that Able induced the boy to steal the coin out of his grandfather's house in Henderson county, and bring it to him at a village about 2

in one state and take it to another state, where he takes possession of and sells it for the benefit of both, may be convicted of horse stealing in the latter state, appears to be sound. The question is distinguishable from the general question whether one who personally steals property in one state or country, and carries it into another, may be convicted of larceny or theft in the latter.

Little authority has been disclosed upon the point under consideration.

In *State v. Mintz*, 189 Mo. 268, 88 S. W. 12, where the defendant engaged a teamster to obtain from a railroad station in Illinois certain goods consigned to a firm for which the latter had formerly done carting work, and convey such goods into Missouri, where they were disposed of under the defendant's instructions, it was held that he was properly convicted of larceny in Missouri, under a statute declaring that every person who shall steal property in another state or country, and bring the same into Missouri, may be convicted and punished for larceny in the same manner as if the property had been feloniously stolen or taken in Missouri. The main point discussed in this case, however, was whether the act of obtaining the goods from the railroad company constituted larceny or obtaining property by false pretenses.

It was also held that if the defendant procured the teamster to commit the larceny, and had the felonious intent of stealing and converting the property to his own use, he could be convicted, although the teamster had no intent of stealing the property when he obtained it. *Ibid.*

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And under the statute involved in that case it was held unnecessary that the indictment charge that the property was stolen in one state and brought into the one where the prosecution was instituted. *Ibid.*

In *Sutton v. State*, 16 Tex. App. 490, where the defendant aided another in stealing a mule in one state, and furnished the other the means of taking the mule to another state, and then went to the latter state himself, in pursuance of an agreement with the other person, and there received a part of the proceeds of the property which the other person had disposed of, he was held a principal in the theft from its inception to its final consummation, and guilty of larceny in the state to which the mule was taken.

In *Williams v. State*, 27 Tex. App. 466, 11 S. W. 481, where the defendant was convicted of horse stealing, a charge was held correct which in effect instructed the jury that all persons are principals who act together in the commission of an offense, and that if the jury believed from the evidence beyond a reasonable doubt that the defendant, together with some other person, fraudulently took the horses in controversy in the territory of New Mexico from the owner, without his consent, with intent to deprive the owner of them, and to appropriate them to their own use, and that such taking under the law of New Mexico constituted the offense of theft, and that the defendant afterwards brought the horses into a county in Texas, where the indictment was found, he was guilty as charged.

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miles distant; that he then brought the coin to Louisville, and sold it there. On these facts it was held that Able was only an accessory before the fact to the stealing of the money, and that, this being the case, he could not be convicted in Jefferson county under an indictment charging him with stealing it there. That case is on all fours with this. If the defendant's statement was true, he had Parker to go down to his uncle's and steal the horse, and bring it to him in Hopkinsville, that he might there sell it, and divide the money with Parker. If he had Parker to steal the horse for him, what he did through his agent, Parker, was in legal effect done by him as fully as if he had done it in person. He was not indicted, however, for what occurred in the state of Tennessee. He was indicted for the stealing of the horse in the state of Kentucky. The rule is well established that, if property is stolen in one state and carried by the thief into another state, it is a fresh asportation in the state to which the property is carried, and the offender may be indicted and punished there. 1 Bishop, *Crim. Law*, §§ 140, 141. When the defendant's agent brought the horse to him in Hopkinsville, and he there took charge of the horse and sold it, there was a fresh asportation of the property by him there, and for this he may be punished in Kentucky.

In *Ferrill v. Com.* 1 Duv. 154, *Ferrill* and *Bullard* stole the horse in Tennessee, and brought it to Kentucky. *Ferrill* sold the horse in Kentucky in the presence of *Bullard*, for the use of both of them, and in pursuance of an agreement between them to this effect. An instruction telling the jury that on these facts they should find *Bullard* guilty as charged was approved; it being held that both were principals in what was done in Kentucky. The principles announced in that case apply equally here; both appellant and *Parker* being present and concurring in the asportation in Kentucky.

The substantial rights of appellant were in no wise affected by the refusal of the court to allow the two writings given in evidence to be taken to the jury room, or by the rebuttal evidence allowed to be introduced by the commonwealth, as, under the views we have indicated, he was guilty as charged on the facts stated by him as a witness on the trial, no less than on the facts proved by the commonwealth.

The case of *Able v. Com.* supra, is overruled.

Judgment affirmed.

42 L.R.A. (N.S.)

## KENTUCKY COURT OF APPEALS.

ED LUCAS, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(149 Ky. 495, 149 S. W. 861.)

**Criminal law — limiting the time of argument — effect.**

Limiting to thirty minutes the time allowed counsel to present the defense in a murder case to the jury is not an abuse of discretion, where the evidence brought out no complicated circumstances or facts necessitating detailed or elaborate explanation.

(September 26, 1912.)

**A**PPPEAL by defendant from a judgment of the Circuit Court for LaFayette County convicting him of murder. Affirmed. The facts are stated in the opinion.

Mr. J. Franklin Wallace for appellant.

Messrs. James Garnett, Attorney General, and D. O. Myatt, Assistant Attorney General, for the Commonwealth:

The time allowed for counsel to present his case to the jury addresses itself to the sound discretion of the trial court, and unless there is a flagrant abuse of that discretion, it will not amount to a reversible error.

*Scott v. Com.* 148 Ky. 80, 146 S. W. 406; *Stout v. Com.* 148 Ky. 199, 146 S. W. 407.

*Lassing, J.*, delivered the opinion of the court:

Ed Lucas was indicted in the Fayette circuit court for the murder of James Keyes. Upon trial he was found guilty and given an indeterminate sentence of two

**Note. — Right to limit time of argument of counsel for accused.**

The earlier cases on this question are collected in the note to *Seattle v. Erickson*, 25 L.R.A. (N.S.) 1027.

As shown in the earlier note the authorities support the rule that, in the absence of statutory provisions prescribing the practice, the trial court may, in its sound discretion, properly limit the time to be consumed by counsel in argument, a discretion with which the appellate court will not interfere unless the time was made so short as manifestly to deprive counsel from presenting the case fully and fairly to the jury.

To the same effect are the following cases: *Scott v. Com.* 148 Ky. 80, 146 S. W. 406; *Stout v. Com.* 148 Ky. 199, 146 S. W. 407; *Graham v. State*, 90 Neb. 658, 134 N. W. 249; *Jenkins v. State*, 60 Tex. Crim. Rep. 230, 131 S. W. 542; *Bradley v. State*, 60 Tex. Crim. Rep. 398, 132 S. W. 484; *King v. State*, — Tex. Crim. Rep. —, 148 S. W. 324; *Hughes v. State*, — Tex. Crim.

to twenty-one years in the state penitentiary. In the motion for a new trial in the lower court, several grounds were assigned; but here counsel for appellant seeks a reversal solely upon the ground that the trial court erred, to his client's prejudice, in limiting him in argument to thirty minutes. It is insisted that, in presenting the defense for one charged with murder, the time allowed was so grossly insufficient to enable counsel properly to present the case to the jury that a reversal should be ordered.

This same question has been several times presented and passed upon by this court. In the leading case of *Combs v. Com.* 97 Ky. 24, 29 S. W. 734, the trial court limited the time for argument to three hours a side. Conceiving that that time was insufficient to enable him properly to present his client's defense, counsel for the accused sought a reversal here. In passing upon the question this court, speaking through Judge Lewis, said: "What length of time the ends of justice and rights of an accused party require should be allowed for argu-

ment to the jury on a criminal trial must from necessity be generally left to the sound discretion of the trial court; otherwise an undue portion of the time of a court might be needlessly consumed in trial of one cause, to detriment of other business and rights of other parties. Therefore this court will not reverse upon the ground too short time was allowed, unless satisfied that discretion has been abused. Counsel were allowed in this case three hours to each side, which, the contrary not appearing, we must conclude was not so short time as to prejudice substantial rights of appellant."

In the more recent cases of *Scott v. Com.* 148 Ky. 80, 146 S. W. 406, and *Stout v. Com.* 148 Ky. 199, 146 S. W. 407, the rule announced in the *Combs* Case was adhered to and reaffirmed, in the case of *Stout* this court holding: "We have ruled in a number of cases that the time that shall be allowed for argument is a matter in the discretion of the trial judge, and that, unless it affirmatively appears that this discretion has been abused to the prejudice of the accused, it will not amount to reversible

Rep. —, 149 S. W. 173; *Holmes v. State*, — Tex. Crim. Rep. —, 150 S. W. 926.

As to just what limitation is reasonable and sufficient to permit counsel to present the case fully and fairly to the jury depends upon the circumstances of each case, so that in reviewing the discretion of the trial court the appellate court will take into consideration not only the number of witnesses examined, and the time consumed in developing the testimony, but also the simplicity of the facts and circumstances surrounding the transaction.

The limitations for the argument of counsel under the following circumstances have been held reasonable, and not such an abuse of discretion as to require reversal of the judgment:

—four and a half hours in a prosecution for murder, in the absence of showing that accused was prejudiced thereby. *Holmes v. State*, — Tex. Crim. Rep. —, 150 S. W. 926;

—three hours on each side in a prosecution for homicide, where it had taken only about two days to hear the testimony. *Bradley v. State*, 60 Tex. Crim. Rep. 398, 132 S. W. 484;

—two hours to each side in a prosecution for robbery, in the absence of a showing that injury resulted to accused, or that additional time was necessary or demanded when the time had expired. *King v. State*, — Tex. Crim. Rep. —, 148 S. W. 324;

—one hour and fifteen minutes for counsel on each side in a prosecution for rape, where no objection was made or exception taken to the order, though the narrow limitation was disapproved by the court. *Hanks v. State*, 83 Neb. 464, 129 N. W. 1011;

—one hour in a prosecution for rape, 42 L.R.A. (N.S.)

where the issues were somewhat of a novel character; the court, though disapproving the limitation, held it not ground for reversal in the absence of a showing that injury resulted to the accused by reason of such limitation. *Jenkins v. State*, 60 Tex. Crim. Rep. 236, 131 S. W. 542;

—forty minutes in prosecution against accused for abandoning and refusing to support his wife. *Graham v. State*, 90 Neb. 658, 134 N. W. 249;

—ten minutes in a prosecution for burglary, where the facts were few and simple, only two witnesses being introduced, and they testified for the prosecution and established the guilt of accused beyond a reasonable doubt. *Stout v. Com.* 148 Ky. 199, 146 S. W. 407;

—ten minutes in prosecution for larceny, where only four witnesses including the accused testified, and the facts were few and simple. *Scott v. Com.* 148 Ky. 80, 146 S. W. 406.

The action on the part of the trial judge in a prosecution for murder in advising counsel that he had exhausted his time for argument after he had addressed the jury for two hours, and refusing to extend the time beyond an additional half hour, did not deprive the accused of the constitutional guaranty that "no person shall be deprived of the right to prosecute or defend his cause in any of the courts of the state, in person, by attorney, or both," where there were few witnesses to the material points in the case, and counsel had neglected to apply to the court for additional time before the argument of the case began, as provided by the rule of court which limited the time for argument in such cases to two hours. *Lindsay v. State*, 138 Ga. 818, 76 S. E. 369.

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error. . . . The trial court should, of course, allow counsel for the accused in every case reasonable time and opportunity to present the reasons why there should be an acquittal; but it is obvious that the time that should be allowed depends upon the facts and circumstances of each particular case. It is not to be altogether regulated by the number of witnesses that are introduced, as a very complicated state of facts might be presented by the testimony of a single witness. It is rather to be controlled by the simplicity of the facts and circumstances surrounding the transaction."

Applying that test to the case at bar, Was the time allowed for argument sufficient to enable counsel properly, fairly, and fully to present his client's case to the jury? While quite an array of witnesses was introduced, they testified with remarkable unanimity to the material facts. Indeed, there is practically no disagreement among them as to what took place, save that the defendant himself testified that, at the time he fired the fatal shot, the deceased was advancing upon him in a threatening manner, with a razor in his hand, and that he fired in self-defense. The commonwealth proved by all of its witnesses, and the defendant admitted, that in the afternoon of Sunday, December 31, 1911, the appellant went to the home of one Charles Keyes and asked to see Lucy Roberts. When she came in and asked what he wanted, he drew a pistol from his pocket, whereupon she screamed and ran from the room; that he followed her out through the back door and around to the front of the house, when she ran into the front door, and it was barred against him. He went off down the street some little distance, remained a time, and apparently started to leave, when Jerry Roberts, who was in the house of Charles Keyes, went out; whereupon appellant fired several shots at Roberts. Roberts returned this fire. Still later, James Keyes, who was also in the house, announced his intention of going home, which was in the direction appellant was going. He left the house, and, as he approached appellant, he was ordered by appellant to stop or to go back. He announced that he was not bothering appellant, and continued in the direction of his home, also toward appellant, who was in the street in front of him. Thereupon appellant fired two shots, and upon the firing of the second shot Keyes seized appellant, threw him to the ground, and held him there until Charles Keyes came out of his house and went to where they were. Charles Keyes took the pistol from appellant and pulled James Keyes off of him; whereupon appellant attempted to assault Charles Keyes, who, af-

ter throwing the pistol which he had taken from appellant at him, retreated toward his house, followed by appellant. James Keyes was taken to the hospital, found to be mortally wounded, and died either that or the succeeding day. Appellant was cut about the neck or face with a knife or razor, and was also bruised in the face by a blunt instrument, presumably the pistol which was thrown at him by Charles Keyes. He admits firing the shots, but states, in justification for so doing, that James Keyes was then advancing upon him with a razor. The overwhelming weight of the evidence is that James Keyes was at the time going home, and was not offering to do any violence whatever to appellant. All the witnesses agree that he was going in the direction of appellant, and all likewise testified that that was toward his home, where he had announced his intention of going. The trial was entered upon about 11 o'clock in the morning, the jury selected, the case stated, and the evidence all heard by 5 o'clock in the afternoon of the same day. The evidence brought out no complicated circumstances or facts necessitating detailed or elaborate explanation, in order that the jury might understand them; hence there was no necessity for prolonged argument. Under the facts in this case, we are of opinion that there was no abuse of discretion in limiting the argument to thirty minutes to a side.

Judgment affirmed.

## KENTUCKY COURT OF APPEALS.

ADOLPH SEATON, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(149 Ky. 498, 149 S. W. 871.)

**Dead body — place of burial — punishment.**

1. One is not punishable for burying his child in a wood lot rather than in a burying ground.

*Note. — Improper burial or lack of proper funeral services as a criminal offense.*

As to regulations of burials and cemeteries generally, see note to Laurel Hill Cemetery v. San Francisco, 27 L.R.A. (N.S.) 260; as to injunctive relief as to cemetery property, burials, or removal of remains, see note to Wormley v. Wormley, 3 L.R.A. (N.S.) 481; as to liability for disinterment of dead bodies, see note to State v. McLean, 42 L.R.A. 721.

This note does not include cases on cremation instead of burial generally, nor upon the sale of dead bodies for purposes of dissection.



Mr. M. E. Gilbert for appellant.

Mr. John G. Lovett, for the Commonwealth:

The right to bury a corpse and preserve its remains is a legal right, which the courts will protect; and certain persons have certain duties to perform toward it, and the right to dispose of a corpse by decent sepulture.

13 Cyc. 268.

Civilized countries have always recognized and protected as sacred the right of Christian burial and the undisturbed repose of human bodies when buried.

Thompson v. State, 105 Tenn. 177, 51 L.R.A. 883, 80 Am. St. Rep. 875, 58 S. W. 213.

At common law it is made the duty of a father decently to inter his child and defray the necessary expenses thereof, if possessed with means.

13 Cyc. 273; 3 Am. & Eng. Enc. Law, 52.

Messrs. James Garnett, Attorney General, D. O. Mayett, Assistant Attorney General, and S. E. Clay also for the Commonwealth.

Lassing, J., delivered the opinion of the court:

Dolph Seaton was indicted by the grand jury of McCracken county for failing to provide a Christian burial for his deceased infant child. A demurrer to the indictment having been overruled, he entered a plea of "not guilty," and upon trial before a jury he was fined \$150. To reverse the judgment predicated thereon, he prosecutes this appeal.

The evidence discloses the following facts: The child was prematurely born and lived only about two weeks. Upon the evening of its death, appellant went to the house of a neighbor, John Bobo, and notified him that the child was dead. Thereupon Bobo and his wife went to appellant's house, and sat up with the corpse that night. On the following morning Bobo suggested that appellant take the necessary steps to procure a burial permit. This appellant declined to do, claiming that it was unnecessary, and that he did not propose going to any expense whatever on account of the burial. At Bobo's suggestion, he procured the services of another neighbor, John Doyle, to assist in digging the grave. While Bobo was gone for Doyle, appellant took some pieces of rough board, made a rude box, took it to a point in a woods lot on his farm, which he said was a suitable place for the grave. At this place selected by appellant, Bobo and Doyle dug the grave about 2 feet deep. Appellant, in the meantime, brought the corpse from the house in a small paper box, to where the grave was being dug, placed

it upon the ground, and assisted in digging the grave. When the grave was completed, the wooden box was lowered in it, the paper box with the corpse placed therein, the lid put on, and the grave filled to a level with the surrounding ground, appellant assisting in this work by tramping the dirt as it was being put back into the grave. After the grave had been filled, he requested Bobo and Doyle to rake the leaves back over the place where the grave was so as to conceal, as far as possible, the identity of the grave, though Doyle says he placed a stake at or near the grave to mark it. The evidence further shows that appellant declined to send for his wife's mother, and stated that he did not want any of his relatives notified. No services of any kind were held at the grave. The child was clothed before being put into the box, but as to the character of the clothing the evidence is silent. Appellant offered to testify upon this point, but the commonwealth objected, and the evidence was not introduced. The evidence further shows that appellant gave as a reason for wanting the identity of the grave concealed that, if his wife knew where it was, she would weep and grieve over it. Although appellant was a poor man, he was financially able to have bought a coffin for the child, had he desired to do so. It is also shown that he had lumber at and around his home out of which he could have made a better and more presentable box than that in which he buried the child, but he said that he did not propose using his good lumber for this purpose.

Upon this state of facts, it is insisted by counsel for appellant that the trial court should either have sustained the demurrer to the indictment, or else have dismissed the proceeding at the conclusion of the evidence. It is urged for the commonwealth, first, that the judgment should be upheld, because appellant caused this child to be buried in a woods lot, rather than in a cemetery or in some place which would be by the neighborhood regarded as a suitable place for the burial of one's dead; second, that he should be punished for failing and refusing to provide a better box or coffin in which to bury the child; and, third, that the penalty should be imposed because of his failure to have the burial attended with appropriate or any ceremonies whatever.

The question is a new one in this court. Disputes have frequently arisen between relatives and friends over the right to select the last resting place of the bodies of their dead, but we have not heretofore been called upon to pass upon a question of the character here presented. There is no statute upon the subject. We must look to the com-

mon law to determine whether the acts of appellant are such as may be punished.

In the case of *Neighbors v. Neighbors*, 112 Ky. 161, 65 S. W. 607, the question was raised as to the right of the widow and children to have the body of their deceased husband and father removed from one burying ground to another nearer their home. Their right to do this was resisted by the brothers and sisters of the deceased. Upon consideration here, it was held: "There is not a property right to a dead body in a commercial sense, but there is a right to bury it which the courts of law will recognize and protect. This right embraces the right to select the place of burial and to change it at pleasure. This right, in the absence of testamentary disposition of the body, belongs to the next of kin."

Hence, under the rule announced in that case, it was the right of appellant to select the place where his child should be buried, and he violated no law or duty which he owed to the commonwealth or to the public, in selecting a spot in his woods lot, rather than in some public cemetery or private burying ground.

This brings us to a consideration of the second charge in the indictment, to wit, that appellant failed and refused to furnish a respectable and proper coffin or casket in which to bury his child. There is no rule of law defining how a corpse shall be dressed for burial, or the character of coffin or casket in which it shall be inclosed, or the material out of which the box in which the coffin is to be placed shall be made, or the depth of the grave. These matters are left, as from the very exigencies of the case they must be, for determination by relatives, friends, or persons having the matter in charge. The terms "decent," "respectable," and "proper" burial, as used in this connection, are necessarily relative terms, varying, of course, with the financial and social standing of the deceased and his relatives, and not infrequently affected by the community and the rules of religious, social, or political organizations of which the deceased may have been a member of with which he was affiliated. What would be regarded as entirely proper and appropriate by one might be regarded as wholly inadequate and altogether unsuitable by another, and so no rule governing the case can well be formulated, but, by common consent, a determination of these matters is left exclusively to the relatives or friends of the deceased.

The evidence shows that the corpse in this case was clothed, and, we must presume, properly so. The father chose a practically worthless paper box in which to bury it, rather than go to the expense of purchasing a coffin or having one made. It was satis-

factory to him, and, while it no doubt shocked the sense of propriety of his neighbors and the people generally in that locality, if he had a legal right to make a selection, no just ground of complaint is afforded because, in the exercise of that right, he failed to make a selection that would have been, in the minds of his neighbors and friends, regarded as suitable, decent, proper, or appropriate.

It is urged that, inasmuch as appellant was able to furnish a coffin, whether manufactured or homemade, in which to bury the child, he should be punished for his failure to do so. This claim is based upon the idea that the coffin must be of some wooden or metallic substance. There is no law so holding, and custom has not so decreed. Webster, in his *New International Dictionary*, defines coffin to be "A chest or case for the reception of a corpse, commonly of wood or metal, though esp. among the ancients stone and pottery coffins occur. . . . Coffin generally designates the case immediately inclosing the body." The custom of the country imposed upon appellant only the duty of decently burying his child; that is, it must be properly clothed when being taken to the place of burial, and then placed in the ground or tomb, so that it will not become offensive or injurious to the lives of others. He may not cast it into the street, or into a running stream, or into a hole in the ground, or make any disposition of it that might be regarded as creating a nuisance, be offensive to the sense of decency, or be injurious to the health of the community. *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Kanavan's Case*, 1 Me. 226; *Reg. v. Vann*, 2 Den. C. C. 325, *Temple & M.* 632, 21 L. J. Mag. Cas. N. S. 39, 15 Jur. 1090, 5 Cox, C. C. 379. The good of society prohibits him from so doing. But since he is left absolutely free to determine the kind of a casket in which the child should be buried, we cannot hold that he should be punished because the selection made by him was not such as his neighbors and the people of the community in which he lived would have made.

We come next to the question, Is appellant subject to punishment because he refused to permit his relatives and those of his wife, or others, to be notified, so that they might be present at the interment? His relatives and friends may have regarded this conduct on his part as a lack of consideration or respect for their feelings in the matter, but this is the extent of the bearing which his conduct, in this particular, can have upon the case. They had no legal right to be present. They may have been offended because not notified or invited, but no ground of complaint is afforded to

the public on this account. In some localities funerals are not infrequently attended by invitation. Some are strictly private; while others are open to the public. These are matters which address themselves to the discretion and will of those in interest,—the relatives and friends of the deceased.

Lastly, Did appellant, in causing the interment to be made without any religious ceremony, render himself liable to punishment? It is usual in this and other civilized communities to have the interment accompanied with some character of religious ceremony; but there is no law imposing upon those having in charge the burial of the dead such duty. There being no law requiring this almost universal custom, no just ground of complaint is afforded because appellant failed to observe it. The customs of the country vary so much on the question of ceremonies used in the interment of the dead that, if it were not violative of that provision of the Constitution guarantying to every man the right to worship God according to the dictates of his own conscience, it would be utterly impracticable to prescribe a form that would be acceptable to the people generally.

It was no doubt the extreme miserly and niggardly disposition manifested by appellant that aroused the indignation of his neighbors causing the indictment, and ultimately induced the jury to assess the fine against him which it did. While, by the facts in the record, appellant is shown to be a man utterly lacking in parental instincts, he has kept himself within the pale of the law. At the conclusion of the evidence the trial judge should have directed a verdict in his favor.

Judgment reversed and cause remanded, with directions to dismiss the proceedings.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

HENRY L. HIGGINSON et al.  
v.

CHARLES H. SLATTERY et al.

(212 Mass. 583, 99 N. E. 523.)

**Parks — municipal corporation — power of legislature to appropriate to other use.**

1. The legislature may authorize the construction of a public school in a public park the fee of which was acquired under

its authority by a municipal corporation under power of eminent domain, without compensating the municipality for such use. Same — scope of authority.

2. Legislative permission to place a school in a public park does not authorize the erection of a building 21 per cent of which is to be used for administrative offices of the school committee and the school-house commission, and it is immaterial that a prior statute authorizing construction of a building and securing the land therefor contemplated one to be devoted to both purposes.

(October 15, 1912.)

**R**ESERVATION by the Supreme Judicial Court for Suffolk County for the determination of the full court of questions arising in a suit to restrain the erection by respondents of a building in a public park. Injunction to issue.

The facts are stated in the opinion.

Messrs. Nathan Matthews and Philip Nichols, for petitioners:

Under the existing statutes, assuming them to be constitutional, the schoolhouse commissioners have no authority to erect the proposed building upon the Fens.

Com. v. Stevens, 10 Pick. 247; Re Wellington, 16 Pick. 87, 26 Am. Dec. 631; Boston Water Power Co. v. Boston & W. R. Corp. 23 Pick. 360; Locks & Canals v. Lowell, 7 Gray, 223; Quincy v. Boston, 148 Mass. 389, 19 N. E. 519; Boston & A. R. Co. v. Cambridge, 166 Mass. 224, 44 N. E. 140; Coolidge v. Williams, 4 Mass. 140; Cleveland v. Norton, 6 Cush. 380; Com. v. Roxbury, 9 Gray, 492.

The legislature cannot constitutionally authorize the diversion of a part of the Back Bay Fens from its use as a park without the consent of the city of Boston, except by the exercise of the power of eminent domain and the payment of just compensation.

Foster v. Park Comrs. 133 Mass. 321; Atty. Gen. v. Abbott, 154 Mass. 323, 13 L.R.A. 251, 28 N. E. 346; Church v. Portland, 18 Or. 73, 6 L.R.A. 259, 22 Pac. 528; Rowzee v. Pierce, 75 Miss. 846, 40 L.R.A. 492, 65 Am. St. Rep. 625, 23 So. 307; McIntyre v. El Paso County, 15 Colo. App. 78, 61 Pac. 237; Board of Education v. Kansas City, 62 Kan. 374, 63 Pac. 600; McCullough v. Board of Education, 51 Cal. 418; Codman v. Crocker, 203 Mass. 146, 25 L.R.A.(N.S.) 980, 89 N. E. 177; Dartmouth College v. Woodward, 4 Wheat. 518, 694, 4 L. ed. 629, 673; Mt. Hope Cemetery v. Boston, 158 Mass. 510, 35 Am. St. Rep. 515,

**Note.** — Generally, as to what use of squares, parks, or commons amounts to diversion from the use to which they were dedicated, see note to Codman v. Crocker, 25 L.R.A.(N.S.) 980. And as to power of 42 L.R.A.(N.S.)

legislature to control use to which property taken for purposes of a park or square may be put, see notes to Daughters v. Riley County, 27 L.R.A.(N.S.) 930.

33 N. E. 695; *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *State ex rel. Geake v. Fox*, 158 Ind. 126, 56 L.R.A. 893, 63 N. E. 19; *Webb v. New York*, 64 How. Pr. 10; *State ex rel. Board of Education v. Haben*, 22 Wis. 660; 1 Dill. Mun. Corp. 5th ed. §§ 108-117; *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Re Ninth Avenue*, 45 N. Y. 729; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540; *New Orleans, M. & C. R. Co. v. New Orleans*, 26 La. Ann. 478; *Cooley, Taxn.* 3d ed. 1305; 1 Dill. Mun. Corp. §§ 119, 120.

The payment of assessments for the establishment of a park constitutes a contract between the public and the landowners that the land thus acquired shall be and remain a public park; and the owners of the land assessed and their successors in title have a property interest in its continued existence as a park, so that, if the state subsequently attempts without compensation to use the land for a different purpose, such conduct is in violation of both the Federal and the state Constitutions.

*Smith v. Boston*, 7 Cush. 254; *Castle v. Berkshire County*, 11 Gray, 26; *Davis v. Hampshire County*, 153 Mass. 218, 11 L.R.A. 750, 26 N. E. 848; *Hammond v. Worcester County*, 154 Mass. 509, 28 N. E. 902; *Stanwood v. Malden*, 157 Mass. 17, 16 L.R.A. 591, 31 N. E. 702; *Nichols v. Richmond*, 162 Mass. 170, 38 N. E. 501; *Robinson v. Brown*, 182 Mass. 266, 65 N. E. 377; *Putnam v. Boston & P. R. Corp.* 182 Mass. 351, 65 N. E. 790; *Dorgan v. Boston*, 12 Allen, 223; *Downer v. Boston*, 7 Cush. 277; *Lowell v. Oliver*, 8 Allen, 247; *Jones v. Metropolitan Park Comrs.* 181 Mass. 494, 64 N. E. 76; *New England Hospital v. Street Comrs.* 188 Mass. 88, 74 N. E. 294; *Sears v. Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Newton v. Mahoning County*, 100 U. S. 548, 25 L. ed. 710; 3 Dill. Mun. Corp. 5th ed. §§ 1132, 1160; *Church v. Portland*, 18 Or. 73, 6 L.R.A. 262, 22 Pac. 528; *Lewis, Em. Dom.* 3d ed. § 198; *Wormser v. Brown*, 72 Hun, 93, 25 N. Y. Supp. 553; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528; *Pearsall v. Eaton County*, 74 Mich. 558, 4 L.R.A. 193, 42 N. W. 77; *Williams v. Smith*, 22 Wis. 594; *Gilman v. Milwaukee*, 55 Wis. 328, 13 N. W. 266; *Rutherford v. Taylor*, 38 Mo. 315; *Price v. Thompson*, 48 Mo. 361; *Church v. Portland*, 18 Or. 73, 6 L.R.A. 259, 22 Pac. 528; *Rowzee v. Pierce*, 75 Miss. 846, 40 L.R.A. 402, 65 Am. St. Rep. 625, 23 So. 307; *McIntyre v. El Paso County*, 15 Colo. App. 78, 61 Pac. 237; *Muhlker v. New York & H. R. Co.* 197 U. S. 544, 569-571, 49 L. ed. 872, 877, 878, 25 Sup. 42 L.R.A. (N.S.)

Ct. Rep. 522; *Ladd v. Boston*, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858; *Onset Street R. Co. v. Plymouth County*, 154 Mass. 395, 28 N. E. 286; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 140; *Wilson v. Massachusetts Institute*, 188 Mass. 565, 75 N. E. 128; *Central Trust Co. v. Hennen*, 33 C. C. A. 189, 61 U. S. App. 714, 90 Fed. 593.

Mr. George A. Flynn, for respondents:

It was the intention of the legislature to authorize the park commissioners to permit the erection in the Fens of the building of the High School of Commerce, with administrative quarters for the school committee and schoolhouse department, as provided by a previous legislature.

*Sheldon v. Boston & A. R. Co.* 172 Mass. 180, 51 N. E. 278; *Mitchell v. Witt*, 98 Va. 459, 36 S. E. 528.

When a municipality holds property for purposes strictly public, its ownership is as an agency of government, and the control of the legislature over it is supreme.

*Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Codman v. Crocker*, 203 Mass. 146, 25 L.R.A. (N.S.) 980, 89 N. E. 177; *McHugh v. Boston*, 173 Mass. 408, 53 N. E. 905; *Holt v. Somerville*, 127 Mass. 408; *Wrentham v. Norfolk*, 114 Mass. 555; *Abbott v. Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325; *Atty. Gen. v. Abbott*, 154 Mass. 323, 13 L.R.A. 251, 28 N. E. 346; 1 Dill. Mun. Corp. 5th ed. p. 202, § 117; *Hartford v. Maslen*, 76 Conn. 599, 57 Atl. 740; *Steele v. Boston*, 128 Mass. 583; *Lincoln v. Boston*, 148 Mass. 578, 3 L.R.A. 257, 12 Am. St. Rep. 601, 20 N. E. 329; *Com. v. Davis*, 162 Mass. 510, 26 L.R.A. 712, 44 Am. St. Rep. 389, 39 N. E. 113; *Codman v. Crocker*, 203 Mass. 146, 25 L.R.A. (N.S.) 980, 89 N. E. 177.

The payment of the betterment tax did not give rise to any contractual rights within the protection of the Constitution.

*Dorgan v. Boston*, 12 Allen, 223; *Sears v. Boston*, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138; *Warren v. Street Comrs.* 187 Mass. 290, 72 N. E. 1022; *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. ed. 197, 204; *Boston v. Turner*, 201 Mass. 190, 87 N. E. 634; *Sears v. Street Comrs.* 180 Mass. 274, 62 L.R.A. 144, 62 N. E. 397; *Home for Aged Women v. Com.* 202 Mass. 422, 24 L.R.A. (N.S.) 79, 89 N. E. 124; *Burbank v. Fay*, 65 N. Y. 64; *Whitney v. State*, 96 N. Y. 241; *Chicago v. Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598; *State, Kean, Prosecutrix, v. Elizabeth*, 54 N. J. L. 462, 24 Atl. 495, affirmed on appeal in 55 N. J. L. 337, 26 Atl. 939; *Nichols, Em. Dom.* § 141.



**Rugg, Ch. J.**, delivered the opinion of the court:

This is a bill in equity by taxpayers of Boston to restrain certain officers of that city from erecting a building upon a public park known as the Back Bay Fens. This park was established in 1879 under the authority of Stat. 1875, chap. 185. The city of Boston acquired the fee to the lands included within the park, and has expended large sums of money in locating, laying out, constructing, and improving it. By Stat. 1911, chap. 540, the park commissioners of Boston (the public board having control of the Back Bay Fens and other parks) were authorized, upon request of the schoolhouse commissioners of the city, with the approval of the school committee, to permit the erection of a building for the High School of Commerce within the limits of the Back Bay Fens.

The first question is whether the legislature has the power to authorize the construction of such a building in a public park of Boston without the consent of the city expressed either by its voters or its city council, and without the exercise of the power of eminent domain. This necessitates an inquiry into the nature and quality of the right and title of a municipality in land acquired by it for park purposes. The park in question was taken by Boston in the exercise of the power of eminent domain. Therefore, no question arises respecting compliance with the terms of a gift, devise, grant, or request, and considerations which would be decisive under such circumstances are aside from this discussion. *Howe v. Lowell*, 171 Mass. 575, 51 N. E. 536. See *Cary Library v. Bliss*, 151 Mass. 364, 375, 7 L.R.A. 765, 25 N. E. 92; *Riverside v. MacLain*, 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 184, 71 N. E. 408; *Lamar County v. Clements*, 49 Tex. 347; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130; *San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74; *Fessler v. Union*, 67 N. J. Eq. 14, 56 Atl. 272. This is the simple instance of a park acquired by the expenditure of public moneys raised by taxation.

Cities and towns are territorial subdivisions of the state, created as public corporation for convenience in the administration of government. They exercise only the powers which have been conferred by express enactment of the legislature or by necessary implication from undoubted prerogatives vested in them. They have a twofold character, the one governmental and the other private. In the one they execute the functions and possess the attributes of sovereignty which have been delegated by the legislative department of government; in the other they are clothed with the capacities of a private corporation, and may claim its

rights and immunities, and are subject to its liabilities. *Neff v. Wellesley*, 148 Mass. 487, 2 L.R.A. 500, 20 N. E. 111; *Davies v. Boston*, 190 Mass. 194, 76 N. E. 663; *Haley v. Boston*, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; *Atty. Gen. ex rel. Kies v. Lowrey*, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; *Hunter v. Pittsburg*, 207 U. S. 161, 178, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *Vilas v. Manila*, 220 U. S. 345, 356, 55 L. ed. 491, 495, 31 Sup. Ct. Rep. 416.

The property of which a city or town has acquired absolute ownership as an agency of the state, and which it holds strictly for public uses, is subject to legislative control. It may be transferred to some other agency of government charged with the same duties, or it may be devoted to other public purposes. This power always has been exercised in this commonwealth upon some principles of public justice to the communities affected. *Rawson v. Spencer*, 113 Mass. 40; *Agawam v. Hampden County*, 130 Mass. 528; *Springfield v. Springfield Street R. Co.* 182 Mass. 41, 64 N. E. 577; *Worcester v. Worcester Consol. Street R. Co.* 182 Mass. 49, 64 N. E. 581, s. c. 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327. The property which a municipality holds in its private capacity is not subject to the unrestricted authority of the legislature, and no person can deprive it of such property rights against its will, except by the exercise of eminent domain with payment of full compensation. *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Ware v. Fitchburg*, 200 Mass. 61, 68, 85 N. E. 951; *Codman v. Crocker*, 203 Mass. 146, 150, 25 L.R.A.(N.S.) 980, 89 N. E. 177.

The precise point is whether the city of Boston in establishing this park acted as an arm of the commonwealth or as a private corporation in its proprietary capacity. This point has never been decided in this commonwealth. In several cases, however, the character of land devoted to use as a park or common has been before the court, and expressions indicative of its view have been used. It was said in *Holt v. Somerville*, 127 Mass. 408, 411, respecting park land taken under a statute similar to that we are now considering: "The legal title . . . became vested in the city, not for its own use in a corporate capacity, but in perpetual trust for the use of all who at any time might enjoy the benefit of a public park." In *Clark v. Waltham*, 128 Mass. 567, 569, it was decided that the city held "the park, not for its own profit or emolument, but for the direct and immediate use of the public. If it can be said that there is any duty in the town to construct paths over it or to keep such paths in repair, it is a corporate

duty imposed upon it as the representative and agent of the public and for the public benefit." It was held in *Wrentham v. Norfolk*, 114 Mass. 555, 562, that the title to an ancient common or training field laid out by the original proprietors was in the town, not for its own use in a corporate capacity, but for the benefit not only of inhabitants of the town but of all "who might have occasion to use it." In *Oliver v. Worcester*, 102 Mass. 489, 494, 3 Am. Rep. 485, it was said respecting a similar common: "The whole common is in one sense dedicated to the public use, as a place of public resort and recreation, over any part of which persons may pass freely, unless restricted for some public and sufficient reason." In *Abbott v. Cottage City*, 143 Mass. 521, 525, 58 Am. Rep. 143, 10 N. E. 325, respecting a park, it was asserted by Mr. Justice Holmes, apparently as a proposition too plain to require further discussion, that "the use is in the public at large." In *Atty. Gen. v. Abbott*, 154 Mass. 323, 13 L.R.A. 251, 28 N. E. 346, while holding that a park could be established by dedication, it was said that the easement was "not in the town, but it is in the public at large." See also *Atty. Gen. v. Vineyard Grove Co.* 181 Mass. 507, 64 N. E. 75; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631. In *Com. v. Abrahams*, 156 Mass. 57, 30 N. E. 79, where rights in Franklin park, acquired by Boston under the same statute as the Back Bay Fens, were considered, it was said: "The parks of Boston are designed for the use of the public generally." This language was quoted with approval in *Com. v. Crowninshield*, 187 Mass. 221, 224, 68 L. R. A. 245, 72 N. E. 903, 905.

Several cases have arisen involving the character of the public interest in Boston Common, which was dedicated by its owners in 1634 "for the common use of the inhabitants of Boston as a training field and cow pasture." In *Steele v. Boston*, 128 Mass. 583, it was said that "the city holds the Common for the public benefit, and not for its emolument or as a source of revenue, and . . . maintains the Common solely for the benefit of the public. If there is any legal duty to keep the paths in a safe condition, it is solely a public duty." In *Lincoln v. Boston*, 148 Mass. 578, 580, 3 L.R.A. 257, 12 Am. St. Rep. 601, 20 N. E. 329, 330, it was said as to the Common: "The use of it is dedicated to and belongs to the public. . . . The city cannot let or sell the Common. . . . The ordinance set out in the declaration is not the exercise of an owner's authority over his property, but is a police regulation for the use of a public place by the public." In *Com. v. Davis*, 162 Mass. 510, 26 L.R.A. 712, 44 Am. St. Rep. 389, 39 N. E. 113, Mr. Justice Holmes said: "There 42 L.R.A. (N.S.)

is no evidence before us to show us that the power of the legislature over the Common is less than its power over any other park dedicated to the use of the public, or over public streets the legal title to which is in a city or town. . . . As representative of the public, it may and does exercise control over the use which the public may make of such places." In *Codman v. Crocker*, 203 Mass. 146, 152, 153, 25 L.R.A. (N.S.) 980, 89 N. E. 177, 179, 180, it was said by Chief Justice Knowlton: "In different decisions the city has been treated as holding the legal title [to the Common], but it holds it only as an agency of government representing the interests of the public. It has no rights of a private owner apart from its holding as a representative of the government. As an agency of the government representing the people, it is subject to the control of the legislature, which may abolish it and establish another agency in its place, or may deprive it of its power to represent the public, or may transfer a part or all of its governmental authority to another creation. . . . We are of opinion that the title of the city is held only in its municipal capacity as an agency of the government for the benefit of the public, and that the power of the legislature to represent this interest is supreme."

These decisions touching Boston Common, although made respecting land dedicated instead of taken by eminent domain, nevertheless concern the character and nature of the purpose to which common or park land is devoted. A dedication of land by its private owner "for the common use of the inhabitants of Boston is as strongly restricted to the municipality as is that taken for its park purposes under Stat. 1875, chap. 185.

A critical analysis of Stat. 1875, chap. 185, tends to show that it put upon Boston, so far as that city acted under its provisions, the exercise of a governmental function for the benefit of the general public in the neighborhood of the parks established. Section 16 permits any city or town adjoining Boston, after the act shall have been accepted by the voters, to elect park commissioners with powers similar to those conferred upon the Boston park commissioners, "and to lay out and improve parks within such adjoining city or town in conjunction or connection with any park laid out in Boston." The establishment of parks by the adjoining cities and towns under this statute thus was conditioned upon prior action by Boston, and then the other municipalities could lay out parks only "in conjunction or connection" with some park previously laid out by Boston. The plain implication is that, when a joint enterprise of this sort was completed, it was for the general benefit

and use of the public, and that municipal boundaries were to be obliterated so far as concerned reasonable enjoyment of the entire park unit, although its territory may have been furnished by two or more cities or towns.

Playgrounds and public shade trees acquired and maintained by cities and towns are closely analogous in their essential features to parks. In *Kerr v. Brookline*, 208 Mass. 190, 34 L.R.A.(N.S.) 464, 94 N. E. 257, it was said: "The town is not the owner of the playground in any ordinary sense. The property is held under the statute solely for a public use. Rev. Laws, chap. 28, § 19." In *Donohue v. Newburyport*, 211 Mass. 561, 98 N. E. 1081, the planting, maintenance, and care of shade trees by cities and towns was held to be a purely public service, without any element of special advantage to the municipality, undertaken distinctly for the public weal, and not for the private emolument of the municipality.

It has been held frequently that cities and towns are not liable for injuries occasioned to people using public parks (*Veale v. Boston*, 135 Mass. 187; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Lincoln v. Boston*, 148 Mass. 578, 3 L.R.A. 257, 12 Am. St. Rep. 601, 20 N. E. 329; *McKay v. Reading*, 184 Mass. 140, 68 N. E. 43), nor for the negligent conduct of park commissioners acting within the scope of their authority (*Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042). The ground of these decisions of necessity is that the maintenance of public parks is the function of an agency of government, and not one resting in any degree upon the property rights of the municipality.

In other jurisdictions it has been held that the use of a public park is not confined to citizens of the municipality in which it is located, but is for all people. *Price v. Plainfield*, 40 N. J. L. 608, 612; *People ex rel. Britton v. Park & Ocean R. Co.* 76 Cal. 156, 161, 18 Pac. 141. It has been decided also in substance that the acquisition, control, and management of public parks belong primarily to the state. Municipalities, in this particular, act as governmental agencies under an authority delegated by the state, and are always subject to the legislature. *Hartford v. Maslen*, 76 Conn. 599, 611, 57 Atl. 740; *Re Condemnation of Land*, (D. C.) 128 Fed. 185, 186; *Re Certain Land*, (D. C.) 119 Fed. 453, 454; *Louisville & N. R. Co. v. Cincinnati*, 76 Ohio St. 481, 497, 81 N. E. 983; *Daughters v. Riley County*, 81 Kan. 548, 552, 27 L.R.A.(N.S.) 938, 106 Pac. 297; *Baltimore v. Reitz*, 50 Md. 574, 581. See also *Douglass v. Montgomery*, 118 Ala. 599, 610, 43 L.R.A. 376, 24 So. 745; 42 L.R.A.(N.S.)

*Hurd v. Harvey County*, 40 Kan. 92, 95, 19 Pac. 325; *People ex rel. Britton v. Park & Ocean R. Co.* supra; *West Chicago Park Comrs. v. McMullen*, 134 Ill. 170, 178, 10 L.R.A. 215, 25 N. E. 676; *Northport Wesleyan Campmeeting Asso. v. Andrews*, 104 Me. 342, 350, 20 L.R.A.(N.S.) 976, 71 Atl. 1027; *David v. Portland Water Committee*, 14 Or. 98, 123, 12 Pac. 174; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605.

Passing from a consideration of the authorities to the underlying principles which in reason must govern, a park of the nature here in question appears to be for the general public, rather than for the municipality in its proprietary capacity. The use of the park is in kind analogous to those confessedly public. It closely resembles roads and bridges. These are open to general public travel without reference to the residence of the traveler. The enjoyment of a public park hardly can be restricted to residents of a particular city or town. It cannot be made a source of revenue as may a system of waterworks or sewerage, or gas, electric light, or markets. Their use by those most needing them might be prevented by any pecuniary charge. Historically, the advantages derived from parks never have been treated as proper subjects for private enterprise as have the other functions which, when assumed by the city or town, have been regarded as private. On the contrary, parks, in the proper sense to which the public are regularly admitted, have been inseparably connected with a public agency. The pleasure resorts authorized by Stat. 1906, chap. 463, pt. 3, § 34, for street railway companies and kindred places, are different in kind from a public park. Although the establishment of this park was permissive, and not compulsory, this distinction is not decisive. It is the character of the use which stamps a given municipal venture as public or proprietary. *Tindley v. Salem*, 137 Mass. 171, 176, 50 Am. Rep. 289. Adopting this as the test, the dominant aim in the establishment of public parks appears to be the common good of mankind, rather than the special gain or private benefit of a particular city or town. The healthful and civilizing influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the state under modern conditions. It relates not only to public health in its narrow sense, but to broader considerations of exercise, refreshment, and enjoyment. We should hesitate to say that the state would be powerless to exert compulsion if a city or town should be found so unmindful of the demands of humanity as to fail to provide itself with adequate public grounds. The

municipal spirit which dictates an extensive park system is the same in kind as that which provides fine streets and avenues, beautiful bridges, and ample public schools of a high standard of efficiency, all distinctly public in their nature. The end subserved by these instrumentalities is essentially the same general public good.

There are decisions to the contrary by courts of recognized authority. People ex rel. Park Comrs. v. Detroit, 28 Mich. 230, 15 Am. Rep. 202; State ex rel. Wood v. Schweickardt, 109 Mo. 496, 512, 19 S. W. 47. See People ex rel. McCagg v. Chicago, 51 Ill. 17, 2 Am. Rep. 278. But they were made before the absolute necessity of public parks as an accompaniment of modern urban congestion had become so apparent as it is now, and under a Constitution and body of statute and case law differing from our own. We are not inclined to follow them.

Therefore, we are of opinion, both on authority and on reason, that the park here in question was taken and paid for by the city of Boston as an agency of government, and not as a private corporation.

This conclusion is reached without shaking in any degree the authority of Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695, but with a full recognition of the soundness of that decision. The reference to parks as among the private property of the city, on page 519 of that judgment, was an *obiter dictum*, merely by way of illustration, and might be true in many instances of gift, grant, devise, or special dedication. It does not apply to a park acquired as was the Back Bay Fens. It follows that the state has the power to appropriate it to another public use without the consent of the city. Hence it is not necessary to decide whether the approval of the park commissioners and of the school committee constituted an assent by the municipal corporation.

Stat. 1875, chap. 185, § 3, authorized the taking of the land in fee. In this respect the statute is constitutional and vested an absolute title in the city for the public benefit. Dingley v. Boston, 100 Mass. 544; Page v. O'Toole, 144 Mass. 303, 10 N. E. 851; Conklin v. Old Colony R. Co. 154 Mass. 155, 28 N. E. 143; Titus v. Boston, 161 Mass. 209, 36 N. E. 793; Newton v. Perry, 163 Mass. 319, 39 N. E. 1032; Burnett v. Boston, 173 Mass. 173, 53 N. E. 379; Manning v. Bruce, 186 Mass. 282, 71 N. E. 537; Hellen v. Medford, 188 Mass. 42, 69 L.R.A. 314, 108 Am. St. Rep. 459, 73 N. E. 1070; Weeks v. Grace, 194 Mass. 296, 9 L.R.A. (N.S.) 1092, 80 N. E. 220, 10 Ann. Cas. 1077; Boston v. Talbot, 206 Mass. 82, 93, 91 N. E. 1014; Winnisimmet Co. v. Grueby, 4 L.R.A. (N.S.)

209 Mass. 1, 95 N. E. 293. The public purpose for which a city has acquired land in fee by the exercise of eminent domain may be changed by law and the land devoted to some other public use. No private right of reversion intervenes. Strock v. East Orange, 80 N. J. L. 619, 77 Atl. 1051; Seattle Land & Improv. Co. v. Seattle, 37 Wash. 274, 79 Pac. 780; McNeil v. Hicks, 34 La. Ann. 1090, 1093; Brooklyn v. Copeland, 106 N. Y. 496, 501, 13 N. E. 451; Brooklyn Park v. Armstrong, 45 N. Y. 234, 243, 6 Am. Rep. 70; Malone v. Toledo, 28 Ohio St. 643; Eldridge v. Binghamton, 120 N. Y. 309, 24 N. E. 462; Clark v. Providence, 16 R. I. 337, 1 L.R.A. 725, 15 Atl. 763. The legislature, in making such designation of a new public use, represents the public, and its determination is final. Prince v. Crocker, 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446; Codman v. Crocker, 203 Mass. 146, 150, 25 L.R.A. (N.S.) 980, 89 N. E. 177.

It remains to ascertain the will of the legislature as manifested in its statutes. We are of opinion that the statutes upon which the respondents rely do not show a legislative intent to permit the erection of the kind of building here proposed. The construction of the projected building 300 feet long and 150 feet wide and more than 60 feet high is wholly inconsistent with the use of the land covered by it and in its immediate vicinity for a park. Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end. Boston Water Power Co. v. Boston & W. R. Corp. 23 Pick. 360; Quincy v. Boston, 148 Mass. 389, 19 N. E. 519; Old Colony R. Co. v. Framingham Water Co. 153 Mass. 561, 563, 13 L.R.A. 332, 27 N. E. 662; Boston & A. R. Co. v. Cambridge, 166 Mass. 224, 44 N. E. 140; Eldredge v. Norfolk County, 185 Mass. 186, 70 N. E. 36. The policy of the commonwealth has been to add to the common-law inviolability of parks express prohibition against encroachment by buildings, highways, steam or street railways. Rev. Laws, chap. 53, §§ 17 and 20, chapter 28, § 11. The respondents rely upon Stat. 1911, chap. 540, for the necessary legislative permission. This act allows the "erection of a building for the High School of Commerce within the limits of the Back Bay Fens." The building which it is proposed to erect is to be used not only for the High School of Commerce, but also for the administrative offices of the school committee and the schoolhouse commission of the city of Boston. Twenty-one per cent of the building is to be devoted exclusively to these administrative offices, and only the remainder to

the High School of Commerce and for corridors, heating, ventilating, and other general needs of the building. Thus it appears that a very substantial part is for uses other than those permitted by Stat. 1911, chap. 540. The respondents urge that this statute should be read in connection with Stat. 1909, chap. 446 (which authorized the construction of a building for both purposes and the taking of land therefor), and the two acts treated as parts of a legislative unit. But this involves too great a stretch of the language used. It would have been simple to employ words in 1911 plainly indicative of an intent to authorize the construction of the building contemplated by the legislature of 1909. The failure to make unequivocally clear such a purpose strongly points, as matter of construction, to a legislative intent to permit only the building for the High School of Commerce. The firmly settled and frequently declared policy of the legislature heretofore has been to preserve public parks free from all intrusion of any kind which would interfere in any degree with their complete use for this public end. It cannot be assumed that this policy is to be lightly thrown aside. It might well be that relaxation in favor of a High School of Commerce was thought wise, but that a building to include also the administrative offices of the school committee and the schoolhouse commission of a great city, to which many more people would resort, and in considerable part for business rather than educational purposes, was deemed inexpedient. The two statutes are more easily susceptible of a construction which does not bind them together as a single piece of legislation. There does not seem to be justification under all the circumstances for construing them as a unit. The city, therefore, has no authority to expend money for the erection upon the Back Bay Fens of the kind of building proposed, but only for one to be used exclusively as a High School of Commerce.

The parties have requested a decision of the question whether the constitutional rights of the owners of property which was assessed a betterment tax for the layout and construction of the Back Bay Fens would be invaded by the construction of such a building as is authorized by Stat. 1911, chap. 540. But it was said in *Prince v. Crocker*, 166 Mass. 347, 362, 32 L.R.A. 610, 44 N. E. 446, that such a question was not in issue on a taxpayer's petition. In justice it cannot be determined without hearing the parties whose property rights are claimed to be involved. *Lawrence v. Smith*, 201 Mass. 214, 87 N. E. 623.

Injunction to issue.

42 L.R.A. (N.S.)

## MASSACHUSETTS SUPREME JUDICIAL COURT.

### RE OPINION OF THE JUSTICES.

(211 Mass. 624, 98 N. E. 611.)

#### Public money — purchasing homes — legislative power.

The legislature cannot use the public money, whether derived from taxation or from unclaimed deposits turned over by savings banks, to the securing of homes for wage earners by purchasing the property and renting it or selling it to them on instalments.

(May 28, 1912.)

**R**EQUEST by the House of Representatives for the opinion of the Supreme Judicial Court as to the constitutionality of a bill for the extension and definition of the duties of the homestead commission. Negative answer returned.

#### *Note. — Power of state to engage in enterprises generally conducted by private person or corporation.*

As to the right of municipal corporations to engage in enterprises generally regarded as of a private character, see note to *Holton v. Camilla*, 31 L.R.A. (N.S.) 116.

The present note, like the one above referred to, is limited strictly to enterprises which are usually regarded as private and in which the public as a whole is not interested, quasi public enterprises, or businesses such, for instance, as owning and operating railroads, toll roads, street railways, and waterways; building bridges, levees, wharves, docks, etc., not being covered herein. Likewise those cases in which the question was as to whether the state could prohibit the sale of intoxicating liquors by private individuals or corporations, and itself engage in the distribution thereof, have been excluded as forming a class distinct because of the fact that the regulation thereof is admittedly within the police power.

Upon principle, it would seem, as is said in *RE OPINION OF JUSTICES*, that any legislative act requiring the use of public money for a purpose designed primarily for the aggrandizement of individuals, and only for the incidental benefit of the public, could not be justified, but would be a taking of public money for private use, which in effect would be the taking of private property without compensation for the benefit of one individual or class of individuals. This is in accord with the rule that, in general, appropriations should be made only for public purposes (6 Cyc. 894), and is supported by the few decisions in which the question has been passed upon.

The question stated in the title has been approached from the view point of the right of the state to engage in an enterprise of the class under consideration, as affected by

The House of Representatives on May 6, 1912, forwarded to the Supreme Court the following resolution:

Ordered, that the opinion of the Justices of the Supreme Judicial Court be required on the following important questions of law:

First. Are the provisions of the bill to extend and define the duties of the home-stead commission, now pending in the House of Representatives, copies of which are submitted herewith, constitutional, and particularly are the provisions of § 1 of said bill constitutional?

Second. Would the provisions of said bill, and particularly the provisions of § 1 of said bill, be constitutional if the following amendment of § 1, now pending in the House of Representatives, were adopted:

Strike out, in lines five and six, the words, "providing homes for mechanics, laborers, or other wage earners," and insert in place thereof the words, "for the purpose of improving the public health by providing homes in the more thinly populated areas of the state for those who might otherwise live in the most congested areas of the state?"

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The undersigned justices of the supreme judicial court have considered the questions submitted to them, a copy of which is hereto annexed, and answer as follows:

The questions relate to the constitution-

constitutional provisions relating to internal improvements. A case illustrative of this is *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 70 L.R.A. 450, 81 Pac. 450, 6 Ann. Cas. 298, wherein it was held that an act appropriating public money for the construction, operation, and maintenance of an oil refinery for the purposes of receiving, manufacturing, storing, and handling crude and refined oil and its by-products by the marketing of the same, contravened a constitutional inhibition against the state engaging in works of internal improvements. Another decision which involves a question of internal improvements, and which is somewhat akin to *RE OPINION OF JUSTICES*, is *Rippe v. Becker*, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331, wherein it was held that an act providing for the purchase of a site and for the erection of a state elevator or warehouse for public storage of grain could not be justified on the ground that it was an exercise of the police power of the state, in that it regulated the business of receiving, weighing, and inspecting grain in elevators, but on the other hand was a provision for the state itself engaging in carrying it on, and in violation of the constitutional provision that "the state shall never contract any debts for works of internal improvement, or be a party in carrying on such works." Many other cases determine what constitutes a work of internal improvement, but this note is not concerned with that general question.

Still another case which may be regarded as within the scope of this note is *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568, wherein the constitutionality of a statute appropriating public money to be loaned to anyone who has not more than 160 acres of land free from mortgage encumbrance, for the purpose of buying seed grain, was attacked upon the ground that it violated the constitutional provision prohibiting the loan of the credit of the state to individuals. In upholding this contention the court said: "If the state cannot loan its credit, it cannot borrow the money on its own bonds, and then loan the money. It cannot do indirectly what it cannot do

directly. . . . Taxation cannot be imposed for a private purpose, and, if the state can appropriate for a private purpose the money in its treasury and then replace it by taxation, it can do indirectly what it cannot do directly."

But one case (*State ex rel. Lyon v. McCown*, — S. C. —, 75 S. E. 392) has been found which arrives at a conclusion contrary to that reached in the above cases, but the decision therein is clearly distinguishable, as the court took the ground that the enterprise engaged in was of a public rather than a private nature. The act in suit provided for the creation and operation of a state warehouse system for storing lint cotton, and was attacked upon various constitutional grounds, the first of which was that it appropriated public revenue to private purposes in that it provided that the state, through her public officers, should engage in enterprises which in no way related to governmental functions, or which were incidental or necessary to the exercise of the police power, but was in effect solely for the benefit of private individuals. This contention was disposed of on the ground that the act was to prevent "forced sales" at low prices, at a time when the market was controlled by the manipulation of speculators, and that therefore the statute gave protection not only to the cotton grower, but to the people generally as well as to the government, and consequently must be regarded as appropriating money for a public purpose and within the exercise of the police power of the state. The only other, among the many grounds upon which the constitutionality of the act was attacked, which is pertinent to this note, is that the act provided for the pledging of the credit of the state for the benefit of private individuals who were owners of lint cotton, in contravention of the constitutional inhibition against pledging or loaning the credit of the state for the benefit of any individual; but this contention was also disposed of upon the ground that the act was intended as a public measure, and therefore necessarily related to a subject that was public in its nature. G. J. C.

ality of a bill entitled "An Act to Extend and Define the Duties of the Homestead Commission." The general scheme embodied in the proposed bill is that the commonwealth shall purchase land, and develop, build upon, rent, manage, sell, and repurchase the same. The homestead commission is clothed with the fullest power to go into the business of buying, renting, and selling real estate. As expressed in the bill, its purpose is to provide homes "for mechanics, laborers, or other wage earners," or, as suggested by the amendment set forth in the second question, to improve "the public health by providing homes in the more thinly populated areas of the state for those who might otherwise live in the most congested areas of the state." In a constitutional sense the difference between these two statements of purpose is not material in view of the actual provisions of the bill. The substance of it is that the commonwealth is to go into the business of furnishing homes for people who have money enough to pay rent and ultimately to become purchasers. It is not a plan for pauper relief. The question is whether this is a public use.

To this fundamental test must be brought all governmental activity in every system based upon reason rather than force. The dominating design of a statute requiring the use of public funds must be the promotion of public interests, and not the furtherance of the advantage of individuals. However beneficial in a general or popular sense it may be that private interests should prosper and thus incidentally serve the public, the expenditure of public money to this end is not justified. Government aid to manufacturing enterprises, the development of water powers and other natural resources by private persons or corporations with public funds, either through loans or by the more indirect method of exemption from taxation or taking of stock, have been universally condemned by courts throughout the country, although often attempted by legislation. The leading case is *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, where a statute was considered authorizing the city of Boston to issue bonds for the raising of money to be lent to owners of real estate whose buildings had been destroyed in the devastation wrought by the Boston fire of 1872. This statement of the law by Mr. Justice Wells, at page 461 of 111 Mass., hardly can be surpassed for accuracy and clearness: "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential

character, a private, and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." This principle has been applied to a great variety of cases. It was amplified with a full citation of authorities in *Opinion of Justices*, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405.

The question, in its last analysis, is one of taxation. Can the commonwealth raise money by taxation for the purposes set forth in the act?

Taxation is the ultimate question notwithstanding the provisions of § 3, which authorize the treasurer and receiver general to lend to the commission from funds deposited in the treasury of the commonwealth by the savings banks under Stat. 1908, chap. 590, § 56. This statute requires payment to the treasurer of the commonwealth of all deposits in savings banks whose owners are unknown, which have remained untouched for thirty years. The constitutionality of this statute was upheld in *Atty. Gen. v. Provident Inst. for Savings*, 201 Mass. 23, 86 N. E. 912, s. c. 221 U. S. 660, 55 L. ed. 899, 34 L.R.A.(N.S.) 1129, 31 Sup. Ct. Rep. 661, on the express ground that the money is to be held and used by the commonwealth "in recognition of the rights of the owner, and of the necessity of repaying it to him, with interest, when he establishes his lawful right thereto. The commonwealth, under the statute, becomes a kind of trustee for the owner." These funds belong to a large number of persons. It may be that some never will be reclaimed, while undoubtedly some of them will be demanded. This bill does not contemplate a mere investment of funds in such form that they may be available for payment to the real owner when he appears. On the contrary its manifest purpose is a permanent investment not subject to repayment in any form for at least six years, and thereafter only by instalments. It does not appear how large the savings bank deposit is, nor is that material. The commonwealth

holds the entire fund as trustee, and must be ready to pay it to the owners on demand. So far as the commonwealth by a permanent investment renders itself unable to make such repayment on demand, it must be ready to repay out of other funds. But these can be raised only by taxation. In any event, therefore, the question is one of taxation. It is too obvious for discussion that the proposed loan is not an investment on any theory of trusteeship which courts are bound to administer. *Re Dickinson*, 152 Mass. 184, 9 L.R.A. 279, 25 N. E. 99; *Brigham v. Morgan*, 185 Mass. 27, 69 N. E. 418. While these rules may not bind the legislature in dealing with trust funds held by the state, a wide divergence from them stamps the act as an appropriation, and not as an investment. Nor can it be said that this is an investment on the ground that such funds may not be claimed. This would be contrary to the principle on which the constitutionality of the statute was upheld, and under which the commonwealth obtained possession of the money. It would be treating the money in substance as escheated. Even if it were escheated, it then would be money in the treasury freed from any trust. Such money, however, is public money, and can be appropriated only to public uses. It can no more be diverted for private benefit than can money raised by taxation. *Simmons v. Hanover*, 23 Pick. 188; *Allen v. Marion*, 11 Allen, 108.

Taxation is somewhat historical in its nature, and can be most intelligently approached by comparison of those subjects which have been held to be a public use and those which have been held not to be a public use. It is not now open to question that the establishment and maintenance of water and sewerage systems and electric light and gas plants are public uses. They relate to commodities which are or have become universally necessary, and they cannot be procured by each individual or family acting separately, but require co-operation. As a practical matter, provision for these necessities is monopolistic in character and having due regard to the reasonable convenience of the public, there can be no competition respecting them. The permanently exclusive use of portions of the public ways is essential to the effective furnishing of these necessities. Highways are public in their nature, and their construction and repair are legitimate public expenses. Hence they cannot be appropriated to any use which is private. These necessities cannot be provided without the exercise of powers conferred only by the legislature, and commonly require the exercise of eminent domain. Although water and artificial light are in a

certain sense beneficial to individuals, their public functions are so overshadowing as to mark them as proper subjects for state or municipal ownership. *Opinion of Justices*, 150 Mass. 592, 8 L.R.A. 487, 24 N. E. 1084.

On the other hand it was said in *Opinion of Justices*, in 1892, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142, and again in 1903, 182 Mass. 605, 60 L.R.A. 592, 66 N. E. 25, that it was beyond the power of the legislature to authorize cities and towns to engage in the business of furnishing coal or fuel to the public. The economic aspects of conducting business of this character through public instrumentalities are not for our consideration. Such a system is not possible under our Constitution. The grounds upon which these opinions were founded are that such enterprises are conducted by individuals. They are universally recognized as legitimate and proper fields for private and personal adventure. No legislative authority is required to engage in them, and no powers derived from that source are needed for their prosecution. It is a natural right subject only to regulation by the police power. A person lawfully engaged in such business cannot be driven out by taxation to support his rival, even though that rival be an arm of government.

The questions of the present order are closely analogous to those raised by the order of the honorable house considered in *Opinion of Justices*, *supra*. It was said there in substance that it was not within the power of the legislature to authorize the taking of land outside the limits of streets for the purpose of being leased or sold under such restrictions as would insure proper development of industrial and commercial facilities. Such purpose was said to be primarily for the aggrandizement of individuals, and only incidentally for the promotion of the public weal. We are unable to distinguish the purchase, development, renting and sale of land in the manner provided by the present bill, from the principles announced in these decisions and opinions and many others collected and somewhat reviewed in 204 Mass. 607, 27 L.R.A. (N.S.) 483, 91 N. E. 405.

Buying and selling land always has been freely exercised by all individuals who desired, under the Constitution. Proprietorship of his own home has been one of the chief elements of strength in the citizen, and widely diffused land ownership has conferred stability upon the state. It is matter of common knowledge that thousands of inhabitants of the commonwealth who are "mechanics, laborers, or other wage earners" have become, through industry, temperance, and frugality, owners of the homes



in which they dwell. These proprietors, however humble may be their houses, cannot be taxed for the purpose of enabling the state to aid, in acquiring a home, others whose temperament, environment, or habits have heretofore prevented them from attaining a like position. Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principle of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage earner might be taken by the power of the commonwealth for the purpose of handing it over to another wage earner. Neither the power of taxation nor of eminent domain goes to this extent. If the purpose is a public one, the property of every inhabitant, however improved or used, must yield to the superior right. But if the end to be gained is not public, no one can be compelled to contribute under either form of governmental power.

Ownership of a bit of land is one of the deep-seated desires of mankind. The property resting on such proprietorship is among the dearest rights in the minds of many people secured by the Constitution. If the power exists in the legislature to take a tract of land away from one owner for the purpose of enabling another to get the same tract, the whole subject of such ownership becomes a matter of legislative determination, and not of constitutional right.

Experiments in other lands, where the people have established either no bounds or fragile ones to the absolutism of governmental powers by a written Constitution, afford no guide in the determination of what our Constitution permits.

It may be urged that the measure is aimed at mitigating the evils of overcrowded tenements and unhealthy slums. These evils are a proper subject for the exercise of the police power. Through the enactment of building ordinances, regulations, and inspection as to housing and provision for light and air, lies a broad field for the suppression of mischiefs of this kind.

For these reasons the Justices of the Supreme Judicial Court (with the exception of Mr. Justice Loring, whom there has been no opportunity to consult) respectfully answer both questions in the negative.

Arthur P. Rugg.

James M. Morton.

John W. Hammond.

Henry K. Braley.

Henry N. Sheldon.

Charles A. De Courcy.

## GEORGIA SUPREME COURT.

WESTERN & ATLANTIC RAILROAD  
COMPANY, Plff. in Err.,

v.  
WESTERN UNION TELEGRAPH COM-  
PANY.

(138 Ga. 420, 75 S. E. 471.)

### Telegraph — right of way — railroad.

1. A telegraph company may condemn a right of way on and along the right of way of a railroad company, when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise, or with the actual operation of the railroad.

### Eminent domain — telegraph line — consent to regulation.

2. It is not a prerequisite to the exercise of such right of condemnation, that the telegraph company should first file with the

Headnotes by EVANS, P. J.

*Note. — Eminent domain: condemnation of right of way for telegraph or telephone line along railroad right of way.*

This note does not cover the right of foreign telegraph companies to enter a state, except so far as that is incidentally touched upon in connection with the post roads act. The question whether a foreign company is entitled to the benefit of any given state statute conferring upon telegraph or telephone companies the right to condemn a right of way along a railroad right of way is also excluded. There are also excluded the questions as to the railroad's constitutional right to compensation for the taking (see note in 29 L.R.A. (N.S.) 703), the measure of compensation (see note in 26 L.R.A. (N.S.) 191), and the rights of the owner of the fee of the railroad right of way. There is also excluded any discussion of the effect upon the rights of the petitioning telegraph company, of the railroad's contract with another telegraph company for the use of the right of way for telegraph purposes.

### The post roads act.

The act of Congress of July 24, 1866, confers upon all telegraph companies "the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States," and "over and along any of the military or post roads of the United States which have or may hereafter be declared such by act of Congress." It is further provided that before any such company shall exercise the power conferred, it must file with the Postmaster General its written acceptance of the restrictions and obligations imposed by the act. 14 Stat. at L. 221, chap. 230, Rev. Stat. §§ 5263 et seq. U. S. Comp. Stat. 1901, p. 3579. By other Fed-

railroad commission its consent that the commission shall have jurisdiction over it for the purpose of regulating tolls on messages originating and ending within the state of Georgia.

**Telegraph — right of way — both sides of track.**

3. A telegraph company may not condemn a railroad company's right of way on both sides of the track, at least without making it appear that it is necessary to occupy both sides, and that the railroad company's operation of its trains will not be materially interfered with.

**Same — selection by railroad.**

4. Where it appears that the demands of a modern railroad company are such that a telegraph system is a necessary auxiliary to its safe and proper operation, and where

it appears that present telegraph service is afforded to the railroad company by an existing line of telegraph by virtue of a contract between the railroad company and the telegraph company, which contract is about to terminate, and where it appears that the existing line is located on an advantageous portion of the right of way, and that the railroad company, in order to obtain the necessary telegraphic service, intends and purposes, in good faith, to construct a line of its own on the location of the old telegraph line, relatively to the telegraph company proposing to condemn a right of way, the railroad company has a preferential selection of the route. Under such circumstances, the telegraph company will be enjoined from condemning the route which has been selected in good faith by the railroad company.

eral legislation all railroads are made post roads. July 7, 1838, 5 Stat. at L. 271, chap. 172; March 3, 1853, 10 Stat. at L. 255, chap. 146; Rev. Stat. § 3964, U. S. Comp. Stat. 1901, p. 2707; June 8, 1872, 17 Stat. at L. 283, chap. 335.

It is to be noted at the outset that the right to take without compensation is not the only question bearing upon the limits to be put upon the construction of an act, like that of 1866, failing to provide for compensation at all. There is also the question whether the courts can satisfy the constitutional requirement of compensation by reading into such an act the requirement of compensation, and providing, in some manner, procedure to ascertain the amount of, and to enforce the payment of, the same. All such inquiries are foreign to the note except as may incidentally appear in the review of the cases below. Justice Harlan, in filing his dissenting opinion in the *Pennsylvania R. Co. Case*, *infra*, to the effect that the act authorized compulsory taking by telegraph companies of an easement along railroad rights of way, said that the amount of compensation "could be ascertained by the court in some appropriate way."

As early as 1874, in *Atlantic & P. Tele. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158, Fed. Cas. No. 632, it was held that the act of 1866 did not empower a telegraph company to erect its lines along the railroad right of way against the consent and without compensating the railroad; and that, even if such were the congressional intention, in so far as it authorized the taking without compensation, it was beyond the power of Congress so to enact.

And in *Pensacola Tele. Co. v. Western U. Tele. Co.* 96 U. S. 1, 24 L. ed. 708, affirming 2 Woods, 643, Fed. Cas. No. 10,960, although the primary holding was that a state law conferring upon a domestic telegraph company exclusive right to maintain lines in two named counties was in conflict with the act of 1866, and hence inoperative to prevent a foreign telegraph company from erecting lines within its counties along a railroad, under an agreement with such railroad based upon a second state law au- 42 L.R.A. (N.S.)

thorizing such railroad to construct a telegraph line, or assign the rights so to do to any telegraph company, the court made the following statements: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of the post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges. . . . No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized, state sovereignty under the Constitution is not interfered with. Only national privileges are granted."

And in referring to the *Pensacola Case*, the court in *Western U. Tele. Co. v. National Tele. Co.* 22 Blatchf. 108, 19 Fed. 660, said: "It was not held in that case that a telegraph company could acquire a right of way over a railroad without the consent of the owner of the said road, or even that the act gave to telegraph companies the power to require such a right of way by compulsory proceedings upon due compensation to the owner; and the contrary was plainly intimated."

And the court in *Postal Tele. Cable Co. v. Southern R. Co.* 89 Fed. 190, said that before the privileges conferred upon telegraph companies by the act of 1866 could be exercised upon a railway right of way, the consent of the railway must be obtained, or such proceedings had as would insure to the railway just compensation. "The mode or method of exercising this right of eminent domain is fixed by the laws of the several states. Such mode or method is exclusive in its character in ascertaining the amount of the just compensation to be allowed." The court decided upon the telegraph com-

**Same — railroad line — both sides of track.**

5. A railroad company cannot defeat the exercise of the right of eminent domain by a telegraph company in constructing a line of telegraph on a portion of its right of way, by the construction and maintenance of a line on both sides of its track, when a line on one side of its track is ample to furnish it with necessary telegraph service.

**Same — state lands — permission.**

6. A telegraph company cannot construct a line of telegraph over the land of the state without permission of the state. Civil Code, § 2811, does not grant that permission except upon due compensation. That section allows condemnation of the state's land by telegraph companies in the same way as the right of way of a railroad com-

pany and private land. The lessee of the state's road has only a usufructuary interest therein, and this cannot be condemned by a telegraph company separately and apart from the state, in the absence of legislative sanction. Any condemnation proceeding must be against both.

**Same — possibility of telephone use — effect.**

7. Where a telegraph company in its notice of condemnation seeks only to occupy a railroad company's right of way for the purpose of constructing and maintaining a telegraph line, the possibility of stringing telephone wires for the use of a telephone company is no objection to the right to condemn. When the telegraph company attempts to impose an additional servitude, the railroad company has its remedy against such act.

pany's right to appropriate under the state laws, and allowed the appropriation.

And in *Postal Teleg. Cable Co. v. Cleveland, C. C. & St. L. R. Co.* 94 Fed. 234, where the plaintiff invoked state law, along with the statute of 1866, to condemn a right of way for its lines along defendant's right of way, and the former law failed to apply, the case was dismissed upon a holding that "the act of July 24, 1866, made no provision for compensation, hence the procedure cannot be sustained by that act."

The case of *Western U. Teleg. Co. v. Ann Arbor R. Co.* which originated in the state court and was an attempt by the telegraph company to enjoin the defendant railroad from interfering with certain telegraph lines erected by petitioner upon defendant's right of way on a contract with the latter's predecessor in title, was removed to a Federal court and the dismissal thereof by that court was affirmed by the Federal circuit court of appeals (33 C. C. A. 113, 61 U. S. App. 741, 90 Fed. 379), which, after holding that under the facts and the state law the defendant railroad had taken its right of way free from the easement imposed by its predecessor in title in favor of the telegraph company, held further, under the authority of the *Pensacola Case*, that the act of 1866, since it conferred no right of eminent domain, could not be invoked, as was attempted by the telegraph company, to justify a continued maintenance of its lines upon defendant's right of way. And on appeal to the Supreme Court (178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 869), that court put the same construction upon the Federal statute, and emphasized the fact by basing upon that construction a disposal of the case entirely different from that of the lower courts. The court reversed the lower court's decree of dismissal and directed a remand to the state court, holding that the averment in plaintiff's bill that it had filed the required acceptance of the act of 1866, and that, independent of the contract, it had a right to maintain its line upon the right of way, did not entitle the defendant to remove to the Federal court the cause as one arising under the 42 L.R.A. (N.S.)

laws of the United States. The court, after quoting from the opinion in the *Pensacola Case*, supra, to the effect that the statute did not authorize any compulsory taking of property from railroads, said: "It was not asserted in argument that the telegraph company had the right independently of the contract, . . . and in view of the settled construction of the statute we could not permit such a contention to be recognized as the basis of jurisdiction."

At present, as far as the jurisprudence of the United States Supreme Court is concerned, it would seem to be immaterial that there might have been a weakening factor in the *Ann Arbor* decision, and that the statements quoted from the *Pensacola Case* were probably *dicta*. For the court in *Western U. Teleg. Co. v. Pennsylvania R. Co.* (apparently the leading case upon the question) expressly adopted the two cases as having together settled the law to be that the act of 1866 authorizes no condemnatory proceedings by telegraph companies against railroads, but that the authority given thereby to telegraph companies to "construct, maintain, and operate" their lines over and along such railroads was intended primarily to prevent state interference with such construction, maintenance, and operation. In that case the telegraph company, at the expiration of its agreement with the railroad company, under which it was maintaining its lines, and after fruitless attempts to renew the same, invoked Pennsylvania law and the statute of 1866 in an action at law to condemn (120 Fed. 362), and a suit in equity (*ibid*) to restrain interference with the telegraph lines pending the condemnation proceedings. The Pennsylvania law being held inapplicable, the act of 1866 was held not to entitle the telegraph company to the rights claimed on either side of the court. Contemporaneously a similar double proceeding had been brought in New Jersey (120 Fed. 981), apparently invoking the Federal legislation alone. A preliminary injunction was granted. On review, the circuit court of appeals (59 C. C. A. 113, 123 Fed. 33) affirmed the decision of the court for

**Same — interference with railroad — interstate commerce.**

8. A telegraph company will not be permitted to condemn the right of way of a railroad company for the construction and maintenance of lines of telegraph in such a manner as to materially interfere with the railroad company in the operation of its trains and in the transportation of passengers and goods. A telegraph line so constructed and maintained as not to interfere with the transportation of passengers and goods beyond the state is not a burden on interstate commerce.

**Damages — telegraph — railroad right of way.**

9. The ruling in the case of Atlantic Coast Line R. Co. v. Postal Teleg. Cable Co. 120 Ga. 268, that the measure of damages where the right of way of a railroad

company is taken by a telegraph company is the value of the land actually taken, and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company; that the right of way of a railroad company has no general market value for other uses than that to which it is applied, and that peculiar advantages and benefits accruing to a telegraph company from its use of the railroad's right of way cannot be considered in the assessment of damages,—has not the effect of putting the eminent domain laws of the state in opposition to the due process clause of the 14th Amendment of the Constitution of the United States.

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Pennsylvania and reversed that of the court of New Jersey. The decision of the circuit court of appeals was affirmed by the Supreme Court (equity, 195 U. S. 544, 49 L. ed. 314, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517, law, 195 U. S. 594, 49 L. ed. 332, 25 Sup. Ct. Rep. 150, 1 Ann. Cas. 533). It is to be noted that the telegraph company throughout its various pleadings made consistent attempts to have the courts fix the amount of compensation to be paid the railroad, or direct the fixing thereof, and that, though the absence from the act of any provision for compensation may have been one of the reasons for the construction put upon the act, still the case is authority for the proposition that the act confers upon telegraph companies no power of compulsory taking of easements along railroad rights of way, either with or without paying compensation.

The Supreme Court, in the Pennsylvania Case, made a general review of previous Federal decisions on the point, wherein it stated that the judgments in *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623, result affirmed in 49 C. C. A. 663, 111 Fed. 842, with no mention of the act of 1866, and *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 114 Fed. 787, "ultimately rested upon local statutes," and in effect overruled anything that might have been said or held in those cases favoring the proposition that the act of 1866 confers upon telegraph companies the right of eminent domain.

Likewise, the case of *St. Paul, M. & M. R. Co. v. Western U. Teleg. Co.* involved the right, by virtue of the act of 1866, of a telegraph company to maintain and operate its lines along a railroad's right of way in the event that it should be decided that there was no existent authority so to do arising from the contracts under which the lines had become attached to the right of way. The circuit court (106 Fed. 243) did not pass upon the point; but the circuit court of appeals (55 C. C. A. 263, 118 Fed. 497) cited the Supreme Court decision in the *Pensacola and Ann Arbor Cases*, supra, as holding that the act of 1866 "does

not give to a foreign telegraph company in any state the right to enter upon private property and set its poles without the owner's consent." The court, however, continued by saying: "Yet, if a telegraph company erects its poles on a railroad right of way with the consent of the owner, as in the present instance, and its poles and wires in no wise interfere with travel or the operation of the railroad, no reason is perceived why a court of equity should compel it to remove its lines from the right of way, if the telegraph company is willing to pay a reasonable compensation for its use, especially where it appears that no express agreement was made that they should be removed when the lines were erected." After thus apparently holding, the court went so far as to issue a decree directing a stay of proceedings in which the parties might arrange by further contract for the continued maintenance of the telegraph lines, and granting the telegraph company permission, in default of such an agreement, to apply for the appointment of a master and two commissioners to fix the compensation to be paid by the telegraph company to the railroad. This holding was disapproved by the Supreme Court in the *Pennsylvania R. Co. Case*, 195 U. S. 572, 49 L. ed. 323, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517. And although that case makes no reference to the fact, it is further to be noted that, although the circuit court of appeals in the *St. Paul Case* based the right of the telegraph company to continue to occupy its position on the railroad right of way upon authority of the Federal statute, still that court went on to say: "Furthermore, the statutes of the state of North Dakota . . . expressly confer upon telegraph companies the right to exercise the power of eminent domain, . . . and the proposition seems to be well established . . . that where a corporation which has the right to acquire property by an exercise of the power of eminent domain has taken possession of property, and has erected . . . structures thereon, but has not complied with some condition precedent necessary to render its acts in all respects lawful (such

**E**RROR to the Superior Court of Fulton County to review a judgment denying an injunction to restrain proceedings to condemn a right of way for a telegraph line along complainant's railroad. Reversed.

The facts are stated in the opinion.

Messrs. Claude Waller and Tye, Peeples, & Jordan, for plaintiff in error:

The act of Congress of July 24, 1866, does not confer the right of eminent domain upon telegraph companies.

Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517, 195 U. S. 594, 49 L. ed. 332, 25 Sup. Ct. Rep. 150, 1 Ann. Cas. 533; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24

L. ed. 708; Richmond v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778.

That right must be founded upon some statute of the state and must be clearly and expressly given.

Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Markham v. Howell, 33 Ga. 511.

Although the General Statutes are sufficiently comprehensive to embrace any land owned by the state, this is not sufficient to authorize condemnation of such land without the consent of the state, though the land may be held under lease by another.

Seattle & M. R. Co. v. State, 7 Wash. 150, 22 L.R.A. 217, 38 Am. St. Rep. 866, 34 Pac.

. . . as a failure on its part to pay some person the damages necessarily incident to the maintenance of the structure), "a court of equity "has the power to determine the amount of the unpaid damages, . . . and direct that the structure be permitted to remain and be operated, provided the assessed damages be paid." And it is further to be noted that when the St. Paul Case came again before the circuit court of appeals under the title of Great Northern R. Co. v. Western U. Teleg. Co. 98 C. C. A. 193, 174 Fed. 321, certiorari denied in 216 U. S. 619, 54 L. ed. 640, 30 Sup. Ct. Rep. 574, without opinion, the court in effect conceded that its former decision in the case upon this point had been overruled, by saying: "Exhaustive briefs have been presented in which are discussed . . . whether the telegraph company has under the acts of Congress, or can acquire in this suit, . . . an easement for its lines over the railroad right of way. But these questions were determined . . . in the former opinion of this court. . . . We cannot again go into them, . . . even if it be true . . . that the conclusions reached on the first appeal are, in part at least, contrary to views more recently announced . . . in other but similar cases. . . ."

Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 594, 49 L. ed. 332, 25 Sup. Ct. Rep. 150, 1 Ann. Cas. 517. That the Supreme Court might, if its jurisdiction could be invoked, reach a different result in the case in hand, does not open it up for re-examination by us."

The case of Western U. Teleg. Co. v. Pennsylvania Co. 125 Fed. 67, reversed in 68 L.R.A. 968, 64 C. C. A. 285, 129 Fed. 849, on other grounds, decided prior to the Supreme Court decision in the Pennsylvania R. Co. Case, expressly followed the circuit court decision in that case; and Western U. Teleg. Co. v. Pittsburg, C. C. & St. L. R. Co. 137 Fed. 435, expressly follows the Supreme Court decision in the Pennsylvania Case.

The condemnation of the railroad's right of way to the concurrent use thereof by the telegraph company, in Postal Teleg. Cable 42 L.R.A. (N.S.)

Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735, was upheld as being authorized by state law. The court said: "The certificate of the Postmaster General . . . showing the acceptance by respondent of the provisions of the act of Congress, July 24, 1866, . . . was properly admitted in evidence. By accepting the provisions of this act, respondent is given the right to erect its telegraph lines upon all post roads, and by § 3964 of the Revised Statutes of the United States, all railroads are made post roads. But before respondent can exercise the right thus granted by Congress, it must have fixed and paid to the appellant just compensation for the easement. . . . The state law becomes auxiliary to the act of Congress, and provides the method of condemnation and compensation. In other words, a right is given by this act of Congress, and the remedy is furnished by the laws of the state."

And in Postal Teleg. Cable Co. v. Morgan's L. & T. R. & S. S. Co. infra, under "State authorization, what constitutes," *q. v.*, apparently as a reason for the holding that the state law invoked authorized the condemnation sought by the telegraph company, the court said: "Defendant contends that, as the plaintiff is proceeding under act of 1880 [state law invoked by the telegraph company], he must be confined to its provisions. But the act of Congress is paramount, so far as location or the right of way is concerned, and the act of 1880 is auxiliary to it, and provides for the method of condemnation and compensation. The act of Congress of 1866 authorizes no compulsory process. . . . Hence the necessity of resorting to state process for condemnation and compensation."

And this confusing language of the Louisiana court, together with the language of Postal Teleg. Cable Co. v. Southern R. Co. 89 Fed. 190, supra, has been seized upon by the court in Postal Teleg. Cable Co. v. Chicago, I. & L. R. Co. 30 Ind. App. 654, 66 N. E. 923, and made the basis of *dictum* which, stripped of evasiveness, seems to be to the effect that, although, as a matter of

551; *Atlanta v. Central R. & Bkg. Co.* 53 Ga. 120; *Atlanta v. First Presby. Church*, 86 Ga. 742, 12 L.R.A. 852, 13 S. E. 252; 15 Cyc. 611, 612; *St. Louis, J. & C. R. Co. v. Illinois Inst.* 43 Ill. 303; 2 Lewis, Em. Dom. 746; *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.* 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422.

The telegraph company cannot be allowed to condemn when there will be caused thereby a material interference with the railroad company's free exercise of its franchise, or with the actual operation of its road.

*Savannah, F. & W. R. Co. v. Postal Teleg. Cable Co.* 112 Ga. 941, 38 S. E. 353.

Such a construction of the laws of this state as would require only nominal dam-

ages to be paid by the defendant for its condemnation of the right of way of plaintiff is violative of the 14th Amendment to the Constitution of the United States.

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Hall v. DeCuir*, 95 U. S. 485, 24 L.

statutory construction, a state statute giving telegraph companies general power of condemnation might not of itself authorize the appropriation of a railroad right of way to additional use by a telegraph company, still a telegraph company may eke out the authority desired by subscribing to the act of 1866, and then invoking the state and the Federal law in conjunction.

These state decisions antedate the Pennsylvania railroad decision, and in the light of that decision, so far as they may authorize a telegraph company, by invoking the post roads act, to successfully supplement deficient state authorization to condemn a right of way over a railroad right of way, would appear to be inharmonious with the Pennsylvania railroad decision, although in that decision this particular guise of the question of construction of the act of 1866 was not before the court. And the case of *Northwestern Teleph. Exch. Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 334, 89 N. W. 315, takes a view, and probably holds (see argument of counsel, 76 Minn. 341, in connection with opinion, at pages 345, 346), contrary to the *dictum* in the Indiana case.

Since the United States Supreme Court decision, the question as to the power of a telegraph company, by virtue of the act of 1866, to condemn an easement for its lines along a railroad does not seem to have been squarely raised in any reported state case; but in *Western U. Teleg. Co. v. Omaha*, 73 Neb. 536, 103 N. W. 87, there is *dictum* following and citing the *Pennsylvania R. Co. Case*.

In view of the apparent settlement of the question by the Supreme Court of the United States, this extended discussion might seem unwarranted. But it is to be noted that as late as 1911 a California district court of appeals (apparently without having had its attention called to the *Pennsylvania R. Co. Case*), after holding that, in view of reasons set forth, the maxim, *Expressio unius est exclusio alterius*, did not apply to show an intention on the part of the legislature, in its enactment of a law granting the right to condemn prop-

erty to foreign corporations "organized for the purpose of carrying freight or passengers," to take away the existent right of foreign telegraph companies to exercise the right of eminent domain to establish their lines along railways, re-enforced the holding by stating with equal solemnity the proposition that, "if, in fact, it was the intention of the legislature by the enactment of said section to exclude from the right of condemning property . . . all other foreign corporations than those of the class mentioned therein, the section in effect contravenes the laws of Congress with respect to foreign telegraph corporations which have subscribed to the restrictions and obligations imposed upon such corporations by Congress, and therefore, to the extent that it attempts to preclude such corporations authorized to carry on their business in California from the exercise of such right, is invalid." *Western U. Teleg. Co. v. Superior Ct.* 15 Cal. App. 679, 115 Pac. 1091, 1100. Just what the court meant it is difficult to see. It may be noted here that there is a palpable difference between a state's attempt actively "to exclude" telegraph companies from the railroad's right of way (e. g., attempt of Florida to give one telegraph company a monopoly of the railroad's right of way in two counties, *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, affirming 2 Woods, 643, Fed. Cas. No. 10,960), and a state's attempt "to exclude" a telegraph company "from the right of condemning property under the power of eminent domain," as the words are used in the California case. If, as may be gained from that court's statement that "the deprivation of the right in such corporations to condemn property for their uses whenever necessary might deprive them of the right to do business at all," the court meant to say that original omission by a state to authorize telegraph companies to condemn easements along railway rights of way, or even express original exception of telegraph companies from the benefit of all statutes delegating any power of eminent domain, would constitute a violation of the act of 1866, then, in case of

ed. 547; *New Mexico v. United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128; *Western U. Teleg. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 123, 1 Ann. Cas. 517.

**Messrs. Dorsey, Brewster, Howell, & Heyman,** for defendant in error:

The condemnation of the rights of way sought by the telegraph company, and the location of the telegraph lines as provided for in said condemnation, would not interfere with the railroad establishing its own telegraph line, nor would the building of such additional telegraph line interfere with the operation of the trains of the railroad.

*Atlantic Coast Line R. Co. v. Postal Teleg. Cable Co.* 120 Ga. 280, 48 S. E. 15, 1 Ann. Cas. 734; *Savannah, F. & W. R. Co. v.*

*Postal Teleg. Cable Co.* 112 Ga. 946, 38 S. E. 353; *Georgia R. & Bkg. Co. v. Atlantic Postal Teleg. Cable Co.* 152 Fed. 995; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 120 Ala. 21, 24 So. 411; *Union P. R. Co. v. Colorado Postal Teleg. Cable Co.* 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 567; *Southwestern Teleph. Co. v. Kansas City, S. & G. R. Co.* 109 La. 892, 33 So. 910; *Postal Teleg. Cable Co. v. Chicago, I. & L. R. Co.* 30 Ind. App. 654, 66 N. E. 921; *St. Louis & S. F. R. Co. v. Southwestern Teleph. & Teleg. Co.* 58 C. C. A. 198, 121 Fed. 284; *Pacific Postal Teleg. Cable Co. v. Oregon & C. R. Co.* 163 Fed. 967; *American Teleph. & Teleg. Co. v. St. Louis, I. M. & S. R. Co.* 202 Mo. 656, 101 S. W. 578; *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.* 82

such alleged passive violation, it is difficult to imagine any practical method of vindicating the alleged rights of the telegraph companies so as not to run counter to the previous decision in *Western U. Teleg. Co. v. Pennsylvania R. Co.* supra. If, on the other hand, the California court is given the benefit of the doubt by confining its statement to the facts of the case, still the court has said in effect that once a state has conferred upon a foreign telegraph company authority to condemn rights of way over and along railways, then the act of 1866 precludes the repeal of such authorization. As to whether a state's repeal of its own statute authorizing foreign telegraph companies to condemn rights of way along railway rights of way is "state interference" with such foreign telegraph companies, within the meaning of the post roads act as construed in the *Pennsylvania R. Co.* decision, there seems to be no authority other than the California case.

Two cases which have allowed telegraph companies by compulsory proceedings under the post roads act, to construct their lines along railroad rights of way, probably have distinguishing features. In *Mercantile Trust Co. v. Atlantic & P. R. Co.* 63 Fed. 513, the act of 1866 was held to authorize a telegraph company that had accepted its stipulations to construct, against the consent of the receiver of the railroad, its telegraph lines upon and along the railroad's right of way which had been acquired across the public domain of the United States under special congressional grant subsequent to the act of 1866, providing that the railroad constructed thereunder should be subject to the use of the United States for postal, military, naval, and all other government services, since the grant showed congressional intention that the railroad should take the right of way subject to the provisions of the prior act of 1866.

This case was cited and followed in the remarkably similar case of *Union Trust Co. v. Atchison, T. & S. F. R. Co.* 8 N. M. 327, 43 Pac. 701. The reasoning of the court, together with the fact of the failure of the act of 1866 to provide for compensation, 42 L.R.A. (N.S.)

might raise the question as to whether the telegraph companies need compensate such a land grant railroad for the use of its right of way. Each of these two cases was decided by overruling a demurrer to the telegraph company's petition of intervention, praying for a decree that the receiver of the railroad accord to petitioner the right of so constructing the telegraph lines, in which petition it appeared that petitioner was willing and ready to pay compensation and that the petition tendered the same. It appears that in the *New Mexico* case some of the railroad right of way in question, instead of being land grant, right of way, had been acquired by the railroad by purchase or condemnation. The railroad's contention that the act of 1866 did not apply to this land was disposed of by quoting the language of the *Pensacola* Case to the effect that the act was not to be confined in its application to military and post roads such as were carved out of the public domain, but extended to all railroad rights of way. This application of the language of the *Pensacola* decision would seem to be contrary to the *Pennsylvania R. Co.* Case.

In the absence of special considerations of the kind just referred to, it would therefore seem to be the law that the only legal way in which a telegraph company can erect its lines upon a railroad right of way is by either getting the consent of the railroad or proceeding under some state law, if such exists, authorizing a condemnation of a right of way by a telegraph company.

State authorization, what constitutes.

In *Union P. R. Co. v. Colorado Postal Teleg. Cable Co.* 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 564, the court seems to have confused the question of the power of the state to take at all (either by direct exercise of the power of eminent domain or by delegation thereof), with the question whether the statute relied upon by the telegraph company did, as a matter of construction, delegate the power claimed. But

Ala. 297, 2 So. 712; Salt Lake City v. Salt Lake City Water & Electrical Power Co. 24 Utah, 249, 61 L.R.A. 648, 67 Pac. 672; Postal Telegr. Cable Co. v. Chicago, I. & L. R. Co. 30 Ind. App. 654, 66 N. E. 921.

The fact that plaintiff's railroad belongs to the state does not affect defendant's rights in the premises.

Western U. Telegr. Co. v. Western & A. R. Co. 91 U. S. 283, 23 L. ed. 350; Western U. Telegr. Co. v. American U. Telegr. Co. 65 Ga. 160, 38 Am. Rep. 781.

The defendant having instituted condemnation proceedings for telegraph purposes, such proceedings cannot be enjoined because the plaintiff fears that the defendant, after having secured its right of way, will under-

take to grant privileges to other parties not authorized.

Nolan v. Central Georgia Power Co. 134 Ga. 210, 67 S. E. 656; Jones v. North Georgia Electric Co. 125 Ga. 618, 6 L.R.A. (N.S.) 122, 54 S. E. 85, 5 Ann. Cas. 526; Postal Telegr. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; Oregon Short Line R. Co. v. Postal Telegr. Cable Co. 49 C. C. A. 663, 111 Fed. 842; Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan. 484, 65 Pac. 684; State ex rel. Harlan v. Centralia-Chelalis Electric R. Power Co. 42 Wash. 632, 7 L.R.A. (N.S.) 198, 85 Pac. 344.

A condemner has a large discretion in the selection of a location for its route.

Piedmont Cotton Mills v. Georgia R. &

it was seemingly held that the authorization to a telegraph company to condemn a right of way for its lines upon and along a railroad right of way was within the constitutional power of the legislature to subject to the exercise of the power of eminent domain property already devoted to a public use, and that the railroad companies were not within the constitutional limitation against the arbitrary transfer of property from one public use to another of the same kind, since condemnation of the easement sought by the telegraph company would interfere neither with public use of property for railroad purposes, nor with the public use thereof for the line of another telegraph company already installed upon the right of way.

Longitudinal occupation of the strip of the railroad right of way between the edge thereof and the track proper, by telegraph or telephone lines, has been held to have been the intention of the legislature in enacting statutes authorizing condemnation proceedings by such companies for the construction of their lines.

—"along and upon any railroad." St. Louis & C. R. Co. v. Postal Telegr. Co. 173 Ill. 508, 51 N. E. 382 (the unsuccessful contention of the railroad was that the term "railroad" was confined in meaning to the track, and that, since the legislature could hardly have intended longitudinal construction of telegraph lines "upon" the track, the term "upon" merely signified "across");

—"upon the right of way of railroad companies." South Carolina & G. A. R. Co. v. American Teleph. & Telegr. Co. 65 S. C. 459, 43 S. E. 970 (even though defendant railroad owned in fee);

—"along and parallel to any of the railroads in the state." Postal Telegr. Cable Co. v. Morgan's L. & T. R. & S. Co. 49 La. Ann. 58, 21 So. 183, restated in Postal Telegr. Cable Co. v. Louisiana Western R. Co. 49 La. Ann. 1270, 22 So. 219, held again in Southwestern Teleph. Co. v. Kansas City, S. & G. R. Co. 109 La. 892, 33 So. 910.

—"along and parallel to any of the railroads of the state." Postal Telegr. Cable 42 L.R.A. (N.S.)

Co. v. Farmville & P. R. Co. 96 Va. 661, 32 S. E. 468, expressly overruling Postal Telegr. Cable Co. v. Norfolk & W. R. Co. 88 Va. 920, 14 S. E. 803 (the latter decision, by a bare majority, holding that the phrase did not mean "along the right of way and parallel to the track;" that it merely authorized the condemnation for telegraph lines "alongside of" the railroad right of way).

Where the statutes under which the telegraphic companies have proceeded have not expressly made railroad rights of way subject to condemnation for the longitudinal construction thereon of telegraph lines, the railroads have usually invoked the rule of statutory construction that, where property is already impressed with a public or quasi public use, it may be condemned to another public use only where the legislative authorization so to condemn it is "special," or "express," or arises from "necessary implication,"—to use some of the expressions given by the courts in laying down the rule. The rule, as laid down by the different cases, varies in form or substance, or both, the variation adopted in any particular case being designed seemingly more to lend persuasive color to the result to be reached by the courts, than because of any attempt to lay down a guarded statement of the rule, or because the particular variation may have become stereotyped in the particular jurisdiction. Since the concurrent use of the right of way for both trains and properly constructed telegraph lines would seemingly be entirely feasible, the rule, as in most cases, availed the railroads very little where the statute relied upon by the telegraph companies has been in any degree favorable to the latter. (The following statement from Georgia R. & Bkg. Co. v. Atlantic Postal Telegr. & Cable Co. 152 Fed. 991, in effect lays down an opposing rule: "Under the laws of the state, if one person owned the entire right of way which the postal company seeks to condemn for the purposes of its telegraph lines, the court . . . would permit the condemnation. Much more should it be granted against a corporation which has been permitted to exercise the right of eminent domain over the



Electric Co. 131 Ga. 129, 62 S. E. 52; 15 Cyc. 634, 635; 1 Rorer, Railroads, 281; 1 Lewis, Em. Dom. 2d ed. § 279, p. 675; 3 Elliott, Railroads, § 919, p. 1264; 10 Am. & Eng. Enc. Law, 2d ed. 1057; Savannah, F. & W. R. Co. v. Postal Teleg. Cable Co. 112 Ga. 945, 38 S. E. 353; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 68, 42 S. E. 315.

If the condemnation law merely incidentally affected interstate commerce, this would not necessarily make such law violative of the United States Constitution.

Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 632, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 Ann. Cas. 437; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Lake

Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335.

Evans, P. J., delivered the opinion of the court:

Many of the questions presented by this record are novel, and arise from the pecul-

same line as against the lands of private persons, and for its own purposes.")

In Oregon Short Line R. Co. v. Postal Teleg. Cable Co. 49 C. C. A. 663, 111 Fed. 842, affirming 104 Fed. 623, where the rule, as stated by the court, was that property dedicated to one public use cannot be taken for another under general laws conferring the right of eminent domain, where the second use will destroy or injure the use to which the property is already devoted, it was held that, although there be no express authority to occupy the rights of way of railroads, the statutory authority in telegraph companies to exercise the right of eminent domain, standing alone and unaffected by other statutory enactments, would empower the telegraph company to condemn a right of way, provided the proposed construction did not in any way interfere with the railroad uses of the property. It was also held that statutory requirement that the second use be more necessary than the first did not modify the rule of law as importing into it conditions precedent to the second taking, but was merely a statutory declaration of the rule; that the statutory requirement had to do with comparative, and not absolute necessity; that it did not authorize inquiring whether some other property would serve the use so to be imposed; and that a finding that the property was necessary for the telegraph company, and not necessary for the use of the railroad, and that the second use was more necessary than the first, entitled the telegraph company to the condemnation sought.

So, under a general grant of authority to condemn "such real estate and rights of way as may be necessary" for "erecting and keeping in repair lines of telegraph," a telegraph company may condemn an easement upon and along a railroad right of way where the construction of the proposed telegraph lines will not constitute an interference with the operation of the railroad. Postal Teleg. Cable Co. v. Chicago, I. & L. R. Co. 30 Ind. App. 654, 66 N. E. 919.

Authority to condemn the right to con-

struct a telegraph line along a railroad right of way is conferred by a statute authorizing telegraph companies to appropriate from "any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase, or by virtue of any provision in the charter of such corporation," "so much of said lands as may be necessary to erect . . . poles, piers, abutments, wires, and other necessary fixtures." Ft. Worth & R. G. R. Co. v. Southwestern Teleg. & Teleph. Co. 96 Tex. 160, 60 L.R.A. 145, 71 S. W. 270; Southwestern Teleg. & Teleph. Co. v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 52 S. W. 106.

Authority in telegraph companies to condemn "the property, privileges, rights, or easements of private corporations," to secure rights of way for their telegraph lines, empowers them to condemn such rights of way along and upon railroad rights of way. Mobile & O. R. Co. v. Postal Teleg. Cable Co. 101 Tenn. 62, 41 L.R.A. 403, 46 S. W. 571.

A statute authorizing telegraph and telephone companies "to enter upon any land, whether owned by private persons in fee or in any less estate, or by any corporation," for the purpose of making preliminary surveys, etc., "with a view to the erection of any telephone or telegraph lines, and . . . to appropriate so much of said lands as may be necessary to erect . . . poles . . . wires, and other necessary fixtures," and providing that in case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a telephone or telegraph company shall be limited to such use as shall not materially interfere with the uses to which by law the company is authorized to put the same, was held "expressly" to give telegraph and telephone companies the power to condemn an easement for the erection and maintenance of their poles and wires along the rights of way of railroads, subject to the limitation imposed. American Teleg. & Teleg. Co. v. St. Louis, I. M. & S. R. Co. 202 Mo. 656, 101 S. W. 576.

iar facts of the case. The state of Georgia owns a railroad extending between Atlanta and Chattanooga, Tennessee. On the 19th day of July, 1890, by authority of the general assembly (Acts 1889, p. 141), the railroad was leased to the Nashville, Chattanooga, & St. Louis Railway for the period of twenty-nine years from December 27, 1890. The leasing company by the terms of the act became a body corporate under the name and style of the Western & Atlantic Railroad Company. Prior to the lease there had been erected on the right of way of the railroad a line or lines of telegraph poles and wires. At that time and continuously since a line of wire on these poles was set apart for the exclusive use of the lessee in the transaction of its

railroad business. In 1891 another line of wire was strung for the exclusive use of the leasing company, at considerable cost to the lessee. And in 1906 a line of double wires and a line of single wire were stretched upon the same poles at segmental parts of the railroad, at considerable expense to, and for the exclusive use of, the leasing company in the operation of the railroad. In 1884 the Western Union Telegraph Company and the Nashville, Chattanooga, & St. Louis Railway Company entered into a contract for the maintenance and operation of a telegraph line upon its own railroad and such other railroads as it might subsequently acquire by lease or purchase. This contract was to continue in force for twenty five years from July 1st,

The rule that lands appropriated to a public use "cannot again be subjected to another public use, unless such secondary appropriation be authorized by the legislature," applies only when the second public use would supersede or destroy the former, and cannot defeat a condemnation of a right of way for purposes of erecting a telegraph line along a railroad right of way, where the telegraph lines will not materially interfere with the use of the land for railroad purposes. *Postal Tele. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

Authority in telegraph companies to enter upon lands in the state of Oregon for the purpose of surveying their lines, and to appropriate and condemn such lands, not exceeding 25 feet in width, as might be necessary or convenient, was held to empower them to condemn easements along and upon a railroad right of way; since the concurrent use of the right of way for both railroad and telegraph purposes is entirely feasible, and since, although telegraph companies usually condemn easements for their lines, still authority to take "lands" implies authority to take any less estate. *Pacific Postal Tele. Cable Co. v. Oregon & C. R. Co.* 163 Fed. 967.

Authority to condemn a right of way for a telephone line upon and along a railroad right of way is conferred by a statute permitting telephone companies "to construct" lines upon and along railroads. *Canadian P. R. Co. v. Moosehead Teleph. Co.* 106 Me. 363, 29 L.R.A. (N.S.) 703, 76 Atl. 885, 20 Ann. Cas. 721. The holding is somewhat weakened by the facts that, in addition to the permission "to construct," the statute provided, in case of failure of the railroad and telephone companies to agree as to the structure of the telephone lines, for a hearing before a railroad commission, which should be "binding upon the parties;" that the telephone company's rights in question in the suit were based upon such a hearing; and that the case was finally disposed of on other and independent grounds. (It is to be further 42 L.R.A. (N.S.)

noted that, in so far as the case purports to be authority on the proposition as to whether "to construct," as such, implies a grant of authority to condemn for the purpose of construction, there is opened up a general field of inquiry beyond the limits of this note.)

The relocation along a railroad by a telephone and telegraph company of its poles and wires so as to substitute a direct, for a circuitous, route between termini, even though the line, when relocated, will serve substantially the same patrons, is a "new" line within the meaning of a law authorizing telephone and telegraph companies to condemn rights of way for their lines along railroad rights of way, "for the purpose of constructing new lines." *Cumberland Teleph. & Tele. Co. v. Yazoo & M. Valley R. Co.* 90 Miss. 686, 44 So. 166.

On the other hand, the rule of construction under consideration was applied in *New York City & N. R. Co. v. Central U. Tele. Co.* 21 Hun, 261, as the basis of a holding that railroads were not within the scope of the term "public roads" in, and telegraph companies were not authorized to condemn a right of way for their lines over and along railroad rights of way by, a statute authorizing the exercise of the power of eminent domain to construct "lines of telegraph upon, over, or under any of the public roads, streets, and highways, and upon, through, or over any other land."

And in *Oregon Short Line R. Co. v. Postal Tele. Cable Co.* 49 C. C. A. 663, 111 Fed. 842, affirming result of 104 Fed. 623, where the right of a telegraph company to condemn to its use as a right of way for its telegraph lines, part of a railroad right of way, was held authorized under a statute giving telegraph companies general authority to condemn, it was said, and probably held, that the condemnation sought was not authorized by another statute giving telegraph companies authority to construct lines along and upon the public roads and highways which crossed the lands and waters of the state.

And it was held in *Western U. Tele. Co. v. Pennsylvania R. Co.* 59 C. C. A. 113,

1884, and thereafter until the expiration of one year after written notice by either party to terminate the contract. In this contract the telegraph company obligated itself to set apart one wire on the main line for the preferential use of the railroad company, and agreed that, if the railroad company should require greater wire facilities, the telegraph company would furnish an additional wire at the cost price upon poles already erected, and that the railroad company at its own cost would string such additional wire. In August, 1911, the telegraph company gave to the railroad company written notice of its intention to terminate the contract after the expiration of one year. The telegraph company then opened up negotiations with the

Western & Atlantic Railroad Company to purchase an easement for its line of poles and wires, which negotiation was fruitless. Whereupon the telegraph company served the Western & Atlantic Railroad Company with written notice of its purpose to condemn, along its right of way in this state, a right of way upon which to construct (when necessary), maintain, and operate its telegraph line. "The location of the right of way sought to be acquired is substantially that location now occupied by the telegraph line of the Western Union Telegraph Company along main line of your railroad from Atlanta, Georgia, to the Tennessee line at or near Graysville, Georgia, and along the branch line known as the Rome branch;" the main line running from At-

123 Fed. 33, that the right was not conferred upon a telegraph company by its charter authority "to erect and construct works, edifices, fixtures, or structures along any of the roads, highways, streets, and waters" of the state.

In *Northwestern Teleph. Exch. Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 334, 79 N. W. 315, the railroad right of way was at most places 100, but in some places 200 or 300, feet wide. Petitioner sought to condemn for the erection of his telephone lines a right of way 6 feet wide to run where the railroad right of way was only 100 feet wide, over private lands alongside of, and 3 feet from, the railroad right of way, and to run where the railroad right of way broadened out, across the sections of the same, so as to keep the telephone poles in the same straight line. The telephone company invoked generally both the act of 1866, which it had legally accepted, and certain state law, a reference to which latter in the statute book shows that it authorized the creation of corporations for "works of internal improvement requiring the taking of private property or any easement therein for public use, including . . . telegraph lines, canals, . . ." etc., and authorized the condemnation by any such corporations of the "right of way over, through, under, and across any lands needed for the construction of any railroad or telegraph, pneumatic tube lines, . . ." etc. The court said that a telephone line is a telegraph line within the meaning of the act of 1866, but held that the act was of no service to plaintiff in these proceedings; that petitioner's proposed telephone line was at any rate a work of public improvement within the meaning of the state law, and hence petitioner was entitled to condemn rights of way; that there was, however, under the rule requiring express statutory authority, or such authority by necessary implication, for the taking of property already devoted to the public use, no authority for the taking of the proposed easement, since the statute contained no express authority to take a right of way upon the railroad's right of way, and there 42 L.R.A. (N.S.)

was no authority by implication, since there was insufficient necessity for the proposed taking. This matter of necessity seemed to resolve itself in the court's mind entirely into the question of getting around the corners of the widened places in the railroad right of way, and the court finally rested its decision, denying the telephone company an easement over such sections of the railway right of way, upon the feasibility of a plan outlined by the court whereby the poles could be placed so as to round such corners without unusual stress upon the poles and guy wires.

Again, constitutional declaration that telephone companies are common carriers, confers upon them no authority to exercise the power of eminent domain, and hence no authority to condemn the right to erect their lines along a railroad right of way. *Alabama & V. R. Co. v. Cumberland Teleph. & Teleg. Co.* 88 Miss. 438, 41 So. 258.

— "necessity" for the taking.

Express legislative authority empowering telegraph and telephone companies to condemn easements, and construct and operate telegraph and telephone lines along the rights of way of railroads in the state, provided the latter are not thereby obstructed and just damages are paid, forecloses the question in a proceeding by a telephone company under the statute, as to whether the telephone company could not construct its lines over property that had not been appropriated to railroad uses, and the issue on necessity for such appropriation is narrowed to two question: Would the easement sought by the telephone company substantially obstruct the right of way for railroad purposes, and is the character and location of the easement sought necessary for the telegraph company. *St. Louis & S. F. R. Co. v. Southwestern Teleph. & Teleg. Co.* 58 C. C. A. 198, 121 Fed. 276.

"Necessity" for the appropriation of a part of a railroad right of way for telegraph purposes exists where it appears that the appropriation is necessary to effectuate the purpose of the telegraph lines.

tanta, Georgia, to the Tennessee state line at or near Graysville, Georgia, through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield, and Catoosa, a distance of approximately 121.37 miles. The telegraph line will enter upon the right of way of the railroad company at the Marietta Street bridge at the same point where it now enters upon the right of way, and continue upon the east side of the tracks a specified distance of about 3 miles, then to cross the tracks and continue on the west side, a specified distance, to a point north of the 5-mile post, then to cross the tracks and continue on the east side a specified distance, to the 6-mile post, at which point the line would divide, and part of the line cross to the west side of the tracks. From the

6-mile post to the Tennessee state line the line would extend on both sides of the track as now located, except at Marietta, Adairsville, Dalton, and Tunnel Hill. The right of way thus sought to be acquired by the telegraph company to be of sufficient width to enable it to conveniently construct (when necessary), maintain, and operate its line located and constructed substantially as follows: As many wires or cables of wire as might be necessary from time to time to transact the business of the telegraph company, to be strung on poles placed at an average distance from the center of the main line track of 27 feet, except where your right of way is limited or widened, with a minimum distance from edge of right of way (except where right

"It is not a question whether there is other land . . . equally available, but . . . whether the land sought is needed for the construction of the public work. . . . With the degree of necessity or the extent which the property will advance the public purpose, the courts have nothing to do." *Postal Telegr. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

And to take advantage of a statute giving a telegraph company the right to condemn so much and such portion of a railroad right of way as might be necessary for erecting, maintaining, and operating its telegraph lines, subject to the limitation that such portion be not taken so as to interfere with the railroad's use, a telegraph company is not obliged affirmatively to show that there was an absolute necessity for it to take the particular strip sought to be condemned, since, in the nature of things, a similar strip located almost anywhere else on the railroad right of way, at a sufficient distance from the track, might answer the purposes in view. *Savannah, F. & W. R. Co. v. Postal Telegr. Cable Co.* 112 Ga. 941, 38 S. E. 353.

Appropriation by a telegraph company for the erection of its lines over a railroad's right of way, to be confined to that portion not actually used or required for railroad purposes, and constructed so as not to interfere with the ordinary use of the right of way for railroad purposes, is a more necessary public use, within the meaning of a statute providing for the taking of property already devoted to a public use for a more necessary public use. *Postal Telegr. Cable Co. v. Oregon Short Line R. Co.* 114 Fed. 787. To practically the same effect is *Postal Telegr. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623, affirmed in 49 C. C. A. 663, 111 Fed. 842, *q. v. supra*.

And in *Postal Telegr. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735, although it does not appear that there was a statutory or constitutional requirement that land devoted to one public use could be appropriated to another only when the latter was a more 42 L.R.A. (N.S.)

necessary one, to that contention by the railroad it was answered by the court that "the property sought was practically idle," and that "the appropriation of the right of way of a railroad not essential to the enjoyment of its franchises and property, for the construction of a telegraph line, is to and for a more necessary public use."

The condemnation of a right to construct a telegraph line along a railroad right of way is not prevented by the fact that a right of way for the line might be obtained over other property and in other ways. *Ft. Worth & R. G. R. Co. v. Southwestern Telegr. & Teleph. Co.* 96 Tex. 160, 60 L.R.A. 145, 71 S. W. 270.

—compatibility of concurrent use of railroad right of way for railroad and telegraph or telephone purposes.

The question of compatibility has been usually raised under the rule of construction discussed above, and the uniformity of the results of the cases in allowing the condemnation, under the variously worded statutes above, is a better index of the law than the following illustrative propositions laid down by the courts:

"Common knowledge teaches that there is ample space on the 100 feet of the railroad's right of way for two or more telegraph lines without obstructing the free and ample use for railroad purposes." *Mobile & O. R. Co. v. Postal Telegr. Cable Co.* 120 Ala. 21, 24 So. 408.

"It is a matter of common observation that telegraph poles and wires have become usual incidents on railroad rights of way,—always on one side and frequently on both." *American Teleph. & Telegr. Co. v. St. Louis, I. M. & S. R. Co.* 202 Mo. 656, 101 S. W. 576.

A proposed erection by condemnation of telegraph lines along a railroad right of way is not contrary to public policy in that it would give two telegraph lines instead of one along a railroad. On the contrary, the result would be promotive of the interests of the public as tending by competition to give better service at lower

of way is limited or widened) of 6 feet. Poles to have a length of not less than 20 feet, to be placed in the ground a depth of not less than 4 feet. At highways, railway crossings, depots, and side tracks, poles to have a height of from 25 to 40 feet above the ground, with an average of forty poles per mile on both sides of the track from Atlanta, Georgia, to Kingston, Georgia, and of thirty poles per mile from Kingston, Georgia, to the Tennessee line. "Said poles will nowhere be placed upon any of the embankments or in the cuts of your railway, nor will said wires be attached or fastened to any of the bridges or trestle work of said railway." There will be wires crossing the tracks from the main telegraph line to reach the offices of the telegraph

company at various points mentioned along the railroad. At all points where the wires so cross the tracks, the lowest wires to be not less than 25 feet above the tracks. The term for which the condemnation was desired was the term expiring December 27, 1919, which date is the expiration of the railroad company's lease with the state. Thereupon the Western & Atlantic Railway Company filed a petition to enjoin the proposed condemnation by the Western Union Telegraph Company. The telegraph company showed cause by demurrer and answer, and after hearing evidence the court refused an interlocutory injunction.

1. It is settled law in this state that a telegraph company, in the exercise of the right of eminent domain granted to it by

rates (*dictum*). Postal Tele. Cable Co. v. Oregon Short Line R. Co. 104 Fed. 623.

In Savannah, F. & W. R. Co. v. Postal Tele. Cable Co. *supra*, where it appeared that the telegraph company was seeking to place its poles 30 feet from the center of the track, that the poles were to be 25 feet in length, and to extend above the ground 20 feet, etc., it was held that, notwithstanding evidence by several witnesses that the railroad company might be greatly damaged by the blowing down by storms of the poles, there was no reversible abuse of discretion on the part of the trial judge in refusing to grant an injunction against the condemnation proceedings.

And in Atlantic Coast Line R. Co. v. Postal Tele. Cable Co. 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734, on the question of measure of damages for the taking, the court said: "We are unable to see how a telegraph pole of less height than the distance from its location to the track can be considered a menace to the operation of the road." The case of Georgia R. & Bkg. Co. v. Atlantic Postal Tele. Cable Co. 152 Fed. 991, held that the proposed appropriation would not interfere with ordinary travel upon the right of way, the court saying: "The height of the poles above ground will not exceed the distance from the poles to the end of the nearest cross-ties. . . . In case a pole should fall under ordinary circumstances this will leave a margin of about 2 feet beyond the length of the pole, and the distance from its base to the track. But the Georgia railroad says that its right of way at certain points is too narrow for the telegraph company to execute its proposition. The proposition is, however, made, and at those attenuated points on the Georgia line, . . . contiguous territory . . . will probably be found in the neighborhood." But further there seem to be no direct holdings of the court's dealing with the question of the compatibility of the two uses as affected by the ratio of the length of the pole to its distance from the track. In the following cases, however, in which appropriations were allowed, the nature in this regard of the proposed construction

appears, more or less incidentally, from the respective opinions. In Oregon Short Line R. Co. v. Postal Tele. Cable Co. 49 C. C. A. 663, 111 Fed. 842, and Postal Tele. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735, poles 30 feet long, to be set in the ground not less than 5 feet deep, were to be placed not nearer than 30 feet from the outer edge of the track; in American Teleph. & Tele. Co. v. St. Louis, I. M. & S. R. Co. *supra*, poles "not less than 25 feet" in length, to be set "about 5 feet" deep, were to be placed 35 feet from the center line between the rails of the main track, where the width and condition of the railroad right of way would permit of going so far, and not nearer than 15 feet in any event, . . . and not nearer than 15 feet from the center line between the rails of all side tracks, etc., where the width and condition of such side tracks, etc., would permit of going so far; in Pacific Postal Tele. Cable Co. v. Oregon & C. R. Co. 163 Fed. 967, the length of the proposed poles was not given, their distance from the track was to be the same as in the preceding case; in St. Louis & C. R. Co. v. Postal Tele. Co. 173 Ill. 508, 51 N. E. 382, poles "not less than 25 feet" in length, to be set "not less than 5 feet" deep, were to be placed not less than 25 feet from the outer edge of the track; and see Postal Tele. Cable Co. v. Chicago, I. & L. R. Co. 30 Ind. App. 654, 66 N. E. 919, where it seems that for a 2-miles stretch "near Cedar lake," the poles were to be set upon a railroad right of way only 25 feet wide, 4 feet from the edge thereof.

— telephones as "telegraphs."

Investigation of the question as to whether a telephone company is authorized to condemn a right of way along a railroad right of way, by statutory authorization conferring such a right upon "telegraph" companies, should properly be based upon a review of authorities upon the general question as to whether telephones are included by implication in statutory references to "telegraphs." Such a broad review is be-

the state, may condemn a right of way on and along the right of way of the railroad company, when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise, or with the actual operation of the road. Whether the construction of the telegraph line on a particular portion of the railroad's right of way will or will not materially interfere with the operation of the railroad

is ordinarily a question of fact. *Savannah, F. & W. R. Co. v. Postal Telegr. Cable Co.* 112 Ga. 941, 38 S. E. 353.

2. The railroad company denies that a telegraph company possesses any power of condemnation without first filing with the railroad commission of this state its consent that the railroad commission shall have jurisdiction over it for the purpose of regulating tolls charged on long-distance messages originating and ending within the

yard the scope of this note. Telephone companies, however, have been held entitled to condemn rights of way for their lines along railroad rights of way under statutes conferring such rights upon "telegraph" companies, in *Gulf, C. & S. F. R. Co. v. Southwestern Telegr. & Teleph. Co.* 18 Tex. Civ. App. 500, 45 S. W. 151; *Southwestern Telegr. & Teleph. Co. v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 52 S. W. 106; *San Antonio & A. P. R. Co. v. Southwestern Telegr. & Teleph. Co.* 93 Tex. 313, 49 L.R.A. 459, 77 Am. St. Rep. 884, 55 S. W. 117 (followed in *Ft. Worth & R. G. R. Co. v. Southwestern Telegr. & Teleph. Co.* 96 Tex. 160, 60 L.R.A. 145, 71 S. W. 270); *San Antonio & A. P. R. Co. v. Southwestern Telegr. & Teleph. Co.* — Tex. Civ. App. —, 56 S. W. 201; *Gulf, C. & S. F. R. Co. v. Southwestern Telegr. & Teleph. Co.* 25 Tex. Civ. App. 488, 61 S. W. 406.

*Alabama & V. R. Co. v. Cumberland Teleph. & Telegr. Co.* 88 Miss. 438, 41 So. 258, is *contra*. It should be noted that this decision was not based primarily upon general reasoning or authority, but upon the court's holding that in Mississippi telephone companies were, and had always been, "treated as separate and distinct companies."

#### Sufficiency of petition.

Examination of cases shows that the condemning companies have in their petitions gone very much into detail in designating the rights desired, and in the description of the instrumentalities to be erected along the railroads, and although these petitions have been frequently attacked upon the ground of alleged insufficiency, there seems to be no reported case in which just such an attack was sustained; there is therefore practically no authority on just how little descriptive matter a petition might contain and still be held sufficient. But in cases where objections of insufficiency have failed, it has been said or held that the petition need not set out the exact spot where the poles are to be placed, or whether on one side or the other of the roadbed (*Mobile & O. R. Co. v. Postal Telegr. Cable Co.* 120 Ala. 21, 24 So. 408); nor state how many wires are to be placed upon the cross-arms (*St. Louis & C. R. Co. v. Postal Telegr. Co.* 173 Ill. 508, 51 N. E. 382); nor locate each pole by individual description, so as to designate by metes and bounds the exact spot 42 L.R.A. (N.S.)

of earth to be occupied by each pole (*Ibid.*); nor be accompanied by the filing of a plat, where such plat, if filed, would add nothing to the definiteness of the petition (*Ibid.*); nor describe the right of way for the proposed line by legal subdivision, as might be necessary when condemning a right of way through a farm, since the railroad is a fixed monument and a location of the proposed telegraph line thereupon and with reference thereto is sufficient (*Postal Telegr. Cable Co. v. Oregon Short Line R. Co. supra*).

And so a statutory provision that if a telegraph or telephone company, "after having surveyed and located its lines," shall, in all cases where such companies fail to agree with the owner of the property through which said lines are to be located, apply to the circuit court, etc., to condemn, does not make the survey and location of a proposed telephone line a condition precedent to condemning an easement upon and along a railroad right of way, since the survey and location mentioned were intended for the sole purpose of securing a description of the property sought, and to give notice to the owner thereof as to the extent of the condemnation sought; and a petition definitely locating the proposed telephone line upon the railroad right of way is good without a survey having been made. *St. Louis & S. F. R. Co. v. Southwestern Teleph. & Telegr. Co.* 58 C. C. A. 198, 121 Fed. 276.

And so it has been held that such a petition is not vague and indefinite for failing to state whether the railroad company holds an easement or the fee in its right of way. The court said: "It asks a right of way over the right of way of the railroad company,—a well-defined and well-known subject,—under whatsoever tenure it may be held, above all thoroughly known to the railway company." *Postal Telegr. Cable Co. v. Southern R. Co.* 89 Fed. 190.

On the other hand, in *St. Louis & C. R. Co. v. Postal Telegr. Co. supra*, there are statements based upon two New Jersey cases (not having to do with railroad rights of way) that (1) "Where a telegraph company seeks to condemn a part of the right of way of a railroad company, the position and size of the telegraph poles should be stated," and that (2) "data should be given by which the location of the telegraph poles may be determined, and the intended heights of the poles, as well as the number and size of the cross-arms they are to bear, should be indicated."

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state of Georgia Originally the railroad commission of Georgia had jurisdiction only over railroads. In 1891 its authority and jurisdiction were extended so as to embrace telegraph companies and express companies. Acts of 1890-91, p. 151; Civil Code 1895 §§ 2217, 2218. In 1894 an act was passed providing for the condemnation of private property for public uses by all corporations or persons authorized to take or damage private property for public purposes. Civil Code, §§ 5206 et seq. In 1898 the provisions of this act were made applicable to telegraphic companies. Civil Code, § 5235. In 1905, § 2347 of the Code of 1895, which authorizes telegraph companies to construct, maintain, and operate telegraph lines through or over any lands of this state, and on, along, and upon the right of way and structures of any railroad, and, when necessary, under or over any private lands in this state, was so amended as to extend its provisions to telephone companies, and to confer upon both telephone and telegraph companies the power of eminent domain; provided, that where it is necessary for such companies to exercise the right of eminent domain, they shall proceed to exercise it in the same manner as heretofore provided by law for the exercise of such right of eminent domain by telegraph companies; and further provided, that no corporation shall have the benefit of this section until it has filed with the railroad commission of the state its consent that the railroad commission shall have jurisdiction over it for the purpose of regulating intrastate rates. Civil Code, § 2811. In 1907 the railroad commission of this state was expressly given jurisdiction over both telegraph and telephone companies for the regulation of their intrastate business. Civil Code, § 2662. The history of the legislation on this subject, as thus outlined, shows that telegraph companies were not originally under the jurisdiction of the railroad commission; that, as soon as the commission was given jurisdiction over them, the power of eminent domain was conferred upon them; that telephone companies were not brought within the jurisdiction of the railroad commission until 1907; and that prior to that time telephone companies could not exercise the right of eminent domain without first voluntarily submitting to the jurisdiction of the commission. It would seem from a reference to the act of 1905, that so much of Civil Code, § 2811, as requires a filing with the railroad commission of its consent to submit to its jurisdiction, was applicable to telephone companies which did a purely telephone business, or in conjunction therewith a telegraph business. The Code section is a little 42 L.R.A. (N.S.)

confusing, but this confusion is dissipated by a reference to the act of 1905. Given this construction, the provision of § 2811, about filing a consent to submit to the jurisdiction of the railroad commission, is not applicable to telegraph companies.

We therefore hold that it is not prerequisite that a telegraph company, in the exercise of the right of eminent domain under the statute, shall first file with the railroad commission its consent to submit to its jurisdiction.

3. The telegraph company claims the right to condemn the railroad company's right of way on both sides of the track. We have been unable to find any reported case dealing with the exact question. In solving this problem we must look to our statute to ascertain the extent of the power of condemnation which is given to telegraph companies. The act of 1894 (Civil Code, §§ 5206 et seq.) is a general statute defining the manner of the exercise of the right of condemnation by those entitled to take or injure private property for public use upon making adequate compensation. It was specially made applicable to telegraph companies by amendment. Civil Code, § 5235. It is declared in § 5236 that "when a telegraph company undertakes to condemn so much of the right of way of a railroad company as may be necessary for its use for the purpose of constructing, maintaining, and operating its telegraph lines along and upon such right of way, the notice provided for in § 5218 of the Code shall be directed to the railroad company, and shall set out the manner in which the telegraph company proposes to construct its lines on the right of way of the railroad company." This implies that a telegraph company can only take of the railroad's right of way so much thereof as may be necessary for the purpose of constructing, maintaining, and operating its lines of wire. Without such a limitation it would be in the power of a telegraph company with a monopolistic tendency to acquire by condemnation proceedings, the right to occupy all of the right of way of a railroad company not required for railroad use, to the arbitrary exclusion of any other telegraph company that subsequently might wish to occupy a portion of the right of way, either with the consent of the railroad company or by virtue of the exercise of eminent domain. We are mindful of the case of Savannah, F. & W. R. Co. v. Postal Teleg. Cable Co. supra, wherein it was ruled that "it is not essential that the telegraph company should affirmatively show that, in order to erect, maintain, and operate its telegraph lines between the points proposed, it is necessary for it to

condemn such right of way; nor is it essential for it to show that it is necessary for it to use the particular portions of such right of way which it proposes to condemn." No case is broader than its facts; and the quotation which we take from the headnote in that decision, as illustrated by the discussion in the opinion, was not intended to cover the question in hand. In that case the telegraph company was only seeking to condemn a portion of the right of way on one side of the track, and there arose a controversy as to the right of the telegraph company to select that particular portion without showing a necessity for the location of its poles on the particular portion. And in that connection the court said: "In the very nature of things it would be impossible to show this; for a similar strip located almost anywhere else on the right of way, at a sufficient distance from the railroad track, might answer for the purpose in view, and certainly numerous other locations for such a strip could be found upon the right of way." The court had in mind only one strip of land, and not two strips separated by the railroad track. And even where a single strip of the right of way is sought to be taken by the telegraph company, the telegraph company cannot take more than may be necessary for its use for the purpose of constructing, maintaining, and operating its telegraph lines along and upon the railroad's right of way. If the corporation should attempt to take more land than is authorized, a court of equity will restrain it from so doing. *Savannah, F. & W. R. Co. v. Postal Telegr. Cable Co.* 115 Ga. 554, 560, 42 S. E. 1. The condemner has a large discretion in the selection of its route, but we do not understand that it was ever contemplated by the statute that a telegraph company could arbitrarily condemn both sides of a railroad track for the construction of lines of wires on both sides of the track, when the necessary wires could be strung upon poles erected on one side of the track.

4. It appeared from the evidence that the railroad company could not safely and expeditiously operate its cars and engines without the aid of a telegraph line; that the demands of a modern railway are such that a telegraph system is a necessary auxiliary to its safe and proper operation. In view of the telegraph company's voluntary termination of its contract with the railroad company, the latter is compelled to erect and maintain its own telegraph poles and wires, in order to operate its road by means of electrical signals and orders. The railroad company contends that it should have the right of prior selection in the location of

a line of telegraph for railroad use, and that it intends to erect poles upon substantially the same locations as at present occupied by those of the telegraph company. On the other hand, the telegraph company denies that the railroad company has any such right, but asserts that it has the right to select a route over the railroad company's right of way at any point which does not materially interfere with the railroad company in the conduct of its business. These conflicting claims must be solved by the application of the rule that property dedicated to one public use cannot be subjected to another public use, except in cases where the latter use does not materially interfere with the former. If the railroad company owned the existing line of telegraph, and it was necessary to maintain and have it for the safe and convenient handling of its trains and cars, no one would seriously contend that the telegraph company could deprive the railroad company of its use by virtue of the exercise of the right of eminent domain. Assuming, of course, the necessity of a line of telegraph as auxiliary to the operation of a railroad company, the railroad company would have the same right in locating its telegraph line as it would have in locating its railroad track, or its depot and its warehouses, on its own right of way. If a railroad company was originally constructing its track, could it be said that a telegraph company could arbitrarily select sites for its poles so as to force the railroad company to build its track on a less desirable place on its own right of way? Surely not. The fundamental basis of the principle of subjecting one public use to a second public use is that the first use must not be materially interfered with. It would indeed be a most unfair demand to make of the owner of property charged with the discharge of a public duty, that he must make his property subservient to the convenience of the demandant who desires it for another public use. The railroad company is held off by its contract from constructing its line of telegraph on that portion of its right of way which it prefers, and which it has selected, until the contract expires; and the telegraph company should not be given a preference because it is not fettered by the same contract in proceeding to condemn the same portions of the railroad right of way. This conclusion cannot be affected by the fact that the telegraph line was in existence at the execution of the lease. There was no exception, either in the leasing act or the contract of lease, that the lessee was to take the road burdened with a use by the telegraph company. The telegraph com-



pany recognizes that its right to occupy the right of way is contractual; hence its notice to the railroad company to terminate the contract, and its proceedings to acquire the right of occupancy by condemnation.

5. The telegraph company at present occupies with its poles and wires both sides of the railroad track for nearly the entire distance of the main line of the railroad. According to the evidence a single set of poles is sufficient to carry the necessary wires for a telegraph line for railroad use. It therefore cannot be said that it is necessary that the railroad have a line on both sides of its track. But, as we have already said, the railroad company has the right of prior selection of the route.

6. The railroad company takes the position that the telegraph company has no power to condemn its usufructuary interest in the right of way without express permission of the state, and that, at all events, the state is a necessary party to the condemnation proceedings. The telegraph company contends that the state has expressly given its consent for any telegraph company to construct and maintain a line of telegraph upon the lands of the state. In support of this contention § 2811 of the Civil Code is cited. That section, after declaring that any chartered telegraph company shall have the right to construct and maintain its line along and over the public highways of the state, with the approval of the county or municipal authorities, proceeds as follows: "And, upon making due compensation, shall have the right to construct, maintain, and operate telegraph or telephone lines, or both, through or over any lands of this state, and on, along, and upon the right of way and structures of any railroads, and, where necessary, under or over any private lands in this state, and to that end may have and exercise the right of eminent domain." The quoted clause does not give to a telegraph company a free license to construct its lines over the lands belonging to this state. It expressly provides that "upon making due compensation" a telegraph company is given the right to construct its lines upon the lands of the state, upon the right of way of a railroad company and upon private lands. The telegraph company's making due compensation is put forth as a condition precedent for the construction of its lines. This provision of the Code places the land of the state upon the same plane as a railroad's right of way and land of private owners, with respect to condemnation. There is nothing in the language granting this concession which can be construed into a general permission to telegraph compa-

nies to build their lines upon the state's land without compensation.

In this state a tenant can neither assign his lease nor sublet the premises without the landlord's permission. Nor can a tenant who leases premises for a particular use devote them to other uses without the landlord's consent. *Dodd v. Ozburn*, 128 Ga. 380, 57 S. E. 701. Acquisition of the right of occupancy of land by means of condemnation is the equivalent of a conveyance. The difference consists in the means of acquiring the right; the former is involuntary and the latter is voluntary. If a tenant cannot convey the right to devote the premises to a use not authorized by the lease, it must follow that the right cannot be acquired by condemnation. A telegraph line can only be constructed by an invasion of the premises of the landlord, and that cannot be accomplished except by his voluntary consent or by condemnation. It is true that if a tenant's possession be disturbed by the construction of a telegraph line, he is to be separately compensated for his injury; but it does not follow that separate condemnation proceedings may be taken against landlord and tenant. The relation of the state to the lessee of its railroad is that of landlord and tenant. The lessee has but a usufructuary interest in the possession of the leased premises, for the specific uses named therein. *State v. Western & A. R. Co.* 136 Ga. 619, 625, 71 S. E. 1055. Because of this relation any condemnation proceeding must be instituted jointly against the state and the lessee, unless the state gives to the telegraph company permission to occupy its railroad without condemnation, which it has not done.

Our attention is called to the provisions of the eminent domain law respecting the right of a telegraph company to condemn the right of way of a railroad company, and especially to the provision that in such cases only the railroad company is to be notified. The argument is that the lessee is a railroad company, and therefore falls within all of the provisions of the statute on the subject. We do not think so. The statute refers to railroad companies which own their rights of way, the ownership extending either to the easement of right of way or to the fee in the soil. For reasons already stated, it is manifest that the statute does not contemplate proceedings solely to condemn the right of way of a railroad company which has no ownership or easement of the right of way or of the fee; one which is merely a tenant, possessing no estate, but only a usufructuary interest in the land.

7. Another objection to the telegraph

company's right to condemn is its contractual stipulation with the American Telegraph Company and subsidiary companies that the respective parties shall use in common, as far as practicable, the facilities of each other, in order to avoid unnecessary duplication of lines and wires. This contract was made to cover large systems of telegraph and telephone companies, and it will not be imputed to the telegraph company that it will attempt to impose an additional use not mentioned in the notice of condemnation. If the telegraph company undertakes to impose an additional servitude, the railroad company has its remedy against such an act. *Nolan v. Central Georgia Power Co.* 134 Ga. 201, 210, 67 S. E. 656.

8. The railroad company further sets out that it is a common carrier engaged in interstate business; that if a portion of its right of way is condemned for the construction of a telegraph line, the danger of falling poles and other inconveniences would interfere with its traffic and would be a burden on interstate commerce. The deduction is sought to be drawn that the condemnation of the railroad's right of way is prohibited by that provision of the Constitution of the United States giving to Congress the exclusive power to regulate commerce between the states. We fail to appreciate this objection. A telegraph company cannot condemn any portion of a railroad's right of way necessary for the operation of its trains and cars. The possibility of poles falling upon the track is too remote a contingency to be considered. *Atlantic Coast Line R. Co. v. Postal Teleg. Cable Co.* 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734. The railroad is now being operated with a telegraph line on both sides of its track, and yet no complaint is made that existing conditions interfere with the railroad company in the discharge of its duties as a carrier of passengers and goods.

9. A further contention advanced by the railroad company in bar of the proposed condemnation of its right of way is that the eminent domain laws of this state, as construed in *Atlantic Coast Line R. Co. v. Postal Teleg. Cable Co.* supra, authorizing condemnation of the right of way of a railroad company by a telegraph company, are unconstitutional, in that they allow the property of the railroad company to be taken without due process of law. In the case cited this court ruled that the measure of damages in such cases is the value of the land actually taken, and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company; that the right

of way of a railroad company has no general market value for other uses than that to which it is applied; and that peculiar advantages and benefits accruing to a telegraph company from its use of the railroad's right of way cannot be considered in the assessment of damages. The effect of this ruling is alleged to be that a railroad company is entitled to no more than nominal damages for the appropriation of a portion of its right of way under condemnation proceedings for the erection or maintenance of lines of poles and wires of a telegraph company, and hence it is not permitted to receive the full value of the property taken and the injury inflicted. The rule laid down for the measure of damages in 120 Ga. 268 (supra), is the correct rule, supported by reason and by authority. The measure of damages as there defined affords to the railroad company full compensation for the value of the land taken, and the statute providing for the condemnation of a railroad's right of way is not unconstitutional for the reason that the railroad company's property is taken without due process of law.

The case is reversed and remanded for another hearing.

All the Justices concur.

#### IDAHO SUPREME COURT.

WILLIAM E. WILSON et al., Respts.,

v.

ANTHONY V. LINDER et al., Appts.

(21 Idaho, 576, 123 Pac. 497.)

Tenant in common — joint remaindermen — purchase — tax title.

1. The rule that a cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance, and assert it against his companions in interest, is applied in this case

Headnotes by AILSHIE, J.

*Note. — Laches as affecting the right of one cotenant to benefit of purchase of outstanding title by another.*

The present note is supplementary to a note on the same subject, *Stevenson v. Boyd*, 19 L.R.A.(N.S.) 526. The effect of adverse possession is not within the scope of these notes, except as it may incidentally affect the question of laches.

In *Starkweather v. Jenner*, 216 U. S. 524, 54 L. ed. 602, 30 Sup. Ct. Rep. 382, 17 Ann. Cas. 1167, the court held that a delay of four years in seeking to require a cotenant to share with other tenants in common the benefits of his purchase of the common

to a joint remainderman in expectancy, and accordingly, held, that a remainderman in expectancy cannot acquire a tax title to the property so as to exclude or cut off the expectancy of his coremaindermen, where the expectant interests flow from a common title, provided the other remaindermen contribute or offer to contribute their respective shares of the money expended for the protection of such title within a reasonable time.

**Same — contribution — joint remainderman in possession.**

2. Where one of several remaindermen in expectancy was in possession of the property as lessee of the life tenant, paying the annual rental to the life tenant during

the years for which the taxes were allowed to go delinquent, and he subsequently buys the property at delinquent tax sale, he is under no obligation to personally bear the expense of such taxes; and it is the duty of the other remaindermen who claim the protection of such tax title to bear their respective shares of the expenses incurred in the purchase of the property and the payment of such taxes and assessments.

**Life tenant — duty to pay taxes — lessee.**

3. It is the duty of a life tenant and those succeeding to his estate by purchase to pay the taxes on the property, and they cannot by payment acquire any adverse rights against the remaindermen; but such duty and obligation does not rest on a mere

property at a public sale under the provisions of an encumbrance, was such laches as to bar any rights of cotenants, where there had been a large increase of value of the property in the interim.

And it was held in *Randolph v. Vails*, — Ala. —, 60 So. 159, where two cotenants bought land in which they had an interest in common with others, from the purchaser at a sale under a mortgage, that the rights of at least the adult claimant to participate in the benefits of the purchase were barred by laches (even though there was said to be some evidence of fraud, and the right to redeem the premises probably would have been extended beyond the usual reasonable period of two years given by a court in equity to cotenants within which to assert their claim to the benefit of the purchase of the outstanding title), since they failed for more than nine years after the redemption of the property, and since the purchasers had, almost six years before this claim, divided the land in severalty and strangers had become interested therein. But the court dismissed the bill without prejudice, saying that possibly some of the minor claimants might be able to establish some interest in the lands.

In *Smith v. Goethe*, 159 Cal. 628, 115 Pac. 223, Ann. Cas. 1912 C, 1205, a suit seeking to establish a resulting trust, the court, in reversing and remanding the case for a new trial, because the findings of the lower court could not be sustained by the evidence, said of the complainant's claim for judgment on the pleading: "The complainant alleges the making of an offer of payment by plaintiff to defendants. If we assume that this was an allegation of a tender sufficient for the purpose under discussion, the plaintiff is met by the difficulty that his allegation is denied, and that the finding of the court is against him. We find nothing in the answer which, in our judgment, obviated the necessity of proving a reasonably prompt tender as a condition of claiming the benefit of the purchase made by the cotenant."

But a delay of two years in reimbursing cotenants and seeking to share in the benefits of a decree by which they had been subrogated to an equity or lien against the common property, upon the payment of a 42 L.R.A. (N.S.)

claim held against the property by a third person, was held in *Harrison v. Cole*, 50 Colo. 470, 116 Pac. 1123, not to constitute laches barring the remedy, it not appearing that there had been any material change of value in the property in the interval. In this case, however, the relations of the parties were such as to increase the equities beyond those resulting from the mere relation of cotenancy itself.

And a delay of about five years in demanding the benefit of a purchase by a cotenant of a title derived from foreclosure of a mortgage was held in *Caldwell v. Caldwell*, 173 Ala. 216, 55 So. 515, not to be such laches as to bar the remedy; but in this case the complainants relied upon an alleged verbal agreement by which they were to be permitted to redeem within five years, which agreement, however, was void and unenforceable under the statute of frauds.

So, in *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858, it was held that the purchase by one cotenant of a tax certificate against property owned in common with the heirs of another, and the subsequent payment of taxes thereon, inured to the benefit of the heirs, and that their claim was not barred by laches even after a lapse of many years, where they were unacquainted with their rights, and the adverse claimants failed either to enter into open and notorious possession of the whole property, or to advise the heirs of their interest in the land.

And in *Peabody v. Burri*, 255 Ill. 592, 99 N. E. 690, delay of over twenty years by one cotenant in seeking relief against a cotenant who had purchased an outstanding tax title on the common property was held not such laches as to bar her, it appearing that she was unaware of her rights and that the other party had not been prejudiced.

Although not within the scope of this note, attention is called to the case of *Scanlon v. Parish*, 85 Conn. 379, 82 Atl. 969, holding that where one cotenant has voluntarily taken an assignment of a mortgage upon the common property, he may, after calling upon his cotenant to pay his proportionate part of the mortgage, foreclose the same.

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lessee from the life tenant who pays his annual rent for the land to the life tenant, and acquires no other profit or benefit from the lands on account of which a duty arises to defray taxes and assessments.

**Tenant in common — joint remaindermen — taxes — contribution.**

4. Where a remainderman in expectancy has purchased the land at tax sale, and other remaindermen with like expectant interests, all flowing from a common source, seek the protection of the tax deed acquired under such purchase, equity imposes upon them the duty of paying or offering to pay their respective shares of the money thus expended, and they must do so within a reasonable time in order to entitle them to equitable relief.

**Same — diligence — laches — effect.**

5. Equity does not obligate a cotenant to pay out his own money to protect the common title, but it rather permits him to do so, and, when he has done so, it then lays an obligation upon the other cotenants to exercise reasonable diligence and do equity in contributing their shares in the way of reimbursing him for his outlay; and a failure to do so within a reasonable time will be taken as an election on their part to allow him to take the benefit of his expenditure, and the title he has thus acquired for his individual use and benefit.

**Same — failure to tender — effect.**

6. Where a remainderman in expectancy purchased the property at tax sales for the taxes imposed for the years 1900 and 1901, and his coremaindermen in expectancy had notice of this fact, and did not contribute or offer to contribute their respective shares, and thereafter in November, 1908, commenced an action to have their respective titles in expectancy in the property quieted, and still did not pay or offer to pay their share of the money expended to protect such tax title, held, that they are guilty of such delay and laches and lack of equity as to preclude any right of recovery.

**Adverse possession — color of title — purchase from life tenant.**

7. Where a remainderman in expectancy took a deed in January, 1902, from the life tenant at a time when it could not be known or foreseen whether the life estate would mature into a fee-simple title or the remaindermen would ever acquire any title or interest in the estate, and the deed thus executed purported to convey an absolute and fee-simple title to the estate, and the purchaser took such conveyance, believing she was acquiring an absolute estate, and entered into the possession of the property thereunder and continued in the open, exclusive, and notorious possession thereof, occupying and cultivating the same continuously until the commencement of an action by the other remaindermen in expectancy in November, 1908, paying all taxes and assessments thereon, and making improvements, held, that such facts constitute color of title and adverse possession 42 L.R.A. (N.S.)

within the meaning of §§ 4038, 4030, and 4040, Rev. Codes, and bar any right of recovery on the part of the other remaindermen in expectancy.

**Real property — merger of titles.**

8. The general and prevailing rule that, where legal and equitable titles both meet in the same person, the equitable title is merged in the legal title, is subject to the restriction that the merger takes place only where the legal and equitable estates are coextensive and commensurate.

(March 30, 1912.)

**A**PPEAL by defendants from a decree of the District Court for Ada County in plaintiffs' favor in an action brought to quiet title to certain land. Reversed.

The facts are stated in the opinion.

Mr. Ira E. Barber, for appellants:

Notice was served on plaintiffs as early as 1902 of the adverse claim of defendants and cross complainant, and this adverse claim and tenure, supported by conduct giving it the color of integrity, continued for more than five years prior to the initiation of this action, and amounted to an ouster.

38 Cyc. 25; *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. 521; *Alvarado v. Nordholt*, 95 Cal. 116, 30 Pac. 211; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Aguirre v. Alexander*, 58 Cal. 21; *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74.

A claim to property under a conveyance however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under color of title.

*Wright v. Mattison*, 18 How. 50, 15 L. ed. 280; *Little v. Crawford*, 13 Idaho, 146, 88 Pac. 975.

If plaintiffs could sue during the lifetime of Jesse Wilson, at any time after the entry of possession under the deed of 1902, under which they claimed the whole estate, then the statute of limitations began to run against them from the time they had notice, or, from the conduct of defendants, should have known of the adverse claim.

1 Cyc. 1072; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Schlarb v. Cas-taing*, 50 Wash. 331, 97 Pac. 289.

If a tenant pays rent and the landlord enjoys the same, the tenant is under no duty to pay taxes, and may purchase the property at tax sale.

*Keith v. Keith*, 26 Kan. 42; *Smith v. Newman*, 62 Kan. 318, 53 L.R.A. 934, 62 Pac. 1011; *Uhl v. Small*, 54 Kan. 651, 39 Pac. 178.

In order to preclude a tenant in common

from purchasing at a tax sale, there must be something which makes it his duty to pay the taxes.

*Blackwood v. Van Vleit*, 30 Mich. 118; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Sands v. Davis*, 40 Mich. 14; *Palmer v. Ozark Land Co.* 74 Ark. 253, 85 S. W. 408; *Willard v. Ames*, 130 Ind. 351, 30 N. E. 210; *Nagle v. Tieperman*, 74 Kan. 32, 9 L.R.A. (N.S.) 674, 85 Pac. 941, 88 Pac. 969, 10 Ann. Cas. 977.

Where a cotenant claims adversely to his cotenants, he may buy at a tax sale, and his purchase does not inure to the community.

*Peck v. Lockridge*, 97 Mo. 549, 11 S. W. 246.

An adverse claimant may strengthen his title by buying at a tax sale.

*Atkinson v. Dixon*, 89 Mo. 468, 1 S. W. 13; *Jeffery v. Hursh*, 45 Mich. 59, 7 N. W. 221; *Blackwood v. Van Vleit*, 30 Mich. 118; *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976.

A cotenant may, by delay, lose the right to benefit by the purchase of an outstanding title by his fellow owner.

*Stevenson v. Boyd*, 153 Cal. 630, 19 L.R.A. (N.S.) 525, 96 Pac. 284; *Mahoney v. Nevins*, 190 Mo. 360, 88 S. W. 731.

And he must elect to do this within a reasonable time.

*Stevenson v. Boyd*, supra; *Savage v. Bradley*, 149 Ala. 169, 123 Am. St. Rep. 30, 43 So. 20; *Mandeville v. Solomon*, 39 Cal. 125; *Craven v. Craven*, 68 Neb. 459. 94 N. W. 604; *Buchanan v. King*, 22 Gratt. 414; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931; *Barnes v. Boardman*, 152 Mass. 391, 9 L.R.A. 571, 25 N. E. 623; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Goralski v. Kostuski*, 179 Ill. 177, 70 Am. St. Rep. 98, 53 N. E. 720; *Reed v. Reed*, 122 Mich. 77, 80 Am. St. Rep. 541, 80 N. W. 996; *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749, 22 Mor. Min. Rep. 11; *Freeman, Cotenancy*, 2d ed. 156.

Where a tenant is free from fault and under no obligation to pay the taxes, it is difficult to assign any reason for restraining him from bidding to his own use at a tax sale, and he may buy to his exclusive use.

*Freeman, Cotenancy*, 158; *Boynton v. Veldman*, 131 Mich. 555, 91 N. W. 1022; *Sands v. Davis*, 40 Mich. 14; *Bennet v. North Colorado Springs Land & Improv. Co.* 23 Colo. 470, 58 Am. St. Rep. 281, 48 Pac. 812.

*Messrs. Cavanah & Blake and E. J. Dockery*, for respondents:

It devolved upon Jesse Wilson and his successors in interest to pay the taxes on this land, and if they failed to pay the 42 L.R.A. (N.S.)

taxes, and permitted the land to be sold for taxes, and bought the land at a tax sale, and a certificate was issued to them and thereafter a tax deed, they could not acquire any interest in the land adverse to the respondents.

*Black, Tax Titles*, § 285; *Solis v. Williams*, 205 Mass. 350, 91 N. E. 148; *Wider-sum v. Bender*, 172 Mass. 436, 52 N. E. 717; *Murch v. J. O. Smith Mfg. Co.* 47 N. J. Eq. 193, 20 Atl. 213; *Defreese v. Lake*, 109 Mich. 429, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; *Stevens v. Melcher*, 152 N. Y. 551, 46 N. E. 965; *Pike v. Wassell*, 94 U. S. 711, 24 L. ed. 307.

A sale or conveyance in due form for taxes extinguishes all prior liens, whether for taxes or otherwise.

*Auditor General v. Clifford*, 143 Mich. 626, 107 N. W. 287; 37 Cyc. 1478.

*Allshie, J.*, delivered the opinion of the court:

This action was instituted by respondents to quiet the title to 160 acres of land described in the complaint. The appellants, who were defendants in the lower court, answered, and the appellant Emma J. Linder filed a cross complaint, praying for a decree quieting her title to the whole tract of land as against all the plaintiffs. A decree was entered in favor of the plaintiff, and the defendants appealed.

The tract herein described formerly belonged to James Wilson, who died in March, 1899, leaving surviving children as follows: William E. Wilson, Lizzie Everett, Charlotta Calhoun, Jesse Wilson, and Emma J. Linder. He left a will whereby he devised the lands involved herein to Jesse Wilson, subject to the following restriction and proviso: "That my son Jesse shall have the home place [following with a description]. But should my son Jesse die without any wife or children, the property herein conveyed shall be equally divided between my other four children, or their heirs, share and share alike." In *Wilson v. Linder*, 18 Idaho, 438, 138 Am. St. Rep. 213, 110 Pac. 274, this court construed the foregoing provision of the will of James Wilson, and held "that the devisee, Jesse Wilson, took a limited estate only, subject to the vesting of an absolute and fee-simple title on his leaving surviving him at the time of his death a wife or child, and that the remaindermen had only an expectancy which might be vested in them as an absolute estate upon the contingency of Jesse Wilson dying without either wife or child." The cause was remanded and a new trial was had. The appellants herein took the position on the new trial that Emma J. Linder should have her title quieted, on the ground,

first, that Anthony V. Linder acquired a good title to the property by reason of tax-sale certificates and deeds issued thereon; and, second, that Anthony V. Linder and Emma J. Linder, his wife, had been in the peaceable and adverse possession of the land under color of title for a period exceeding that prescribed by the statute of limitations. During the years 1900 and 1901, Jesse Wilson leased the land to A. V. Linder and wife, and it appears that he lived most of the time during those two years with the Linder family. He failed to pay the taxes for the year 1900, and in July, 1901, the land was sold at tax sale for the 1900 taxes, and was bid in by Anthony V. Linder. The taxes for the year 1901 were also allowed to go delinquent, and in July, 1902, the land was again sold for taxes, and was bid in by Anthony V. Linder. Tax deeds were subsequently taken on both certificates. On January 4, 1902, Jesse Wilson sold the land to Anthony V. Linder for the sum of \$3,300, which sum was a fair cash value for the property at that time, and he thereupon executed a deed of conveyance in favor of Linder. This sale and transfer was made upon the theory and with the understanding that Jesse Wilson owned the fee-simple title to the land, and that he was able to convey a like title and interest to a purchaser. This court held, however, in *Wilson v. Linder*, supra, that Jesse Wilson had in fact only a "limited or qualified fee in the place, subject to divestiture on his death without leaving surviving him a wife or child." It follows, therefore, that the deed from Jesse Wilson to Anthony V. Linder, while purporting upon its face to convey a fee-simple title to the property, did, in fact, only convey what subsequently proved to be the mere life estate of Jesse Wilson, as he thereafter died without leaving a wife or child surviving him. This court accordingly held on the previous hearing that the respondents in this case at all times had a contingent remainder in this estate which could only be defeated upon the happening of the contingency named in the will of James Wilson; namely, the death of Jesse Wilson leaving surviving him a wife or child.

It is first contended by the appellants that they acquired a good title to this property by reason of the tax sales of 1901 and 1902, and the tax deeds subsequently issued thereon. They contend that they were under no obligation to pay these taxes for the benefit of the respondents, and that at the time of the purchase of this property at the tax sales they were mere tenants of Jesse Wilson, and that it was not inconsistent with the terms of their lease or their obligation to the landlord for them to purchase the prop-

erty at tax sale. The respondents, on the other hand, contend that appellants were joint remaindermen in expectancy with the respondent Emma J. Linder, and that she owed the same duty to her remaindermen to protect the title that one cotenant owes to the other cotenants to protect the common title for the common benefit of all the cotenants. The rule is well established that "a cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others if they choose within a reasonable time to claim the benefit of the purchase by contributing or offering to contribute their proportion of the purchase money." *Freeman, Cotenancy*, 2d ed. § 154; *Stevenson v. Boyd*, 153 Cal. 630, 19 L.R.A. (N.S.) 525, 96 Pac. 284; *Smith v. Goethe*, 159 Cal. 628, 115 Pac. 223, Ann. Cas. 1912 C, 1205; *Savage v. Bradley*, 149 Ala. 169, 123 Am. St. Rep. 30, 43 So. 20.

We are inclined to the opinion that the rule above announced with reference to the duty of a cotenant to protect the common title is applicable to the appellants here. It is worthy of note, however, and we cannot pass it without calling attention to that distinction, that here the respondents and appellant Emma J. Linder were not in fact cotenants, and yet the relative equitable relations which they sustained to each other are very similar to that of cotenants. Here the interest of the respondents and Emma J. Linder (who, by the way, are the brothers and sisters of Jesse Wilson) was a mere expectancy as remaindermen. They had no present title or interest, and their expectancy itself was subject to be cut off upon the happening of the condition named in the will of James Wilson; that is, upon the death of Jesse Wilson leaving surviving him either a wife or child. Their expectancy as remaindermen, however, was dependent upon and must flow from a common source of title. Conceding, therefore, for the purposes of this case that the Linders, as joint remaindermen in expectancy with the respondents, were under the duty and obligation of protecting the common title the same as if they were cotenants, there are still other reasons hereafter to be considered which, to our minds, are amply sufficient to defeat the respondents' right of recovery.

In the first place, respondents have never offered, and do not in this proceeding offer, to pay their share of taxes paid by the Linders at the tax sales of 1901 and 1902, covering the taxes for the years 1900 and

1901. In justification, however, of their failure to pay their share of these taxes, they invoke the rule which has been frequently announced, that "it is the duty of the life tenant and of those who may succeed to his estate by purchase to pay the taxes assessed upon the property, nor can they by payment acquire any adverse rights against the remainderman." *Solis v. Williams*, 205 Mass. 350, 91 N. E. 148. They contend that, since the profits and income from the place were more than sufficient to pay the taxes, it was the duty of the Linders, who succeeded to the life estate of Jesse Wilson, to pay the taxes out of the income and receipts from the place. This contention is undoubtedly in conformity with the generally accepted rule of law. *Defreese v. Lake*, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; *Stevens v. Melcher*, 152 N. Y. 551, 46 N. E. 965; *Pike v. Wassell*, 94 U. S. 711, 24 L. ed. 307.

In this case, however, while the Linders were in possession of the place during the years 1900 and 1901, their possession was not that of purchasers of the interest of the life tenant, but as lessees. During these years they were Jesse Wilson's tenants, and paid him the rent for the place. They cannot, therefore, be said to have received any rents, profits, or benefits from the place out of which it was their duty to pay the taxes. If, as has been heretofore conceded, it was their duty as remaindermen in expectancy to protect the like expectancy of the other remaindermen, they should be compensated within a reasonable time for their outlay in so doing. Mr. Freeman in his work on *Cotenancy*, 2d ed. at § 150, says: "The right of a cotenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having within a reasonable time elected to bear his portion of the expense necessarily incurred in the acquisition of the claim. . . . The cotenant asking a court of equity to award him the benefit of a purchase must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in no wise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition." *Stevenson v. Boyd*, 153 Cal. 630, 19 L.R.A. (N.S.) 525, 96 Pac. 285, reaffirmed and followed in *Smith v. Goethe*, 159 Cal. 628, 115 Pac. 223, Ann. Cas. 1912 C, 1205.

It is to be remembered that equity does not oblige a cotenant to pay out his own money to protect the common title, but it rather permits him to do so, and, when he has done so, it converts him into a trustee, and then lays an obligation upon the other

cotenants to exercise reasonable diligence and do equity in contributing their shares by way of reimbursing him for his outlay, and a failure to do so within a reasonable time will be taken as an election on their part to allow him to take the benefit of the outlay and take the title he has acquired thereby for his individual use and benefit. In *Mandeville v. Solomon*, 39 Cal. 125, the supreme court of California, speaking through Mr. Justice Wallace, in considering this question, said: "Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property; it, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the absolute exclusion of the other, it, at the same time, exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his cotenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying, until the rise of the land or some event, yet in the future, shall determine his course. Unless he make his election to participate within a reasonable time, and contribute, or offer to contribute, his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction, and abandoned its benefits." *Stevenson v. Boyd* and *Smith v. Goethe*, supra; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Savage v. Bradley*, 149 Ala. 169, 123 Am. St. Rep. 30, 43 So. 20.

Applying the foregoing rule to the facts of this case, it will be seen that since the Linders received no income or benefit from the land during the years 1900 and 1901, out of which it would be their duty to pay the taxes, it was therefore incumbent upon the respondents to make an offer of contribution within a reasonable time in order to be entitled to the benefits of the purchase made at the tax sales. This they failed to do. They had notice that the Linders had purchased this property at the tax sales, and had paid all taxes for the years 1900 and 1901. They likewise had notice that the Linders purchased the estate from Jesse Wilson on January 4, 1902, and that they claimed and thought they were getting a fee-simple title to the property. Mrs. Linder testifies, and it is undisputed: "Either in 1901 or 1902, along about October, I advised my brother and sister of the fact that we had bought the place in at tax sale. . . . I told my

brother Will sometime before February 12th, 1904, that we had paid for the place, and had a deed, and that we had a tax-title deed also. I was talking with Mrs. Everett in 1902. I told her we had a deed from brother Jesse, and that, if she wanted the place, she would have to pay some of the taxes on it. I told my brothers and sisters that the taxes had gone delinquent, and that Mr. Linder had bought them in. I did that for the reason that they were talking about such things. I told them that, if they wanted to come in and pay their part of the taxes, they could do it. I did not recognize that they had an interest in this land. I told them that the taxes had gone delinquent because they asked the question. I think that was in the fall of 1902 when Mrs. Everett and I were talking about the taxes." They placed improvements on the property, paid the taxes, and treated it as their own and occupied it as a home; and this was done with the full knowledge, and at least the passive consent, of the respondents. Notwithstanding these facts, the respondents allowed the matter to run from the time of the issuance of these tax-sale certificates, in July, 1901, and July, 1902, and the execution of the deed from Jesse Wilson to Mrs. Linder in January, 1902, and took no action whatever and manifested no intention of making claim to the place or of contributing their share, until November, 1908, when this action was commenced, and at no time have they ever tendered their share of the taxes. In the meanwhile the land has greatly increased in value, and, whereas it was not worth more than the amount the Linders paid for it (\$3,300) in 1902, it was estimated to be of the value of about \$24,000 at the time of the trial of this case. The period of their laches exceeds that of the statute of adverse possession of real estate. Rev. Codes, §§ 4038, 4040. Under all of the authorities, this is too great a delay to be countenanced by a court of equity, and more especially where the claimants have been at all times in a position to know the facts as they have in this case, and yet have slept on their rights for so many years. No reason is shown for this delay.

It has been argued by counsel for respondents that the tax certificates issued to the Linders for the taxes for the years 1900 and 1901, and all right acquired under them, was immediately merged in the deed executed by Jesse Wilson on January 4, 1902. This contention is made upon the principle of law that, where legal and equitable titles both meet in the same person, the equitable merges in the legal title. This is true as a general proposition, but with many exceptions and qualifications, 42 L.R.A. (N.S.)

one of which is that there will be no merger where it will prove inequitable or to the disadvantage of the person who is honestly seeking to protect his rights. It is also subject to the restriction that the merger takes place "only where the legal and equitable estates are coextensive and commensurate." *Bowlin v. Rhode Island Hospital Trust Co.* 31 R. I. 289, 140 Am. St. Rep. 758, 76 Atl. 348; *Hildreth v. Eliot*, 8 Pick. 293; *Den ex dem. Wills v. Cooper*, 25 N. J. L. 137, 164; 16 Cyc. 669. The lien given by the tax-sale certificates, which would ripen into absolute and fee-simple titles if no redemption be made, should not be merged into a legal title which subsequent events proved to be a mere life estate. It has been held by many courts that, "regardless of the question as to whether there has been a plea of the statute of limitations, a court of equity will refuse to entertain a suit brought after unreasonable delay;" and this rule has been announced where the period constituting the laches is much shorter than that prescribed for the limitation of actions. *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 987; *Bell v. Hudson*, 73 Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791. See also note to *Smith v. Thompson*, 54 Am. Dec. 130. While the deed from Jesse Wilson to Emma J. Linder, under which the Linders entered upon the land, only conferred a limited estate, still it constituted color of title, and the Linders entered, believing they had a fee-simple title, and their possession under the circumstances of the case became an adverse possession. *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784; *Little v. Crawford*, 13 Idaho, 146, 88 Pac. 974; *Wright v. Mattison*, 18 How. 50, 15 L. ed. 280.

Some suggestion was made on the oral argument that the tax certificate and deed were invalid on account of some irregularities, but, so far as we have been able to examine them, in the light of any objection urged, they seem to meet the substantial requirements of the statute as the same has been construed by this court in *White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674; *Stewart v. White*, 19 Idaho, 60, 112 Pac. 677; and *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102.

The judgment must be reversed, and it is so ordered, and the cause is hereby remanded, with direction to the trial court to enter judgment in favor of the appellant Emma J. Linder as prayed for in her cross complaint. Costs awarded in favor of appellants.

Stewart, Ch. J., and Sullivan, J., concur.

Petition for rehearing denied May 3, 1912.



## KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. JOHN S.  
DAWSON, Attorney General,  
v.

EDWARD E. SAPP, District Judge.

(87 Kan. 740, 125 Pac. 78.)

**Criminal law — power to suspend sentence.**

1. Whenever a verdict or plea of guilty has become final, the court is under an absolute duty to pronounce sentence, and has no discretion, as a disciplinary measure, to suspend it.

**Same — parole of convict — loss of jurisdiction.**

2. Where after a verdict or plea of guilty the defendant is permitted to go at large, under an arrangement that he shall escape punishment unless the court shall in the future determine to impose a sentence, the jurisdiction of the case is lost with the expiration of the term, and no valid sentence can thereafter be pronounced.

**Same — fixing date — effect.**

3. The rule stated applies notwithstanding the sentence purports to be suspended until a certain date, for the purpose of retaining control of the defendant, who is ordered to appear at that time and show that he has not violated the law in the interval.

(July 6, 1912.)

**A**PPPLICATION by the State for a writ of mandamus to compel the defendant judge to pronounce sentence upon certain defendants who had pleaded guilty to violations of the law relating to the sale of intoxicating liquors. Writ denied.

The facts are stated in the opinion.

Mr. John S. Dawson, Attorney General, for plaintiff:

Mandamus will lie to compel a judge to render judgment in a criminal case.

State v. Snyder, 98 Mo. 555, 12 S. W. 369; State ex rel. Webster v. Knight, 46 Mo. 83; State ex rel. Wright v. Adams, 76 Mo. 605; 1 Bishop, Crim. Proc. 3d ed. §§ 1402, 1403; Gray v. State, 107 Ind. 177, 8 N. E. 16; Re Terry, 71 Kan. 362, 80 Pac. 586.

Mr. A. S. Wilson, for defendant:

A court has the inherent power to suspend sentence after a plea of guilty, and mandamus will not lie to compel sentence.

State v. Addy, 43 N. J. L. 113, 39 Am. Rep. 547; Allen v. State, Mart. & Y. 294;

Headnotes by MASON, J.

**Note.** — The power of a court to suspend sentence or stay execution of sentence is considered in the notes to State v. Abbott, 33 L.R.A.(N.S.) 112, and Fuller v. State, 39 L.R.A.(N.S.) 242.  
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Weaver v. People, 33 Mich. 297, 1 Am. Crim. Rep. 552; People ex rel. Forsyth v. Court of Sessions, 141 N. Y. 288, 23 L.R.A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675; People v. Mueller, 4 Crim. L. Mag. 725.

If the plea of guilty was obtained by promise of leniency or by some other arrangement it is not the duty of the court to sentence the defendant, but its duty is to set aside the plea of guilty and grant the defendant a new trial.

People v. Brown, 54 Mich. 15, 19 N. W. 571; People v. Blackburn, 6 Utah, 347, 23 Pac. 759; 21 Am. & Eng. Enc. Law, 1083, note 6.

The court at this time had no power to impose sentence.

Grundel v. People, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; Re Flint, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; People ex rel. Boenert v. Barrett, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23; Re Webb, 89 Wis. 354, 27 L.R.A. 356, 46 Am. St. Rep. 846, 62 N. W. 177, 9 Am. Crim. Rep. 702; Re Peterson, 19 Idaho, 433, 33 L.R.A.(N.S.) 1067, 113 Pac. 729; Com. v. Maloney, 145 Mass. 205, 13 N. E. 482; Ex parte Cornwall, 223 Mo. 259, 135 Am. St. Rep. 507, 122 S. W. 666; Ex parte Clendenning, 22 Okla. 108, 19 L.R.A.(N.S.) 1041, 132 Am. St. Rep. 628, 97 Pac. 650; Re Strickler, 51 Kan. 700, 33 Pac. 620; Re Terry, 71 Kan. 364, 80 Pac. 586.

Mason, J., delivered the opinion of the court:

On December 11, 1911, in the district court of Cherokee county, sitting at Columbus, a number of defendants pleaded guilty to violations of the law relating to the sale of intoxicating liquors. They have not been sentenced. On December 30th the attorney general applied to this court for a writ of mandamus, requiring sentence to be pronounced. An answer to the application has been filed, and the case is submitted upon a motion of the state for judgment upon the pleadings. The answer sets out, among other matters, that the defendants had pleaded guilty under an arrangement that their sentences were to be suspended, and that they were to pay the costs, that "such sentences were suspended until the first day of the May term, 1912, for the purpose of retaining control of those defendants, and requiring them to report and show their good faith in the matter," that the defendants were required to appear at that time, and show to the satisfaction of the court that they had not violated the law in the interval; that they were allowed various periods, ranging from thirty to ninety days,

to pay the costs; that the term of court ended December 16th.

Two principal contentions are made against the allowance of the writ: (1) That the court had discretion to make the order suspending sentence; and (2) that, if not, then jurisdiction of the cases has been lost and no sentence can now be pronounced.

A court may postpone the rendition of judgment in a criminal case, and has a practically unlimited discretion in that regard, so long as the imposition of a sentence as a matter of course at some time remains in contemplation. As to this, there is no conflict in the authorities. There is a difference of judicial opinion, however, as to whether a court may withhold sentence with the understanding that it may never be pronounced at all. The cases on the subject are fully collected in a note in 33 L.R.A.(N.S.) 112, introduced by this paragraph: "It may be stated generally that a court has power temporarily to suspend sentence in order to afford time for motions for new trials, appeals, etc., and to inform itself as to sentence to be pronounced. A conflict, however, exists as to the power of courts to suspend sentence indefinitely, some decisions holding such a suspension to be an infringement upon the executive power to reprieve and pardon." Other recent notes on the subject are to be found in 132 Am. St. Rep. 644; 25 Harvard L. Rev. 739; and 12 Columbia L. Rev. 543.

We think the better rule is that, where a verdict or plea of guilty has become final, the court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, but is under an absolute duty to pronounce it, and this duty is violated whenever an order is made the purpose and natural effect of which is that the defendant shall understand that he may never be punished. There is an obvious and important difference between the mere delay to pronounce sentence and its suspension in the sense in which the expression is here used. Whether a postponement is rightful depends not upon its length or definiteness, nor upon whether it extends beyond the term, but upon its purpose and character. Whenever prior to judgment the defendant is permitted to go at large with the understanding that (although the verdict or plea of guilty is to stand) he may escape punishment altogether, and that his subsequent conduct may affect the matter, the court is really exercising a power of parole, which does not belong to it except as conferred by statute. In the present case, it is clear that the defendants were in effect given a discharge during good behavior. Obviously the understanding was that they were not to be punished for their past misconduct unless they 42 L.R.A.(N.S.)

misbehaved in the future. The entering into such an arrangement was not within the scope of the court's duties.

A mere difficult question is whether the order made by the court resulted in a loss of jurisdiction with the expiration of the December term of court, when it could no longer be vacated. In jurisdictions where the right of the court to suspend sentence is denied, it is generally held that, when the defendant is set at liberty upon an indefinite suspension, he cannot be further proceeded against, and, if rearrested, is entitled to be discharged. See notes already cited; also 19 Enc. Pl. & Pr. 448; 12 Cyc. 773; note, 41; 25 Am. & Eng. Enc. Law, 314. The following cases bear directly upon this phase of the matter: *Gray v. State*, 107 Ind. 177, 8 N. E. 16; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *Grun- del v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; *People ex rel. Smith v. Allen*, 155 Ill. 61, 41 L.R.A. 472, 39 N. E. 568; *State v. Hockett*, 129 Mo. App. 639, 108 S. W. 599. The principle upon which these cases turn was applied in *Re Beck*, 63 Kan. 57, 64 Pac. 971. There, after conviction upon several counts, the defendant was sentenced upon but one. Later an attempt was made to sentence him upon the other counts, but he was discharged upon habeas corpus; the court saying: "It was competent for the court temporarily to suspend judgment for the purpose of hearing motions for a new trial and in arrest of judgment, also to gain information that would enable the court to impose a just sentence on the defendant, to give the defendant an opportunity to perfect an appeal, or for other proper relief, but an indefinite suspension, or the holding of the sentence over the head of the defendant, to be executed from time to time as the court may see fit, is wholly unauthorized." (p. 59.) The principle is substantially the same as that which forbids a discretionary stay of execution of a sentence after it has been pronounced. *Re Strickler*, 51 Kan. 702, 33 Pac. 620; *Ex parte Clendenning*, 22 Okla. 108, 132 Am. St. Rep. 628, 97 Pac. 650, annotated in 19 L.R.A.(N.S.) 1041; *Re Peterson*, 19 Idaho, 433, 33 L.R.A.(N.S.) 1067, 113 Pac. 729.

In many of the cases the action of the court which results in a loss of jurisdiction is described as the indefinite postponement of a sentence. As already indicated, we think the important consideration in this connection is the purpose of the postponement. The mere omission to pronounce sentence, even though several terms pass without an order of continuance or any other

action, might not amount to a suspension of sentence, in the sense here intended, if it were occasioned, for instance, by a doubt as to whether a verdict should be set aside, or as to what punishment ought to be assessed. On the other hand, the fact that in the present case the order purported to suspend the sentences until a definite time does not prevent a loss of jurisdiction. A mere postponement of sentence until that time would of course not have divested the court of jurisdiction.

But the defendants were ordered to appear at the May term, not that they might receive sentence, but that they might report and show their good faith in the matter and their good conduct in the interval. The purpose was expressed to retain control of them,—clearly in order to influence their conduct, perhaps in part with regard to the payment of costs. If this order were valid, its effect could have been indefinitely extended by additional orders of the same character. It was, in substance, an attempt to grant a parole in a manner different from that authorized by statute. It might have been vacated prior to the final adjournment of the court, but with the lapse of the term all control over the defendants ceased. The reason of the rule applied is that the defendant ought not, in the absence of a statute permitting it, to be held in fear of punishment which may or may not be inflicted at the pleasure of those in authority. The rule being for the protection of the defendant, a doubt may exist whether anyone else should be permitted to invoke it. But there could be no purpose in granting a writ requiring a sentence to be pronounced, which would be held void if attacked by the person against whom it runs.

The writ is denied.

**WASHINGTON SUPREME COURT.**  
(Department No. 2.)

**WILLIAM RIDDOCH, Appt.,**  
v.

**STATE OF WASHINGTON, Resp't.**

(68 Wash. 329, 123 Pac. 450.)

**State — liability for negligence of officers — statutory provision.**

1. Statutory permission to anyone having a claim against the state to begin an action therefor does not create a right of action against the state for injury through a defect in a state armory leased for exhibition purposes, where the injury was due either to the negligence of the state's agent in supervising the construction of the

building or in leasing it in an unsafe condition.

**Same — engaging in private enterprise — effect.**

2. A state does not become liable for the torts of its officers by permitting the leasing of its armory for pay, on the theory that it thereby engages in a private enterprise and abandons its right to immunity from suit.

(May 1, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Thurston County sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **J. L. Waller and Reynolds, Ballinger, & Hutson**, for appellant:

The state is liable for tort.

Jones v. Mersey Docks & Harbour Bd. Trustees, 11 H. L. Cas. 443, 22 Eng. Rul. Cas. 378; Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 487; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Dill. Mun. Corp. 3 ed. §§ 965 et seq.; Mersey Docks & Harbour Bd. Trustees v. Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872; Sutton v.

**Note. — Liability of state for injury in state building.**

But one additional case has been found on this question, and that holds that a state fair conducted by an agricultural society created as an agency of the state for the dissemination of scientific agricultural intelligence is not, merely because admission fees are charged, an organization for pecuniary profit so as to render the state liable for injuries resulting from the collapse of a grand stand negligently maintained in an unsafe condition. *Melvin v. State*, 121 Cal. 16, 53 Pac. 416. It was further held in this case that the claim for negligent injuries was a debt within the meaning of a statute providing that the state should not be liable for debts created by the board controlling the fair.

Generally as to what claims constitute valid demands against the state, see the note in 42 L.R.A. 33. As to maintainability of action against state as based on contract, when state of facts involves wrongful act of officer, see the note to *State v. Mutual L. Ins. Co.* post, 256.

As to right of set-off, counterclaim, or recoupment in an action by the state, see the note in 33 L.R.A. (N.S.) 377.

As to immunity from suit of a state institution not of a political or governmental character, see the note in 35 L.R.A. (N.S.) 243.

L. A. W.

Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Cunningham v. Seattle*, 42 Wash. 134, 4 L.R.A.(N.S.) 633, 84 Pac. 641, 7 Ann. Cas. 805; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, 2 Denio, 433; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Burke v. State*, 64 Misc. 558, 119 N. Y. Supp. 1089; *Hannon v. St. Louis County*, 62 Mo. 313; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

Messrs. W. V. Tanner, Attorney General, and S. H. Kelleran, Assistant Attorney General, for respondent:

The state is not liable for torts of its officers or agents.

*Billings v. State*, 27 Wash. 288, 67 Pac. 583; *Robertson v. Sichel*, 127 U. S. 507, 514, 32 L. ed. 203, 206, 8 Sup. Ct. Rep. 1286; *Belknap v. Schild*, 161 U. S. 10, 15, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443; *German Bank v. United States*, 148 U. S. 573, 579, 37 L. ed. 564, 569, 13 Sup. Ct. Rep. 702; *State v. Mutual L. Ins. Co.* 175 Ind. 59, post, 256, 93 N. E. 213; *Moody v. State Prison*, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131; *Bourn v. Hart*, 93 Cal. 321, 15 L.R.A. 431, 27 Am. St. Rep. 203, 28 Pac. 951; *Murdock Parlor Grate Co. v. Com.* 152 Mass. 28, 8 L.R.A. 399, 24 N. E. 854; *Sipple v. State*, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; *Overholser v. National Home*, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487; *Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607; *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440; *Claussen v. Luverne*, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Am. Cas. 673; *State v. Hill*, 54 Ala. 67; *Elmore v. Fields*, 153 Ala. 345, 127 Am. St. Rep. 31, 45 So. 66; 36 Cyc. 881; *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457; *Jones v. Mersey Docks & Harbour Bd. Trustees*, 11 H. L. Cas. 453, 22 Eng. Rul. Cas. 378.

Ellis, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries sustained by the plaintiff through the giving way of the railing of a gallery in the Armory Building in the city of Seattle. A demurrer to the complaint was sustained. The plaintiff declined to plead further, and the action was dismissed. The plaintiff appeals.

The complaint alleges, in substance, that at the time of the accident the armory had been leased, for the sum of \$50, for the night to the Seattle Athletic Club, which was holding therein an athletic entertain-

ment; that during the entertainment, and at a time of excitement, numbers of spectators in the gallery leaned upon and over the rail, causing it to give way and fall, precipitating the rail and some of the persons in the gallery upon the plaintiff, who was standing upon the floor below, inflicting the injuries complained of.

It is charged as negligence that the railing was heavy, and not securely fastened nor properly braced in view of the purpose for which the building was leased; that another obvious and easy method of fastening and bracing the railing should have been employed; that the defective construction and bracing of the railing was not apparent to ordinary inspection, but the exercise of ordinary care on the part of the state would have led to a discovery of the defective condition, and that the defendant failed to exercise such care, and failed to make proper inspection; that no notice or warning was given to the plaintiff, or to anyone, of the defective condition; that the defendant failed to prevent the admission of persons to the gallery, and failed to prevent them from leaning against and pushing upon the defective railing.

There can be no doubt but that, if the armory had been owned by a private individual, the negligence pleaded would have been sufficient to entail a liability for the injury. There is therefore presented, as the dominant question for solution, whether, under the facts pleaded, the state, as owner, is liable as a private owner would be. The first inquiry going to the solution of the question is, Whose was the negligence? It is manifest that it was that of some of the officers or agents of the state, since the state can only act through officers or agents. The act (Laws 1907, chap. 55, p. 83), in pursuance of which the armory was constructed, made an appropriation therefor, created a commission, clothed it with the authority, and charged it with the duty to bring about the construction of the building. If the defect was one of original construction, whether in plan, work, or material, then plainly the negligence was that of this commission, or of its agents.

The Military Code (Laws 1909, chap. 134, § 97, p. 494, Rem. & Bal. Code, § 7334), by implication, authorizes the leasing of armories for purposes other than military, but contains the proviso "that no armory shall be used for any other than a strictly military purpose without the recommendation of the officer in charge thereof." It is therefore a part of the official duty of the officer in charge to determine when and for what purpose, other than military, the armory may be used. It follows that if it

was unfit for the purpose desired it was the duty of that officer to withhold his recommendation; and his failure to do so was negligence in his official capacity. If the state can be held liable for the negligence charged, it must be upon the ground that it can be held for the negligence, either of the commission or of the officer in charge.

The state Constitution (§ 26 of article 2) says: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." This provision creates no cause of action, imposes no liability, as against the states, where none would exist independently of it. It merely directs the legislature to provide a remedy for causes of action recognized at common law as against the sovereign, or created by statute.

Pursuant to this constitutional provision, the legislature, by the Laws of 1895 (Rem. & Bal. Code, § 886), enacted that "any person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county." The word "claim," as used in this section, is synonymous with "cause of action." The scope of the section is the same as that of the constitutional provision. *Northwestern & P. Hypotheek Bank v. State*, 18 Wash. 73, 42 L.R.A. 33, 50 Pac. 586. It creates no cause of action. It provides a remedy for existing causes, but imposes no new liability. It does not waive any defense. *Billings v. State*, 27 Wash. 288, 67 Pac. 583.

The doctrine that a sovereign state is not liable for the misfeasance, malfeasance, nonfeasance, or negligence of its officers, agents, or servants, unless it has voluntarily assumed such liability, is established by authority so cogent and uniform that isolated expressions which might be construed as tending to the contrary are negligible. This court has clearly announced that doctrine in *Billings v. State*, supra, an action to recover damages resulting from delay of the commissioner of public lands in issuing a state land sale contract. The court thus stated the issue: "The sole question to be determined is whether the complaint herein states a cause of action against the respondent; or, in other words, whether the state, under our statute, is liable for damages suffered by an individual by reason of the negligence or malfeasance of one of its officers, occurring while engaged in the discharge of his official duty." Meeting this issue, the court said: "It [the state] has not consented, either expressly or impliedly, to become responsible for the misconduct or

negligence of its officers or agents; and, in the absence of a statute making it liable in damages therefor, no such action as the present one can be maintained against the state."

This rule of nonliability for torts is tersely expressed by the United States Supreme Court, in *Robertson v. Sichel*, 127 U. S. 507, 515, 32 L. ed. 203, 206, 8 Sup. Ct. Rep. 1286, 1290, as follows: "The government itself is not responsible for the misfeasances or wrongs or negligences, or omissions of duty, of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests. *Story, Agency*, § 319; *Seymour v. Van Slyck*, 8 Wend. 403, 422; *United States v. Kirkpatrick*, 9 Wheat. 720, 735, 6 L. ed. 199, 203; *Gibbons v. United States*, 8 Wall. 269, 19 L. ed. 453; *Whiteside v. United States*, 93 U. S. 247, 257, 23 L. ed. 882, 885; *Hart v. United States*, 95 U. S. 316, 318, 24 L. ed. 479, 480; *Moffat v. United States*, 112 U. S. 24, 31, 28 L. ed. 623, 625, 5 Sup. Ct. Rep. 10; *Schmalz's Case*, 4 Ct. Cl. 142."

The following authorities declare and exemplify the rule. Some of them expressly declare, and through all of them runs the controlling principle, that the exemption is based upon absence of obligation, and not upon mere absence of remedy. *Belknap v. Schild*, 161 U. S. 10-16, 40 L. ed. 599-601, 16 Sup. Ct. Rep. 443; *German Bank v. United States*, 148 U. S. 573-579, 37 L. ed. 564-569, 13 Sup. Ct. Rep. 702; *State v. Mutual L. Ins. Co.* 175 Ind. 59, post, 256, 93 N. E. 213, 218; *Moody v. State Prison*, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131; *Bourn v. Hart*, 93 Cal. 321-327, 15 L.R.A. 431, 27 Am. St. Rep. 203, 28 Pac. 951; *Murdock Parlor Grate Co. v. Com.* 152 Mass. 28, 8 L.R.A. 399, 402, 24 N. E. 854; *Overholser v. National Home*, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487; *Lewis v. State*, 96 N. Y. 71, 48 Am. Rep. 607; *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440; *Claussen v. Luverne*, 103 Minn. 491-495, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Ann. Cas. 673; *State v. Hill*, 54 Ala. 67; *Elmore v. Fields*, 153 Ala. 345, 127 Am. St. Rep. 31, 45 So. 66; *Story, Agency*, 9th ed. § 319; 36 Cyc. 881.

The appellant seeks to confine this rule of nonliability for torts to cases where the negligence of the officer or agent occurred in the discharge of some purely govern-

mental function of the state. He contends that, in leasing the armory, the state was engaged in a private enterprise, and that the rule of nonliability therefore does not apply. The question is admittedly a new one. No authority distinctly so holding, nor, indeed, recognizing such an exception, has been cited, and we have found none. It is argued that the distinction is sustained by analogy to a similar exception to the rule of nonliability as applied to municipal corporations. The analogy, however, does not hold. Municipal corporations enjoy their immunity from liability for torts only in so far as they partake of the state's immunity, and only in the exercise of those governmental powers and duties imposed upon them as representing the state. In the exercise of those administrative powers conferred upon or permitted to them solely for their own benefit in their corporate capacity, whether performed for gain or not, and whether of the nature of a business enterprise or not, they are neither sovereign nor immune. They are only sovereign and only immune in so far as they represent the state. They have no sovereignty of their own; they are in no sense sovereign *per se*. Their immunity, like their sovereignty, is in a sense borrowed; and the one is commensurate with the other. Such is, in effect, the conclusion reached in *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332-367, after a most exhaustive review of the authorities, both American and English. The same principle underlies our own decisions. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; *Cunningham v. Seattle*, 42 Wash. 134, 4 L.R.A.(N.S.) 633, 84 Pac. 641, 7 Ann. Cas. 805; *Linne v. Bredes*, 43 Wash. 540-546, 6 L.R.A.(N.S.) 707, 117 Am. St. Rep. 1068, 86 Pac. 858, 11 Ann. Cas. 238.

On the other hand, the state is inherently sovereign at all times and in every capacity. It is the organized embodiment of the sovereign power of the whole people. By reason of this sovereignty, it possesses all powers, but only such powers, as are within the limitations of the state Constitution and without the prohibitions of the Federal Constitution. It can do no act, except in the exercise of this sovereign power and within these constitutional limitations. If it may constitutionally take over any enterprise, though usually of the nature of a private business, the very taking over is an exercise of this sovereign power. It seems much more logical and much more consonant with the idea and genius of sovereignty that the enterprise thus taken over should be impressed with the sovereign

character of the state, than that the state should become hampered by the private character of the enterprise. The latter result is incompatible with the concept of sovereignty.

This seems to us to be the only logical basis for the following decisions, holding the state not liable for torts in connection with the administration of such enterprises taken over by the state: *State v. Hill*, 54 Ala. 67, in which the state was held not liable, at the suit of an owner, for the tortious killing of stock by the agents of the state in operating a railroad; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, in which the state was held not liable to a spectator, who had paid for admission to a state fair conducted by an agency of the state, for a tortious injury by the falling of negligently constructed seats; *Denning v. State*, 123 Cal. 316, 55 Pac. 1000, in which the state was held not liable to an employee, injured by the fall of a negligently fastened ladder on a tugboat owned by the state, and operated by the state harbor commissioners as an agency of the state.

But, whatever the true basis of these decisions, they are in direct opposition to appellant's contention that the state is liable for torts committed by its officers or agents in the administration of any enterprise, whenever a private person conducting the same kind of enterprise would be liable for similar torts. On the other hand, we know of no authority supporting this contention.

The English cases, *Jones v. Mersey Docks & Harbour Bd. Trustees*, 11 H. L. Cas. 443, 22 Eng. Rul. Cas. 378; and *Mersey Docks & Harbour Bd. Trustees v. Gibbs*, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, L. R. 1 H. L. 93, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, relied upon by the appellant, cannot be so read. The liability, in the one case for a poor rate, and in the other for a tort, was not based in either instance upon the fact that the dock board were occupiers for profit, but upon the fact that they were not occupying for the Crown. The board was thus in effect held to be a municipal corporation. These cases are exhaustively discussed, as bearing upon the liability of municipal corporations, by Chief Justice Gray, in *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. at pages 354, 355, 356, where that distinguished jurist points out that the true basis of these decisions is that corporations created to construct and maintain public works of a peculiar nature in a certain locality were liable to private action for special injuries, "for the very reason that they did not occupy as servants of the public or government." Manifestly they could not partake of the sovereign's immunity.

The other English case cited, *Moodalay v. East India Co.* 1 Bro. Ch. 469, is even less pertinent. The East India Company, a commercial corporation, had been intrusted with the government of India. The master of the rolls, in holding the company liable for breach of its private contract, said: "I admit that no suit will lie in this court against a sovereign power for anything done in that capacity; but I do not think the East India Company is within that rule. They have rights as a sovereign power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable."

The case of *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737, has no bearing upon the question here presented. The sole question decided was that the liquor traffic, being subject to antecedent excise laws of the United States, when taken over by the state, was still subject to those laws, — purely a question of conflict of laws. This fact is clearly pointed out, and the decision limited to that single question, by the subsequent case of *Murray v. Wilson Distilling Co.* 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

Even assuming that there may be, on sound principles, the same rule of liability as applicable to private persons or corporations, where the state engages in a purely private enterprise, with the intention of prosecuting it for profit, the complaint, when taken, as it must be, in connection with the statute, fails to show that the state, in leasing the armory, was so engaged. The armory, by the terms of the act authorizing its construction (Laws 1907, chap. 55, pp. 83 et seq.), was constructed for governmental purposes. The officers in charge and conducting the business in connection therewith (Rem. & Bal. Code, § 7334) are primarily discharging governmental functions. The implied authority to lease, on occasion, but only on the recommendation of the officer in charge, cannot be held to control the dominant purpose of the act as a governmental measure and make of the armory a business enterprise. There is in the whole Military Code no intention, either expressed or implied, that the state shall engage in conducting a hall for entertainment purposes as a business venture for profit. The whole enterprise, as evinced by the Military Code, lacks this essential element of a business venture. The fact that the legislature, foreseeing that there might be occasions when the public would

require a meeting place which would accommodate a large number of people, such as the armory affords, accorded, as a mere incident to the general powers of the officer in charge, the power to recommend that the armory might be so used,—does not sustain a contention that the state has relinquished its governmental functions and assumed a private capacity. This, in any view of the matter, could only be done by conducting a business purely for profit, as it is usually and ordinarily conducted by private persons; that is to say, as a business. Nor does it alter the case that a charge was made for the use of the building. That was a mere incident in no manner changing the main design. As illustrating the point, the dispensary act of the state of Georgia may be instanced. By that act, the state took over the liquor business and administered it through the instrumentality of public officers. A charge for the liquors dispensed was a necessary incident. The supreme court of Georgia, in considering that phase of the act, used the following language: "It is manifest that the primary object of this dispensary act was not for the purpose of gain and embarking a municipality in a commercial enterprise, but that the end and purpose had in view was a regulation of the sale of an injurious and dangerous beverage, in the interest of temperance, and for the purpose of throwing a safeguard around the morals of the people. The revenue derived from this source was merely one of its incidental features." *Plumb v. Christie*, 103 Ga. 686-695, 42 L.R.A. 181-186, 30 S. E. 759-763.

By a statute of California, the harbor commissioners were given control of the harbor of San Francisco, with the duty of constructing and operating wharves, and as an incident thereto of charging and collecting wharfage. In answer to a contention that this placed the state in the position of engaging in a business enterprise for profit, the supreme court of that state said: "The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent 'as will enable the commissioners to discharge the duties required of them by the act' does not affect its character as a governmental agency. . . . So, here the fact that the board is authorized and required to collect tolls and charges under the act does not make the board an instrument or agency of the state for profit, or convert it into a mere business enterprise." *Denning v. State*, 123 Cal. 316-322, 55 Pac. 1000, 1001. In this connection, see also *Melvin v. State and State v. Hill*, supra. The permission to use the

armory was a matter of grace and accommodation to the public, rather than a business enterprise. An intent to use the armory as a source of profit is nowhere in the act shown to have been in the legislative mind.

The contention that this is an action on contract, and not in tort, cannot be sustained. The fact that the state, in making a contract, assumes a liability on the contract, does not create a liability for a tort committed by its officers or agents in connection with the subject-matter of the contract, and for which the contract furnishes no basis for a measure of damages. Suppose the building had been a theater, owned and operated by private persons, the plaintiff's action would still be in tort, and not for breach of contract. The same elements are present in every case of injury to a passenger on a railroad or street car. The duty to carry safely is assumed by contract; but the action is in tort. A similar contention was advanced in *Billings v. State*, 27 Wash. 288, 67 Pac. 583, but this court denied liability, because the action was for a tort. The case of *Chapman v. State*, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457, does not militate against this view. There the state was held liable upon a contract of bailment, as is pointed out in the later case of *Denning v. State*, 123 Cal. at page 323, 55 Pac. 1002, where it is said: "Here the contract of employment has nothing whatever to do with the liability, except to create a duty on the part of the employer, a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz., that of employer and employee, and under the old system of pleading was always classed as an action *ex delicto*."

In *Hill v. United States*, 149 U. S. 593-598, 37 L. ed. 862-864, 13 Sup. Ct. Rep. 1011, 1013, it is said: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract." See also *Gibbons v. United States*, 8 Wall. 269-274, 19 L. ed. 453, 454, and *Melvin v. State*, supra.

The New York case cited by the appellant — *Burke v. State*, 64 Misc. 558, 119 N. Y. Supp. 1089 — is not apposite, except as illustrating the fact that there is a liability for tort where the state assumes it by stat-

ute, which was the basis of the liability in that case. See also *Sipple v. State*, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; *Splitstorf v. State*, 108 N. Y. 205, 15 N. E. 322.

There is no statute whereby this state has assumed a liability for the negligence or misfeasance of its officers or agents; and we find no established principle of law sustaining such a liability, in the absence of such statutory assumption. No consideration of hardships to be avoided would justify a court in abrogating established principles of substantive law to create a liability not so assumed. To change substantive law is the province of the legislature, not of the courts. Nor can the argument that it is the tendency of the times for states to take over and administer for the people interests and enterprises heretofore deemed of a private nature alter the case. On the contrary, the state can only do these things in the exercise of its sovereign and constitutional powers; and as part and parcel of these same sovereign powers it alone may say, through its legislature, when and how it shall waive its immunity from liability for tort. The importance of the question, and the able and earnest manner in which it has been presented, merit the full consideration which we have given it.

The demurrer was properly sustained. The judgment is affirmed.

Dunbar, Ch. J., and Fullerton, Morris, and Mount, JJ., concur.

## INDIANA SUPREME COURT.

STATE OF INDIANA, Appt.,  
v.

MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK.

(175 Ind. 59, 93 N. E. 213.)

State — action against — wrongful tax  
exaction — recovery.

1. An action to recover money which a corporation was compelled to pay as a tax to replace a payment which had been embezzled by the tax collector does not sound in tort so as not to come within a statute giving a court jurisdiction to hear and de-

*Note.* — When claim against state deemed based on contract within statute permitting action against state.

Breach of contract, and not tort, for which an action will not lie against the state, is the basis of an action for damages for the loss of coal received at a state wharf, in consideration of wharfage and dockage paid to the state, which was agreed to be delivered on such wharf for



termine claims on contract against the state, although it is alleged that in compelling payment of the substituted amount the taxing officers acted illegally and wrongfully.

**Same — implied contract — statutory jurisdiction.**

2. A claim to repayment of money exacted from the taxpayer by taxing officers to replace a tax payment which had been embezzled by the collector is within a statute permitting anyone having a money demand against the state arising out of a contract, express or implied, to file it in court for adjudication, although the state does not recognize the validity of the claim or contemplate its payment.

**Tax — payment to wrong official — embezzlement — acquiescence by state.**

3. Long acquiescence by the officials in the payment of tax money by foreign insurance companies to the state auditor, to be paid by him into the treasury, when the statute requires such corporations to make returns to the auditor and pay the tax into the treasury, will not, on the theory either of estoppel or of departmental or of administrative construction, prevent the state from requiring a second payment in case the auditor misappropriates a payment to him to his own use without paying it into the treasury; especially where the auditor to whom the money was paid had no authority with respect to it, or power to interpret the law governing the payment.

**Same — interest — liability for.**

4. An insurance company which is compelled to pay a second time tax money which was embezzled by the officer to whom

payment was made, but who had no authority to collect the tax, is not liable for interest on the tax from the time it should have been paid into the treasury, where the statute makes no provision for interest on unpaid taxes.

(December 9, 1910.)

**A** PPEAL by the state from a judgment of the Circuit Court for Marion County in plaintiff's favor in an action brought to recover money which it was compelled to pay as a tax to replace a payment which had been embezzled by the tax collector. Reversed in part.

The facts are stated in the opinion.

Messrs. James Bingham, W. H. Thompson, E. M. White, and A. G. Cavins for appellant.

Messrs. Smith, Duncan, Hornbrook, & Smith, William L. Taylor, and R. L. Wilson for appellee.

Jordan, J., delivered the opinion of the court:

This action was instituted by the Mutual Life Insurance Company of New York, against the state of Indiana, in the superior court of Marion county the latter sitting as a court of claims under and by the authority of the provisions of § 1485, Burns's Anno. Stat. 1908, Acts 1895, p. 231. By the first paragraph of the complaint the plaintiff seeks to recover as a claim against the state \$1,206.76 as principal and \$1,726.84 interest paid by it to the treasurer of the state

removal therefrom, and which was lost by the breaking of the wharf through neglect of the harbor commissioners to keep it in repair. Chapman v. State, 104 Cal. 690, 43 Am. St. Rep. 158, 38 Pac. 457.

But tort consisting, not in breach of contract, but in negligence in connection with the performance of a public duty, for which no action will lie against the state, is the foundation of an action for injuries received by the holder of a season ticket at a state fair, through the collapse of an unsafe grand stand occupied by spectators at horse races, which, so far from being authorized, had been impliedly discouraged, by the legislature. Melvin v. State, 121 Cal. 16, 53 Pac. 416.

So, a cause of action *ex delicto*, and not one upon contract which by statute is maintainable against the state, is shown by a servant's complaint for injuries resulting from the state's breach of a duty, which, although growing out of the relation, was not expressed in the contract, and for the breach of which the contract of employment furnishes no rule or standard for the estimation of damages. Denning v. State, 123 Cal. 316, 55 Pac. 1000.

And an action against a state for dam-

ages caused by the wrongful delay of the land commissioner to issue a contract of purchase to an applicant who had complied with the prerequisites is based on the misconduct of an officer, for which the state is not liable, and cannot be maintained upon the theory that the plaintiff is suing as a party to a contract. Billings v. State, 27 Wash. 288, 67 Pac. 583.

It was held in Clark v. State, 7 Coldw. 306, that a state whose comptroller accepted deposits of securities to protect note holders of free banks of the state was not liable for the fraud or negligence of its officers, and could not be held responsible for resultant deficiency of the securities upon the theory that it impliedly assumed the relation of agent, bailee, or trustee.

See also State v. Ward, 9 Heisk. 100, holding that lessees of convicts took them subject to the governor's pardoning power, and therefore could not recover from the state damages from being deprived of the convicts though the act of pardoning was an abuse of power.

As to liability of state for injury in state building, see note to Riddoch v. State, ante, 251, and see other notes therein cited.

L. A. W.

involuntarily and under protest. The principal sum demanded arises out of money paid by plaintiff to James H. Rice, Auditor of state as taxes for the first half of the year 1884, being \$3 on each \$100 of premiums collected by plaintiff within the state of Indiana, which sum it appears that said auditor failed to pay to the treasurer of state. The payment by plaintiff of the principal and interest was made on December 11, 1906, and interest was computed and charged by the state from 1884 to December 11, 1906. By the second paragraph of the complaint the plaintiff seeks to recover back from the state the interest only that it paid upon the principal. Appellant demurred to each paragraph of the complaint for want of facts. Its demurrer was overruled, to which ruling of the court it excepted. It then answered the complaint specially in four paragraphs. No general denial was filed. Appellee demurred to each paragraph of the answer. Its demurrer was sustained to the second, third, and fourth paragraphs of the answer, and appellant refused to plead further. Appellee's demurrer to the first paragraph of the answer was overruled, and it refused to plead further. Thereupon the court rendered a judgment in favor of appellee. From the judgment appellant has appealed directly to this court under the provisions of § 1489, Burns's Anno. Stat. 1908, Acts 1889, p. 265, § 5, and relies for reversal of the judgment below upon the alleged errors of the court in overruling its demurrer to each paragraph of the complaint, and in sustaining the demurrer of appellee to the second, third, and fourth paragraphs of the answer. The complaint to some extent may be said to state conclusions of the pleader, instead of facts.

In the first paragraph plaintiff alleges: That on and prior to March 8, 1848, it was and ever since has been and yet is a corporation organized and acting under and pursuant to the laws of the state of New York. "That ever since said March 8, 1848, it has been engaged in conducting the business of life insurance in the state of Indiana, under authority granted to it by the properly constituted authorities of said state, and that upon the enactment of the first statute of said state so requiring, it made application as a foreign corporation to the auditor of state for permission to do business in the state of Indiana. That upon such application plaintiff took every step and did everything which said auditor requested and required as a condition precedent to its right to do business in said state of Indiana, and thereupon said auditor of state granted to plaintiff his certificate of authority to do business in the state of Indiana as a foreign insurance company. That from time to

time, ever since said date, and at the times provided by the statutes of the state of Indiana from time to time in force, it has applied to the auditor of state for a renewal of such certificate of authority to do business in the state of Indiana, and at the time of each application plaintiff took every step and did everything which said auditor for the time being requested or required from it, as conditions precedent to its doing business in the state of Indiana, as a foreign life insurance company, and in every such instance said auditor of state granted to plaintiff his certificate of its right to do business in the state of Indiana as a foreign insurance company. That ever since said March 8, 1848, plaintiff has been actively engaged in the business of life insurance in the state of Indiana under such certificates, and is yet so engaged in doing a life insurance business in the state of Indiana under the last certificate of such authority to do business in the state of Indiana issued to it by said auditor of state. That from the date of its beginning to do business in the state of Indiana under the authority of the certificates so issued to it by the auditors of state, as heretofore set forth, up to and including the year 1905, each auditor of state construed the statutes of said state as authorizing him to receive and collect from plaintiff, and from other foreign insurance companies doing business in the state of Indiana, all taxes and charges levied and demanded under the laws of said state for the privilege of so doing business in said state, for the purpose of paying them into the office of the treasurer of state and each auditor of state from time to time demanded and received from this plaintiff and all other foreign insurance companies doing business in the state of Indiana (of which in 1884 there were 122, and which steadily increased until 1905 there were 162), except 5, under the construction so placed by him upon such statutes, the taxes and charges by him computed as being due, and from said plaintiff under such statutes for the privilege of doing such business in the state of Indiana, and in pursuance of such demand this plaintiff paid all such taxes and dues to said auditors of state from the date of its admission to do business in the state of Indiana up to and including the year 1905; that said auditor of state paid said taxes and dues (except possibly as herein-after stated) to the treasurers of state, who received the sums of money from said auditors and placed them in the funds of the state. And plaintiff further says that as required by the statutes of the state of Indiana, from time to time in that behalf enacted and in force, the respective auditors of state made stated reports to the governors

of the state of Indiana of the business transacted in the office of said auditors during the period covered by said reports respectively. That said reports in every instance showed the fact that each auditor, under the construction by him placed upon such statutes, had collected from all such foreign insurance companies except five the taxes due from them to the state of Indiana, and had charged himself therewith on his account of the time of the receipt thereof, and had credited himself with the payment thereof to the treasurer of state at the time of making such payments to said treasurer. That at the meetings of the general assembly of the state of Indiana printed copies of such reports of the auditors of state were, by the governors, transmitted both to the senate and the house of representatives, and printed copies thereof were forwarded to each member of both houses. That the chief executives of the state and the legislative department of the government were in this manner fully apprised of the construction placed upon the statutes of the state, enacted in that behalf by the auditors of state, and of their acts and conduct in receiving such taxes and in paying them to the treasurers of state.

"That in addition to the delivery of copies of said printed reports to the governors and to the members of the general assembly of the state of Indiana, many hundreds of copies of said reports were distributed to private citizens throughout the state. And plaintiff further avers that in certain years the state board of tax commissioners, which was charged with the duty of preparing blank forms of reports of said insurance companies, to be by them made to the auditor of state as a basis for estimating the taxes to be paid them, in preparing such form of reports, caused to be printed on the back thereof a copy of the statute in that behalf enacted: 'Sec. 83. (Acts 1881, pp. 611, 636.) Every insurance company not organized under the laws of this state, and doing business therein, shall in the months of January and July of each year, report to the auditor of state, under oath of the president and secretary, the gross amount of all receipts received in the state of Indiana, on account of insurance premiums for the six months last preceding, ending on the last day of December and June of each year next preceding, and shall, at the time of making such report, pay into the treasury of the state the sum of \$3 on every \$100 of such receipts, less losses actually paid within the state; and any such insurance company failing or refusing for more than thirty days to render an accurate account of its premium receipts, as above provided, and pay the required tax thereon, shall forfeit \$100 for 42 L.R.A. (N.S.)

each additional day such report and payment shall be delayed, to be recovered in an action in the name of the state of Indiana, on relation of the auditor of state, in any court of competent jurisdiction; and it shall be the duty of the auditor of state to revoke all authority of any such defaulting company to do business within the state.' That such construction of said statute placed thereon by said several auditors of state was, with full knowledge thereof, acquiesced in for a period of more than twenty-five years by the several governors of the state of Indiana, by the treasurers of state by the legislative department thereof, and by the public at large, as the proper construction thereof. And plaintiff further avers that, in the years 1904 and 1905, David Sherrick was auditor of state and in such years unlawfully converted to his own use certain of the moneys so paid into his hands by foreign insurance companies; that the governor of Indiana, still putting the same construction upon the statutes of Indiana in that behalf enacted, directed the attorney general of the state of Indiana and the prosecuting attorney of the nineteenth judicial district of the state of Indiana to prosecute said Sherrick for the embezzlement of moneys belonging to the state of Indiana, and they did so institute and prosecute such proceedings, and said Sherrick was convicted upon said charge; that upon the trial of said cause the criminal court of Marion county adopted the same construction of said statute, but upon the appeal of said cause to the supreme court of the state of Indiana, that court determined that said Sherrick, as auditor of state, had no lawful authority to receive such taxes, and this was the first time that any such construction had been put upon any such statute by any department of the state government. And plaintiff further avers that on making said several payments of said taxes for said several years to the several auditors holding said office from time to time during said years, it acted in the utmost good faith, believing that said auditors were lawfully authorized to receive said taxes for the purpose of paying them into the treasury of the state, and until August 6, 1906, supposed that said auditors had in due course paid all said moneys into the treasury of the state of Indiana.

"That after the rendition of a decision by the supreme court of the state of Indiana in the case of Sherrick v. State, 167 Ind. 345, 79 N. E. 193, Warren Bigler, then holding the office of auditor of state, notified plaintiff by letter that James H. Rice in the year 1884 had failed to pay over to the treasurer of state the sum of \$11,418.50 which had been paid into his hands by various foreign insurance companies, and that on

that account there was due from plaintiff the sum of \$1,799.45, and demanded payment thereof. That thereafter, to wit, on August 22, 1906, said Warren Bigler, as such auditor of state, wrote to plaintiff another letter, in which he stated that he was mistaken in his former letter, and that there was due from plaintiff on account of the failure of said James H. Rice, former auditor of state, to pay over to the treasurer of state the amount by plaintiff paid for the last half of the taxes for the year 1884, the sum of \$1,296.76, to which there must be added interest to the amount of \$1,718.21, making an aggregate sum of \$3,014.97, which amount was demanded from plaintiff. That on November 20, 1906, said Warren Bigler wrote another letter to plaintiff, demanding payment of said sum on or before December 11, 1906, and declared if said sum was not paid on or before that date plaintiff would be declared in default to the state of Indiana, and a penalty of \$100 a day added thereto, a forfeit added for each day until it was paid, and its authority to do business in the state of Indiana declared revoked.

"That thereafter, on November 30, 1906, John C. Billheimer, who had succeeded Warren Bigler as auditor of state, wrote a letter to plaintiff, wherein he stated that the second letter of said Warren Bigler was in error in stating that the taxes which said James H. Rice as auditor of state had failed to pay over to the treasurer of state were for the last half of the year 1884, and that in fact they were for the first half of the year 1884, and demanded the amount of \$3,014.97. That letters of like tenor and effect, save as to amounts claimed to be due, were written by said Warren Bigler, auditor of state and John C. Billheimer auditor of state to a number of other foreign insurance companies, and such insurance companies were engaged in endeavoring to discover whether in point of fact said James H. Rice had failed to account for said sum of \$11,418.50, and were of the opinion that it was by no means certain that he had failed to account for the sum; and they requested said auditor of state to grant them time further to investigate that question, and that time be given them in which to institute some test case in the proper court, both to determine that fact and also to determine whether as a matter of law they were liable to pay said several sums demanded from them respectively, even if it should be proved that said James H. Rice, auditor of state, had failed to pay or account for said sum of \$11,418.50, and had offered by way of compromise to adjust the claim of the state by the payment of principal without right to make any demand for its return, and bring a friendly suit to 42 L.R.A. (N.S.)

test the question of liability for the interest, which offer was first accepted, but afterward on December 10, 1906, said auditor withdrew his assent to such compromise, and declared that all such companies must pay the full amount so claimed from them, principal and interest, on or before December 11, 1906, and if any company failed to make such payment on said date, the penalties stated in said letter of November 10th would be enforced, and the authority of such company to do business in the state of Indiana would be revoked.

"That during the years before named plaintiff, by expenditure of large sums of money and much labor, had established a large and profitable business in the state of Indiana, and had secured more than 13,000 residents and citizens of the state of Indiana to become policy holders in its company, whose policies aggregated \$26,454,251. That the annual premiums thereon amounted to over \$860,000. That in the event said auditor of state should proceed to enforce said threat of revoking its authority to do business, it would not only inflict great and irreparable injury upon the business of plaintiff, causing a loss of many thousands of dollars to it, but it would create much confusion and uncertainty in the minds of policy holders and endanger their securities under said policies. That thereupon plaintiff, imperiled and coerced by such threats so made by said auditor of state, did pay unto the office of the treasurer of state the said principal sum of \$1,296.76 and the sum of \$1,726.84 interest thereon to date of said payment, and notified both the treasurer and the auditor, in writing that it paid said sums not voluntarily, but under the coercion and duress arising out of the threats contained in said communications from said auditor of state, and to arrest the imposition of the threatened penalties and the revocation of its charter, and under protest both as to principal and interest, and reserved the right to recover either of said sums so paid."

The second paragraph of the complaint is substantially the same as the first, except that appellee thereunder seeks to recover \$1,726.84 so paid by it as interest upon the principal sum of \$1,296.76 into the office of the treasurer of the state.

At the very threshold we are confronted with the contention of the attorney general that the superior court of Marion county, under the provision of § 1485, Burns's Anno. Stat. 1908, Acts 1895, p. 231, had no jurisdiction to hear and determine this action. This section reads as follows: "That any person or persons having or claiming to have a money demand against the state of Indiana, arising at law or in equity, out of contract express or implied, accruing within

fifteen years from the time of the commencement of the action, may bring suit against the state therefore in the superior court of Marion county, Indiana, by filing a complaint with the clerk of said court and procuring a summons to be issued by said clerk, . . . and jurisdiction is hereby conferred upon said superior court of Marion county, Indiana, to hear and determine such actions, and said court shall be governed by the laws, rules, and regulations which govern said superior court in civil actions in the making up of issues, trial, and determination of said cause." The argument advanced by the attorney general is that appellee, under both paragraphs of its complaint, proceeds upon the theory that the money which it seeks to recover was "wrongfully and unlawfully extorted from it by the state, acting through its auditor, and that appellee was compelled to pay into the state treasury a sum of money which it did not owe, or to submit to a revocation of its right to do business within this state, and the imposition of the statutory penalty of \$100 a day." Or, in other words, he insists that each paragraph charges the auditor of state with illegal, unauthorized, and wrongful acts, in excess of the power granted to him by law. His claim is that the action as presented by appellee's complaint sounds in tort, and not in contract. Therefore, it is asserted that under the terms of the statute in question the lower court had no jurisdiction.

It is settled beyond controversy that the state, which in the eye of the law is recognized as a sovereign, cannot, without its consent, be sued by a citizen. In case the state, through its legislative department, has granted the right or privilege to claimants to institute actions against it upon certain terms and conditions, all persons seeking to avail themselves of the privilege so granted must accept it subject to the terms and conditions attached thereto or forming a part of the right as granted by the state. Or, in other words, the suit instituted must be limited to such claims as are contemplated by the act authorizing the state to be sued. *May v. State*, 133 Ind. 567, 33 N. E. 352; *Thweatt v. State*, 66 Ga. 673; *Chicago, M. & St. P. R. Co. v. State*, 53 Wis. 509, 10 N. W. 560; *Houston v. State*, 98 Wis. 481, 42 L.R.A. 39, 74 N. W. 111; *Murdock Parlor Grate Co. v. Com.* 152 Mass. 28, 8 L.R.A. 399, 24 N. E. 854; *Hill v. United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011. In the absence of a statutory law creating a liability, the rule universally recognized and enforced is that neither a state nor the United States is legally liable to respond in damages to a person for an injury resulting from the misconduct, neg-

ligence, or tortious acts of its officers or agents. *Houston v. State*, supra, and authorities cited; *German Bank v. United States*, 148 U. S. 573, 37 L. ed. 564, 13 Sup. Ct. Rep. 702. It is evident, under the facts alleged in the paragraphs of complaint, that appellee's demand against the state cannot be said to arise out of or be founded on an express contract between it and appellant. Consequently, unless appellee's money demand against the state—which it either actually has or claims to have—arises out of an implied contract, appellee, under the provisions or terms of the statute in question, has no right to maintain this action, and the demurrer of appellant to the complaint, upon this ground alone, should have been sustained.

We are unable, however, to concur in the view of the attorney general that the action at bar arises out of a tort committed by an officer or agent of the state. It is true that the pleading contains averments that the money that was paid into the state treasury by appellee was wrongfully and unlawfully extorted from it; that it was coerced by a threat made by the auditor of state that he would revoke its authority to do business within the state. It is manifest that these averments were employed by the pleader more fully to show that the money in question was paid over by appellee involuntarily, and therefore, if it belonged to it and not to the state, it might be recovered in this action. *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 608, 77 Am. St. Rep. 548, 80 N. W. 865, and cases cited. Eliminate these averments from the complaint, and it is shown, by the remaining clear and positive allegations that the payment in question to the state was not voluntarily made, but was made by appellee under protest, and at the time it made the payment, as shown, it notified the auditor of state and treasurer of state that it reserved the right to recover the money so paid. The essential fact to be shown by the complaint upon this feature of the case was that the payment of the money was involuntary. Under the circumstances, the claim of the attorney general that the action sounds in tort, instead of in contract, is untenable.

We may next inquire, What did the legislature mean by the words, "A money demand arising at law . . . out of contract, express or implied?" The phrase, "money demands on contracts," was defined in the Revised Statutes of 1852 as follows: "The phrase, 'money demands on contract,' when used in reference to an action, means any action arising out of contract, where the relief demanded is a recovery of money." 2 Gavin & Hord, § 797, p. 336. This same definition is contained in the Revision of

1881, § 1356, Burns's Anno. Stat. 1908, § 1285 Rev. Stat. 1881. It must be conceded that the relief demanded in this action is the recovery of money. It is evident, that this demand does not arise out of an express contract.

It will be noted that the statute that authorizes the state to be sued does not confine the action alone to one arising at law or in equity out of an express contract, but it may be one which arises out of what in law is recognized and denominated as an implied contract.

We may presume that the legislature, in extending to claimants the right to recover against the state upon a money demand arising out of an implied contract, fully understood the meaning and character of such contracts. The legislature evidently contemplated that money at some time might be paid into the treasury of the state under such circumstances as would not lawfully permit the state to retain it against the person making the payment, and therefore the state, under the law, would be impliedly obligated to refund the money to the person entitled thereto. We are of the opinion that, in view of its terms, the statute in question must be held to apply to such a case. The attorney general, however, insists that the state has never recognized appellee's claim to the money in controversy, and in no manner has it agreed to repay it or restore it to appellee. It is true that the facts as alleged do not disclose any express agreement on the part of the state to refund the money in question to appellee, and it is evident from the argument of its counsel that repayment thereof is the very opposite of its intention. It may be said, we think, that some looseness and ambiguity impress some of the decisions of the higher courts in respect to the application of the principle of implied contract to particular facts. An express contract is said to be a mutual understanding and coming together of the minds of the contracting parties to do or not to do a particular thing; while an implied contract, generally speaking, is defined: (1) As an obligation where there is no express or formal agreement by the parties to the contract, but their intention so to do is shown by their acts or from circumstances; and (2) obligations implied by law, without regard to the acts or intention of the parties. 7 Am. & Eng. Enc. Law 2d ed. 92; 15 Am. & Eng. Enc. Law 2d ed. 1078; *People ex rel. Dusenbury v. Speir*, 77 N. Y. 144.

In express contracts it is the consent of the parties thereto which creates the liability, while under a contract or obligation implied by law there is no actual consent or promise. Under the facts in the particular 42 L.R.A. (N.S.)

case it is the law alone which declares that the necessary consent shall be implied. In *People ex rel. Dusenbury v. Speir*, supra, the court characterizes implied or constructive contracts—as they are sometimes called—as follows: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention." This principle is recognized and sustained by the decisions of this court which hold that where a person has obtained money to which he is not entitled, but which in right and justice belongs to another, an action may be maintained for its recovery by the person entitled thereto, upon an implied promise or agreement on the part of the person obtaining the money. *McQueen v. State Bank*, 2 Ind. 413. The court in the latter case held that "if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, such money is, in contemplation of law, money received for the use of the injured party. It is not the money of the wrongdoer. He has no right to retain it; and the law therefore implies a promise from him to return it to the lawful owner." In support of the same rule, see also *Ash-ton v. Shepherd*, 120 Ind. 69, 22 N. E. 98; *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89. In the latter case this court said: "In an action for money had and received there need be no privity of contract proved, other than such as arises out of the fact that the defendant has received the plaintiff's money under circumstances which make it against conscience that he should retain it." In 4 *Wait on Actions and Defenses*, 469, the author states the rule as follows: "An action of assumpsit for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself or third persons, under such circumstances that in equity and good conscience he ought not to retain the same and which *ex æquo et bono* belongs to the plaintiff. . . . It is not, however, essential that any privity of contract should be shown; if the plaintiff's right to the

money is established, and the defendant is shown to have received it under such circumstances that he ought not to retain it, the law implies a promise to pay it to the party who ought to have it."

By the facts alleged it is shown that the state, through its proper officials, demanded of appellee company, and received from it the money in controversy, and that it passed into the state's treasury for the use of the state in the administration of its affairs. In the light of the principle asserted by the authorities to which we have referred, if, as appellee under the facts insists and contends, the state is not entitled to the money in controversy, but on the contrary it rightfully belongs to appellee, the state cannot rightfully retain it as against appellee, and the law creates an implied obligation on the part of the state to pay it over to appellee. Therefore, appellee had the right to sue the state in the superior court of Marion county, under § 1485, *supra*, and that court, under the provisions of the statute, had jurisdiction to hear and determine the merits of the action. What we have said, however, in dealing with the question of jurisdiction as raised by the attorney general, must be confined to that question alone; or, in other words, to appellee's right to sue the state under the statute upon an implied contract or liability, and we must not be understood as in any manner upholding or affirming appellee's ultimate right to recover against the state upon the facts alleged in the complaint.

We next turn to the consideration of the case as presented by the first paragraph of the complaint. The contention of the attorney general is that the averments of the complaint disclose that the money that appellee seeks to recover in this action was lawfully collected from it, both as to principal and interest, and that therefore there is no liability shown to exist against the state that appellee can enforce in this action. He insists that the decisions in the cases of *Sherrick v. State*, 167 Ind. 345, 79 N. E. 193, and *Daily v. State*, 171 Ind. 646, 87 N. E. 4, deny appellee's right to recover the money in dispute, and that the decisions in those cases govern the question of the liability of the state. On the other hand, counsel for appellee present their view of the case from the facts as follows: "Our contention is this, that although the construction placed upon the law by the auditor of state was not sound, yet the state, through the officers and departments already so many times mentioned, by adopting that construction and acquiescing therein for so long a period, estopped itself from asserting the invalidity thereof against all persons who, acting in good faith and with honest intent and pur-

pose, also accepted such interpretation of the statute, prior to the time when a different construction thereof was announced by this court." Counsel very frankly assert that if they are wrong in this contention that ends the matter. Further advancing their contention counsel say: "As to duration of time, the question is simply this, Did the state acquiesce in such payments, so generally and for so long a period of time as to lull appellee to sleep, and lead it to understand that it might safely pursue the course it did? Had any reasonable objection been made to the course pursued, appellee and other insurance companies in the life of the bond given by the auditor of state could have recovered the money thus wrongfully paid to Rice. The acquiescence of the state after the payments were made is quite as important a consideration as the acquiescence in the payments made prior to 1884, and particularly is this true when the state by such acquiescence has cut off the insurance companies from any redress. So that appellee, on the question of acquiescence, is entitled to reckon the time that has elapsed since 1884, just as much as the time that elapsed from 1873 to 1884."

The statute governing the payment of taxes by foreign insurance companies, to which class appellee belongs, is embraced in § 67 of the general law concerning taxation, approved March 6, 1891 (*Acts 1891*, p. 199, § 10,216, *Burns's Anno. Stat. 1908*). This section declares that "every insurance company not organized under the laws of this state and doing business therein shall in the months of January and July of each year, report to the auditor of state, under oath of the president and secretary, the gross amount of all receipts received in the state of Indiana on account of insurance premiums for the six months last preceding, ending on the last day of December and June of each year next preceding, and shall at the time of making such report *pay into the treasury of the state* the sum of \$3 on every \$100 of such receipts, less losses actually paid within the state; and any such insurance company failing or refusing for more than thirty days to render an accurate account of its premium receipts, as above provided, and pay the required tax thereon, shall forfeit \$100 for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the state of Indiana on the relation of the auditor of state in any court of competent jurisdiction, and it shall be the duty of the auditor of state to revoke all authority of any such defaulting company to do business within this state." (*Our italics.*)

It will be observed that this statute, in positive and imperative terms, requires in-

insurance companies to pay the money exacted from them as taxes, not to the auditor of the state, but into the treasury of the state. This statute appears to have been first enacted in the legislature in 1873, in an act supplementary to and amendatory of an act providing for the uniform assessment of property, etc., and is embraced in §§ 8 and 9 of said act. Acts 1873, p. 205. It was re-enacted in 1881 in an act concerning taxation, and is embraced in § 83 of Acts 1881 (S. S.) pp. 611, 636; and it was again re-enacted in 1891 (Acts 1891, chap. 99), and has been a law of the state for a period of over thirty-seven years.

Section 9247, Burns's Anno. Stat. 1908, § 5637, Rev. Stat. 1881, provides and points out the method of paying money into the treasury of the state. Appellee must be presumed to have known the requirements of §§ 9247 and 10,216, supra, and in turning the money over to said auditor it was chargeable, at its peril, with notice or knowledge of the scope of his official authority under the law to receive said money for the state as payment of the taxes in question. Or, in other words, that under the laws of the state he had no authority whatever to receive the money in behalf of the state. Sherrick v. State, supra; Hord v. State, 167 Ind. 622, 79 N. E. 916; Silver, B. & Co. v. Indiana State Bd. of Edu. 35 Ind. App. 438, 72 N. E. 829.

Appellee argues that Rice, as auditor of state, received and accepted the money from it under the provisions of § 10,216, supra, and that he construed said section as authorizing him in his official capacity to receive the money from appellee company to be paid by him to the treasurer of state; and it seeks to invoke the principle of practical or departmental construction in order to constitute a part of the basis upon which to predicate its right to recover the money in controversy. Its counsel concede that under the decision in the Sherrick Case, supra, the construction accorded to the statute by Auditor Rice and the other auditors following him was neither sound nor tenable, but they claim that the state is shown to have acquiesced in this construction of the law for a series of years, and that the state is now precluded from claiming that the construction placed on the statute by the auditors was not correct. We are not inclined to accept this view of the case. The question in question is not impressed with ambiguity whatever, either patent, and as to its meaning there can be no doubt. Therefore, it is not a question of departmental or administrative construction, but of the construction of the statute by the legislature. The state has no right to claim that the money of the state is to be paid into the treasury of the state.

time they make their respective reports to the auditor of state, to be paid by them into the treasury of state. Neither departmental nor judicial construction is allowable to interpret a law which is plain upon its face and requires no interpretation. State v. Sopher, 157 Ind. 360, 61 N. E. 785; Hord v. State, supra, and authorities cited. United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582. The money required to be paid is not a license fee for permitting the insurance companies to conduct their business within the state, but it is for taxes imposed upon such companies by the legislature. In respect to the payment of the money as required by this statute it is sufficient to say, *Ita lex scripta est*. Under the law, there is no reasonable ground for asserting that the auditors in any manner received the money from appellee in their official capacity, but they must be held to have received it in their individual capacity as the agents of appellee, for the purpose, as we may assume, of paying it into the treasury of the state, possibly less any commission to which they considered themselves entitled. Sherrick v. State, supra.

The statute did not invoke any construction by said auditors. The provision thereof requiring the money to be paid to the treasurer of state by the insurance companies is perfectly plain and certain upon its face; it affords no room for interpretation. It was the duty of both appellee and said auditors to regard its requirements. Sherrick v. State, supra. It must follow, therefore, that the act of said auditors in receiving the money from appellee was not due to any misinterpretation of the law on their part, but must be attributed to the wilful disregard of its plain provisions.

Again, upon another view of the question, the auditors, under the law, were not charged with the execution thereof in respect to whom the money should be paid by the foreign insurance companies in satisfaction of the taxes exacted of them by law. They were bound to know the requirement of the law and must be presumed to have known that the statute required the money to be paid by such companies, not to them as auditors, but into the state treasury. Therefore, they had no legal authority to place an interpretation on that provision of the statute which prescribed the officer to whom it should be paid. Having no legal authority to do so, whether express or implied, to interpret the statute in this respect, their acts could be of no avail. Therefore, in this case, the principle of judicial or administrative construction which counsel for appellee contend, has no application, and is without effect. It is only in the discharge of their



official duties that a construction or interpretation, placed upon a law by departmental or administrative officers charged with the duty of enforcing or applying it, becomes material or of any effect or force. Endlich, Interpretation of Statutes, § 360; Re Manhattan Sav. Inst. 82 N. Y. 142; United States v. Tanner, 147 U. S. 661, 37 L. ed. 321, 13 Sup. Ct. Rep. 436; Nye v. Foreman, 215 Ill. 285, 74 N. E. 140; Westbrook v. Miller, 56 Mich. 148, 22 N. W. 256. Under this view of the question, appellee's claim that the state has by its conduct so accepted the acts of said auditors, and so acquiesced in their conduct, that it is estopped from demanding the money which it received from appellee on December 11, 1906, is untenable. From this viewpoint it is insisted that it is wholly immaterial what is the proper construction of the statute; that if the auditors accorded the wrong construction to the law, and the state acquiesced therein, it is precluded. The infirmity of this argument is that it would be unreasonable to assert that the state can be held in any manner to have acquiesced in the unauthorized acts of said auditors. Those officers having no jurisdiction to interpret the provision of the statute in controversy, their act in so doing was unwarranted, and the charge that the state accepted the construction and acquiesced therein is but a conclusion of the pleader; for certainly the state cannot be regarded as having accepted and acquiesced in the auditor's unauthorized interpretation of the law, which interpretation is manifestly at variance with the express and plain provisions of the act in question.

The contention of appellee that the state is estopped by its conduct from requiring appellee to pay the money involved into the state treasury cannot be upheld. It may be said, in passing, that if the state on December 11, 1906, was legally entitled to the money that appellee paid over under protest, then, a correct result having been reached by the payment of the money into the state treasury, appellee must fail in this action.

In regard to the question of estoppel urged by appellee it may be said that "the effect of an estoppel *in pais* is to prevent the assertion of an unequivocal right, or preclude a good defense, and justice demands that it should not be enforced unless substantiated in every particular." 2 Herman Estoppel & Res Judicata, § 944. Generally speaking, the ground upon which an estoppel proceeds is fraud, actual or constructive, on the part of the person sought to be estopped. The fraud is said to consist in the denial of that which the person to be estopped had previously affirmed or asserted. Ward v. Berkshire L. Ins. Co. 108 42 L.R.A.(N.S.)

Ind. 301, 9 N. E. 361; Wisehart v. Hedrick, 118 Ind. 341, 21 N. E. 30; Reid v. State, 74 Ind. 252. The doctrine of estoppel springs from equitable principles, and is designed to aid the law in the administration of justice where, without its aid, injustice might result. Its purpose is to preserve rights previously acquired, and not to create new ones. Sherrick v. State, 167 Ind. 345, 79 N. E. 193. There is in this case, however, no insistence by counsel for appellee that there was any misrepresentation, knowingly or otherwise, by the state, made through any of its duly authorized officials; but the argument is advanced by appellee that the state, with knowledge or notice that the auditor of state was receiving from it and the other foreign insurance companies the taxes in question, and was paying them to the treasurer of state, must be deemed to have acquiesced in his acts, and is estopped by its conduct of acquiescing therein from recovering the money in controversy of appellee. Appellee, in order to maintain the estoppel which it urges against the state, seeks to bring home to the latter, through the biennial reports made by the auditor of state, as shown, notice of the unauthorized acts of said auditor in collecting the money from the insurance companies.

It is charged that these reports disclosed that the several auditors had, from time to time, collected from all the foreign insurance companies except five the taxes due from them to the state, and that these several officials had credited themselves, respectively, with the payment of the money to the treasurer of state. While it may be conceded, without deciding, that by virtue of these reports of the auditors, which were laid before the general assembly by the several governors, the state may be held to be chargeable, through its legislative department, with notice of the unauthorized acts of said auditors; nevertheless, an essential element to constitute an estoppel by conduct is lacking; namely, that it does not appear that appellee at the time it paid the taxes to said auditor was not apprised that he was not authorized under the law to collect and receive these taxes. It is an undisputed proposition that, in a case where a person seeking the benefit of the estoppel has knowledge or means of knowledge in respect to all the facts equal to that possessed by the one against whom the estoppel is urged, there can be no valid estoppel. Reid v. State, supra; Leonard v. American Ins. Co. 97 Ind. 299; Platter v. Elkhart County, 103 Ind. 360, 2 N. E. 544; Silver, B. & Co. v. Indiana State Bd. of Edu. 35 Ind. App. 438, 72 N. E. 829; and authorities cited. In short, it may be said that

we have a case before us in which neither misrepresentation nor concealment is charged against the state; neither do the facts show knowledge as to one of the parties and ignorance on the part of the other; consequently, appellee is not in a position to invoke the principle of estoppel. It, and the state, were bound to know that the auditor of state was not authorized by the statute to receive the money for the taxes. Hence, in respect to the question of knowledge or notice, the state and appellee may be said to have been on a parity with each other.

If appellee continued, as it appears it did, to pay the money due from it to the state as taxes to an officer unauthorized under the law to receive it, such payments were unwise, and if it were conceded that the state was apprised of the acts of the auditor of state in accepting the money, it certainly, under the law, was not required to take any steps to protect appellee against its own folly, nor could it be expected to do so. Counsel argue that if appellee is required again to pay these taxes it will result in hardship and injustice. It has never paid said taxes, for its payment to the auditor of state, as we have shown, was not a payment to the state; and the position in which it is now placed, under the circumstances, must be attributed to its own fault in failing to comply with the plain requirements of the law. To sustain its contention that it ought not to account to the state for the taxes in controversy would be equivalent to offering an inducement to persons to rely upon their own voluntary ignorance in regard to their legal rights and duties, and would tend to break down the force and effect of the ancient maxim, *ignorantia legis neminem excusat*, which applies alike to both common and statutory law. By reason of the conclusions which we have reached, we dismiss, without consideration, the contention of the attorney general that the state cannot be estopped by the laches or delays of its public officers. Upon this point, however, see *Terre Haute & I. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401.

We conclude, and so hold, that the facts alleged in the complaint do not constitute an estoppel against the state, and that appellee is not entitled to recover, under the first paragraph of its complaint, the principal money which it paid over to the state on December 11, 1906.

Counsel for appellee insist that whatever may be the law as to the right of the state to call upon appellee to pay the principal of the taxes in question, there can be no foundation upon which it can predicate any right to require it to pay interest on these taxes. We concur in this contention. It will be 42 L.R.A. (N.S.)

observed that § 10,216, Burns's Anno. Stat. 1903, Acts 1891, p. 199, § 67, which imposes the taxes upon foreign insurance companies, and which, as previously shown, has formed a part of the general taxation law of this state since 1873, provides that "any such insurance company failing or refusing for more than thirty days to . . . pay the required tax thereon shall forfeit \$100 for each additional day, . . . to be recovered in an action in the name of the state of Indiana on the relation of the auditor of state." It will be noted that neither this section, nor any other part of our statute concerning taxation, contains any provision for allowing interest upon taxes. This court has held that under the taxing law of 1891 interest is not authorized to be collected upon delinquent taxes. *Evansville & T. H. R. Co. v. West*, 139 Ind. 254, 37 N. E. 1009; *Western U. Teleg. Co. v. State*, 146 Ind. 54, 44 N. E. 793; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443. Upon the same point is the holding in the case of *Morrow v. Geeting*, 23 Ind. App. 494, 55 N. E. 787. The same principle is affirmed and sustained in the following cases: *Western U. Teleg. Co. v. State*, 55 Tex. 314; *Shaw v. Peckett*, 26 Vt. 482; *Perry v. Washburn*, 20 Cal. 318; *Danforth v. Williams*, 9 Mass. 324; *Kentucky C. R. Co. v. Pendleton County*, 8 Ky. L. Rep. 517, 2 S. W. 176; *Camden v. Allen*, 26 N. J. L. 398; *State v. Southwestern R. Co.* 70 Ga. 11; *Perry County v. Selma, M. & M. R. Co.* 65 Ala. 391. Taxes levied or imposed by the state are not debts in the ordinary acceptance of that term, so as to make them bear interest under the general interest laws of the state. In the absence of any express declaration by the legislature that taxes shall bear interest, the latter, as authorities affirm, should not be allowed. A tax made payable by a statute at a certain time does not bear interest unless the statute so provides. In support of these propositions, see authorities just cited.

It is manifest, we think, that the state had no right to exact the payment of interest upon the principal sum of the unpaid taxes. It follows, therefore, that appellee is entitled, under the second paragraph of the complaint, to recover from the state the amount of interest which it is shown to have paid upon the principal. The manifest theory of the first paragraph of the complaint is to recover the principal which appellee paid to the state on December 11, 1906; therefore, under our holding, this paragraph is insufficient and the lower court erred in overruling the demurrer thereto. Under our holding herein there was no error on the part of the court in overruling the

demurrer to the second paragraph of the complaint.

On account of the error of the court in overruling the demurrer to the first paragraph of the complaint, the judgment is in part reversed, but so far as the judgment awards to appellee a recovery of the total amount of interest which it paid over to the state on December 11, 1906, it is in all things affirmed; and the cause is remanded to the lower court, with instructions to modify the judgment by eliminating therefrom all that part which embraces and awards to appellee a recovery of the principal amount of the taxes paid over to it by the state on December 11, 1906, and for further proceedings not inconsistent with this opinion.

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**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

**FREDERICK LEBER, Appt.,**

v.

**KING COUNTY, Resp't.**

(69 Wash. 134, 124 Pac. 397.)

**Highway — embankment — necessity of barrier.**

1. A county is not bound to maintain a barrier along the side of a graded roadway

**Note. — Duty of county or town to maintain barriers along rural highways or bridges.**

As to what injuries may be deemed to be proximately caused by the absence of a guard rail in a highway, see note to *Lyons v. Watt*, 18 L.R.A. (N.S.) 1136. The cases cited there will not be included in the present note, since the facts and circumstances upon which negligence was predicated in the other note are sufficiently set forth.

Nor does the present note include the duty to erect barriers across the highway when the same is blocked, or is being repaired, or is abandoned; or the duty to guard portions of the highway in process of repair. The duty to provide barriers against abandoned highways is treated in a note to *Daniels v. County Ct.* 37 L.R.A. (N.S.) 1158; and the duty to provide barriers to protect travelers from obstructions outside the highway, in the note to *Shea v. Whitman*, 20 L.R.A. (N.S.) 980; and those questions are therefore not treated in the present note.

**In general.**

The cases are unanimous in holding that it is the duty of towns or counties to place some guard at dangerous and exposed places, where the happening of accidents from the failure to place guards may be

15 feet wide, although it is at the top of an embankment 8 or 10 feet high, where the slope is not precipitous, but gradual.

**Pleading — allegation of defect in highway — sufficiency.**

2. A condition sufficient to hold a county liable for injury to a traveler on a highway whose horse went over an embankment upon which it was built is not shown by allegations that the defect was the existence on the side thereof of a steep, precipitous, and sheer decline or pitfall of some 8 or 10 feet to the bottom, which defendant negligently permitted to remain without barrier; and that plaintiff's horse fell down and into said declivity and precipice.

(June 21, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for King County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. William Farmerlee, for appellant:

If there is a dangerous place, such as a declivity or excavation, so close to the highway, or to the traveled part thereof, as to render the latter unsafe for travelers in the absence of a railing or barrier, the want of such railing or barrier constitutes a de-

reasonably anticipated. And for the purposes of this note, it matters not whether the damage results from walking or driving in such unguarded places, whether from fright of a horse at some object within or without the bounds of the highway, whether in daytime or at night, provided such an accident might reasonably be anticipated. And these extraneous facts will not be here set out, except where they are necessary for an understanding of the case. The chief difficulty arises in determining whether, in any particular case, the danger is sufficiently imminent to require such a guard or barrier, and naturally each case must be decided upon its own state of facts. No rule can be laid down that will apply to all conditions, and often reasonable men will differ as to the need for barriers under the same conditions. When this difference of opinion appears to be probable or possible, as is indicated below, courts do not take upon themselves the duty of deciding as a matter of law whether barriers are reasonably necessary or not, but leave that question to the jury, to be determined as one of fact.

In *Collins v. Dorchester*, 6 Cush. 396, the rule is laid down that towns are bound to erect fences or railings at such places as, without them, would be unsafe or inconvenient for travelers exercising ordinary care.

"Of course, county authorities cannot b.

fect in the highway itself, for injuries from which the municipality is liable.

15 Am. & Eng. Enc. Law, 2d ed. 455; Neel v. King County, 53 Wash. 490, 102 Pac. 396; Malloy v. Walker Twp. 77 Mich. 448, 6 L.R.A. 695, 43 N. W. 1012; 5 Thomp. Neg. § 6055; Mochler v. Shaftsbury, 46 Vt. 580, 14 Am. Rep. 634; Taylor v. Ballard, 24 Wash. 191, 64 Pac. 143; Prather v. Spokane, 29 Wash. 549, 59 L.R.A. 346, 92 Am. St. Rep. 923, 70 Pac. 55; Trexler v. Greenwich Twp. 168 Pa. 214, 31 Atl. 1090; Bryant v. Randolph, 133 N. Y. 70, 30 N. E. 657; Morrell v. Peck, 88 N. Y. 398; Davis v. Snyder Twp. 196 Pa. 273, 46 Atl. 301; Russell v. Westmoreland County, 26 Pa. Super. Ct. 425; Drew v. Sutton, 55 Vt. 536, 45 Am. Rep. 644; Sharp v. Evergreen Twp. 67

Mich. 443, 35 N. W. 67; Harris v. Clinton Twp. 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425; Adams v. Natick, 13 Allen, 429; Woodman v. Nottingham, 49 N. H. 387, 6 Am. Rep. 526; Haskell v. New Gloucester, 70 Me. 305; Babson v. Rockport, 101 Mass. 93; Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407; Koester v. Ottumwa, 34 Iowa, 41; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; O'Leary v. Mankato, 21 Minn. 65; Pittston v. Hart, 89 Pa. 389; Harris v. Great Barrington, 169 Mass. 271, 47 N. E. 881; Seeton v. Dunbarton, 72 N. H. 263, 56 Atl. 197; Maxim v. Champion, 50 Hun, 88, 4 N. Y. Supp. 515, affirmed in 119 N. Y. 626, 23 N. E. 1144; Wallace v. New Albion, 192 N. Y. 544, 84 N. E. 1122, affirming 121 App. Div. 66, 105 N. Y. Supp.

said to be negligent under all circumstances for the mere failure to erect guard rails or fences. It must depend upon circumstances, for, if in mountainous or hilly localities they be always required to erect and maintain fences wherever a road is on a hillside, or about some steep descent, it would add enormously to the road expenses of a county,—so much so that the requirement would be in many cases prohibitory, and prevent the construction of roads that would be very desirable for the neighborhoods. But there are many places, even at remote points from towns and cities, which are so very dangerous, and can be so easily protected by a reasonable expenditure as to demand some such protection for the benefit of those traveling over them." Roth v. Highways Commission, 115 Md. 469, 80 Atl. 1031.

Although the question whether guard rails are required is generally for the jury, the jury must first understand not only what the law requires, but what the facts of the case are. Cobb v. Bradford Twp. 232 Pa. 198, 81 Atl. 199.

Among the facts material to be considered are the character and amount of travel, the character of the road itself, its width and general construction, the character and extent of the slope or descent of the bank, the direction of the road at the place, the length of the portion claimed to require a railing, whether the danger is concealed or obvious, and the extent of the injury likely to occur therefrom. Seeton v. Dunbarton, 72 N. H. 269, 56 Atl. 197.

The law does not impose on supervisors the duty of maintaining a guard rail at every point where a gully starts at the roadside, or where some natural depression or small declivity on adjacent land may happen to be; it is only when these gullies or declivities become dangerous on account of their proximity to the highway that the duty of maintaining guard rails arises. Cobb v. Bradford Twp. supra.

The mere fact that the roadway is of sufficient width for the usual and ordinary travel does not necessarily relieve a township from the duty of maintaining guard

rails at dangerous places, but it has something to do in determining whether, under all the circumstances, it is necessary to provide additional safeguards in such a case. Ibid.

And the fact that a town or its officers have been more negligent elsewhere than at the place of the accident, or that other authorities are more negligent than the ones in question, cannot exempt the latter from responsibility. Ibid.

If a road or bridge is out of repair and needs guards or railings in order to render it safe for the public, an obligation and liability rests on the town or other responsible body, and does not depend upon its having funds for such a purpose, nor upon its own judgment or discretion. Hyatt v. Rondout, 44 Barb. 385, affirmed in 41 N. Y. 619, without opinion.

The fact that no injury has previously resulted from the same condition of the highway for a considerable length of time does not necessarily exonerate a town from negligence in continuing the highway in that condition, but may be submitted to the jury, and its weight as evidence may properly be left to them. Maxim v. Champion, 50 Hun, 88, 4 N. Y. Supp. 515, affirmed in 119 N. Y. 626, 23 N. E. 1144; Fox v. Union Turnp. Co. 59 App. Div. 363, 69 N. Y. Supp. 551.

The fact that a particular bridge has never had, since its erection many years before, any protection along its sides, and that none of the many bridges in the town similar to this one have ever had any, cannot, as a matter of law, justify a town in assuming that they are safe, and in this respect in a proper condition; the question arising in each particular case must be controlled by the circumstances attending it. Pelkey v. Saranac, 67 App. Div. 337, 73 N. Y. Supp. 493.

The fact that a town or its officers have many bridges of a like character to inspect, for the purpose of ascertaining their condition as to being properly protected by barriers, and several miles of dugway presenting a like question, cannot excuse such town or officers from acting in regard to the

524; *Hey v. Philadelphia*, 81 Pa. 50, 22 Am. Rep. 733; *Lower Macungie Twp. v. Merkhoffer*, 71 Pa. 276; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831.

Messrs. John F. Murphy and Robert H. Evans, for respondent:

The county was free from negligence, and is not liable for plaintiff's injuries.

*Dignan v. Spokane County*, 43 Wash. 419, 86 Pac. 649; *Beall v. Athens Twp.* 81 Mich. 536, 45 N. W. 1014; *Kingsley v. Bloomington Twp.* 109 Mich. 340, 67 N. W. 333; *Bell v. Wayne*, 123 Mich. 386, 48 L.R.A. 644, 81 Am. St. Rep. 204, 82 N. W. 215; *Heister v. Fawn Twp.* 189 Pa. 253, 42 Atl. 121; *Card v. Columbia Twp.* 191 Pa. 254, 43 Atl. 217; *Nichols v. Pittsfield Twp.* 209

Pa. 240, 58 Atl. 283; *Teater v. Seattle*, 10 Wash. 327, 38 Pac. 1006.

#### Per curiam:

This is an action to recover damages for personal injuries. A demurrer to the complaint for want of facts constituting a cause of action having been sustained, and the plaintiff electing not to plead further, judgment of dismissal was rendered against him accordingly. From this disposition of the cause the plaintiff has appealed.

The contentions of counsel require us to notice only the following allegations of the complaint: "That the said defendant on the 31st day of August, 1910, and for a long time prior thereto, disregarded its said duty in this: That on said date, and for a long

particular bridge, especially when its condition has been expressly called to their attention and when they have been requested to act in reference thereto. *Ibid.*

But the mere probability that a railing would have prevented a certain accident is not sufficient to establish that the absence of such railing is a defect for which a town is liable. *Com. v. Wilmington*, 105 Mass. 599; *Mack v. Shawangunk*, 98 App. Div. 577, 90 N. Y. Supp. 760.

The duty of a township to erect barriers along a highway at dangerous places is not affected or relieved by the fact that such barriers might interfere with the use of an adjacent log way. *Kelley v. Mayberry Twp.* 154 Pa. 440, 26 Atl. 595.

#### Accidents not reasonably to be anticipated.

See in this connection note in 18 L.R.A. (N. S.) 1135, as to proximate cause.

In case of accidents so unusual or improbable as not reasonably to be anticipated, highway authorities will not be held liable, although there is no barrier, or although the barrier erected was ineffective in preventing the accident.

So it is said that it is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travelers. *Morse v. Belfast*, 77 Me. 44.

A town may be negligent in not placing some guard or warning along an approach to a bridge at an excavation 4 or 5 feet wide and 6 feet deep left outside the abutment at the time of its construction; but there is no necessity of erecting a barrier against the fury of a team of horses running away without restraint. *Stacy v. Phelps*, 47 Hun, 54.

And in *McFarland v. Emporia Twp.* 59 Kan. 568, 53 Pac. 864, where a road extended along a river bank 15 to 30 feet high, with the track 6 feet from the brink, but level and passable its entire width, and a fence consisting of posts and two wires had been strung along the brink, it was held that the town was not bound to do more, 42 L.R.A. (N.S.)

nor guard against horses rushing against it and breaking it down.

Also, where a frightened horse became unmanageable, turned squarely across the road and backed a cutter down a declivity into a pond, evidence that no barriers had been erected along the road, which was 17 feet wide, level and smooth, but that trees skirted the pond except for short breaks of 8 to 12 feet, so that in order to get through such a clearing one would have to turn the horse at right angles with the road, was held to be insufficient to go to the jury on the question of negligence in the town, since there is no negligence in failing to guard against so unlikely a possibility. *Glasier v. Hebron*, 131 N. Y. 447, 30 N. E. 239. And on another appeal in 82 Hun, 311, 31 N. Y. Supp. 236, a nonsuit was held proper.

And a town is not negligent in not maintaining a barrier along a hilly road 12 feet wide, in a country district, although there is a precipitous descent of 19 feet at the side of the road, separated only by a shoulder of earth 6 inches high, where there is a bank 2 feet high on the other side, and where a team could not go down the declivity except by backing right across the highway. *Wade v. Worcester*, 134 App. Div. 51, 118 N. Y. Supp. 667.

And a town is not bound to maintain barriers along a highway bordering a pond, to protect those who may otherwise go out of the limits of the highway to water their horses in the pond. *Com. v. Wilmington*, 105 Mass. 599.

Evidence that a short section of 16-inch logs which, having been placed upon the retaining wall, served as a guard along the edge of a dug road 15 feet wide in a mountain region, had become nearly covered by the action of water, or by working the road, or other causes, so that the surface of the road was raised nearly to the top of the guard, and that a sleigh carrying a load of logs broke in two at that point and the rear bob alued off the bank, causing damage, is not sufficient to go to the jury on the question of negligence on the part of a town in not observing the condition of the log fender

time prior thereto, on the county road and public highway and about  $\frac{1}{4}$  of a mile east of the city limits of Kent, on that certain public road and highway known as the Black Diamond road, and about 400 feet west from where the Molke road branches off therefrom, said defendant so carelessly and negligently maintained and suffered to exist upon said highway, on the right-hand side thereof traveling eastward from Kent, and not separated from said road and highway in any manner whatsoever, a steep, precipitous, and sheer decline and pitfall of some 8 or 10 feet to the bottom thereof measuring from the level of said road and highway, and that the said defendant carelessly and negligently suffered and permitted said decline and pitfall to be and re-

main at said place without any protection to travelers and persons using said highway, and negligently and carelessly failed to erect barriers or a railing or anything whatsoever to keep or prevent a traveler or his horse and wagon from being thrown and precipitated off of said road, and down and over said steep bluff and declivity; and that said conditions above described had existed at said place with the knowledge of the said defendant for a long period of time before the plaintiff was injured thereat, as hereinafter set forth. That on said 31st day of August, 1910, the plaintiff was driving his horse and wagon along said road at said place above described, which said road at said place is very narrow, not exceeding 15 feet in width, and the said plain-

and remedying it. *Lane v. Hancock*, 142 N. Y. 510, 37 N. E. 473.

In *Mineral City v. Gilbow*, 81 Ohio St. 263, 25 L.R.A.(N.S.) 627, 90 N. E. 800, it is said that there is no obligation resting upon the village to prevent a pedestrian from going outside of a street, because of a dangerous place outside the street, not so near as to endanger those using it in the ordinary and proper way.

Where a road 11 feet wide lies along the brink of a steep declivity of 30 or 40 feet to rocks overhanging a stream, and is guarded by a fence four or five rails high, staked and with a rider, the town is not negligent so as to be liable for damages by reason of a horse choking in too small a collar, falling upon the fence, breaking through it, and dragging wagon and all down the declivity. *Chartiers Twp. v. Phillips*, 122 Pa. 601, 16 Atl. 26.

The danger that a horse properly driven will, without cause except a vicious disposition, balk at a point 60 or 70 feet beyond an unguarded wing wall of a bridge, back across the intervening space, and precipitate himself and wagon over the wall, is not one that township authorities ought reasonably to foresee and provide against; the tendency to take fright is common, but the disposition to balk and back without cause is exceptional. *Cage v. Franklin Twp.* 11 Pa. Super. Ct. 533.

But in reversing a judgment for defendant because of various irregularities in the charge to the jury, the court in *Maus v. Mahoning Twp.* 24 Pa. Super. Ct. 624, lays down the rule that the frightening of a horse by an approaching bicycle is not so extraordinary an occurrence as to relieve a township from providing against it, and therefore the jury should determine whether a road is so narrow and dangerous because of declivities as to require barriers, the specific circumstances of this case not being explained.

#### Unguarded highways.

Thus, the question of negligence on the part of the defendant in failing to provide 42 L.R.A.(N.S.)

a barrier has been held by the appellate courts to be one for the jury under the circumstances indicated:

—footpath raised nearly perpendicularly from 2 to 4 feet above the adjoining ground, and 5 or 6 feet above a ditch at the bottom of the embankment (chief question on appeal was contributory negligence). *Williams v. Clinton*, 28 Conn. 264;

—an apparently convenient watering place beside the road with a well beaten path leading to it, and with no fence, railing, or guard to give notice of danger, but which in reality was a deep mudhole, into which a horse sank and was drowned. *Cobb v. Standish*, 14 Me. 198;

—highway along a causeway 5 or 6 feet above the natural surface of the earth. *Haskell v. New Gloucester*, 70 Me. 305;

—culvert 26 feet from end to end, running under a road, with a declivity at one end of 8 or 10 feet, and no barriers except bushes, which did more harm than good by hiding the danger from view. *Roth v. Highways Commission*, 115 Md. 469, 80 Atl. 1031;

—highway through a marsh, smooth and passable for a width of at least 31 feet (jury found no negligence in this case). *Collins v. Dorchester*, 6 Cush. 396;

—no railing between a highway and a stream 10 or 12 feet distant, with a perpendicular bank. *Britton v. Cummington*, 107 Mass. 347.

—highway more than 20 feet wide, the traveled portion generally level and even, except near the center of the road at the place of the accident where there was a depression which filled with water, and travel had gone on either side of it bringing the wheel ruts within 14 inches of an embankment (submitted to arbitrators instead of a jury in this case). *Woods v. Groton*, 111 Mass. 357;

—a fork in a road with no guides to direct travelers, and a gully about 2 feet deep between the two roads, caused by the difference in grades. *Harris v. Newbury*, 128 Mass. 321;

—a horse losing control of its load in ascending a hill, and drawn backwards by its

tiff, in order that other vehicles might pass, was keeping to the right side of said road, and other persons and their teams and automobiles were about to pass the plaintiff in an opposite direction, and the horse and buggy of plaintiff was compelled to take a position very close and near to said declivity and precipice, and the horse of plaintiff, in getting his position to avoid contact and collision with other vehicles, automobiles, and horses on said road, shied or veered to the right, and lost his footing, and fell down and into said declivity and precipice, throwing the plaintiff from the seat of his said wagon a distance of some 16 feet, where the plaintiff struck logs and other hard substances lying in said declivity. That by reason of there being no guard rails or

other obstruction or barrier at said dangerous place to prevent said horse and wagon from falling over the same, and by reason of the carelessness and negligence of the defendant in maintaining and suffering its road to remain in said condition at said time and place, the plaintiff was so thrown over said precipice, and was injured."

It is at once apparent that the only negligence of the county relied upon by the appellant for recovery is the failure of the county to maintain a railing or barrier at the side of the road next to the declivity, since no facts are alleged indicating other defects in the highway rendering it unsafe for travel by teams and vehicles. Appellant relies primarily upon the text of 15 Am. & Eng. Enc. Law, 2d ed. p. 455, where it

weight over the bank at a point where there was no railing. *Lyman v. Amherst*, 107 Mass. 339;

—a rounded roadway only 11 feet wide, with a steep slope at the side into the gutter. *Carville v. Westford*, 163 Mass. 544, 40 N. E. 893;

—only 6 or 8 inches between the beaten track and the shoulder of the highway where the slope of a ditch began, the slope being at an angle of 45 degrees and the ditch 3 feet deep. *Harris v. Great Barrington*, 169 Mass. 271, 47 N. E. 881;

—highway 16 feet wide raised upon an embankment 15 feet high. *Sharp v. Evergreen Twp.* 67 Mich. 443, 35 N. W. 67.

—ditch or drain beside a highway, 11 feet wide at the top, and 4 or 5 at the bottom, and about 6 feet deep, in front of a dwelling house. *Hunt v. Douglass Twp.* 165 Mich. 187, 130 N. W. 648.

—face of highway 11 feet wide somewhat sloping, and outside of the wheel track falling 18 inches in 20, then a 2-inch abrupt drop, and then a slope of 30 degrees for a few feet, so that if a carriage were drawn to the side less than 3 feet from the track it would be overturned, and evidence of "considerable travel." *Seeton v. Dunbarton*, 72 N. H. 269, 56 Atl. 197;

—wheel track 2 feet from edge of embankment. *Hendry v. North Hampton*, 72 N. H. 351, 64 L.R.A. 70, 101 Am. St. Rep. 681, 56 Atl. 922;

—highway upon embankment 12 feet high at a railroad crossing, and sloping away in both directions, confining travel to a space 11 or 12 feet wide, and the approaches curved. *Bryant v. Randolph*, 133 N. Y. 70, 30 N. E. 657;

—steep hill near a village, with a curve at the foot, the accident occurring by reason of a loaded wagon running by gravity backwards. *Coney v. Gilboa*, 55 App. Div. 111, 67 N. Y. Supp. 116.

—highway only 7 feet wide, running to a bank having a descent of 45 degrees, although the road was not used in winter and not much in summer. *Littebrant v. Sidney*, 77 App. Div. 545, 78 N. Y. Supp. 890;

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—the removal of a bridge across a stream at a point where a footpath from a house crosses the stream and opens into the highway, and no barrier put up to protect those who are accustomed to use that access to the street. *March v. Smithfield*, 143 App. Div. 804, 128 N. Y. Supp. 286;

—road excavated from rock beside a creek in a narrow defile for 269 yards, being 8 or 10 feet wide and 4 or 5 feet above the water. *Fay v. Lindley*, 58 Hun, 601, 33 N. Y. S. R. 539, 11 N. Y. Supp. 355;

—highway carried on an embankment across a ravine, the ravine being 3 rods across and 11 feet deep, the embankment being 24 feet between the retaining walls, and the roadbed itself 10 feet wide, and 2½ feet higher on one side, and 3½ on the other, than the top of the retaining wall. *Maxim v. Champion*, 50 Hun, 88, 4 N. Y. Supp. 515, affirmed in 119 N. Y. 626, 23 N. E. 1144;

—a roadway 12 feet wide gradually sloping off to retaining walls 10 feet high. *Holcomb v. Champion*, 36 N. Y. S. R. 759, 12 N. Y. Supp. 882, affirmed in 128 N. Y. 599, 28 N. E. 252;

—highway with high sloping bank rising at one side and a precipitous descent on the other, with the roadbed 9 feet wide, and small rolling stones on the surface. *Reid v. Ripley*, 37 N. Y. S. R. 590, 14 N. Y. Supp. 124;

—road 14 feet wide, several hundred feet along a creek at a distance therefrom of 100 to 200 feet, and at a considerable elevation above it, with a sharp descent and a retaining wall 4 to 5 feet high, with a high bank rising abruptly on the other side. *Van Gaasbeck v. Saugerties*, 82 Hun, 415, 31 N. Y. Supp. 354;

—road on a curve 17 feet wide, with a steep bank 30 feet high only 2 or 3 feet from the track. *Hewett v. Thurman*, 41 App. Div. 6, 58 N. Y. Supp. 83;

—road up a steep hill turning sharply at the top, at which place was a high bank on one side and on the other a steep precipitous fall of 41 feet to a creek, the road being only 12 or 14 feet wide and directly on the edge of the bank. *Hyatt v. Rond-*

1881, § 1356, Burns's Anno. Stat. 1908, § 1285 Rev. Stat. 1881. It must be conceded that the relief demanded in this action is the recovery of money. It is evident, that this demand does not arise out of an express contract.

It will be noted that the statute that authorizes the state to be sued does not confine the action alone to one arising at law or in equity out of an express contract, but it may be one which arises out of what in law is recognized and denominated as an implied contract.

We may presume that the legislature, in extending to claimants the right to recover against the state upon a money demand arising out of an implied contract, fully understood the meaning and character of such contracts. The legislature evidently contemplated that money at some time might be paid into the treasury of the state under such circumstances as would not lawfully permit the state to retain it against the person making the payment, and therefore the state, under the law, would be impliedly obligated to refund the money to the person entitled thereto. We are of the opinion that, in view of its terms, the statute in question must be held to apply to such a case. The attorney general, however, insists that the state has never recognized appellee's claim to the money in controversy, and in no manner has it agreed to repay it or restore it to appellee. It is true that the facts as alleged do not disclose any express agreement on the part of the state to refund the money in question to appellee, and it is evident from the argument of its counsel that repayment thereof is the very opposite of its intention. It may be said, we think, that some looseness and ambiguity impress some of the decisions of the higher courts in respect to the application of the principle of implied contract to particular facts. An express contract is said to be a mutual understanding and coming together of the minds of the contracting parties to do or not to do a particular thing; while an implied contract, generally speaking, is defined: (1) As an obligation where there is no express or formal agreement by the parties to the contract, but their intention so to do is shown by their acts or from circumstances; and (2) obligations implied by law, without regard to the acts or intention of the parties. 7 Am. & Eng. Enc. Law 2d ed. 92; 15 Am. & Eng. Enc. Law 2d ed. 1078; *People ex rel. Dusenbury v. Speir*, 77 N. Y. 144.

In express contracts it is the consent of the parties thereto which creates the liability, while under a contract or obligation implied by law there is no actual consent or promise. Under the facts in the particular

case it is the law alone which declares that the necessary consent shall be implied. In *People ex rel. Dusenbury v. Speir*, supra, the court characterizes implied or constructive contracts—as they are sometimes called—as follows: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention." This principle is recognized and sustained by the decisions of this court which hold that where a person has obtained money to which he is not entitled, but which in right and justice belongs to another, an action may be maintained for its recovery by the person entitled thereto, upon an implied promise or agreement on the part of the person obtaining the money. *McQueen v. State Bank*, 2 Ind. 413. The court in the latter case held that "if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, such money is, in contemplation of law, money received for the use of the injured party. It is not the money of the wrongdoer. He has no right to retain it; and the law therefore implies a promise from him to return it to the lawful owner." In support of the same rule, see also *Ash-ton v. Shepherd*, 120 Ind. 69, 22 N. E. 98; *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89. In the latter case this court said: "In an action for money had and received there need be no privity of contract proved, other than such as arises out of the fact that the defendant has received the plaintiff's money under circumstances which make it against conscience that he should retain it." In 4 *Wait on Actions and Defenses*, 469, the author states the rule as follows: "An action of assumpsit for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself or third persons, under such circumstances that in equity and good conscience he ought not to retain the same and which *ex æquo et bono* belongs to the plaintiff. . . . It is not, however, essential that any privity of contract should be shown; if the plaintiff's right to the



money is established, and the defendant is shown to have received it under such circumstances that he ought not to retain it, the law implies a promise to pay it to the party who ought to have it."

By the facts alleged it is shown that the state, through its proper officials, demanded of appellee company, and received from it the money in controversy, and that it passed into the state's treasury for the use of the state in the administration of its affairs. In the light of the principle asserted by the authorities to which we have referred, if, as appellee under the facts insists and contends, the state is not entitled to the money in controversy, but on the contrary it rightfully belongs to appellee, the state cannot rightfully retain it as against appellee, and the law creates an implied obligation on the part of the state to pay it over to appellee. Therefore, appellee had the right to sue the state in the superior court of Marion county, under § 1485, supra, and that court, under the provisions of the statute, had jurisdiction to hear and determine the merits of the action. What we have said, however, in dealing with the question of jurisdiction as raised by the attorney general, must be confined to that question alone; or, in other words, to appellee's right to sue the state under the statute upon an implied contract or liability, and we must not be understood as in any manner upholding or affirming appellee's ultimate right to recover against the state upon the facts alleged in the complaint.

We next turn to the consideration of the case as presented by the first paragraph of the complaint. The contention of the attorney general is that the averments of the complaint disclose that the money that appellee seeks to recover in this action was lawfully collected from it, both as to principal and interest, and that therefore there is no liability shown to exist against the state that appellee can enforce in this action. He insists that the decisions in the cases of *Sherrick v. State*, 167 Ind. 345, 79 N. E. 193, and *Daily v. State*, 171 Ind. 646, 87 N. E. 4, deny appellee's right to recover the money in dispute, and that the decisions in those cases govern the question of the liability of the state. On the other hand, counsel for appellee present their view of the case from the facts as follows: "Our contention is this, that although the construction placed upon the law by the auditor of state was not sound, yet the state, through the officers and departments already so many times mentioned, by adopting that construction and acquiescing therein for so long a period, estopped itself from asserting the invalidity thereof against all persons who, acting in good faith and with honest intent and pur-

pose, also accepted such interpretation of the statute, prior to the time when a different construction thereof was announced by this court." Counsel very frankly assert that if they are wrong in this contention that ends the matter. Further advancing their contention counsel say: "As to duration of time, the question is simply this, Did the state acquiesce in such payments, so generally and for so long a period of time as to lull appellee to sleep, and lead it to understand that it might safely pursue the course it did? Had any reasonable objection been made to the course pursued, appellee and other insurance companies in the life of the bond given by the auditor of state could have recovered the money thus wrongfully paid to Rice. The acquiescence of the state after the payments were made is quite as important a consideration as the acquiescence in the payments made prior to 1884, and particularly is this true when the state by such acquiescence has cut off the insurance companies from any redress. So that appellee, on the question of acquiescence, is entitled to reckon the time that has elapsed since 1884, just as much as the time that elapsed from 1873 to 1884."

The statute governing the payment of taxes by foreign insurance companies, to which class appellee belongs, is embraced in § 67 of the general law concerning taxation, approved March 6, 1891 (Acts 1891, p. 109, § 10,216, Burns's Anno. Stat. 1908). This section declares that "every insurance company not organized under the laws of this state and doing business therein shall in the months of January and July of each year, report to the auditor of state, under oath of the president and secretary, the gross amount of all receipts received in the state of Indiana on account of insurance premiums for the six months last preceding, ending on the last day of December and June of each year next preceding, and shall at the time of making such report *pay into the treasury of the state* the sum of \$3 on every \$100 of such receipts, less losses actually paid within the state; and any such insurance company failing or refusing for more than thirty days to render an accurate account of its premium receipts, as above provided, and pay the required tax thereon, shall forfeit \$100 for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the state of Indiana on the relation of the auditor of state in any court of competent jurisdiction, and it shall be the duty of the auditor of state to revoke all authority of any such defaulting company to do business within this state." (Our italics.)

It will be observed that this statute, in positive and imperative terms, requires in-

insurance companies to pay the money exacted from them as taxes, not to the auditor of the state, but into the treasury of the state. This statute appears to have been first enacted in the legislature in 1873, in an act supplementary to and amendatory of an act providing for the uniform assessment of property, etc., and is embraced in §§ 8 and 9 of said act. Acts 1873, p. 205. It was re-enacted in 1881 in an act concerning taxation, and is embraced in § 83 of Acts 1881 (S. S.) pp. 611, 636; and it was again re-enacted in 1891 (Acts 1891, chap. 99), and has been a law of the state for a period of over thirty-seven years.

Section 9247, Burns's Anno. Stat. 1908, § 5637, Rev. Stat. 1881, provides and points out the method of paying money into the treasury of the state. Appellee must be presumed to have known the requirements of §§ 9247 and 10,216, supra, and in turning the money over to said auditor it was chargeable, at its peril, with notice or knowledge of the scope of his official authority under the law to receive said money for the state as payment of the taxes in question. Or, in other words, that under the laws of the state he had no authority whatever to receive the money in behalf of the state. *Sherrick v. State*, supra; *Hord v. State*, 167 Ind. 622, 79 N. E. 916; *Silver, B. & Co. v. Indiana State Bd. of Edu.* 35 Ind. App. 438, 72 N. E. 829.

Appellee argues that Rice, as auditor of state, received and accepted the money from it under the provisions of § 10,216, supra, and that he construed said section as authorizing him in his official capacity to receive the money from appellee company to be paid by him to the treasurer of state; and it seeks to invoke the principle of practical or departmental construction in order to constitute a part of the basis upon which to predicate its right to recover the money in controversy. Its counsel concede that under the decision in the *Sherrick Case*, supra, the construction accorded to the statute by Auditor Rice and the other auditors following him was neither sound nor tenable, but they claim that the state is shown to have acquiesced in this construction of the law for a series of years, and that the state is now precluded from claiming that the construction placed on the statute by the auditors was not correct. We are not inclined to accept this view of the case. The statute in question is not impressed with any ambiguity whatever, either patent or latent, and as to its meaning there can be no doubt. Therefore, it affords no room for departmental or judicial construction, for the legislature in plain and precise terms has declared therein that the money exacted of foreign insurance companies is, at the

time they make their respective reports to the auditor of state, to be paid by them into the treasurer of state. Neither departmental nor judicial construction is allowable to interpret a law which is plain upon its face and requires no interpretation. *State v. Sopher*, 157 Ind. 360, 61 N. E. 785; *Hord v. State*, supra, and authorities cited. *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582. The money required to be paid is not a license fee for permitting the insurance companies to conduct their business within the state, but it is for taxes imposed upon such companies by the legislature. In respect to the payment of the money as required by this statute it is sufficient to say, *Ita lex scripta est*. Under the law, there is no reasonable ground for asserting that the auditors in any manner received the money from appellee in their official capacity, but they must be held to have received it in their individual capacity as the agents of appellee, for the purpose, as we may assume, of paying it into the treasury of the state, possibly less any commission to which they considered themselves entitled. *Sherrick v. State*, supra.

The statute did not invoke any construction by said auditors. The provision thereof requiring the money to be paid to the treasurer of state by the insurance companies is perfectly plain and certain upon its face; it affords no room for interpretation. It was the duty of both appellee and said auditors to regard its requirements. *Sherrick v. State*, supra. It must follow, therefore, that the act of said auditors in receiving the money from appellee was not due to any misinterpretation of the law on their part, but must be attributed to the wilful disregard of its plain provisions.

Again, upon another view of the question, the auditors, under the law, were not charged with the execution thereof in respect to whom the money should be paid by the foreign insurance companies in satisfaction of the taxes exacted of them by law. They were bound to know the requirement of the law and must be presumed to have known that the statute required the money to be paid by such companies, not to them as auditors, but into the state treasury. Therefore, they had no legal authority to place an interpretation on that provision of the statute which prescribed the officer to whom the money should be paid. Having no legal authority, either express or implied, to interpret the statute in this respect, their acts in so doing would be of no avail. Therefore, under the law in this case, the principle of departmental or administrative construction, for which counsel for appellee contend, can have no application, and is without force; for it is only in the discharge of their

official duties that a construction or interpretation, placed upon a law by departmental or administrative officers charged with the duty of enforcing or applying it, becomes material or of any effect or force. Endlich, Interpretation of Statutes, § 360; Re Manhattan Sav. Inst. 82 N. Y. 142; United States v. Tanner, 147 U. S. 661, 37 L. ed. 321, 13 Sup. Ct. Rep. 436; Nye v. Foreman, 215 Ill. 285, 74 N. E. 140; Westbrook v. Miller, 56 Mich. 148, 22 N. W. 256. Under this view of the question, appellee's claim that the state has by its conduct so accepted the acts of said auditors, and so acquiesced in their conduct, that it is estopped from demanding the money which it received from appellee on December 11, 1906, is untenable. From this viewpoint it is insisted that it is wholly immaterial what is the proper construction of the statute; that if the auditors accorded the wrong construction to the law, and the state acquiesced therein, it is precluded. The infirmity of this argument is that it would be unreasonable to assert that the state can be held in any manner to have acquiesced in the unauthorized acts of said auditors. Those officers having no jurisdiction to interpret the provision of the statute in controversy, their act in so doing was unwarranted, and the charge that the state accepted the construction and acquiesced therein is but a conclusion of the pleader; for certainly the state cannot be regarded as having accepted and acquiesced in the auditor's unauthorized interpretation of the law, which interpretation is manifestly at variance with the express and plain provisions of the act in question.

The contention of appellee that the state is estopped by its conduct from requiring appellee to pay the money involved into the state treasury cannot be upheld. It may be said, in passing, that if the state on December 11, 1906, was legally entitled to the money that appellee paid over under protest, then, a correct result having been reached by the payment of the money into the state treasury, appellee must fail in this action.

In regard to the question of estoppel urged by appellee it may be said that "the effect of an estoppel *in pais* is to prevent the assertion of an unequivocal right, or preclude a good defense, and justice demands that it should not be enforced unless substantiated in every particular." 2 Herman Estoppel & Res Judicata, § 944. Generally speaking, the ground upon which an estoppel proceeds is fraud, actual or constructive, on the part of the person sought to be estopped. The fraud is said to consist in the denial of that which the person to be estopped had previously affirmed or asserted. Ward v. Berkshire L. Ins. Co. 108 42 L.R.A. (N.S.)

Ind. 301, 9 N. E. 361; Wisehart v. Hedrick, 118 Ind. 341, 21 N. E. 30; Reid v. State, 74 Ind. 252. The doctrine of estoppel springs from equitable principles, and is designed to aid the law in the administration of justice where, without its aid, injustice might result. Its purpose is to preserve rights previously acquired, and not to create new ones. Sherrick v. State, 167 Ind. 345, 79 N. E. 193. There is in this case, however, no insistence by counsel for appellee that there was any misrepresentation, knowingly or otherwise, by the state, made through any of its duly authorized officials; but the argument is advanced by appellee that the state, with knowledge or notice that the auditor of state was receiving from it and the other foreign insurance companies the taxes in question, and was paying them to the treasurer of state, must be deemed to have acquiesced in his acts, and is estopped by its conduct of acquiescing therein from recovering the money in controversy of appellee. Appellee, in order to maintain the estoppel which it urges against the state, seeks to bring home to the latter, through the biennial reports made by the auditor of state, as shown, notice of the unauthorized acts of said auditor in collecting the money from the insurance companies.

It is charged that these reports disclosed that the several auditors had, from time to time, collected from all the foreign insurance companies except five the taxes due from them to the state, and that these several officials had credited themselves, respectively, with the payment of the money to the treasurer of state. While it may be conceded, without deciding, that by virtue of these reports of the auditors, which were laid before the general assembly by the several governors, the state may be held to be chargeable, through its legislative department, with notice of the unauthorized acts of said auditors; nevertheless, an essential element to constitute an estoppel by conduct is lacking; namely, that it does not appear that appellee at the time it paid the taxes to said auditor was not apprised that he was not authorized under the law to collect and receive these taxes. It is an undisputed proposition that, in a case where a person seeking the benefit of the estoppel has knowledge or means of knowledge in respect to all the facts equal to that possessed by the one against whom the estoppel is urged, there can be no valid estoppel. Reid v. State, supra; Leonard v. American Ins. Co. 97 Ind. 299; Platter v. Elkhart County, 103 Ind. 360, 2 N. E. 544; Silver, B. & Co. v. Indiana State Bd. of Edu. 35 Ind. App. 438, 72 N. E. 829; and authorities cited. In short, it may be said that

we have a case before us in which neither misrepresentation nor concealment is charged against the state; neither do the facts show knowledge as to one of the parties and ignorance on the part of the other; consequently, appellee is not in a position to invoke the principle of estoppel. It, and the state, were bound to know that the auditor of state was not authorized by the statute to receive the money for the taxes. Hence, in respect to the question of knowledge or notice, the state and appellee may be said to have been on a parity with each other.

If appellee continued, as it appears it did, to pay the money due from it to the state as taxes to an officer unauthorized under the law to receive it, such payments were unwise, and if it were conceded that the state was apprised of the acts of the auditor of state in accepting the money, it certainly, under the law, was not required to take any steps to protect appellee against its own folly, nor could it be expected to do so. Counsel argue that if appellee is required again to pay these taxes it will result in hardship and injustice. It has never paid said taxes, for its payment to the auditor of state, as we have shown, was not a payment to the state; and the position in which it is now placed, under the circumstances, must be attributed to its own fault in failing to comply with the plain requirements of the law. To sustain its contention that it ought not to account to the state for the taxes in controversy would be equivalent to offering an inducement to persons to rely upon their own voluntary ignorance in regard to their legal rights and duties, and would tend to break down the force and effect of the ancient maxim, *ignorantia legis neminem excusat*, which applies alike to both common and statutory law. By reason of the conclusions which we have reached, we dismiss, without consideration, the contention of the attorney general that the state cannot be estopped by the laches or delays of its public officers. Upon this point, however, see *Terre Haute & I. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401.

We conclude, and so hold, that the facts alleged in the complaint do not constitute an estoppel against the state, and that appellee is not entitled to recover, under the first paragraph of its complaint, the principal money which it paid over to the state on December 11, 1906.

Counsel for appellee insist that whatever may be the law as to the right of the state to call upon appellee to pay the principal of the taxes in question, there can be no foundation upon which it can predicate any right to require it to pay interest on these taxes. We concur in this contention. It will be 42 L.R.A. (N.S.)

observed that § 10,216, Burns's Anno. Stat. 1908, Acts 1891, p. 199, § 67, which imposes the taxes upon foreign insurance companies, and which, as previously shown, has formed a part of the general taxation law of this state since 1873, provides that "any such insurance company failing or refusing for more than thirty days to . . . pay the required tax thereon shall forfeit \$100 for each additional day, . . . to be recovered in an action in the name of the state of Indiana on the relation of the auditor of state." It will be noted that neither this section, nor any other part of our statute concerning taxation, contains any provision for allowing interest upon taxes. This court has held that under the taxing law of 1891 interest is not authorized to be collected upon delinquent taxes. *Evansville & T. H. R. Co. v. West*, 139 Ind. 254, 37 N. E. 1009; *Western U. Teleg. Co. v. State*, 146 Ind. 54, 44 N. E. 793; *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443. Upon the same point is the holding in the case of *Morrow v. Geeting*, 23 Ind. App. 494, 55 N. E. 787. The same principle is affirmed and sustained in the following cases: *Western U. Teleg. Co. v. State*, 55 Tex. 314; *Shaw v. Peckett*, 26 Vt. 482; *Perry v. Washburn*, 20 Cal. 318; *Danforth v. Williams*, 9 Mass. 324; *Kentucky C. R. Co. v. Pendleton County*, 8 Ky. L. Rep. 517, 2 S. W. 176; *Camden v. Allen*, 26 N. J. L. 398; *State v. Southwestern R. Co.* 70 Ga. 11; *Perry County v. Selma, M. & M. R. Co.* 65 Ala. 391. Taxes levied or imposed by the state are not debts in the ordinary acceptance of that term, so as to make them bear interest under the general interest laws of the state. In the absence of any express declaration by the legislature that taxes shall bear interest, the latter, as authorities affirm, should not be allowed. A tax made payable by a statute at a certain time does not bear interest unless the statute so provides. In support of these propositions, see authorities just cited.

It is manifest, we think, that the state had no right to exact the payment of interest upon the principal sum of the unpaid taxes. It follows, therefore, that appellee is entitled, under the second paragraph of the complaint, to recover from the state the amount of interest which it is shown to have paid upon the principal. The manifest theory of the first paragraph of the complaint is to recover the principal which appellee paid to the state on December 11, 1906; therefore, under our holding, this paragraph is insufficient and the lower court erred in overruling the demurrer thereto. Under our holding herein there was no error on the part of the court in overruling the

demurrer to the second paragraph of the complaint.

On account of the error of the court in overruling the demurrer to the first paragraph of the complaint, the judgment is in part reversed, but so far as the judgment awards to appellee a recovery of the total amount of interest which it paid over to the state on December 11, 1906, it is in all things affirmed; and the cause is remanded to the lower court, with instructions to modify the judgment by eliminating therefrom all that part which embraces and awards to appellee a recovery of the principal amount of the taxes paid over to it by the state on December 11, 1906, and for further proceedings not inconsistent with this opinion.

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**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

FREDERICK LEBER, Appt.,

v.

KING COUNTY, Resp't.

(69 Wash. 134, 124 Pac. 397.)

**Highway — embankment — necessity of barrier.**

1. A county is not bound to maintain a barrier along the side of a graded roadway

***Note. — Duty of county or town to maintain barriers along rural highways or bridges.***

As to what injuries may be deemed to be proximately caused by the absence of a guard rail in a highway, see note to Lyons v. Watt, 18 L.R.A.(N.S.) 1135. The cases cited there will not be included in the present note, since the facts and circumstances upon which negligence was predicated in the other note are sufficiently set forth.

Nor does the present note include the duty to erect barriers across the highway when the same is blocked, or is being repaired, or is abandoned; or the duty to guard portions of the highway in process of repair. The duty to provide barriers against abandoned highways is treated in a note to Daniels v. County Ct. 37 L.R.A.(N.S.) 1158; and the duty to provide barriers to protect travelers from obstructions outside the highway, in the note to Shea v. Whitman, 20 L.R.A.(N.S.) 980; and those questions are therefore not treated in the present note.

**In general.**

The cases are unanimous in holding that it is the duty of towns or counties to place some guard at dangerous and exposed places, where the happening of accidents from the failure to place guards may be

15 feet wide, although it is at the top of an embankment 8 or 10 feet high, where the slope is not precipitous, but gradual.

**Pleading — allegation of defect in highway — sufficiency.**

2. A condition sufficient to hold a county liable for injury to a traveler on a highway whose horse went over an embankment upon which it was built is not shown by allegations that the defect was the existence on the side thereof of a steep, precipitous, and sheer decline or pitfall of some 8 or 10 feet to the bottom, which defendant negligently permitted to remain without barrier; and that plaintiff's horse fell down and into said declivity and precipice.

(June 21, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for King County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. William Farmerlee, for appellant:

If there is a dangerous place, such as a declivity or excavation, so close to the highway, or to the traveled part thereof, as to render the latter unsafe for travelers in the absence of a railing or barrier, the want of such railing or barrier constitutes a de-

reasonably anticipated. And for the purposes of this note, it matters not whether the damage results from walking or driving in such unguarded places, whether from fright of a horse at some object within or without the bounds of the highway, whether in daytime or at night, provided such an accident might reasonably be anticipated. And these extraneous facts will not be here set out, except where they are necessary for an understanding of the case. The chief difficulty arises in determining whether, in any particular case, the danger is sufficiently imminent to require such a guard or barrier, and naturally each case must be decided upon its own state of facts. No rule can be laid down that will apply to all conditions, and often reasonable men will differ as to the need for barriers under the same conditions. When this difference of opinion appears to be probable or possible, as is indicated below, courts do not take upon themselves the duty of deciding as a matter of law whether barriers are reasonably necessary or not, but leave that question to the jury, to be determined as one of fact.

In Collins v. Dorchester, 6 Cush. 396, the rule is laid down that towns are bound to erect fences or railings at such places as, without them, would be unsafe or inconvenient for travelers exercising ordinary care.

"Of course, county authorities cannot be

**E**XCEPTIONS by defendant to rulings of the Superior Court for Kennebec County, made during the trial of an action brought to recover damages alleged to have resulted from defendant's negligence in scaling certain logs, which resulted in a verdict for plaintiffs. Sustained.

The facts are stated in the opinion.

Mr. C. W. Hayes, for defendant.

The most the defendant owed to each party to the contract was the duty to act honestly and without fraud, and not the duty not to err in his judgment, or in his methods of arriving at his result, and consequently is not liable to these plaintiffs in this action.

#### Negligence.

An arbitrator is not liable for negligence. *HUTCHINS v. MERRILL*; *Tharsis Sulphur & Copper Co. v. Loftus*, L. R. 8 C. P. 1; *Pappa v. Rose*, infra, sub "Arbiters under contracts," etc.

In *Tharsis Sulphur & Copper Co. v. Loftus*, supra, Bovill, Ch. J., said, in addition to what is quoted in the *HUTCHINS CASE*: "No authority has been cited to shew that a person called upon to act as an arbitrator, or to settle disputes or adjust accounts between parties, is liable to an action for negligence. In Baron Watson's book on Arbitrators, 3d ed. p. 112, the following passage occurs: 'It has been said that an arbitrator is liable to an action if he misconduct himself, but I cannot find any case in which such an action has been brought.' The author had a large experience, both as a pleader and at the bar, and he states that he never met with any case in which such an action had been brought; and, so far as my own experience goes, such an action would be quite unprecedented. This argument might not have much weight when the circumstances are novel; but this case must occur constantly. It must constantly happen that parties are dissatisfied with the decision of an arbitrator or quasi arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought upon the slenderest grounds, that there is no precedent for such an action for negligence as this."

In *Strong v. Strong*, 9 Cush. 560, an action on a bond to perform an award, the court said, in discussing the situation of an arbitrator: "Although an arbitrator has only special, and often very limited and narrow duties, and is not assumed to possess all the general conditions of a judge, and is not under oath, like a juror, yet the analogy of his duties remains the same as if he were appointed by the highest public authority, or sworn to impartiality of judgment. *Compromissum ad similitudinem judiciorum redigitur*, says the Digest. In accordance with which it is that the law gives to an arbitrator some of the immunities of a judge. Thus, it pro-

Palmer v. Clark, 106 Mass. 373; Flint v. Gibson, 106 Mass. 391; Robbins v. Clark, 129 Mass. 145; Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347; Evans v. Middlesex, 209 Mass. 474, 95 N. E. 897; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; Robinson v. Fiske, 25 Me. 401; Berry v. Reed, 53 Me. 487; Bailey v. Blanchard, 62 Me. 168; Ames v. Vose, 71 Me. 17; Nadeau v. Pingree, 92 Me. 196, 42 Atl. 353; Madunkeunk Dam & Improv. Co. v. E. E. Allen Clothing Co. 102 Me. 257, 66 Atl. 537; Atwood v. Maine Hub & Mfg. Co. 103 Me. 394, 69 Atl. 622; Burton v. Mayo, 106 Me. 195, 76 Atl. 486; Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424,

tects him, in general, from question as to the grounds of his judgment (1 Greenl. Ev. § 249); and from personal responsibility for errors which he may honestly commit (*Billings, Awards*, pp. 103, 104)."

Reference may be made here to *Le Lievere v. Gould* [1893] 1 Q. B. 491, 4 Reports, 274, 68 L. T. N. S. 626, 41 Week. Rep. 468, 57 J. P. 484, where a lessor employed the defendant to examine buildings projected by the lessee, and to issue certificates from time to time as the buildings advanced, having agreed with the lessee to procure him a mortgage in instalments. The mortgage was actually taken by another person, and after the buildings had been partially completed, was assigned to the plaintiff. The payments to the mortgagor under the mortgage were made from time to time upon the certificates of the defendant, and the plaintiff brought an action against the defendant, the architect, for negligence in these certificates, and it was held that there was no privity of contract between them, and that the defendant was not liable to the plaintiff.

#### Fraud.

An arbitrator is not liable for fraud. *Jones v. Brown*, 54 Iowa, 74, 37 Am. Rep. 185, 16 N. W. 140; *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 50 Am. Rep. 323.

In *Jones v. Brown*, supra, the court answered in the negative the following question, the plaintiff being an arbitrator suing upon a bond for his fees: "Can the plaintiff be held liable in a civil action for damages for an award alleged to have been made fraudulently and corruptly?" But in further proceedings in the same case under the name of *Bever v. Brown*, 56 Iowa, 565, 41 Am. Rep. 118, 9 N. W. 911, it was held that the rule of judicial immunity which protects an arbitrator from liability for damages for a fraudulent and corrupt award did not go also to the extent of inhibiting all proof that the award was valueless on account of the corrupt and wilful misconduct of the arbitrator, for the purpose of defeating the arbitrator's claim for compensation for his services.

50 Am. Rep. 323; *Jones v. Brown*, 54 Iowa, 75, 37 Am. Rep. 185, 16 N. W. 140; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652; *Cooley*, Torts, 411; 3 Cyc. 809; 12 Am. & Eng. Enc. Law, 38; *Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539; *Jones v. Brown*, 54 Iowa, 74, 37 Am. Rep. 185, 6 N. W. 140; *Pappa v. Rose*, L. R. 7 C. P. 32, 41 L. J. C. P. N. S. 11, 25 L. T. N. S. 468, 20 Week. Rep. 62, affirmed in L. R. 7 C. P. 525, 41 L. J. C. P. N. S. 187, 27 L. T. N. S. 348, 20 Week. Rep. 784; *Stevenson v. Watson*, L. R. 4 C. P. Div. 148, 48 L. J. C. P. N. S. 318, 40 L. T. N. S. 485, 27 Week. Rep. 682; *Tharsis Sulphur & Copper Co. v. Loftus*, L. R. 8 C. P. 1, 42 L.

J. C. P. N. S. 6, 27 L. T. N. S. 549, 21 Week. Rep. 109; *Corey v. Eastman*, 166 Mass. 279, 55 Am. St. Rep. 401, 44 N. E. 217.

Messrs. Williamson, Burleigh, & McLean, for plaintiffs:

The duty of a surveyor is to ascertain the quantity by the use of the scale.

*Robinson v. Fiske*, 25 Me. 408.

Less protection against negligent acts is accorded a scaler, who is not an arbitrator, but a mere measurer or inspector.

*Gates v. Young*, 78 Wis. 98, 47 N. W. 275.

Inspectors have uniformly been held liable for negligence.

*Hayes v. Porter*, 22 Me. 371; *Nickerson*

In *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, supra, a person having been injured on the plaintiff's premises, it employed a physician to examine him, and later, by order of court and consent of the parties, the case of the injury was referred to the physician and two others as arbitrators, and the plaintiff sued the physician and the attorney of the person injured, alleging that they had fraudulently conspired to make the injuries appear greater than they were, and that they had received from the person injured a part of the award. The defendants severally demurred to the declaration and the demurrers were sustained; but, on appeal, the demurrer of the arbitrator was sustained, but the demurrer of the attorney for the person injured was overruled. The court said: "The principle is too well settled to require discussion, that every judge, whether of a higher or a lower court, is exempt from liability to an action for any judgment given by him in the due course of the administration of justice. This immunity is founded upon considerations of public policy. . . . It is of the highest importance that judges and others engaged in the administration of justice should be independent, and should act upon their own free and unbiased convictions, uninfluenced by any apprehension of consequences. . . . A similar immunity extends to jurors. The question whether a like immunity extends to arbitrators seems never to have arisen in this commonwealth. An arbitrator is a quasi judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him. *Jones v. Brown*, supra. It follows that this suit cannot be maintained against the defendant Sprague, and his demurrer must be sustained."

Apart from the liability for costs under the old chancery practice, no case has been found where an action has been maintained 42 L.R.A. (N.S.)

against an arbitrator chosen by both parties, on the ground of fraud.

Arbiters under contracts providing in advance that matters necessarily arising, or that may arise, under the contract, shall be determined by a third party.

Besides formal arbitrations, where parties to a dispute enter into a formal contract of arbitration, there are many cases where the parties entering into a contract provide therein that disputes arising thereunder of a certain nature shall be determined by the decision of one or more persons selected, or to be selected, or that certain conditions or measurements or computations (as in *HUTCHINS v. MERRILL*), etc., shall be determined by the decision of a certain person or persons selected or to be selected. In some of the cases the courts call the deciding person in such cases a "quasi arbitrator."

It will be seen that in *HUTCHINS v. MERRILL*, the court suggests no distinction affecting the question of liability between the arbitrator of a formal arbitration and the surveyor who, under the contract, scaled the logs. And that its argument from its review of cases of informal arbitrations under contract is, that so far as regards the nonliability of the arbitrator or "quasi arbitrator," they do not differ from formal arbitrations.

Besides the case of *HUTCHINS v. MERRILL*, the liability of such "informal" arbitrator selected by both parties seems to have been directly at issue only in the single case of *Pappa v. Rose*, infra, unless *Reynolds v. Caldwell*, 51 Pa. 298, is to be regarded as in the same class. In the *Reynolds Case*, which was an action by a railroad subcontractor against the principal contractor, where, under the contract, the engineer of the railroad was to be the final arbiter in case of disputes, the court said: "If the engineer undertook to act as umpire, and fraudulently injured the plaintiff, he had a remedy by action against the guilty agent, but not by suit on the contract. He cannot punish the defendants for a fault of which they are innocent.

v. Thompson, 33 Me. 433; Pearson v. Purkett, 15 Pick. 264.

Whitehouse, Ch. J., delivered the opinion of the court:

This is an action to recover damages alleged to have resulted from the negligence of the defendant in scaling certain logs. The plaintiffs made a written contract with one Robert W. Foster to cut and haul the merchantable logs on the timber lands owned by them in the town of Guilford, and therein stipulated that the timber and wood should "be scaled by a disinterested sworn surveyor," to be paid by the plaintiffs. Foster was to receive \$4.50 per thousand feet for cutting, yarding, and hauling the logs; and the evidence tended to show that the fact

that the plaintiffs were to pay the scaler was taken into consideration in fixing the price of cutting and hauling. It was not in controversy that the defendant was selected by the parties to that contract to survey the logs cut thereunder, and that it was mutually agreed that his scale should be final and binding between those parties as the basis of payment under that contract.

It was not in controversy that the scale made by the defendant in the woods made 1,891 pieces and 108,500 feet of lumber, while another scaler at the mill in Foxcroft found but 1,746 pieces and only 57,000 feet, showing a discrepancy of 49,326 feet. There was evidence, however, tending to show that after the logs were landed, and before the

And how could the mistake of the engineer alter the covenants of the parties? By agreeing to refer to him they took the risk of his mistakes." It would seem that this case, whatever its weight, cannot be properly classed among the cases where the arbitrator is selected by both parties, as the engineer of the railroad company, to whom the contractor was bound, would necessarily be insisted upon by him as the arbiter.

The above quotation from the Reynolds Case is copied in part in Keystone Constr. & Engineering Co. v. Bethlehem Consol. Water Co. 9 Northampton Co. Rep. 25, where the arbiter engineer was the engineer of the defendant.

In Pappa v. Rose, L. R. 7 C. P. 525, where a selling broker's contract provided: "Sold by order and for account of Mr. D. Pappa to my principals, Messrs. S. Hanson & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker," it was held that the broker did not contract that he had any particular skill about the business, and he was therefore not liable to an action by the seller for an alleged breach of duty in omitting to use due care, skill, and diligence in sampling and examining the raisins, and in certifying that they were not, in his opinion, of fair average quality within the meaning of the contract. "It is for the parties themselves," said Kelly, C. B., "to take care that the person in whose judgment they confide shall possess the requisite skill to exercise it properly." And while the concurring opinions of the other judges are not, perhaps, as definite as might be wished, the holding of the court is probably correctly set forth in the headnote which states that it was held "that the defendant was employed as a sort of arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfillment of the contract; and, consequently, that he was not liable to an action for failing to exercise reasonable care and skill in coming to a decision,—he having acted bona fide and to the best of his judgment."

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#### Costs on a bill for discovery.

While ordinarily a bill would not lie against an arbitrator, seeking a discovery of the grounds of the award (see Anonymous, 3 Atk. 644), it was held, under the old chancery practice, that upon a bill for discovery against an arbitrator, alleging fraud, the arbitrator must answer, and if the fraud were found, he must pay the costs.

Thus, in Chicot v. Lequesne, 2 Ves. Sr. 315, on a bill to set aside an award, it was alleged that one of the arbitrators excluded one of the other arbitrators from the arbitration, and the court held that if it was found that such exclusion had been made by such arbitrator, the excluding arbitrator should pay the costs.

So, in Lonsdale v. Littledale, 2 Ves. Jr. 451, on allegations that a referee held private hearings of one party, and that the finding was void as unjust, excessive, and extravagant, and the court held that the referee must make discovery of the matter, and declared that, if found to be guilty, he should pay the costs.

See also *dictum* as to the former practice in Knowlton v. Mickles, 29 Barb. 465.

And while it appears to have been held in Steward v. East India Co. 2 Vern. 380, that such action would not lie, in Dummer v. Chippenham, 14 Ves. Jr. 245 (which had nothing to do with arbitrators), Lord Eldon spoke of the Steward Case as probably a misprint and unintelligible. And it was said in Padley v. Lincoln Waterworks Co. 2 Macn. & G. 68, 2 Hall & Tw. 295, 19 L. J. Ch. N. S. 436, 14 Jur. 299, that the Steward Case would not then be recognized.

In Morris v. Reynolds, 2 Ld. Raym. 857, arbitrators appointed by submission under a rule of court were, upon affidavit, required to come before the court in order that an examination be made of their proceedings, it being plain that they made their award after having heard the plaintiff, but refusing to hear the defendant.

And in Rybott v. Barrell, 2 Eden, 131, where a bill was brought in equity to be



booms were hung at the mill in Foxcroft, some of the logs were carried away by high water. But upon this point the testimony was conflicting, and the plaintiffs claimed to recover as damages the sum of \$221.97, being the contract price of \$4.50 per thousand on 49,326. The jury rendered a verdict for the plaintiffs of \$82.98, showing that the discrepancy found by them was only 18,840 feet.

It was expressly admitted by the plaintiffs that the defendant was an experienced and competent scaler, and there was no allegation or evidence of fraud or collusion on his part in making his scale. It is admitted that there was no fraud or mathematical mistake which would release the plaintiffs from paying Foster for cutting and hauling

according to the defendant's scale. But it was contended that he negligently omitted either to count the logs, so that he knew the number of them, or to scale a sufficient number to estimate the average contents, but carelessly accepted the count made by the teamsters, and averaged the number of feet per logs from pencil marks found by him upon the logs.

The defendant admitted that, by reason of the difficulty in counting the logs as they were piled in the yards, he did not actually count all of them, but contended that he counted a sufficient number of them to satisfy his judgment, and that the tally kept by the teamsters of the number of pieces hauled by them was correct. He also earnestly contended that he scaled enough

relieved from an award, upon a suggestion of misbehavior in the arbitrators, the plea of the arbitrators, of the award, was held not good.

In *Lingood v. Croucher*, 2 Atk. 396, where parties agreed upon a submission to an award, and the submission was made an order of the chancery court, one condition being that the parties should be restrained from bringing a bill in equity against the arbitrators, and one of them brought a bill against the arbitrators, charging corruption and partiality, and praying that they might set forth the general account of the partnership matter which they were to determine, the court, while holding that, under the circumstances, the plea of the award by the arbitrators ought to be allowed, nevertheless said: "There are many instances in this court where arbitrators to a bill charging corruption and partiality may plead the award in bar to the discovery; but then it is incumbent upon them to support their plea by shewing themselves incorrupt and impartial, or otherwise the court will give a party a remedy by making arbitrators pay costs. I remember an instance of this sort in a famous case of *John Ward* (2 Ves. Sr. 316, s. c. *Vide Kampshire v. Young*, 2 Atk. 155), who, being a party in a cause where one *John Warner* was an arbitrator, upon *Ward's* coming into the room, he said, 'I, *John Warner* will make you *John Ward* pay costs.' *Ward* complained to the court of this partial behavior in the arbitrators; and the court inverted *Warner's* threats, for they made him pay *John Ward's* costs."

(The *Ward Case* is recited at some length by the lord chancellor in *Chicot v. Lequesne*, supra).

See also *Padley v. Lincoln Waterworks Co.* infra, II.

#### Arbitrators as trustees or receivers of property.

Where an arbitrator is to dispose of property intrusted to him, according to the award, there seems no reason to impute any liability to him for doing so.

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Thus, in *Tope v. Hockin*, 7 Barn. & C. 101, 9 Dowl. & R. 881, 5 L. J. K. B. 342, the court, while not considering it necessary for the decision, gave its opinion that an arbitrator to whom money had been paid for the purpose of determining to whom it belonged, and disposing of it according to his determination, was not liable to a suit for the money after he had paid it out in accordance with his award.

So, in *Phelps v. Dolan*, 75 Ill. 90, the court was of the opinion that "the fact that the arbitrators held funds in their hands to pay, to whomsoever they should find entitled, the amount of their award, did not change the character of the arbitration and make it something else. As to this fund, they may be regarded as trustees; but the trust was fully discharged when they paid out the fund they held, pursuant to the terms of the agreement by which they held it; that is, in satisfaction of the amount they awarded was due from the one party to the other."

There is a curious case of *Gunton v. Nurse*, 2 Brod. & B. 447, 5 J. B. Moore, 259, where a filly was delivered to the arbitrator to make a decision as to the ownership of it, dependent upon whether a certain scar should appear after the coat had been shed. The arbitrator made the award, and the majority of the court seemed to be of the opinion that the arbitrator would not be guilty of conversion for a failure to deliver the animal to the unsuccessful party, but it seems that it was not necessary to decide this, under the circumstances of the case.

In *Cunningham v. Denis*, 51 La. Ann. 902, 25 So. 531, where two partners, in disagreement over the affairs of a partnership, appointed a third person as arbitrator, custodian, receiver, and depository, with authority to dispose of the partnership assets, pay debts of the partnership, and also individual debts of the partners, and settle with them for balance left over, the court was of the opinion that, under the circumstances of the case, any subsequent agreement of the partners as to any of the property in the arbitrator's hands

of the logs of the various sizes to satisfy his judgment that he had scaled a sufficient number to obtain a fair average of all the logs, and introduced evidence to support both of these contentions.

In view of the fact that the proper discharge of the duties of the scaler involves the exercise of skill and judgment, as well as absolute impartiality on his part, and of the mutual agreement of the parties that the defendant should scale the logs, and that his scale should be final and conclusive, the defendant contended that he must be deemed to have acted in the capacity of an arbitrator, or quasi arbitrator, between the parties to the contract, and accordingly requested the presiding judge to instruct the jury "that if the defendant was appointed

by plaintiff and Robert Foster to scale lumber cut by Foster, under contract with plaintiff, and in the contract it was then and there agreed that the scale so made by this defendant should be final and binding between the parties, then the defendant acted in the capacity of an arbitrator between the parties, or at least as a quasi arbitrator, and, if the performance of his said duty requires the exercise of skill and judgment, then the defendant is not liable in this action; there being no proof or allegation of fraud."

The presiding judge declined to give this instruction, but upon this branch of the case instructed the jury as follows:

"I say, too, that if, upon all the testimony in this case, upon one side and the

would not be binding upon him unless assented to by him.

But when a partnership made an agreement to arbitrate differences between the partners, and that the arbitrators should take charge of all the property of the partnership, and the arbitrators made a settlement of the matters between the partners, and turned over some of the property to one of the arbitrators to be paid to one of the partners, it was held that such partner could bring an action against such arbitrator for the money so turned over. *Hegan v. Beckley*, 32 Ky. L. Rep. 349, 105 S. W. 989.

#### Fees.

While the question of arbitrators' fees is beyond the scope of this note, the reader may be interested in reading the case of *Dossett v. Gingell*, 2 Man. & G. 870, 3 Scott, N. R. 170, where there was a rule calling on two arbitrators, who had joined in making an award, to whom, with a third, the cause had been referred by a judge's order, to refund so much of the amount of the fees paid them for their award as exceeded the sum allowed by the master on taxation between the plaintiff and defendant, and the court declined to make any order that the arbitrators should refund the money.

#### II. Arbitrator selected by one party.

There are many occasions where certain matters arising in carrying out a contract are, by the terms of the contract, to be determined by a person nominated by one of the parties. The most familiar instance is that of the architect or engineer of the owner determining certain matters between the owner and contractor. There are cases which seek to place in an analogous position to this a government inspector or other officer whose duties are more than ministerial, but such officers cannot in any just sense be considered as arbitrators, and cases relating to them are therefore excluded here.

The question as to the liability of the owner's architect, who is, by the contract, 42 L.R.A. (N.S.)

to determine questions arising between the owner and contractor, has arisen in some British cases which serve to illustrate its difficulty.

In *Pauley v. Turnbull*, 3 Giff. 70, 7 Jur. N. S. 792, 4 L. T. N. S. 672, where a builder sued the owner and the architect, and the court found that the architect had behaved in a negligent, oppressive, and unfair manner to the builder, the court gave judgment against the owner, and decreed that both the defendants should pay the costs.

In *Badgley v. Dickson*, 13 Ont. App. Rep. 494, where an architect sued for his fees of superintendence, it was held that it was error to hold that his position as arbitrator in giving certificates protected him from the owner's claim that he was guilty of negligence in approving and certifying the work, as his contract with the owner was not relieved by his position as arbitrator. This case cites *Irving v. Morrison*, 27 U. C. C. P. 242, where substantially the same result was reached.

But later cases exonerate the architect, at least from the owner's claim for negligence.

Thus, in *Chambers v. Goldthorpe* [1901] 1 K. B. 624, 70 L. T. N. S. 482, 49 Week. Rep. 401, 84 L. T. N. S. 444, 17 Times L. R. 304, where the plaintiff, an architect, sued for services, and the owner claimed that the architect had been guilty of negligence in estimating the amount due on certificates, it was held by the court that, as the architect was in the position of an arbitrator, the owner could not counterclaim against him for his negligence while acting as such arbitrator.

And the same principle was sustained in *Restell v. Nye* [1901] 1 K. B. 624, where the action was directly by the owner, against the architect, for negligence in certifying upon certificates.

In *Stevenson v. Watson*, L. R. 4 C. P. Div. 148, 48 L. J. C. P. N. S. 318, 40 L. T. N. S. 485, 27 Week. Rep. 682, where the builder brought an action against the architect, alleging that the architect did not properly figure the amount due to the

other, weighing it as I have suggested, you should find from a fair preponderance of the evidence that you are convinced thereby that the defendant in this case was negligent or careless in the scaling of these logs, and that through his negligence and carelessness a misscale was made or a misstatement was made of the amount of the scale, and that thereby the plaintiffs paid any amount of money, under the original contract, then this defendant is liable. When you go out to your rooms, you go out those three different times onto the bank of that river, with the defendant in this case, and ascertain from the testimony in this case what Mr. Merrill did there; determine if what he did there was done carelessly or negligently or not. That is the

question for you to determine. If you conclude that it was done properly, that is the end of the case, and your verdict should be for the defendant. On the other hand, if you are satisfied that it was done carelessly or negligently, then you are to determine what was the amount of the lumber under a fair and perfected scale, that was cut and hauled and yarded in this operation."

The question thus presented is in some respects one of novel impression in this state and in all respects one of more than ordinary importance in determining the duties and responsibilities of quasi arbitrators and those agreed upon to perform judicial functions, as well as the rights of those affected by their acts.

builder, that he had made errors in the bill of quantities, and that he had not made the proper estimate, bearing that in mind, in regard to the extra work, etc., it was held that, as long as there was no allegation of conspiracy between the architect and the owner, no action would lie by the builder against the architect.

In this connection reference should be made to *Reynolds v. Caldwell and Keystone Constr. & Engineering Co. v. Bethlehem Consol. Water Co.* considered *supra*, L., *sub* "Arbiters under contracts," etc.

Whether an architect is personally liable to the builder for fraud in relation to certificates seems not clear, upon the authorities. Such a liability seems to be suggested in *Stevenson v. Watson*, *supra*, and *Coughlan v. Wilmot*, 4 B. C. 20; and was sustained in *Ludbrook v. Barrett*, 25 Week. Rep. 649, 46 L. J. C. P. N. S. 798, 36 L. T. N. S. 616, where the builder alleged that the architect, in collusion with the owner, refused the certificate, in fraud of the builder, and it was held that the builder might bring an action directly against the architect, and it seems in this case he sued him alone.

But it was on the ground of discovery that in *Macintosh v. Great Western R. Co.* 19 L. J. Ch. N. S. 374, 2 Macn. & G. 74, 2 Hall & Tw. 250, 14 Jur. 819, a bill was sustained against a company and its engineer, where there was collusion alleged and withholding of the certificates, the court affirming the decision in 2 De G. & S. 758, where it was held that the engineer was properly joined for purposes of discovery, the court not understanding that any relief was asked for against him affirmatively.

And it does not seem clear that the court intended to do more than enforce the principle of discovery in *Padley v. Lincoln Waterworks Co.* 2 Macn. & G. 68, where a bill was brought against a waterworks company and their engineer to recover for work done for the defendant company by the plaintiff, and charging fraud and collusion between the engineer and the company in respect of the certificates of the 42 L.R.A. (N.S.)

engineer. The court held that the *Steward Case*, 2 Vern. 380, would not be recognized now, and that the engineer must answer interrogatories as to particular facts, and said: "It is true that an arbitrator, if he takes proper means to clear himself from the imputation of fraud, is not bound to state the reasons of his award, because he is acting as judge, and has a right, under that character, to protection. If, however, any fraud is imputed, he must so frame his defense as to disprove the imputation of fraud; otherwise that takes away the protection which belongs to his character of arbitrator. In the present case there are general allegations of fraud and collusion between the arbitrator and other parties, and particular facts are alleged as evidence of the fraud. The arbitrator cannot protect himself from that charge by denying the result of the facts, and negating those facts from which the fraud is inferred, because by so doing he takes upon himself to be the judge in his own case, and to say that he is not guilty of a fraud. He may not call it fraud, but probably the court may call it so; and as long, therefore, as those charges are suggested against him which are alleged to shew the fraud, and until there is an opportunity of trying the whole truth, he cannot refer to his character of arbitrator for the purpose of protection. Having then submitted to answer, I think that the defendant is bound to answer these questions, which are clearly not immaterial for the purpose of the case as stated by the bill."

(It may be noted in this connection that in *Scott v. Liverpool*, 3 De G. & J. 334, 28 L. J. Ch. N. S. 236, 5 Jur. N. S. 105, 7 Week. Rep. 153, where a bill was brought against the owner and his engineer, the bill was dismissed by consent as regards the engineer, the charges having been withdrawn; and that in *Bliss v. Smith*, 34 Beav. 508, where the assignees of the builder alleged that the owner and his architect, in collusion, caused the architect to refuse the proper certificates, the collusion being disproved, the case was dismissed.)

It is a familiar rule of law in this state, established by a uniform line of decisions, that, when parties have mutually agreed upon a surveyor to scale logs, his scale will be binding and conclusive upon them, in the absence of fraud or mathematical mistake. In *Bailey v. Blanchard*, 62 Me. 168, it is said in the opinion that "neither party is at liberty to set aside or impeach [the scale] except upon such evidence as would avoid the award of an arbitrator mutually chosen." In *Bangor Sav. Bank v. Niagara F. Ins. Co.* 85 Me. 68, 20 L.R.A. 650, 35 Am. St. Rep. 341, 26 Atl. 991, it was held that an appraiser to determine the amount of the damage or loss under an insurance policy may call in the aid of a third person skilled in a special branch of the appraisal, and may give to the estimate of such third person such weight and credence as he sees fit, even to the point of founding his judgment upon that estimate, provided he adopts that as his real judgment. In the opinion the court says:

"It is not necessary to follow the different courts in their ingenious efforts to trace, for all cases, a line of distinction between a mere appraisement and an ordinary submission to arbitration. The result may be that such appraisers are properly considered arbitrators for some purposes, but not in all respects. All are invested with quasi

judicial functions, which must be discharged with absolute impartiality, without the improper interference of either party, or undue influence from any source. But appraisers may be said to act in the twofold capacity of arbitrators and experts. In their character of experts they not only give effect to opinions based directly on their personal experience and knowledge, but also opinions founded in some measure upon information which may not be so direct and original as to be competent in itself as primary evidence. A witness called as an expert is expected before testifying to refresh his memory and confirm his judgment by an examination of authorities and conference with other experts. The umpire did precisely this and no more in the case at bar. After making an examination of the premises and certain estimates of his own, he made inquiry of an experienced and disinterested painter respecting the cost of painting. His conclusions may have been affected and modified to some extent by the information thus obtained, but he declares that his report correctly represented his own judgment. He was not only unconscious of any impropriety in seeking this information, but was evidently engaged in a careful and conscientious effort to reach a just and correct appraisal."

So, in *Earle v. Johnson*, 81 Minn. 472, 84

—mere valuer not an arbitrator.

In *Turner v. Goulden*, L. R. 9 C. P. 57, 43 L. J. C. P. N. S. 60, where one party had employed one valuer and another party another, and they were to choose an umpire if they could not agree, and one of the parties brought an action against his own valuer, alleging that he had made a mistake through negligence, it was held that the defendant was not an arbitrator or quasi arbitrator, in which case no action of that sort would have laid against him, but a mere valuer, and the action would lie, and that therefore interrogatories might be presented to the defendant as to the manner or mode in which the valuation had been made.

So, in *Jenkins v. Betham*, 15 C. B. 168, 3 C. L. R. 373, 24 L. J. C. P. N. S. 94, 1 Jur. N. S. 237, 3 Week. Rep. 283, it was held that an action would lie by a party against his own valuers for want of skill and knowledge, the court pointing out that the action was not brought against the defendants for misconduct as quasi arbitrators between the parties.

#### Miscellaneous.

In *Coughlan v. Wilnot*, 4 B. C. 20, where the plaintiff, a builder, put in estimates which were accepted, and he was to do the work under the charge of the engineer of the owner, it turned out that the bill of quantity on which tenders were invited was

too large, and the engineer refused to certify that the plaintiff was entitled to such balance as would have been called for under the tender and bill of quantity, and it was held, in an action against both owner and engineer, reversing the trial court, that the plaintiff was not entitled to recover the amount as per the bill of quantity, and his action as against the engineer was dismissed on the ground that the engineer, so far as he acted under the authority of the employer, was not liable to the builder unless he acted fraudulently, as there was no privity of contract between them, and he was not liable either for acting or for not acting.

In *Kimberley v. Dick*, L. R. 13 Eq. 1, 41 L. J. Ch. N. S. 38, 25 L. T. N. S. 476, 20 Week. Rep. 49, where the architect had assured and practically agreed with his principal that the amount of the expense of the building should not exceed a certain sum, and this was not known to the builder, and in the contract between the builder and the owner the architect was the arbitrator as to certain matters, it was held that the concealment from the builder of the arrangement to limit the cost made the architect a party in keeping down the value of extra work, etc., and that therefore he was not a proper arbitrator as between the owner and the builder, and the court would have to take up the matter of adjustment between the parties.

B. B. B.

N. W. 332, it is said in the opinion of the court: "A person acting in the capacity of the plaintiff as an appraiser under a lease, which requires a valuation to be fixed upon real property, is to all intents and purposes an arbitrator at common law. The proceeding is in effect a common-law arbitration."

So, in *Palmer v. Clark*, 106 Mass. 373, it was stipulated that a party to a contract should only pay to the contractor a sum proportionate to the amount of earth filling upon a lot of land, to be measured on the ground by the city engineer, whose measurements should be conclusive between the parties. It was held by the court that such a reference to a third person in some respects differs from an ordinary submission to arbitration, but that in one respect it is to be treated precisely like an award under arbitration, in that "it could not be impeached for mistake arising from error in judgment or in drawing conclusions from evidence and observation."

In *Flint v. Gibson*, 106 Mass. 391, there was an agreement between a merchant and shipbuilder that certain alterations should be made in the vessel, and that they should be made according to specifications, under the inspection and subject to the approval of an experienced shipbuilder, and that any question arising under the agreement was to be referred to this shipbuilder, whose decision should be final. It was held that this shipbuilder was thus made an arbitrator between the parties, and that his approval was binding upon them as an arbitrator, however much, he might have erred in judgment.

In *Robbins v. Clark*, 129 Mass. 145, the parties contracted with the plaintiff to put certain spiral springs into the defendant's boiler, that these should be tested by the engineer, and if, in the judgment of that engineer, there should be as much as 12 per cent saving of fuel, the contract was to be binding. It was held that the decision rendered was to be considered as the award of a referee under submission to arbitration, and that it could not be "impeached on the ground of any error in judgment on his part in drawing conclusions from the evidence before him."

See also *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347; *Evans v. Middlesex County*, 209 Mass. 474, 95 N. E. 897.

It is an elementary principle respecting the judicial character and function and a firmly established rule of law that judges and arbitrators enjoy immunity from private actions for damages against them for judgments rendered while acting within their jurisdiction in the due course of the administration of justice. *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 42 L.R.A. (N.S.)

424, 50 Am. Rep. 323; *Jones v. Brown*, 54 Iowa, 75, 37 Am. Rep. 185, 6 N. W. 140; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652; *Cooley*, Torts, 411; 3 Cyc. p. 809; 12 Am. & Eng. Enc. Law, 38; *Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539.

The English cases clearly and strongly support the defendant's contention that an action will not lie against an arbitrator or quasi arbitrator for negligence in the exercise of his honest judgment. *Pappa v. Rose*, L. R. 7 C. P. 32, 41 L. J. C. P. N. S. 11, 25 L. T. N. S. 468, 20 Week. Rep. 62, affirmed on appeal in L. R. 7 C. P. 535, 41 L. J. C. P. N. S. 187, 27 L. T. N. S. 348, 20 Week. Rep. 784; *Tharsis Sulphur & Cooper Co. v. Loftus*, L. R. 8 C. P. 1; *Stevenson v. Watson*, L. R. 4 C. P. Div. 148.

In *Tharsis Sulphur & Copper Co. v. Loftus*, above cited, the owners of a cargo and the shipowner agreed that the defendant, an average adjuster, should determine the proportion of loss which the ship and cargo had respectively to bear, and that they would be bound by his decision. It was held that an action would not lie against the adjuster at the suit of the plaintiffs, or owners of the cargo, for want of care in the performance of his duties as average adjuster, inasmuch as he was in the nature of an arbitrator between the parties.

In his opinion, Chief Justice Bovill said: "It must constantly happen that parties are dissatisfied with the decision of an arbitrator or quasi arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought upon the slenderest grounds, that there is no precedent for such an action for negligence as this. It appears to me that the principle upon which *Pappa v. Rose*, supra, was decided applies to this case; and, looking to the inconveniences that would arise if an arbitrator were liable to an action for negligence, I am not disposed to lay it down for the first time that such an action is maintainable. I therefore think our judgment should be for the defendant."

Judge Keating said: "I am of the same opinion. I think that it would be a very dangerous principle to establish that a person in the position of the defendant may be liable to an action for negligence in the discharge of his functions. . . . Now, without deciding what is the proper definition of an arbitrator, it appears to me clear that the defendant is in the position of an arbitrator for the present purpose, inasmuch as he was a person by whose decision two parties having a difference agreed to be bound. It appears to me that the safe rule, when parties agree to be bound by the decision of

a third party on any matter, is that they take him in such a case for better or for worse; and if he discharges his duty faithfully and honestly they must be satisfied."

Judge Brett, concurring, said: "With respect to the first ground taken, it is admitted that as an arbitrator he would not be liable for want of skill, but it is suggested that he would be for want of care. It appears to me that there are the strongest grounds for deciding otherwise. There must have been thousands of such cases in which an allegation of want of care or diligence might have been made, and yet there is no case in the books in which such an action has been brought."

Judge Denman concurred for substantially the same reason.

In *Stevenson v. Watson*, supra, a contract provided that the architect might order additions to or deductions from the plans to build a hall; that the amount of them should be ascertained by the architect; that the contractor and the company would be bound to leave all questions or matters of dispute which might arise during the progress of the work to the architect, whose decision should be final and binding upon all parties. It was held that the functions of an architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he therefore occupied the position of an arbitrator against whom, no fraud or collusion being alleged, an action for negligence in the discharge of his duties could not lie.

In his opinion Chief Justice Coleridge said: "This claim is for that which has been over and over again attempted without success. It is an action against a man for the negligent performance of a duty, in the doing of which the exercise of judgment or opinion is necessary. . . . I think this case is within the authority of the cases cited which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised."

Judge Denman, concurring, said: "But it seems to me that the architect is an arbitrator from the beginning to the end of the contract; he is throughout to have his eye on the work, and give certificates from time to time, all having reference to his final certificate, and, unless he gave the

duty up altogether from the first appointment, he is from the first a person exercising judgment on a matter on which the parties cannot exercise judgment.

"I think, therefore, that the parties have trusted to him, and that from the beginning he must exercise his functions fairly and honestly between them, and that if he violates that duty he is liable to an action. If he honestly performs them, then he honestly performs his bargain, if it be a bargain, or his duty, if it be a duty, arising from the acceptance of the functions, and the parties must abide by it."

The Maine cases cited by the plaintiff, relating to official inspectors, are not applicable. Their duties were prescribed by statute, and they were not acting in the capacity of arbitrators by virtue of a mutual agreement between the parties. Neither is *Gates v. Young*, 78 Wis. 98, 47 N. W. 275, shown to be a case in point. That was an action on a lumber inspector's official bond. The provisions of the statute of that state, requiring such a bond, and prescribing his duties, are not in evidence; but it sufficiently appears in that case, also, that the inspector was not charged with negligence while performing any service in the capacity of an arbitrator between the parties. The case, therefore, is not an authority in support of the plaintiff's contention in the case at bar.

It is obvious that the rule contended for by the plaintiffs would in every case expose the surveyor to the vexation and hazards of a suit at the instance of the dissatisfied party, and thus be destructive of the surveyor's independence and his power to discharge his duties as an arbitrator properly and efficiently. Such a doctrine would be fraught with consequences too mischievous to receive the sanction of the court.

The certificate must therefore be:

Exceptions sustained.

#### NEW YORK COURT OF APPEALS.

OAKES MANUFACTURING COMPANY,  
Appt.,

v.  
CITY OF NEW YORK, Resp't.

(206 N. Y. 221, 99 N. E. 540.)

Judgment — res judicata — nonsuit — effect.

1. A judgment will have the effect of one

*Note.*— *Liability of municipality operating a waterworks system, for breach of duty to consumer.*

As to the duty of a municipality or water company under its contract with consumer

on the merits, and not merely of nonsuit, where, after the judge announces that he will grant a nonsuit, requests for findings are made which result in findings generally on the merits and a dismissal of the complaint.

**Municipal corporation — water supply system — liability for negligence.**

2. A municipal corporation does not, in attempting to maintain a water supply system to supply water to private consumers at a fixed compensation, act in a governmental capacity so as to be relieved from liability for negligent performance of its contracts.

**Water — municipal supply — impurities — assumed risk.**

3. A consumer cannot use water furnished him by a municipal corporation with knowledge that it contains impurities, and

hold the municipality liable for injuries caused thereby.

**Same — poor quality — liability.**

4. Under a charter requiring a municipality to take proper measures to preserve the purity of water furnished by it to consumers, it is not liable in damages because, upon learning that its source of supply does not furnish water of a quality to meet the needs of a particular consumer, it does not procure another supply from another source, where the supply furnished meets the needs of consumers generally, even though a new supply could be secured at reasonable expense.

(October 1, 1912.)

**A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme**

to supply water for extinguishment of fires, see *Niehaus Bros. Co. v. Contra Costa Water Co.* 38 L.R.A. (N.S.) 1045, and note.

And the general question of the liability of municipality for tort in connection with its waterworks system is discussed in *Piper v. Madison*, 25 L.R.A. (N.S.) 239, and the note appended thereto.

In *Stock v. Boston*, 149 Mass. 410, 14 Am. St. Rep. 430, 21 N. E. 871, where the city, which furnished water to plaintiff to use in his greenhouse, negligently exposed a water pipe belonging to it so that it froze, cutting off plaintiff's supply of water which he used for steam heating, and resulting in the destruction of his plants by freezing, it was held that the city was liable for the damage; and the fact that the water was being supplied to him by the city under contract did not prevent him from suing in tort for the damages.

And in *Watson v. Needham*, 161 Mass. 404, 24 L.R.A. 287, 37 N. E. 204, which was an action on the contract, it was held that the city was liable because of its failure to use due diligence to furnish a supply of water according to contract, for steam heating in plaintiff's greenhouse, for the full amount of damage to growing lettuce which was frozen because of such negligence.

In *Keever v. Mankato*, 113 Minn. 55, 33 L.R.A. (N.S.) 339, 129 N. W. 158, 773, Ann. Cas. 1912 A, 216, it was held that a city was not exempt, because carrying on a governmental function, from liability in damages for the death of persons contracting typhoid fever because it negligently permitted its water supply to become contaminated with sewage.

In *Danaher v. Brooklyn*, 119 N. Y. 241, 7 L.R.A. 592, 23 N. E. 745, affirming 51 Hun, 563, 4 N. Y. Supp. 312, which was an action for damages for the death of plaintiff's intestate from typhoid fever contracted by drinking water from a public well maintained by the city in one of its streets, it was held that plaintiff was properly nonsuited, the court saying: "The city was not an insurer of the quality of the water, 42 L.R.A. (N.S.)

and bound under all circumstances to keep it pure and wholesome. This is not claimed. It owned this well as it owned its other property kept for public use, such as streets, parks, and public buildings, and it owed the duty of reasonable diligence to care for it as it was bound to care for such other property. Its liability for unwholesome water in any of its public wells must rest upon negligence," and finding that it was not negligent in that it had no notice of the impurity of the water, which had been used for years, and had apparently remained wholesome until very near the time deceased contracted the disease from it.

In *Dittmar v. New Braunfels*, 20 Tex. Civ. App. 293, 48 S. W. 1114, it was held that a city undertaking to supply citizens with water could not require, as a condition of continuing the supply, the consumer to enter into an agreement absolving it from liability for its own negligence as to the quantity or quality of water furnished, or, in lieu of such an agreement, to pay a higher rate; and it was further held that plaintiff was entitled to sue in equity to prevent the enforcement of such an ordinance, a suit for damages merely being inadequate.

In *Milnes v. Huddersfield*, L. R. 12 Q. B. Div. 443, a municipality which was authorized by special act to prescribe the material of service pipes to be laid from its mains, and had adopted a regulation permitting either lead or iron pipes, was held not liable to a customer who had chosen lead pipes, for injuries resulting from lead poisoning, although the act provided that the municipality "shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special act, who shall be entitled to demand a supply and shall be willing to pay water rate for the same," the court taking the position that the municipality performed its duty when it furnished wholesome water in its mains, R. L. S.

Court, Second Department, affirming a judgment of a Special Term for Queens County dismissing the complaint in an action brought to recover damages for the furnishing by defendant to plaintiff of impure water. Affirmed.

The facts are stated in the opinion.

Messrs. McCabe, Davis, & Kernan, for appellant:

Upon a dismissal upon the pleadings or a nonsuit, plaintiff is entitled to the most favorable construction that the pleadings or the pleadings and evidence will bear.

Veeaz v. Allen, 173 N. Y. 359, 62 L.R.A. 362, 66 N. E. 103; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Coatsworth v. Lehigh Valley R. Co. 156 N. Y. 451, 51 N. E. 301.

The Long Island City and Greater New York charters impose upon defendant the duty to see that all proper measures are taken to preserve the purity of the water for the use of the inhabitants for pay, and of keeping it free from pollution.

Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 53, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; Markey v. Queens County, 154 N. Y. 685, 39 L.R.A. 46, 49 N. E. 71.

The function of supplying water for use by the inhabitants of a city for pay is in the nature of private business, and is to be distinguished from the governmental function of supplying water for fire extinguishment, sewer flushing, and all public uses. In the former case, it is liable for its negligence; in the latter, it is not.

Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Tainter v. Worcester, 123 Mass. 317, 25 Am. Rep. 90; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; New York v. Britton, 12 Abb. P. 367, note; Benson v. New York, 10 Barb. 234; People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor, 53 N. Y. 141, 13 Am. Rep. 480; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248; Southeast v. New York, 96 App. Div. 598, 89 N. Y. Supp. 630; Quill v. New York, 36 App. Div. 481, 55 N. Y. Supp. 889; Messersmith v. Buffalo, 138 App. Div. 432, 122 N. Y. Supp. 918; Danaher v. Brooklyn, 51 Hun, 563, 22 N. Y. S. R. 641, 4 N. Y. Supp. 312, 119 N. Y. 241, 7 L.R.A. 592, 23 N. E. 745; Re Long Island Water Supply Co. 30 Abb. N. C. 37, 24 N. Y. Supp. 807; Dunstan v. New York, 91 App. Div. 359, 86 N. Y. Supp. 562; East Grand Forks v. Luck, 97 Minn. 373, 6 L.R.A.(N.S.) 198, 107 N. W. 393, 7 Ann. Cas. 1015; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386; Piper v. Madison, 140 Wis. 311, 25 L.R.A.(N.S.) 230, 133 Am. St. Rep. 1078, 122 N. W. 42 L.R.A.(N.S.)

730; Snider v. St. Paul, 51 Minn. 470, 18 L.R.A. 151, 53 N. W. 763; State ex rel. Latahaw v. Water & Light Comrs. 105 Minn. 472, 127 Am. St. Rep. 581, 117 N. W. 827; Keever v. Mankato, 113 Minn. 55, 33 L.R.A.(N.S.) 339, 129 N. W. 158, 773, Ann. Cas. 1912A, 216; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 185; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434; Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; Wagner v. Rock Island, 146 Ill. 139, 21 L.R.A. 522, 34 N. E. 545; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 282; Winona v. Botzet, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321; Judson v. Winsted, 80 Conn. 384, 15 L.R.A.(N.S.) 91, 68 Atl. 999; Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114; Brown v. Salt Lake City, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004; Ottersbach v. Philadelphia, 161 Pa. 111, 28 Atl. 991; Todd v. Crete, 79 Neb. 671, 113 N. W. 172, 115 N. W. 307; Davoust v. Alameda, 149 Cal. 69, 5 L.R.A.(N.S.) 536, 84 Pac. 760, 9 Ann. Cas. 847; Tindley v. Salem, 137 Mass. 172, 50 Am. Rep. 289; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Oliver v. Worcester, 102 Mass. 497, 3 Am. Rep. 485; Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 10 L.R.A. 122, 26 N. E. 97; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871; Little v. Holyoke, 177 Mass. 114, 52 L.R.A. 417, 58 N. E. 170; Collins v. Greenfield, 172 Mass. 80, 51 N. E. 454.

Messrs. Terence Farley and Edward S. Malone, with Mr. Archibald R. Watson, for respondent:

The plaintiff was not entitled to the equitable relief which it demanded.

Deeley v. Heintz, 169 N. Y. 129, 62 N. E. 158.

A corporation which is expressly organized for the purpose of distributing water for compensation is not a guarantor of its quality.

3 Dill. Mun. Corp. 5th ed. § 1316; Green v. Ashland Water Co. 101 Wis. 259, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722; Brymer v. Butler Water Co. 172 Pa. 489, 33 Atl. 707; Asher v. Hutchinson Water, Light & P. Co. 61 L.R.A. 88, note; 28 Cyc. 1257, 1287; 1 Farnham, Waters, pp. 689, 829, 884; Gould, Waters, p. 497; Pfeffer v. Pennsylvania Water Co. 221 Pa. 578, 70 Atl. 870.

In regard to the water furnished by it, no other or greater duty is imposed upon the defendant than upon the ordinary water company.

3 Dill. Mun. Corp. 5th ed. § 1317; Wain-



wright v. Queens County Water Co. 78 Hun, 146, 28 N. Y. Supp. 987.

No obligation is imposed upon the city to supply the plaintiff with water which is chemically pure.

Barney v. New York, 83 App. Div. 237, 82 N. Y. Supp. 124; Penrhyn Slate Co. v. Granville Electric Light & P. Co. 181 N. Y. 80, 73 N. E. 566, 2 Ann. Cas. 782; American Smelting & Ref. Co. v. Godfrey, 89 C. C. A. 139, 158 Fed. 225, 14 Ann. Cas. 19; New York v. Pine, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592.

Defendant is not responsible for the damages which the plaintiff sustained, for the reason that, in supplying water to its inhabitants, a municipality acts in its governmental capacity, as a representative of the state and as one of its political subdivisions, instead of in its capacity as a private municipal corporation.

Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; Hughes v. Auburn, 161 N. Y. 96, 46 L.R.A. 636, 55 N. E. 389; Lefrois v. Monroe County, 162 N. Y. 563, 50 L.R.A. 206, 57 N. E. 185; Corbett v. St. Vincent's Industrial School, 177 N. Y. 16, 68 N. E. 997; United States v. Sault Ste. Marie, 137 Fed. 258; Wright v. Augusta, 78 Ga. 241, 6 Am. St. Rep. 256; Davis v. Lebanon, 108 Ky. 688, 57 S. W. 471; Terrell v. Louisville Water Co. 127 Ky. 77, 105 S. W. 100; Aschoff v. Evansville, 34 Ind. App. 25, 72 N. E. 279; Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Rice v. St. Louis, 165 Mo. 636, 65 S. W. 1002; Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 533; Butterworth v. Henrietta, 25 Tex. Civ. App. 467, 61 S. W. 975; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669, affirmed in 2 Denio, 433; McAvoy v. New York, 54 How. Pr. 245; Gastel v. New York, 194 N. Y. 15, 128 Am. St. Rep. 540, 86 N. E. 833, 16 Ann. Cas. 635.

Hiscock, J., delivered the opinion of the court:

The plaintiff for several years has been the owner of a large factory at Steinway, on Long Island, where it has been engaged in the manufacture of logwood extracts or dyes, and during part of that period it has been supplied by the defendant, through its regular system, with water which in part was pumped by the defendant itself, and in part supplied under a contract with a private corporation. The basis of plaintiff's complaint is that the water thus supplied contains so large a percentage of chlorin that it is unfit for plaintiff's pur-

poses without special preparation, which is so expensive as to prevent any profits in the latter's business. The cause of this impurity is that the wells from which the water supply is drawn are situated so near to the ocean that, when they are pumped vigorously, sea water drains through into the wells, and causes the trouble above mentioned.

Originally the action was brought as an equitable one by the plaintiff apparently as a taxpayer seeking to enjoin the city from pumping and from receiving from the private company water from the sources in question, and also asking for damages. On the trial the action became transformed into one of negligence, in which the plaintiff sought to recover damages because of the impure water furnished to it. While plaintiff's case does seem to be one of considerable hardship, since, at the time when it built its factory, no such trouble existed with the water supply as is now shown, there nevertheless seem to be obstacles in the way of its present quest of relief, of which some are insuperable and will be discussed.

The first question which arises is whether the judgment dismissing plaintiff's complaint is one on the merits or one merely of nonsuit. The proceedings on the trial were somewhat informal and out of the ordinary course of procedure. The learned trial judge apparently reached the conclusion early in the trial that plaintiff was prevented from recovering by fundamental principles of exemption from municipal liability, and plaintiff at various points was prevented from giving evidence by the statement of the justice that he would assume the facts to be as alleged in the complaint or as stated by him at the time, and, when the evidence was closed, he indicated that he would grant a motion for a nonsuit. Unfortunately, however, for the plaintiff, it and the defendant decided to submit requests for findings, and those submitted by the former, numbering thirty-seven requests to find facts, and several requests to find conclusions of law, were all passed on by the trial justice, and the result was that, between passing on these requests and various others which I understand to have been submitted by the defendant, findings were made generally on the merits of the action, and on which a judgment was entered dismissing the complaint. No application was made by the plaintiff to have this disposition amended or corrected so as to conform with the informal announcement made on the trial that a nonsuit would be granted, and the question is now first discussed before us.

I see no way in which the plaintiff can

escape from the judgment as one on the merits, or from the binding force of the findings made by the trial court and unanimously affirmed by the appellate division. The situation seems to be clearly covered by the decision in *Keyes v. Smith*, 183 N. Y. 376, 76 N. E. 473. That case was one in equity, and, at the close of the plaintiff's evidence, the defendant offered no evidence, but moved for a dismissal of the complaint on the ground that there was no evidence to sustain the alleged cause of action. No ruling was made on this motion, but subsequently a decision was rendered in accordance with § 1022 of the Code of Civil Procedure, and expressed in findings negating the allegations made by the plaintiff, and which it was necessary for him to sustain by evidence in order to succeed, and judgment was entered in accordance therewith, which did not in terms express that it was on the merits. It was held that such judgment was not one of nonsuit, but one on the merits. It was further held that plaintiff, by merely excepting to the unfavorable findings of fact and conclusions of law, waived his right to insist that there had not been a trial and determination of the whole issue in favor of the defendant; that he should have moved the court to correct the judgment roll in that respect, and should not have waited until the question was raised on appeal. See also *Bliven v. Robinson*, 152 N. Y. 333, 46 N. E. 616; *Deeley v. Heintz*, 169 N. Y. 129, 62 N. E. 158.

The case, in coming within the authority of those above cited, differs from that of *Place v. Hayward*, 117 N. Y. 487, 23 N. E. 25, cited by the appellant, where the plaintiff, on settlement of a case after a trial before a referee, promptly made a motion to have the judgment and findings modified so as to show that the former was one of nonsuit, and not one upon the merits.

Thus we are compelled to consider plaintiff's appeal in the light of the facts as they have been established by the unanimously affirmed findings of the trial court.

Plaintiff claims that the defendant has been guilty of negligence, both because of the water which it has furnished, and because of the failure to furnish proper water. At the threshold of this complaint lies the query whether the defendant, in operating a municipal system for supplying water to ordinary customers on payment of rates, was acting in a governmental capacity or as the proprietor of a corporate business wherein it was subject to many of those principles of liability which would apply to a private individual in the conduct of a similar business. If the defend-

ant was acting in a governmental capacity, it is so plain that it would not be liable in answer to plaintiff's complaint that there would be no need for discussion, but on this question I agree with the contention of the plaintiff that it was not thus acting. The claim of the defendant to the contrary is largely based on the case of *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 48, 30 L.R.A. 660, 51 Am. St. Rep. 667, 42 N. E. 405.

The complaint in that case, in substance, was that the defendant, having availed itself of the right to maintain a municipal waterworks system, operated the latter so negligently and inefficiently that proper fire protection was not afforded, whereby the plaintiff suffered damages. It was held, Judge Gray writing for a unanimous court, that the defendant was acting in a governmental capacity, and was not liable. But, of course, that decision and opinion are to be read in the light of the facts which were involved. The village maintained a fire department, and concededly in so doing it was discharging a governmental function. As a necessary element in the maintenance of the fire department, it undertook to supply water for fire purposes, and in so doing its character and the nature of the acts which it was performing were not different than they were when it supplied engines or men. It was no more liable because the pipes for supplying water were clogged up or broken than it would have been if one of the engines had become out of repair or an insufficient force of men had been maintained for operating the engine and the water. But in the present case, when, in accordance with the powers conferred on it, the city undertook to maintain a municipal water system and to supply water to private consumers at a fixed compensation, it was not acting in such capacity as above stated. It entered on an enterprise which involved the ordinary incidents of a business wherein was sold that which people desired to buy, and which might become a source of profit, and under these circumstances it became liable for breach of contract or for negligence, as the proprietor of a private business might become. *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Re Rapid Transit R. Comrs.* 197 N. Y. 81, 36 L.R.A.(N.S.) 647; 90 N. E. 456, 18 Ann. Cas. 366; *Messersmith v. Buffalo*, 138 App. Div. 427, 122 N. Y. Supp. 918; *Piper v. Madison*, 140 Wis. 311, 25 L.R.A.(N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871.

But, this being so, I am still unable to discover any finding of fact, or any undisputed evidence which the court refused to

incorporate in a finding of fact, which requires or permits the conclusion that this defendant has been guilty of any negligence toward the plaintiff. There was no contract between the defendant and the plaintiff whereby the former undertook to supply proper water, and of which it made a breach for which recovery can now be had. Moreover, this is an action of negligence, and not for breach of contract. Plaintiff is not entitled to recover on account of the impure water which has been supplied to it, within the principles of those cases which recognize the rule of liability where a municipality negligently supplies impure water to a consumer who, in ignorance of its quality, uses the same and suffers. In this case it appears without dispute that the plaintiff understood the character of the water which was being supplied to it, and it could not voluntarily use it with knowledge of its impurities and then recover damages because of them.

There remains, so far as I can see, as the only other basis for a claim of recovery, the one that the city was bound to find some other source of supply from which it could have furnished to plaintiff satisfactory water. The proposition is stated by the learned counsel for the appellant in the form that the charter imposes "upon defendant the duty to see that all proper measures are taken to preserve the purity of the water for the use of the inhabitants." In discharging such a function as that of furnishing water to citizens, the municipal authorities are necessarily invested with a wide discretion, which is not subject to judicial review. *Mills v. Brooklyn*, 32 N. Y. 489. Under any ordinary circumstances which do not involve bad faith or a waste of public funds, they must decide whether one source or another shall be sought, and, after the supply has been obtained, no court can say that mains must be laid in every street, or that every resident must have water best suited for his particular needs.

When we consider the findings in this case in the light of these simple and indisputable principles, we perceive at once how far they fall short of sustaining a recovery on the ground we are now considering. Some of these findings are to the effect that there has been no waste of public funds in furnishing the present supply; that the water in question is used by the residents of the neighborhood in which plaintiff's factory is situated for domestic purposes and also for industrial and manufacturing purposes; that the presence of chlorin in the water has been and is injurious to the boilers and manufacturing processes of the plaintiff; that it is not suitable in its natural state for the peculiar and uncommon

uses to which it is put in the conduct of the plaintiff's business, and is not economically suitable for industrial steam power use; that there is no other manufacturing industry except the plaintiff's in said locality for which said water is unsuitable; and that it is suitable for domestic household uses, and has not been, and is not, injurious to public health.

The court refused to find, and there was no uncontradicted evidence showing, that it was possible for defendant to procure any other supply of better water within any reasonable limit of expenditure. These findings, taken together, indicate that the water now being furnished is reasonably satisfactory for all purposes, except the "peculiar and uncommon uses to which it is put in the conduct of the plaintiff's business," and do not indicate that there is any other better source of supply which is reasonably available.

Under such circumstances, we cannot say that error was committed in holding the defendant not liable, and in dismissing the complaint, and the judgment therefore must be affirmed, with costs.

Cullen, Ch. J., and Gray, Willard Bartlett, Chase, and Collin, JJ., concur. Vann, J., absent.

A petition for rehearing having been filed, Hiscock, J., on December 10, 1912, handed down the following additional opinion (— N. Y. —, 100 N. E. 414):

On this motion our attention is called to the statement in the opinion handed down on the appeal, that "the court refused to find, and there was no uncontradicted evidence showing, that it was possible for the defendant to procure any other supply of better water within any reasonable limit of expenditure," and to the fact that this statement is inaccurate. It is inaccurate. Because of the specific refusal of the court to find these facts, there was inadvertently overlooked an omnibus finding that all of the allegations of the complaint, with certain exceptions, were true, and that these allegations in a somewhat voluminous complaint included the one, "that there was an abundant supply of pure and wholesome water which the defendant, by the use of reasonable diligence, could obtain and supply to the citizens of Long Island City at a reasonable charge therefor, and more especially to the plaintiff." This statement in the opinion, however, is not at all essential to the conclusions which we reached. Under the findings which were made as to the character and general usefulness of the water supplied by the defendant, we do not think that the latter could be held liable in

this action because it did not go forth to secure a new supply for plaintiff's benefit, even though this could be done at a reasonable expense.

The motion for a reargument must be denied, with \$10 costs.

Cullen, Ch. J., and Gray, Vann, Willard, Bartlett, Chase, and Collin, JJ., concur.

## NORTH DAKOTA SUPREME COURT.

JOHN LESLIE PAPER COMPANY, Appt.,  
v.

GEORGE A. WHEELER, Doing Business as  
George A. Wheeler & Company, Resp.

(— N. D. —, 137 N. W. 412.)

### Bankruptcy — discharge — effect on liens.

1. A discharge in bankruptcy leaves intact all liens, except those specially stricken down by the bankruptcy act; the effect of a

Headnotes by FISK, J.

### Note. — *Bankruptcy: effect of discharge on real property liens.*

As to whether or not a judgment on an antecedent debt constitutes a lien on property to which exemption law has attached in the meantime, see note to Gregory Co. v. Cale, 37 L.R.A.(N.S.) 156.

The provisions of the bankruptcy act of 1898, 30 Stat. at L. 564, 565, chap. 541, U. S. Comp. Stat. 1901, p. 3449, which directly apply to the question of the effect of a discharge in bankruptcy upon existing real property liens, are found in § 67, subdivisions c, d, and f, which are as follows:

"c. A lien created by, or obtained in or pursuant to, any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien, and empowered to perfect and enforce the same in his name as trustee 42 L.R.A.(N.S.)

discharge being to release the personal liability only. Such discharge does not affect vested liens upon property acquired more than four months prior to the proceedings in bankruptcy, and the same may be enforced after a discharge is granted.

### Same — releasing judgment — statute.

2. Chapter 125, Session Laws 1905, construed, and held that the legislative intent in the enactment thereof was merely to authorize the cancellation and satisfaction of record of such judgments only as are affected by the discharge in bankruptcy. The legislative purpose was merely to give record notice that judgments extinguished by the bankruptcy proceedings no longer have any vitality to attach as liens to real estate subsequently acquired.

### Homestead — establishment — motion.

3. Whether the lots described were and are defendant's homestead, and therefore not subject to the lien of plaintiff's judgment, must be determined in an appropriate action, and not on motion by affidavits.

(June 28, 1912.)

**A** PPEAL by plaintiff from an order of the District Court for Grand Forks County directing the cancellation and satis-

with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

"d. [as amended in 1910, 36 Stat. at L. 842, chap. 412, § 12, U. S. Comp. Stat. Supp. 1911, p. 1509.] Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act.

"f. That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

faction of record of a judgment against defendant. Reversed.

The facts are stated in the opinion.

Mr. W. J. Mayer, for appellant:

A discharge in bankruptcy leaves intact all liens except those that are specially stricken down by the law itself.

Loveland, Bankr. 3d ed. p. 823; Osborne v. Lindstrom, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 616, 81 N. W. 72; Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244.

Vested remainders are subject to the lien of a judgment and can be levied upon and sold in payment of such judgment.

17 Am. & Eng. Enc. Law, 783.

If it is assumed that the right under which respondent occupied the land was

an estate at sufferance, at will, or for a term of years, his right to possession would cease with the termination of his leasehold, and with the loss of his right to possession his homestead right would be extinguished.

Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Ferris v. Jensen, 16 N. D. 462, 114 N. W. 372; Reeves & Co. v. Saxton, 145 Wis. 10, 129 N. W. 784.

No appearance for respondent.

Fisk, J., delivered the opinion of the court:

This is an appeal from an order of the district court, of Grand Forks county, entered September 7, 1910, directing the cancellation and satisfaction of record of the judgment hereafter referred to. Respond-

And the provisions of the bankruptcy act of 1867, 14 Stat. at L. 523, 526, 533, chap. 176, which directly relate to the question under discussion, are that portion of § 14 which provides that "the assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract or pledge or deposit or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other encumbrances;" that portion of § 20 which provides that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted, as a creditor, only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt;" that portion of § 21 which provides that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon shall be deemed to be discharged and surrendered thereby," and that portion of § 34 which provides 42 L.R.A. (N.S.)

that "a discharge duly granted under this act shall . . . release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy."

Under the act of 1841, 5 Stat. at L. 442, chap. 9, the pertinent provision was in § 2, and was as follows: "Nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the 2d and 5th sections of this act."

From the provisions of the various acts as above set out it follows, as has been almost universally held, that real property liens existing for a proper length of time before the adjudication in bankruptcy are not affected by a discharge in such proceeding. The act of 1841 expressly preserves such liens, and it is the universally accepted rule that a discharge in bankruptcy does not, under the later acts, affect any liens except those specially stricken down by the acts themselves. In this connection, however, it should be remembered that the act of 1867 expressly destroys, except as therein otherwise provided, liens where the debt or claim was proved in bankruptcy, and therefore that a lien would be preserved only where the debt or claim was not submitted to the bankruptcy court; but this provision was not preserved in the act of 1898, under which proof may be made without impairing the lien.

And even aside from the provisions of the various acts, except, of course, as to liens which are expressly stricken down by the acts themselves, it would seem that all specific liens on real property obtained in good faith would remain unaffected by a discharge, under the theory that the discharge releases the personal liability only, for the cases without dissent hold that the discharge is personal to the debtor.

Of course, the decisions are based upon the assumption that the holder of the lien has done nothing which would forfeit his

ent makes no appearance and has filed no brief.

Appellant's statement of facts is, we think, a fair and correct statement. It is as follows: "On the 5th day of December, 1902, George A. Wheeler, Sr., died, leaving a will by which he bequeathed lots 8, 9, 10, and 11, of Westerman & Sheehan's addition to the city of Grand Forks, county of Grand Forks, state of North Dakota, to his wife, Ellen M. Wheeler, for life, remainder to George A. Wheeler, Jr., the defendant in this action. On the 4th day of June, 1908, plaintiff recovered a judgment in the above-entitled action against the said George A. Wheeler, Jr., for the sum of \$348.44, which judgment was duly entered and docketed on that day, and, until the

time of the making and entry of the order from which this appeal is taken, remained of record and undischarged. During all of this period Ellen M. Wheeler resided upon said lots. On the 18th day of February, 1909, respondent was adjudged a bankrupt, and on the 21st day of May, 1909, was discharged from all debts provable in bankruptcy which existed on the 19th day of February, 1909. In June, 1910, defendant made a motion in the district court of Grand Forks county, in the original action brought by appellant, as hereinbefore referred to, to vacate and set aside the judgment therein, resting his claim to such relief upon chapter 125 of the Laws of 1905. This motion was rested by the plaintiff, who appeared, and by affidavit set up the

right to demand the enforcement of his lien, or which would amount to a waiver.

Because of the similarity of conclusions reached under the various acts, the decisions have not been segregated according to act, but the act construed in each case, or where that is not expressly shown, the date of decision therein has been parenthetically noted.

#### Judgment liens.

In the following cases it was in effect held that a discharge in bankruptcy is only a personal release of the bankrupt, and does not release a prior judgment lien upon the property: *Dixon v. Barnum*, 3 Hughes, 207, Fed. Cas. No. 3,928 (1878); *Freeny v. Ware*, 9 Ala. 370 (1846); *Rugely v. Robinson*, 10 Ala. 702 (1846); *Oliphant v. Hartley*, 32 Ark. 465 (1877); *Jones v. Lellyett*, 39 Ga. 64 (act 1867); *Phillips v. Bowdoin*, 52 Ga. 544 (1874); *Barber v. Terrell*, 54 Ga. 146 (1875); *Darsey v. Mumpford*, 58 Ga. 119, 17 Nat. Bankr. Reg. 181 (1877); *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163 (1886); *Smith v. Zachry*, 115 Ga. 722, 42 S. E. 102 (act 1898); *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468 (act 1898); *Philmon v. Marshall*, 116 Ga. 811, 43 S. E. 48 (act 1898); *Camp v. Young*, 119 Ga. 981, 47 S. E. 560 (act 1898); *Taylor v. Marshall*, 153 Ill. App. 409 (act 1898); *Wales v. Bogue*, 31 Ill. 464 (act 1841); *Pauley v. Cauthorn*, 101 Ind. 91 (1884); *Bates v. Tappan*, 99 Mass. 376 (act 1867); *Evans v. Staalle*, 88 Minn. 253, 92 N. W. 951 (1903); *Gregory Co. v. Cale*, 115 Minn. 508, 37 L.R.A.(N.S.) 156, 133 N. W. 75 (1911); *Reed v. Bullington*, 49 Miss. 223 (act 1867); *Davis v. Lumpkin*, 57 Miss. 506 (act 1867); *Bassett v. Thackara*, 72 N. J. L. 81, 60 Atl. 39, 16 Am. Bankr. Rep. 786 (1905); *Popham v. Barretto*, 20 Hun, 229 (1880); *Macy v. Jordan*, 2 Denio, 570 (1845); *Hillver v. LeRoy*, 179 N. Y. 369, 103 Am. St. Rep. 919, 72 N. E. 237 (act of 1898); *Clark v. Israel*, 6 Binn. 391 (1814); *McCance v. Tavor*, 10 Gratt. 580 (act 1841).

But in *Fellows v. Kittredge*, 56 How. Pr. 498 (decided in 1879), it was held that, 42 L.R.A.(N.S.)

since a judgment is not a specific lien on any particular real estate until execution and levy, but rather a general lien on all real estate, which by the statute then in force could be made effective by execution and levy at any time within two years after the bankrupt's discharge, a judgment lien which has not been made specific "must," under the statute, upon application of the bankrupt and upon proof of his discharge from the judgment debt, "be discharged of record." But that under a later statute the mere cancellation of the record of the judgment probably would not affect a lien obtained more than four months before the adjudication in bankruptcy, see *Pickert v. Eaton*, 81 App. Div. 423, 81 N. Y. Supp. 50. And for a discussion relating to the present statute upon the question, see *JOHN LESLIE PAPER CO. v. WHEELER*. And in North Carolina it has been held (*Blum v. Ellis*, 73 N. C. 293), construing the act of 1867, that a creditor, by the terms of that act (§ 22), which required a claimant to prove his demand and disclose "whether any and what securities are held therefor," and by virtue of § 1, which conferred jurisdiction upon the bankruptcy court to ascertain and liquidate the liens upon the assets of the bankrupt, must have his lien enforced in the bankruptcy proceeding under penalty of having it barred by the discharge. In this connection the court said: "The bankrupt law does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens as that which is unencumbered, passes to the assignee, and is in *custodia legis*, subject, of course, to priorities and liens, it follows that the bankrupt court is the proper tribunal in which to administer the remedies for the enforcement of liens.

"The state courts, as we have said, may be employed to collect the assets of a bankrupt, and also to ascertain the liens which may exist upon such assets, but it is one thing to ascertain a lien, and quite another to liquidate it; and if a party can liquidate his own liens, through the intervention of state courts, in the absence of the assignee, who represents the general

facts as hereinbefore stated. An issue was also raised by the affidavits offered by respective parties as to the value of the land; it appearing from appellant's affidavit that the land was worth in excess of \$5,000, and by the affidavits of respondent that it was worth less than that amount. It also appears from the affidavit offered by appellant that Ellen M. Wheeler, owner of the life estate, was entitled to the possession under the will when the judgment was docketed; while from the affidavits of respondent it might be understood that respondent was in joint possession with her at that time, with her permission, under some kind of an agreement which does not clearly appear."

creditors, there is no protection to other creditors against collusion and fraud between the bankrupt and such a claimant; further, the settlement of the estate of a bankrupt may be indefinitely postponed by tedious litigation in the state courts. . . . He [the lien holder] will not be permitted to sleep upon his lien until everything is closed in the bankrupt court, and then virtually nullify the whole thing by proceedings in the state courts. If he remains outside of the bankrupt court, he does so at the risk of having his debt barred, and he may also lose the benefit of his securities." But in connection with this case, see *Brown v. Hoover*, 77 N. C. 40.

And it has been held that specific judgment liens obtained within four months of the adjudication in bankruptcy, which are not void under the bankruptcy act because of the solvency of the debtor at the time the lien was obtained, are not affected by a discharge in bankruptcy, the ground being that the discharge releases from personal liability only, and therefore does not affect a specific lien on real property. *Newberry Shoe Co. v. Collier*, 111 Va. 288, 68 S. E. 974 (1910).

#### Mortgage liens.

So it is held that a mortgage lien is not avoided by the subsequent discharge of the mortgagor as a bankrupt, the courts recognizing the rule that such a discharge releases the personal liability only. *Stewart v. Anderson*, 10 Ala. 504 (act 1841); *Carlisle v. Wilkins*, 51 Ala. 371 (1874); *Copper Belle Min. Co. v. Costello*, 12 Ariz. 318, 100 Pac. 807 (act 1898); *Oliphint v. Eckerley*, 36 Ark. 69 (1880); *Luning v. Brady*, 10 Cal. 265 (1858); *Security Sav. Bank v. Scott*, 3 Cal. App. 687, 86 Pac. 903 (1906); *Price v. Amis*, 58 Ga. 604 (1877); *Camp v. Young*, 119 Ga. 981, 47 S. E. 560 (act 1898); *Pierce v. Wilcox*, 40 Ind. 70 (1872); *Haggerty v. Byrne*, 75 Ind. 499 (1881); *Catterlin v. Armstrong*, 101 Ind. 258 (1884); *Fetter v. Cirode*, 4 B. Mon. 482 (act 1841); *Labauve v. Slack*, 28 La. Ann. 296 (1876); *Prentiss v. Richardson*, 118 42 L.R.A. (N.S.)

Appellant makes the following contentions in its printed brief:

"(1) That chapter 125 of the Laws of 1905 was never intended to enlarge the relief granted by the Federal bankruptcy statute, but was simply intended to provide a means to show by the court records what has already been accomplished.

"(2) That the question as to whether or not appellant has a lien upon specific real property of the respondent by virtue of its judgment is not a proper question to be litigated upon affidavits.

"(3) That, even though it were conceded to be proper for the court to try an issue of this kind upon affidavits, the court must find, as a matter of law, that a lien existed upon respondent's vested remainder in the

*Mich.* 259, 76 N. W. 381 (act 1898); *Nicolay v. Mallery*, 62 Minn. 119, 64 N. W. 108 (1895); *Laurel Oil & Fertilizer Co. v. Horne*, — Miss. —, 58 So. 652 (act 1898); *Chamberlain v. Meeder*, 16 N. H. 381 (1844); *Pickert v. Eaton*, 81 App. Div. 423, 81 N. Y. Supp. 50 (act 1898); *Brown v. Hoover*, 77 N. C. 40 (act 1867); *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394 (act 1898); *French v. Pyron*, 2 Posey, Unrep. Cas. (Tex.) 720 (188—); *Roberts v. Wood*, 38 Wis. 60 (1875). A case illustrative of the peculiarity of the provision of the act of 1867 with respect to proof of claims as affecting a real property lien is *Long v. Bullard*, 117 U. S. 617, 29 L. ed. 1004, 6 Sup. Ct. Rep. 917, wherein it was held under the provisions that the discharge releases from debts which were or might have been proved, and that debts secured by mortgage or pledge can be proved only for the balance remaining due after deducting the value of the security, unless all claims upon the security are released (set out above), that mortgage liens on real property are not affected by the discharge where the creditor neither proves his debt nor releases his lien.

#### Vendors' liens.

So it is held that the discharge in bankruptcy, although releasing the debtor from personal liability for his debt, does not avail to protect the land from a vendor's lien upon it for purchase money. *Lewis v. Hawkins*, 23 Wall. 119, 23 L. ed. 113 (1874); *Eisman v. Whalen*, 39 Ind. App. 350, 358, 79 N. E. 514, 1072 (1906); *Barnett v. Salyers*, 11 Ky. L. Rep. 465, 12 S. W. 303 (1880); *Graves v. Coutant*, 31 N. J. Eq. 763 (1879); *Elliott v. Booth*, 44 Tex. 180, 23 Am. Rep. 593 (act 1867); *Boone v. Revis*, 44 Tex. 384 (act 1867); *Jackson v. Elliott*, 49 Tex. 62 (act 1867).

#### Liens acquired by filing creditors' bill.

And liens acquired on real property by the filing of creditors' bills or suits have been held unaffected by a discharge in bankruptcy. *Phelps v. Curtis*, 80 Ill. 109 (1875):

several lots described by virtue of the judgment at the time the proceedings to vacate were instituted."

We are agreed that the first two contentions are sound, and that the order appealed from must be reversed and will briefly give our reasons therefor.

We take it to be well settled that a discharge in bankruptcy leaves intact all liens, except those specially stricken down by the bankruptcy act. As stated in 2 Loveland on bankruptcy, 4th ed. § 749: "The effect of a discharge is to release the personal liability only. It does not affect liens upon his property. If they are valid, under the laws of the state and the bankrupt act, they may be enforced after a discharge is granted. Thus a judgment which has become a valid lien on property will continue to be so; . . . but if the judgment is merely a personal liability, it is released by a discharge." Among the numerous authorities cited in the foregoing section are Paxton v. Scott, 66 Neb. 385, 92 N. W. 611, 10 Am. Bankr. Rep. 80; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58

L.R.A. 770, 88 N. W. 703; Woods v. Klein, 223 Pa. 256, 72 Atl. 523.

In the first case cited, it is, among other things, said: "The effect of the discharge is personal to the bankrupt, and it does not affect any lawful lien, charge, or encumbrance existing on his property; but judgment may be specially entered thereon *in rem*. . . . The bankruptcy law was carefully designed to save all liens against property from being affected by the discharge, and its terms seem ample for that purpose."

In Woods v. Klein, *supra*, it was said:

"No provision of the bankrupt act contemplates that a valid lien acquired more than four months before the filing of a petition in bankruptcy shall be vacated by the bankruptcy proceedings, or that the enforcement of such a lien by execution shall constitute an illegal preference. Owen v. Brown, 57 C. C. A. 180, 120 Fed. 812. There is a clear distinction between the bald creation of a lien within the four months, and the enforcement of one previously acquired. Thompson v. Fairbanks,

Fetter v. Cirode, 4 B. Mon. 482 (1844); Paxton v. Scott, 66 Neb. 385, 92 N. W. 611, 10 Am. Bankr. Rep. 80 (set out in JOHN LESLIE PAPER CO. v. WHEELER and decided in 1902); Flint v. Chaloupka, 78 Neb. 594, 13 L.R.A. (N.S.) 309, 126 Am. St. Rep. 639, 111 N. W. 465 (1907); Arnold v. Treviranus, 78 App. Div. 589, 79 N. Y. Supp. 732 (1903); Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. Supp. 137 (1905); Lowry v. Morrison, 11 Paige, 327 (1844). And it has been held that an equitable lien is within the exemption of § 67 of the act of 1898, and is not affected by a discharge in bankruptcy. Bridge v. Kedon, — Cal. —, 126 Pac. 149.

For a treatment of the general question of the right of a creditor of a bankrupt to set aside a transfer made in fraud of creditors, see the note to Ruhl-Koblegard Co. v. Gillespie, 10 L.R.A. (N.S.) 305.

#### Mechanics' liens.

So a mechanics' lien enforceable by a proceeding *in rem* on real property has been held not affected by a subsequent discharge in bankruptcy of the owner of the property. McCullough v. Caldwell, 5 Ark. 237 (1843); Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737, 10 Am. Bankr. Rep. 71 (act 1898); Douglas v. St. Louis Zinc Co. 56 Mo. 388 (act 1867); Seibel v. Simeon, 62 Mo. 255 (act 1867). And a mechanics' lien is not a lien "obtained through legal proceedings," within the meaning of the bankruptcy act of 1898. Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737, 10 Am. Bankr. Rep. 71 (act 1898).

#### Miscellaneous liens.

In the following cases the liens set out 42 L.R.A. (N.S.)

in parentheses have been held not to have been affected by a discharge in bankruptcy. Truitt v. Truitt, 38 Ind. 16 (lien held by virtue of the assignment of a certificate of purchase, decided in 1871); Bowditch Mut. F. Ins. Co. v. Jackson, 12 Gray, 114 (statutory lien upon insured property, decided in 1858); Grandin v. First Nat. Bank, 70 Neb. 730, 98 N. W. 70 (attachment lien, decided in 1904); Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. Supp. 189 (lien acquired by bringing contract action on a judgment, decided in 1910); Ex parte Walker, 107 N. C. 340, 12 S. E. 136 (partition of land amounting to more than a lien, decided under act of 1867); Tinstman v. Flenniken, 6 W. N. C. 29 (lien on real estate acquired under an award of arbitrators, decided in 1877); Large v. Bosler, 2 Clark (Pa.) 29 (ground rent lien, decided under act of 1841).

And under that provision of the bankruptcy act in effect in 1801, which provided that nothing contained in the act should impair any lien existing at the date of the act upon the lands and chattels of any person becoming bankrupt, it has been held that an attachment lien served upon real estate was good against the property attached, the ground being that the discharge in bankruptcy released the personal liability only. Ingraham v. Phillips, 1 Day, 117.

#### Liens on exempt property.

In a few instances an attempt has been made to draw a distinction between enforcing a lien after a discharge from bankruptcy against property never in any way dealt with by the bankruptcy court, and enforcing it against property set apart in due form to the bankrupt as exempt, but



196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306. The lien that is invalidated by the bankrupt is one created by a levy, judgment, attachment, or otherwise, within four months. Where the lien is obtained more than four months prior to the institution of the bankruptcy proceedings, it is not only not to be deemed null and void on an adjudication of bankruptcy, but its validity is recognized."

If the foregoing authorities are sound, and we think they are, it follows that if the judgment in question was a lien upon any real property of respondent that such lien is in no way affected by the discharge in bankruptcy, and appellant is entitled to enforce such lien, in so far as the proceedings in the bankruptcy court are concerned.

But the learned trial court, in making the order complained of, no doubt construed chapter 125, Session Laws of 1905, as authorizing the cancellation of such judgment. In this we think there was error. As we construe said chapter, the legislative intent merely was to authorize the cancellation

and satisfaction of record of such judgments only as are affected by the discharge in bankruptcy. It is true that the language of such statute, if literally construed, would support the trial court's interpretation. Section 1 of such act provides: "Any person discharged from his debts pursuant to the act of Congress known as 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States,' approved July 1, 1898, may, at any time after obtaining such discharge in bankruptcy, file in the office of the clerk of any court of record in which a judgment shall have been rendered, or a transcript thereof filed against him, a certified copy of such discharge in bankruptcy, and may make application to the judge of such court for a discharge of such judgment from record, and if it shall appear to the court that the applicant has thus been discharged from the payment of such judgment, the court may order and direct that such judgment be discharged and satisfied of record; and when such order is filed in the office of the

this distinction has been universally held unsound, so far, at least, as concerns exempt lands, the ground being that such lands are not administered in bankruptcy by being set apart to the bankrupt. In this connection the supreme court of Georgia, in *Bush v. Lester*, 55 Ga. 579, 15 Nat. Bankr. Reg. 756, said: "The assignee acquires no title [to lands which the bankrupt is entitled to have set apart as exempt], and imparts none to the bankrupt. He admeasures or values, and allows the bankrupt to retain. The latter has precisely the same title after his exempt property is set apart as he had to it before. Liens upon it are neither extinguished nor removed. His protection thereafter, as to those liens, unless he can show assets for them in the hands of the assignee, depends wholly on the state law. What has been done by the assignee is equivalent to compliance with the state statutes in assigning homestead or claiming exemption, but has no higher validity or greater sanctity. If creditors come who have compounded their liens with the assignee, or who have proved their claims in bankruptcy, they can be resisted. If others come who have not done so, they can enforce their liens or not, according as they might or might not have enforced them against the same property if it had been set apart under the state law, in the method prescribed by that law, without any proceeding in bankruptcy whatever. Exemption granted in bankruptcy resting on the state law has precisely the same effect against prior liens as exemption granted out of bankruptcy, or by the instrumentalities appointed by the state. In respect to the latter, it is well settled by repeated rulings that a creditor having a lien that overrides the exemption may assert it without contesting the right with the debtor on the hearing of his application."

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The cases which involve liens on real property which is the subject of an exemption arrive at a conclusion similar to that reached where the element of exemption does not enter into the question. Thus it has been held that the setting apart of a homestead to a bankrupt and the subsequent discharge do not relieve the property from the operation of a mortgage lien thereon obtained before the bankruptcy. *Long v. Bullard*, 117 U. S. 617, 29 L. ed. 1004, 6 Sup. Ct. Rep. 917 (1886); *Ross v. Worsham*, 65 Ga. 624 (1880); *Brady v. Brady*, 71 Ga. 71 (1883); *Brown v. Hoover*, 77 N. C. 40 (act 1868); *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394 (act 1898). And the same conclusion has been reached as regards judgment liens. *Jackson v. Allen*, 30 Ark. 110 (1875); *Bush v. Lester*, 55 Ga. 579, 15 Nat. Bankr. Reg. 36 (act 1867); *Hiley v. Bridges*, 60 Ga. 375 (1878); *Cooper v. Dearing*, 60 Ga. 633 (1878); *Sosnowski v. Rape*, 69 Ga. 548 (*dictum*, 1882); *Jeffries v. Bartlett*, 75 Ga. 230 (1885); *Gregory Co. v. Cale*, 115 Minn. 508, 37 L.R.A. (N.S.) 156, 133 N. W. 75 (1911); *Fowler v. Wood*, 26 S. C. 169, 1 S. E. 597 (1886). And in *Smith v. Gowdy*, 3 Ky. L. Rep. 538 (decided in 1882), it was held that a purchase money lien on exempt property was not affected by a discharge in bankruptcy.

And it has been held that a discharge in bankruptcy does not discharge a judgment lien obtained within four months prior to the adjudication in bankruptcy upon lands set apart by the trustee as exempt, but as to which the homestead exemption to which the debtor is entitled under the state laws has been waived. *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433 (act 1898); *Camp v. Young*, 119 Ga. 981, 47 S. E. 560 (act 1898).

G. J. C.

clerk of such court, the said clerk shall immediately enter a satisfaction of such judgment upon his records; provided, however, that no such application shall be made, or order granted, except upon thirty days' notice to the judgment creditor whose judgment is sought thereby to be satisfied of record, or his executors, administrators, or assigns served in the manner provided for the service of notices in civil actions; or, in case such judgment creditor or his executors, administrators, or assigns shall not reside within the state of North Dakota, in such manner as the court shall provide by order; provided, further, that nothing in this act shall be construed to apply to judgments not listed among the liabilities of the bankrupt in his petition in bankruptcy under said act of Congress." But we are agreed that the legislative intent in enacting such statute was merely to give record notice that judgments extinguished by the bankruptcy proceedings no longer have the vitality to attach as liens to real estate subsequently acquired. Any other construction would convict the legislature of an attempt to destroy vested rights in property, without providing for compensation; for it must be conceded that, if such judgment was a lien on any real property of respondent, such lien created a vested right in appellant.

That such judgment was a lien upon respondent's interest in the lots described is, we think, apparent, unless said property, at the date the judgment was docketed and since, constituted respondent's homestead, and therefore was exempt from judgment liens.

Section 7082, Rev. Codes 1905, provides that the docketing of a judgment in the district court creates a lien on all the real property, except the homestead, in the county where the same is so docketed of every person against whom any such judgment shall be rendered. Respondent through his father's will, was vested with a title to these lots, subject to a life estate in his mother. Such interest created in respondent a vested remainder constituting him the owner of real property, within the meaning of § 7082, *supra*, and the judgment attached as a lien thereon, unless, as before stated the same constituted his homestead. Rev. Codes 1905, §§ 4725, 4729, 4769; 17 Am. & Eng. Enc. Law, 2d ed. p. 783, and cases cited.

Whether respondent could base his homestead right upon such vested remainder, we need not here determine, for the obvious reason that the homestead character of real property cannot be determined on affidavits. But see 21 Cyc. 503, and cases cited. Appellant is clearly entitled to have 12 L.R.A. (N.S.)

such question tested and determined by an action in court. His remedy is pointed out in the recent case of *Klemmens v. First Nat. Bank*, — N. D. —, 133 N. W. 1044.

The order appealed from is reversed, and the District Court is directed to reinstate such judgment.

## KANSAS SUPREME COURT.

KATE BELLE COBLENTZ

v.

DAVID PUTIFER et al., Appts.

(87 Kan. 719, 125 Pac. 30.)

### Witness — effect — mental capacity.

1. While medical experts may properly answer whether in their opinion, from the conditions shown by a proper hypothetical question, a person was of unsound mind, it is not competent for them to give an opinion as to whether such person had sufficient mental capacity to make a deed in controversy. Capacity to make a deed is a mixed question of law and fact for the jury to determine on proper evidence and instructions, and not for witnesses to decide.

### Evidence — undue influence — requested deed.

2. When it is alleged that a deed was procured by the undue influence of a son upon his mother, he may state whether at any time he asked or requested her to make such deed, when the manifest object of the question is to show that he did not. To state that he did not ask or request such deed is the very opposite of testifying concerning a transaction or communication with the deceased grantor.

### Trial — deed — reasonableness — jury.

3. It is not for the jury to say whether a deed was reasonable or unreasonable, and, unless they are properly instructed as to the meaning of "reasonable," it is error to charge that they may consider reasonableness as a basis for setting it aside.

### Deed — reasonableness — decision of grantor.

4. A property owner free from undue influence, of sufficient mental capacity to convey property, has the right to decide for himself whether a deed made by him is reasonable.

### Trial — special interrogatories — submission.

5. When only seven special questions

Headnotes by WEST, J.

*Note. — Competency of a party to deny a transaction with a person since deceased.*

The earlier cases upon this question are collected in a note to *Blount v. Blount*, 21 L.R.A. (N.S.) 755.

In *Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777, it was held to be proper for a witness to testify that he had had no com-

fairly covering the vital questions raised by the pleadings in a cause are requested, the court should submit them all, and not select three from the number to the exclusion of the others.

(July 6, 1912.)

**A** PPEAL by defendants from a judgment of the District Court for Reno County in plaintiff's favor in an action brought to set aside certain deeds, for partition of real estate, and for an accounting for personal property alleged to have been converted by the defendants. Reversed.

The facts are stated in the opinion.

Messrs. F. F. Prigg and C. M. Williams for appellants.

Mr. F. L. Martin for appellee.

West, J., delivered the opinion of the court:

The plaintiff brought this action to set aside three deeds to her three brothers on the ground that they were procured by the defendants acting together jointly by the exercise of undue influence on her mother at a time when she was not of sound mind, and when by reason of her physical and mental condition she was not capable of making deeds of conveyance and contracts, and did not know and realize the contents of the deeds or the purport thereof. She also prayed for partition, alleging that she was the owner of one fourth of the estate involved, and for rents and profits and an accounting for personal property alleged to have been converted by the defendants. Trial was had by jury, resulting in a verdict and judgment for plaintiff; findings being made that at the time the deeds were executed the grantor did not understand the nature and effect thereof, that she executed them by reason of undue influence exercised by David Putifer. Complaint is

made that the court erroneously permitted a jury to sit in the case, and improperly admitted certain testimony, and erroneously excluded certain testimony offered by the defendants; that error was committed in giving and refusing instructions and in refusing to grant a new trial.

It appears that the father of the parties died in 1895, leaving his widow, Lucy Putifer, and the parties hereto, living upon a small rented farm in Reno county, with very little personal property; that shortly after his death the plaintiff, having reached her majority, went out to work for herself, and after remaining around the neighborhood about one year went away, her whereabouts being unknown to her mother and brothers for a number of years. She never afterwards lived at home, and visited there but once during her mother's lifetime, when upon the occasion of her marriage she remained there about two weeks, never returning again except to attend the funeral of her mother. The three sons continued to live with their mother and remained unmarried until her death in November, 1906. They were all younger than the plaintiff, and at the death of their mother David was twenty-seven, Robert twenty-two, and Solomon's age was between that of his two brothers. Some time after the father's death, these boys rented a section of land, and put in a large crop, and continued to farm this and other land until about 1890, when they and their mother purchased a quarter section for \$750, borrowing \$550 of the money, and shortly afterwards purchased another quarter for \$1,600, going in debt for a portion of the purchase price. On this land they continued to reside until the mother's death. The title was taken in her name. The land appears to have been worked and managed in common, and treated as the joint property; the mutual earn-

munication with deceased, as such testimony was not concerning a transaction, but merely a denial that there was one.

To the same effect is *Kerr v. Kerr*, 85 Kan. 460, 116 Pac. 880.

And for the same reason it was held in *Fish v. Poorman*, 85 Kan. 237, 116 Pac. 898, that a witness may testify that he did not deliver a deed to the deceased person.

But in *United States Health & Acci. Ins. Co. v. Jolly*, — Ky. —, 118 S. W. 281, it was held to be improper for a witness to testify that he had made none of the statements contained in an application for insurance, after the death of the agent who took the application.

In *Re Winslow*, 146 Iowa, 67, 124 N. W. 895, Ann. Cas. 1912 B, 663, the court reversed its former decision in the same case, reported in — Iowa, —, 122 N. W. 971, and held that, in a contest over the probate of

a will which declared that a certain heir had received all that would in any manner be coming to him from the estate, it was improper to permit that heir to testify that he had received nothing from the estate.

And in *Tillman v. Rayner*, 125 App. Div. 309, 109 N. Y. Supp. 443, where the main controversy was whether a check found among the effects of deceased had been paid, it was held that plaintiff could not testify that he had never received any money on the check, or that he had never seen it until after testator's death.

While in *Knowles v. Waller*, 7 Penn. (Del.) 220, 78 Atl. 611, it was held that a judgment creditor, seeking to enforce the judgment against a decedent, was prohibited from testifying that the judgment had not been paid by decedent, but that he could testify that it had not been paid by the administrator.

R. L. S.

ings and accumulations going to pay mortgages for personal property, stock, and farm machinery accumulated upon the land. In the spring of 1906 the mother had pneumonia, from which she recovered, leaving a bronchial affection and cough, which continued. In November, 1906, about the first of the month she became sick and after about six days died. Some five days prior to her death she procured an attorney to come to her place and write two deeds and a bill of sale of the personal property, deeding to David 100 acres of land upon which the home and improvements were located, and to Robert and Solomon each an undivided one half of the remaining land, also a bill of sale of all the personal property to the three sons jointly. On the 8th of the following November this action was begun, resulting in a verdict for the plaintiff, which was by this court reversed (81 Kan. 905, 106 Pac. 1011), after which an amended answer was filed specifically denying incapacity and undue influence, and alleging that the property had been acquired through the joint earnings, industry, and perseverance of the defendants, and that the title was taken in the name of the mother for convenience only, and that the conveyances were made by her in order to place the title where it properly belonged.

The question of mental capacity was vital in the case, and it is contended by the defendants that the verdict and the findings of the jury are unsupported by the evidence and contrary thereto. But whatever our views might be concerning the weight and credibility of the evidence, there was sufficient conflict to remove from us the possibility of holding that the result was entirely unsupported.

As there was an allegation of conversion of personal property, it cannot be said that the court erred in granting plaintiff's request for a jury. Complaint is made about the form of the hypothetical question propounded by the plaintiff to some of her witnesses, but we are unable to find that it contained elements not indicated by the evidence in the case, so as to render it incompetent.

Two physicians were asked to give their opinions as to the effect the supposed sickness, indicated by the testimony, would have upon the mind of the patient, and they answered that her mind would be cloudy; one that she would not be herself at all, and the other that it would surely disturb the mind very materially. The further question was then asked whether, considering the conditions stated in the hypothetical question, she would be competent to make deeds of conveyance and dispose of her property and transact other important

business affairs of life, to which one of the physicians answered: "In my judgment she would not be." The other was asked whether the patient would be competent to make deeds of conveyance and bills of sale conveying and disposing of all of her property, to which he answered: "I would think not." The defendants insist that these questions invaded the province of the jury and called upon the witnesses to decide the very question at issue; and that, while it was proper to take their opinions as to the effect the alleged sickness would have upon the mental capacity of the patient, their opinions as to her capacity to make the conveyances in question was clearly incompetent. Numerous authorities are cited which hold that it is not competent for witnesses in cases of this kind to give their opinions as to the mental capacity of the person in question to execute instruments in controversy, for the reason that the mental capacity of the maker of a deed is a question of fact to be passed upon by the jury, while the legal effect of an instrument is a question of law for the court, and that no witness should be permitted to give an opinion which would have the effect, if followed by the jury, of determining matters of law as well as matters of fact. When, however, a witness has been permitted to give his opinion concerning the effect of certain mental and physical conditions upon the mind of the patient, and has stated that it would be impaired, it would seem a natural thing to then inquire whether, in his opinion, it would be impaired sufficiently to incapacitate the person for making the conveyances in question, because what the jury is supposed to need by way of expert opinion or information is not only the fact whether the mind was impaired, but, if so, the degree of impairment also as applied to the case in hand. In fact, the very purposes of expert testimony is to advise the jury concerning a matter which may not be determined by the concrete facts of the case or from such facts in connection with their own knowledge in common with the rest of mankind. In condemnation cases experts are called to give their opinions as to the value of the land; and, while they are not permitted to advise the jury what sum they should award by way of damages, they are always permitted to advise the jury what they believe the land was worth, before and after the condemnation, which is exactly the same thing in effect, notwithstanding all of the refinements and attempted distinctions found in the reported cases.

In § 1921 of volume 3 of Wigmore on Evidence, we find the following: "Another erroneous test, prevalent in some regions, and nearly allied to the preceding one, if

not merely another form of it, is that an opinion can never be received when it touches 'the very issue before the jury.' . . . The fallacy of this doctrine is, of course, that it is both too narrow and too broad, measured by the principle. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. . . . When all is said, it remains simply one of those impossible and misconceived utterances which lack any justification in principle." In § 1958, the author, after observing that testamentary capacity is a matter of law, depending somewhat upon the nature of the business, and that questions should be framed so as to require the expert to state the measure of the testator's capacity in his own language, says that a difficulty arises; that it is desirable to obtain a compact statement of the general mental condition, and that it is a better indication for the witness to say whether he would or would not trust him to buy property intelligently, than to say he once did this or that wise or foolish act; that the general statement often conveys a more accurate understanding than a rehearsal of many single acts. "Nevertheless, in distinguishing between the proper and improper forms of statement, an easy opportunity is offered for judicial quibbling. In the dilemma thus presented, the solution seems often to depend merely on whether the court is disposed to stick at trifles and the forms of things, or to follow practical good sense." But near the close of the section are these words: "By all courts a mere abstract statement that the person was or was not 'capable' of making a will or a contract or a deed seems to be held improper; but there is a great variety of ruling upon other forms of statement." The essential difficulty with the question is that it involves not only an opinion as to mental capacity, but the views of the witness as to what kind and degree of mentality is necessary to make an instrument valid or binding; and this must be a question of law, and not one of fact. The objection to these questions should have been sustained.

Complaint is made that the court refused to permit each of the defendants to answer whether at any time he had asked or requested his mother to make the deed to him. An objection to this question was sustained because calling for a transaction and communication with a deceased person. We think the very opposite was the purpose of the question, that is, to show that there had been no transaction or communication of the kind—and that the testimony was

competent. In fact, practically this identical question was settled in *Murphy v. Hindman*, 58 Kan. 184, 186, 48 Pac. 850, 851, where it was said: "The testimony given was not with respect to a transaction, but was simply a denial that a transaction was had." (p. 186.) See also *Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777; *Kerr v. Kerr*, 85 Kan. 460, 461, 116 Pac. 880. This evidence was material, and its exclusion was prejudicial error.

Complaint is made of the eighth instruction, in which the jury were charged that, in determining whether Lucy A. Putifer had sufficient mental capacity to execute the deeds in controversy or whether she was acting as the result of undue influence, they had a right to take into consideration her physical and mental condition, her relations to her children and the grantees in the deeds, "the nature of the transaction of executing said deeds, the reasonableness or unreasonableness of such deeds, and every other fact and circumstance in evidence touching upon the question." In *Blodgett v. Yocum*, 80 Kan. 644, 646, 103 Pac. 128, 129, a somewhat similar instruction had been given, and this was held error. It was said: "This instruction was erroneous. It practically told the jury that, if they regarded the disposition which the deceased made of her property as unreasonable, they might infer that at the time she executed the deeds she was of unsound mind or unduly influenced, or both. . . . A person of sound mind who is not unduly influenced may make such disposition of his property by deed or will as he desires, without regard to its fairness or unfairness. . . . The instruction, however, authorized the jury to consider whether they would have made the same disposition of their property under the same circumstances; and, if they concluded that the disposition she made was unfair or unreasonable, it authorized them to infer from that fact alone that she was unduly influenced when she executed the deeds. This is not the law." While the instruction given was not as broad as the one in the *Blodgett* Case, it did, nevertheless, without defining reasonableness, authorize the jury to decide for themselves the reasonableness of the contract, and use their own judgment thereon as a basis for setting it aside. It will not do to say that a person of sound mind may make any sort of conveyance he desires, but that, if he makes a conveyance which appears to the jury unreasonable, they may infer therefrom that he was of unsound mind or unduly influenced. Such a rule would put wills and conveyances not within the control of the person who had accumulated the property, but

within the control of strangers, whose experiences and ideas might differ widely from those of the person who had exercised the *jus disponendi*. This action (Coblentz v. Putifer, 81 Kan. 905, 106 Pac. 1011) seems to have been reversed for a similar error on the authority of Blodgett v. Yocum, supra.

While the court submitted to the jury the three questions already referred to, it refused to submit interrogatories 5, 6, and 7, which inquired whether the property conveyed was accumulated by the labor and management of the defendants, whether the plaintiff contributed anything towards procuring the same, and whether a portion of the labor and industry of the defendants which went to procure the property was furnished after they arrived at majority. We do not see why these questions were refused. They were certainly as competent as those submitted, and while such matters are largely within the discretion of the trial court, which discretion is often sought to be abused, we think the defendants may rightfully complain of the refusal in this instance.

Other alleged errors are urged which do not require comment, but, for those already indicated, the judgment is reversed, and the cause remanded for a new trial.

#### UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHARLES MUNSON, Appt.,

v.

ROBERT W. McCLAUGHRY, Warden of  
the United States Penitentiary.

(— C. C. A. —, 198 Fed. 72.)

#### Criminal law — sentence — burglary and larceny.

1. The sentence of a defendant, convicted on two separate counts of an indictment, under §§ 5478 and 5456, or 5475, Revised Statutes (U. S. Comp. Stat. 1901, pp. 3696, 3683, 3694), of burglary of a postoffice building with intent to commit larceny, and of larceny committed at the same time and as a part of a continuous criminal act, to separate punishments for the burglary and the larceny, is *ultra vires* and void as to the sentence for the larceny, and after

Headnotes by SANBORN, C.

Note. — The question whether burglary and larceny committed as part of the same transaction constitute separate offenses, punishable as such, is considered at pp. 727 et seq. of the note to Hughes v. Com. 31 L.R.A. (N.S.) 693, covering the general subject of conviction of several offenses growing out of the same facts.  
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the defendant has satisfied the sentence for the burglary, he is entitled to his release on habeas corpus.

#### Habeas corpus — excessive judgment.

2. The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction; and a prisoner held under such excess is entitled to his release by writ of habeas corpus.

(July 15, 1912.)

**A**PPEAL by petitioner from an order of the District Court of the United States for the District of Kansas, denying his petition for a writ of habeas corpus to secure his release from the penitentiary, to which he had been sentenced for the commission of burglary and larceny. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Hook, Circuit Judges, and Willard, District Judge.

Mr. Turner William Bell for appellant.

Messrs. H. J. Bone and McCabe Moore for appellee.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is an appeal from an order which denied the petition of Charles Munson for a writ of habeas corpus and a release from the United States Penitentiary at Leavenworth, Kansas. The petitioner was indicted, convicted, and sentenced under one count of an indictment to a fine and imprisonment for five years under § 5478 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3696), for forcibly breaking into a building used in part as a postoffice, with intent to commit larceny in the part of the building so used, and under another count of the same indictment to imprisonment for one year under § 5456 or 5475, Revised Statutes (U. S. Comp. Stat. 1901, pp. 3683, 3694), to begin after the expiration of the sentence for five years, for stealing postage stamps and other property belonging to the Postoffice Department of the United States from the same building at the same time that he committed the offense of breaking with intent to commit larceny, charged in the first count of the indictment. He paid his fine and served his term of five years under the first count, and then presented this petition for a writ of habeas corpus and for his release from the penitentiary, on the ground that where one is convicted of burglary with intent to commit larceny, and of larceny committed at the same time and place, the court is without jurisdiction, after sentencing for the former crime, to impose a farther and separate sentence for the latter.

There is no doubt that the defendant might have been convicted and sentenced for the offense charged in the first count of this indictment without a conviction or sentence for the offense charged in the second count, or for the offense charged in the second count without a conviction or sentence for the offense charged in the first count; and § 1024 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 720), provides that where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, which may be properly joined, the whole may be joined in one indictment in separate counts. Counsel for the United States argue that the act of breaking, or attempting to break into, a building used as a postoffice, with intent to commit larceny therein, and the act of stealing stamps or property of the United States, are separate offenses, as they undoubtedly are when they are not parts of the same act or transaction, and from this premise they deduce the conclusion that, although they are parts of the same act or transaction, they still remain separate offenses, for which the perpetrator may be separately indicted, convicted, and punished. In support of this position they call attention to these authorities: *Ex parte Peters* (C. C.) 2 McCrary, 403, 12 Fed. 461; *United States v. Williams* (D. C.) 57 Fed. 201; *United States v. Yennie* (D. C.) 74 Fed. 221; *Sorenson v. United States*, 94 C. C. A. 181, 168 Fed. 785; *Rapalje, Larceny*, § 351, p. 412; *State v. Barker*, 64 Mo. 282; *State v. Ridley*, 48 Iowa, 370; *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340; *Speers v. Com.* 17 Gratt. 570; *Dodd v. State*, 33 Ark. 517; *State v. Warner*, 14 Ind. 572; *People v. Devlin*, 143 Cal. 128, 76 Pac. 900; *State v. Ingalls*, 98 Iowa, 728, 68 N. W. 445; *Gordon v. State*, 71 Ala. 315; *Territory v. Willard*, 8 Mont. 328, 21 Pac. 301; *State v. Martin*, 76 Mo. 337; *Howard v. State*, 8 Tex. App. 447; *Smith v. State*, 22 Tex. App. 350, 3 S. W. 238; *Rust v. State*, 31 Tex. Crim. Rep. 75, 19 S. W. 763.

A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post-office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act. It seems to be unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act

into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break with the criminal intent, and another for a larceny with the same intent, or such as one for the attempt to break, a second for the breaking, a third for the entering, a fourth for the taking of stamps, a fifth for the taking of other property, a sixth for the conversion of the property, and a seventh for carrying it away, all with the same single criminal intent. And there is evidently no limit to the number of offenses into which criminal transaction inspired by a single criminal intent may be divided, if this rule of division and punishment is once firmly established. The theory that such an act and intent could be punished as two separate offenses seems to have taken its rise in the Federal courts in the decision of Circuit Judge McCrary in *Ex parte Peters* (C. C.) 2 McCrary, 403, 12 Fed. 461. At that time the supreme court of Connecticut had held in *Wilson v. State*, 24 Conn. 57, that a conviction of larceny at the same time that a burglary was committed constituted no defense to a charge of the burglary. Chief Justice Waite, however, in an able opinion which has commended itself to the judgment of many courts, dissented from this conclusion and declared that "whenever, in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations, founded upon the same intent, cannot be maintained."

Judge McCrary, in his opinion in the *Peters Case*, said that the reasoning of Chief Justice Waite was so strong that if it were a question of first impression he would be inclined to adopt his opinion, but that he found the law very well settled to the contrary; and he cited Bishop's *Criminal Law*, § 1062, *Josslyn v. Com.* 6 Met. 236, *State v. Ridley*, 48 Iowa, 370, and *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340. A careful examination of these authorities discloses the fact that they fail to support his statement that they settle the question in favor of his decision.

In *Josslyn v. Com.* the supreme judicial court of Massachusetts held only: "That where the breaking and entering and actual stealing are charged in one count, there is but one offense charged, and there can be but one penalty adjudged. But where they are averred in distinct counts, as distinct substantive offenses, not alleged to have been committed at the same time and as one continued act, if in other respects they are such offenses as may be joined in the

same indictment, the defendant may be convicted on both and a judgment rendered founded on both."

Bishop, at §§ 1062, 1063, and 1064 of his work on Criminal Law, cites authorities on each side of this question, and gives the opinion that "to make a burglary thus double and punish it twice, first as burglary and secondly as larceny, hardly accords with the humane policy of our law."

It will be noticed that the decision in *Josslyn's Case* was that the burglary and larceny might be pleaded as separate offenses where they were "not alleged to have been committed at the same time and as one continued act," which was in effect to hold that, if they were pleaded or proved to have been "committed at the same time and as one continued act," they could not be punished as separable offenses. And that was, at the time Judge McCrary rendered his opinion, and ever since has been, the established rule in Massachusetts. In *Kite v. Com.* decided in 1846, subsequent to *Josslyn's Case*, and more than thirty years before the decision in *Peters Case*, 11 Met. 581, at 583, the supreme judicial court of Massachusetts held that "if the larceny charged in the second count appears, in proof, to have been committed at the time of the breaking and entering, then it is merged, and the conviction is properly for burglary, and the sentence must be accordingly."

Judge McCrary evidently overlooked the clear distinction that had been made by these Massachusetts decisions between the offenses of burglary and larceny when they were distinct and separate in time, place, and act, and burglary and larceny that were parts of the same continuous criminal act, and upon this mistake was founded the decision which he rendered against his own better judgment in *Ex parte Peters*.

The opinions in the other cases, *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340, and *State v. Ridley*, 48 Iowa, 370, which Judge McCrary cited in the *Peters Case*, did not treat or rule the question there and here at issue, and the fact was that the opinion of the courts of Massachusetts was contrary to that which Judge McCrary announced, and in accord with his own good judgment.

Turning, now, to the other decisions in the courts of the United States, the question here under consideration was not presented or considered in *United States v. Williams* (D. C.) 57 Fed. 201. In *United States v. Yennie* (D. C.) 74 Fed. 221, the breaking into the building with intent to commit larceny and the larceny of the postage stamps were charged in the same count of the indictment, and the court held that, 42 L.R.A. (N.S.)

although they were separate offenses, the count was good. The question whether or not the defendants could be punished for both offenses, when they proved to be parts of a single continuing act, inspired by a single criminal intent, was neither considered nor determined. This is also true of the decision in *Sorenson v. United States*, 94 C. C. A. 181, 168 Fed. 785, and the result is that, aside from the opinion under review, no authority in the Federal courts, in support of the proposition of counsel for the government, except the opinion of Judge McCrary in the *Peters Case*, rendered against his own better judgment, and under an evident misapprehension of the state of the decisions, has been called to our attention.

The authorities cited by counsel for the government from the state courts, to the effect that burglary and larceny committed as parts of the same transaction are separate offenses and may be separately punished, have been carefully read. They are not, however, very persuasive, because some of them are founded on the *Peters Case*, some on special statutes of the states in which they were respectively rendered, and some on the argument that burglary and larceny committed as parts of a continuous act may be inspired by different criminal intents, the burglary by the intent to commit some felony other than larceny, such as rape, arson, or murder, so that the intent to commit larceny may not arise until after the breaking and entering with an intent to commit some other felony have been completed (*People v. Devlin*, 143 Cal. 128, 129, 76 Pac. 900),—an argument which is idle in the case in hand, because the same single intent to commit larceny is an indispensable element of each of the offenses of which the petitioner was convicted in this case, under §§ 5478, 5456, and 5475, Revised Statutes.

On the other hand, it seems to be the established rule that where burglary with an intent to steal and stealing at the same time are charged in a single count, and there is a general verdict of guilty, the larceny is merged in the burglary, and a sentence for the burglary only can be inflicted, although separate penalties are prescribed by the statutes for burglary and larceny. *State v. McClung*, 35 W. Va. 280, 284, 13 S. E. 654; *Com. v. Hope*, 22 Pick. 1; *Kite v. Com.* 11 Met. 581; *Roberts v. State*, 55 Miss. 421, 424.

The highest judicial tribunals of Massachusetts, Kentucky, Pennsylvania, and Georgia have decided that burglary with intent to commit larceny and larceny at the same time and as a part of the same transaction may not be lawfully punished as separate



offenses, because they are parts of a single continuous act, inspired by a single criminal intent. *Kite v. Com.* 11 Met. 581, 583; *Triplett v. Com.* 84 Ky. 193, 1 S. W. 84, 85; *Yarborough v. State*, 86 Ga. 396, 12 S. E. 650; *Com. v. Birdsall*, 69 Pa. 482, 485, 8 Am. Rep. 283.

The United States circuit court of appeals for the ninth circuit, after a thoughtful review of the authorities, has decided that, where one is indicted in separate counts and convicted of burglary of a postoffice with intent to commit a larceny, under § 5478, and of larceny at the same time, as a part of the same transaction, under § 5456 or 5475, he can be lawfully punished for the burglary only. *Halligan v. Wayne*, 102 C. C. A. 410, 179 Fed. 112. And because in such a case the burglary and larceny are parts of a single continuous act, inspired by the same single criminal intent, provable by the same evidence, because the arbitrary subdivision of such a single criminal act, inspired by the same criminal intent, into numerous offenses, is unauthorized and oppressive, because, after conviction of such a burglary, the subsequent trial for such a larceny in reality puts the defendant twice in jeopardy for the same criminal act and intent, and because this decision of the court of the Ninth circuit is sustained by the eminent authority of its judgment and by the stronger and better reasons, its conclusion is followed and adopted by this court.

The result is that the power of the United States district court to inflict punishment upon the petitioner was exhausted when it had sentenced him for the burglary with intent to commit the larceny, and its sentence for the larceny was in excess of its jurisdiction and therefore void.

The excess of a sentence beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction; and a prisoner held under such excess alone is entitled to his release by writ of habeas corpus. *Ex parte Lange*, 18 Wall. 163, 176, 178, 21 L. ed. 872, 878, 879; *Michigan Trust Co. v. Ferry*, 99 C. C. A. 221, 231, 175 Fed. 667, 677; *Mackey v. Miller*, 62 C. C. A. 139, 141, 126 Fed. 161, 163; *Ex parte Peeke* (D. C.) 44 Fed. 1016. As the petitioner had satisfied his sentence for the burglary with intent to commit the larceny, and was held only under a void sentence for the larceny committed at the same time and as a part of the same continuous criminal act, inspired by the same criminal intent as was the burglary, he was entitled to his discharge.

The order denying his petition for a writ of habeas corpus and for his release from the penitentiary must therefore be reversed, 42 L.R.A. (N.S.)

and the case must be remanded to the court below, with instructions to release the petitioner.

### ILLINOIS SUPREME COURT.

HARRY V. BAILEY, Admr., etc., of Alexander McCoy, Deceased, Plff. in Err.,

v.

ARCHIE L. ROBISON et al.

(244 Ill. 16, 91 N. E. 98.)

#### Evidence — transactions with decedent — administrator.

1. A statute forbidding evidence of transactions with a person since deceased does not operate to prevent his administrator, in a suit on notes held by decedent against persons still living, from testifying as to his knowledge of decedent's accounts during his lifetime, since the statutory disqualification is only against the persons suing or defending adversely to the administrator.

#### Judgment — binding effect — failure to question ruling.

2. Failure of the successful party to question by cross errors on appeal to an intermediate appellate court the correctness of a rule striking out testimony because of the incompetency of the witness, when his opponent succeeds in reversing the judgment because the admission of such testimony was prejudicial error, notwithstanding it was stricken out, does not estop him from questioning in a higher appellate court the correctness of a ruling holding the witness incompetent on a subsequent trial of the same cause.

(Vickers and Hand, JJ., dissent.)

(February 16, 1910.)

**E**RROR to the Appellate Court, Third District, to review a judgment affirming a judgment of the Circuit Court for Tazewell County, in defendants' favor in an action brought to recover the amounts alleged to be due on certain promissory notes. Reversed.

Statement by Farmer, Ch. J.:

This was an action of assumpsit brought by plaintiff in error, as administrator of the

*Note. — May statutory rule excluding testimony of transaction with deceased person by party or person in interest be invoked against estate of decedent or person claiming under the estate.*

This note does not cover questions of construction which are common to cases where the witness is offered against the estate, and to those where the witness is offered in favor of the estate.

estate of Alexander McCoy, deceased, on two promissory notes. Each of the said notes was dated June 29, 1898, and each was for \$1,000, payable one year after date, with interest at 6 per cent per annum from date. They were both executed by defendants in error and one of them was made payable to plaintiff's intestate. The other was payable to the order of Harry V. Bailey, and was by him indorsed to Alexander McCoy. Both of said notes were found among the papers of Alexander McCoy after his death, in 1902, and bore no indorsements, except, that the interest for the years 1899, 1900, and 1901 was indorsed paid on each of them. Defendants in error admitted liability on the notes in the sum of \$624.25 and pleaded a tender of the same, and, upon its being re-

fused, it was paid into court subject to the order of plaintiff in error. As to the balance of said notes defendants in error pleaded set-off and payment, upon which pleas issue was joined. On the last trial in the circuit court there was a verdict and judgment for defendants in error, and the plaintiff in error appealed to the appellate court. That court affirmed the judgment of the circuit court, and this writ of error is sued out to review the judgment of the appellate court. A full statement of all the facts relating to the controversy will be found in the opinions of the appellate court and this court hereafter referred to.

Messrs. W. R. Curran and William A. Potts for plaintiff in error.

As to the competency of assignor of claim in suit to testify as to transactions with or statements by deceased, where not expressly excluded by the terms of the statute, see note appended to *Glendennin v. Clancy*, post, 315.

As to competency of interested witness to testify to transactions with deceased in which he did not participate, see notes to *Mollison v. Rittgers*, 29 L.R.A. (N.S.) 79, and *Griswold v. Hart*, post, 320.

#### When statute excludes either party to suit.

The question whether an interested person or party to a suit is a competent witness in behalf of an estate, the representative thereof or persons claiming thereunder, as to transactions or conversations with deceased in his lifetime which are relevant to the issue in a proceeding to which the estate, or person representing it or claiming thereunder, is a party, depends almost entirely upon the language of the statute relating to the question. Subject to some exceptions hereafter referred to, if the statute in express terms disqualifies as witnesses either party to a suit involving a transaction between persons one of whom has since deceased, the disqualification includes witnesses in behalf of the personal representative of the decedent as well as witnesses against him.

Thus, while a provision that "neither party shall be allowed to testify against the other, as to any transaction with or statement by any deceased person whose estate is interested in the result of the suit," does not exclude such testimony in favor of the estate by the adverse party (*Dudley v. Steele*, 71 Ala. 423), it does render the personal representative of the decedent incompetent as a witness in behalf of the estate as against the objection of the adverse party (*Adler v. Pin*, 80 Ala. 351, action of trover against administrator).

And, in *McDonald v. Harris*, 131 Ala. 359, 31 So. 548, it was held that heirs were incompetent to testify in favor of the estate as to a transaction with decedent, in

an action by a claimant against the estate, under Ala. Code, § 1794, providing that no person having a pecuniary interest in the result shall be allowed to testify against the party to whom his interest is opposed as to any transaction with or statement by a deceased person whose estate is interested in the result of the suit. The court expressly disapproved of the position taken in *Austin v. Bean*, 101 Ala. 137, 16 So. 41, that the exception as to incompetency is for the protection only of the estate of the deceased and those claiming under him; and said that that position was opposed not only to the terms of the statute, but to its rationale.

Notwithstanding this statute, however, an administrator may testify in behalf of the widow and children of the deceased in an action by them upon a note belonging to the estate, but regularly set apart for them in accordance with the statute, since he has no pecuniary interest in the suit. *Dicus v. Childress*, 128 Ala. 617, 29 So. 617.

A statute providing that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, unless called to testify thereto by the opposite party or required to testify thereto by the court, disqualifies as a witness in his own behalf an administrator who is a plaintiff in a suit upon a contract between deceased and the defendant, where his testimony relates to a conversation had between the intestate in his lifetime and the defendant, in which the terms of the contract relied upon had been by them stated. *Stringfellow v. Montgomery*, 57 Tex. 349. And the widow of a decedent, although not technically a party to the suit, is disqualified from testifying in favor of the administrator, since she is so interested in the result as to come within the reason and spirit of the statute. *Anglin v. Barlow*, — Tex. Civ. App. —, 45 S. W. 827. But in proceedings to probate a will, devisees or legatees are not disqualified as witnesses in support of the will. *Bradshaw*

Messrs. George C. Rider and Prettyman, Velde, & Prettyman, for defendants in error:

Where there has been a former appeal in the same case, no error can be assigned on the second appeal as to matters which were in the record on the first appeal and as to which there was no assignment nor cross assignment of error on the first appeal.

Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861; Chicago, R. I. & P. R. Co. v. Steckman, 125 Ill. App. 299; Henning v. Eldridge, 146 Ill. 305, 33 N. E. 754; Washburn & M. Mfg. Co. v. Chicago Galvanized Wire Fence Co. 119 Ill. 30, 6 N. E. 191; Behmyer v. Odell, 45 Ill. App. 616; Leeds v. Townsend, 124 Ill. App. 582; Davis v. Munie, 140 Ill. App. 171; Penn Plate Glass Co. v. James H. Rice

Co. 216 Ill. 567, 75 N. E. 246; Kantzler v. Bensinger, 214 Ill. 589, 73 N. E. 874; Columbia Theatre Amusement Co. v. Adsit, 211 Ill. 122, 71 N. E. 868; Suburban R. Co. v. Chicago, 204 Ill. 306, 68 N. E. 422.

The plaintiff, as administrator, is in the eyes of the law an interested witness.

Jones v. Abbott, 235 Ill. 220, 85 N. E. 279; Hackett v. Chicago C. R. Co. 235 Ill. 116, 85 N. E. 320; Hecker v. Illinois C. R. Co. 231 Ill. 574, 85 N. E. 456; Reinhardt v. Chicago Junction R. Co. 235 Ill. 576, 85 N. E. 605; Hayward v. Sencenbaugh, 235 Ill. 580, 85 N. E. 939.

Farmer, Ch. J., delivered the opinion of the court:

This case has been four times before the

v. Roberts, — Tex. Civ. App. —, 52 S. W. 574.

This statute also contains a provision that it shall extend to and include all actions by or against the heirs or legal representatives of the decedent, arising out of any transaction with such decedent. (See *Rascoe v. Walker-Smith Co.* 98 Tex. 565, 86 S. W. 728.) Under this provision heirs are incompetent as witnesses in their own behalf when parties to a suit involving the title to land of their ancestors. *Barrett v. Eastham Bros.* — Tex. Civ. App. —, 86 S. W. 1057; *Wolf v. King*, 49 Tex. Civ. App. 41, 107 S. W. 617.

A person interested in the issue between two parties to a litigation one of whom is the executor of an estate, although not a party to the proceeding, is disqualified from testifying as a witness in behalf of the estate, by the terms of a statute that it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with or admission of a deceased person. *Pitzl v. Winter*, 96 Minn. 499, 5 L.R.A. (N.S.) 1009, 105 N. W. 673.

A statutory provision disqualifying a party to any proceeding when the adverse party claims or opposes as heir, legatee, or devisee of any deceased person, as to any statements by such deceased person equally within the knowledge of the witness and the deceased, unless the witness is called by the adverse party, disqualifies as witnesses children of the testator who are devisees, and legatees under his will, from testifying as to conversations with the testator before and after the execution of the will, tending to show that he did not intend to provide therein for an omitted child. *Re Atwood*, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036.

Under a statutory provision that in all suits where an executor, administrator, or guardian is a party in a case where judgment may be rendered either for or against the estate represented by such executor, administrator, or guardian, neither party shall be allowed to testify as a witness, unless required by the opposite party or by 42 L.R.A. (N.S.)

the court trying the cause, an executor is incompetent as a witness in his own behalf in an action against him upon a contract made with his testator, where the judgment, if recovered, would go against the testator's estate. *Thom v. Wilson*, 24 Ind. 323. Neither may an administrator testify in behalf of his estate in an action against him in his official capacity to recover on a contract made with his intestate. *Denbo v. Wright*, 53 Ind. 226.

And in a suit by the administrator of one estate against another estate, the administrator of the latter estate is disqualified as a witness in its behalf. *Markel v. Spitler*, 28 Ind. 488. But the widow of a decedent may testify in behalf of the estate in an action against it as to conversations or transactions in her presence, between the plaintiff and her deceased husband, then the subject of litigation. *Denbo v. Wright*, supra.

Statute excluding adverse party or party with adverse interest.

On the other hand, where the statute expressly disqualifies as witnesses parties to a transaction involved in suit one of whom has since deceased, where the interest of the witness is adverse to the interest of the decedent, a witness is competent to give evidence relating to a transaction with the decedent, where a judgment or allowance to the interest of the estate, its personal representative, or persons claiming thereunder, but is incompetent to testify against the estate.

Thus a statutory provision that in suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against the estate, does not disqualify as a witness in favor of the estate the widow

appellate court. The three published opinions of that court will be found in *Robison v. Bailey*, 113 Ill. App. 123, *Bailey v. Robison*, 123 Ill. App. 611, and *Robison v. Bailey*, 137 Ill. App. 470. This is its second appearance in this court. *Bailey v. Robison*, 233 Ill. 614, 84 N. E. 660. The last trial resulted in a verdict and judgment for defendants in error, which have been affirmed by the appellate court, and the record is now before us for review on a writ of error to the appellate court.

Plaintiff in error has argued at considerable length the facts and the weight of the evidence; but, as these questions are not

subject to review by this court, they will not be considered.

The most important of the errors of law assigned is the ruling of the circuit court, and its approval by the appellate court, in holding that plaintiff in error was an incompetent witness. There was evidence that the defendant in error, Archie L. Robison gave plaintiff's intestate a check for \$1,500 December 28, 1901, which was after the maturity of the notes sued on, and that this check was paid by the bank to Alexander McCoy in his lifetime. Defendants in error contended that this was a payment on the notes in controversy. The deceased kept

of the decedent, although she is a party to the issue and of record. *Cincinnati, H. & I. R. Co. v. Cregor*, 150 Ind. 625, 50 N. E. 760. And where the interest and testimony of an heir are not adverse to the estate, he is not disqualified as a witness or as an affiant to an affidavit in support of a motion to appoint a receiver to take charge of property claimed to belong to the estate. *Salée v. Soules*, 168 Ind. 624, 81 N. E. 587.

Under a statute providing that in suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record whose interest is adverse to such estate shall not be a competent witness as to such matters against the estate, the term "party" means a party to the issue, and not merely a party to the record; hence, a person is not incompetent as a witness simply because he may be a party to the record. To disqualify him, it must also appear that he has some interest in the result of the suit, in common with the party calling him (*Upton v. Adams*, 27 Ind. 432; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726; *Sloan v. Sloan*, 21 Ind. App. 315, 52 N. E. 413). And there is nothing in the language of this statute disqualifying, as witnesses in their own behalf, executors or administrators of one estate where suing the executors or administrators of another (*Sloan v. Sloan*, supra; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109, 63 N. E. 255).

A statute disqualifying as a witness any surviving or remaining party to a transaction or contract, or any other person whose interest shall be adverse to the right of a deceased or lunatic party, when any person or thing to a contract in action is dead or has been adjudged a lunatic and his right thereto or therein has passed either by his own act or the act of the law to a party on the record, who represents his interest in the subject in controversy, excludes only witnesses whose interest is adverse to the rights of the decedent. *Brose's Estate*, 155 Pa. 619, 26 Atl. 766.

Under this statute, in the distribution of 42 L.R.A. (N.S.)

the estate of a deceased person where a claim is presented in the ordinary way against such estate, the heirs, legatees, and other interested parties are competent to testify in favor of such estate. The estate of the deceased person is the thing or contract in action, and under the express terms of the statute, witnesses adverse to such estate cannot testify to any matter occurring before the death of the decedent, while those in support of the estate may be heard. *Crosetti's Estate*, 211 Pa. 490, 60 Atl. 1081. Only witnesses are incompetent who are either the other party to a transaction or contract in action, or have an interest adverse to the interest of the decedent. *Miller v. Miller*, 1 Pa. Dist. R. 95. Hence, an executor may testify in behalf of the estate in an action against it upon a claim contracted with the decedent in his lifetime. *Borkey's Estate*, 2 Woodw. Dec. 163. So a trustee in a deed of trust may testify in support of the deed although the grantor is dead, since his interest is neither adverse nor hostile to the grantor or the *cestui qui trust*. *Kraft v. Neuffer*, 202 Pa. 558, 52 Atl. 100. But in a suit by an heir to set aside a deed of his ancestor on the ground of want of mental capacity, the heir is not a competent witness in his own behalf. *King v. Humphreys*, 138 Pa. 310, 22 Atl. 19; *Crothers v. Crothers*, 149 Pa. 201, 24 Atl. 190. And on a bill in equity to set aside a conveyance of property by a father of the parties in his lifetime to the defendant, neither the plaintiff nor her husband is a competent witness. *Campbell v. Brown*, 183 Pa. 112, 38 Atl. 516. In actions between two different estates an interested party is disqualified from testifying in his own favor. *Fisher's Estate*, 7 Pa. Dist. R. 116.

In a controversy between the executors of a deceased husband and the administrator of his deceased wife, involving the ownership of property, a daughter who is interested in sustaining the administrator of the mother against the executors of the father is not a competent witness in favor of the former. *Crosetti's Estate*, supra.

Statute excluding witness when adverse party is personal representative, etc.

The statutory provision that no party to any civil action, suit, or proceeding, or per-

his notes in the Farmers' National Bank in the city of Pekin, and plaintiff in error, who was the son-in-law of the deceased, was offered as a witness in his own behalf, and was sought to be examined as to his knowledge of the contents of the package in which deceased kept his notes during his lifetime. The object, as appears from the questions asked, was to prove that on the day the \$1,500 check was given to the deceased he had other notes of defendants in error besides the two sued on and the one for \$1,500 paid to plaintiff in error after the death of Alexander McCoy. Objection was made by counsel for defendants in error to

his testifying, on the ground that he was an incompetent witness. The incompetency alleged was that he was the administrator and his wife was sole heir of the deceased. The objection was sustained and the witness was not permitted to testify to anything that occurred prior to the death of Alexander McCoy. This ruling of the court was one of the errors assigned in the appellate court.

It appears plaintiff in error was called as a witness by defendants in error on the first trial in the circuit court to identify certain transactions between them and the deceased, and to prove the payment by them

sons directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf when an adverse party sues or defends as a trustee or conservator of any idiot, lunatic, or deceased person, or as executor, administrator, heir, legatee, or devisee of any deceased person, does not disqualify a witness, although an heir of the decedent, from testifying in behalf of the estate in a case where the adverse party against whom the witness is called sues in no representative capacity, but in his own right, and the witness is called for, not against, a party defending in the capacity of administrator. *Freeman v. Freeman*, 62 Ill. 189. So the administrator of a deceased person is competent to testify in his own behalf, in an action for damages for the wrongful death of his intestate. *Illinois C. R. Co. v. Reardon*, 157 Ill. 372, 41 N. E. 871; *Lingreen v. Illinois C. R. Co.* 61 Ill. App. 174. And a husband may testify in behalf of the administrator of his deceased wife in proceedings relative to her private property, as to her purpose or intention in executing certain deeds. *Ledford v. Weber*, 7 Ill. App. 87. But persons who were present when a will was executed and attested are disqualified to testify to the facts of such execution and attestation, where they are parties to the proceedings for the probate of the will and beneficiaries thereunder as well as trustees to carry into effect its provisions, the opposite parties being heirs at law of the deceased. *Re Tobin*, 196 Ill. 484, 63 N. E. 1021. And on a bill in chancery to contest a will, no interested party may testify either for or against the will. *Volbracht v. White*, 197 Ill. 298, 64 N. E. 324. Nor may an executor, without reference to whether he is made a party complainant or defendant in a proceeding to set aside the probate of a will, testify in favor of the validity of the will. *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124. So, where the complainants sue for an estate as the heirs of one person and the defendants defend as the heirs of another, none of the parties are competent to testify in their own behalf. *Gillam v. Wright*, 246 Ill. 398, 138 Am. St. Rep. 243, 92 N. E. 906. But in an action by the administrator of one estate against the administrator of another, a party to the suit whose interest in the subject-matter of the litigation is equally balanced may testify for the opposite party. *Remann v. Buckmaster*, 85 Ill. 403.

other, a party to the suit whose interest in the subject-matter of the litigation is equally balanced may testify for the opposite party. *Remann v. Buckmaster*, 85 Ill. 403.

The disqualifying provisions of the Colorado statute are similar to those of the Illinois statute, indeed are adopted from it; and following the Illinois decisions, the Colorado court holds that no party interested therein is competent to testify in a proceeding to probate a will. *Re Shapter*, 35 Colo. 578, 6 L.R.A. (N.S.) 575, 117 Am. St. Rep. 216, 85 Pac. 688.

An administrator is not disqualified from testifying in his own behalf by a statutory provision that no party to a civil action shall be allowed to testify where the adverse party is the administrator of a deceased person. *Doughman v. Doughman*, 21 Ohio St. 658. It has been said that this provision is intended for the benefit and protection of the estate, and should not be permitted to operate as a source of injury thereto, since the interest of an estate may urgently require that an executor or administrator should waive what belongs to him as a privilege and call the opposite party as a witness. The facts upon which he founds his defense or upon which he bases his claim may be locked up in the breast of the adverse party and without his testimony, failure of justice may ensue. The legislature cannot have designed to place the estates of deceased persons at such disadvantage by depriving them of evidence within reach, necessary to protection against imposition and fraud. Hence the adverse and surviving party when compelled to testify by the executor or administrator cannot reasonably complain, for though a party, he can then be examined fully in his own behalf on the subject of his examination in chief. *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N. E. 61; *Neil v. Cherry*, 2 Ohio Dec. Reprint, 417. Where the executor or administrator of one estate sues the executor or administrator of another, they are adverse parties and hence incompetent to testify in their own behalf. *Farley v. Lisey*, 55 Ohio St. 627, 45 N. E. 1103.

An executor or administrator of an estate is not disqualified from testifying in his own behalf by a statutory provision that no person shall be allowed to testify when

to the witness, as administrator, of certain sums due on notes payable to the intestate. During his testimony he volunteered statements as to the existence of other notes of defendants in error to Alexander McCoy besides those in controversy and the note which had been paid by defendants in error after the death of McCoy. These statements, on motion of defendants in error's counsel, were stricken out. On cross-examination he repeated similar statements. In rebuttal plaintiff in error was called as a witness in his own behalf, apparently for the purpose of testifying as to other matters, but during his testimony he again made similar statements. All these statements were stricken out and the conduct of the witness in making them was assigned as

error on the appeal to the appellate court. That court held he was an incompetent witness, and that his repeated statements, though stricken out by the court, were so prejudicial as to require a reversal of the judgment, and the cause was remanded for a new trial. It does not appear plaintiff in error was offered as a witness at any of the subsequent trials until the last one, and the trial court held him incompetent to testify as a witness to any facts or transactions occurring prior to the death of Alexander McCoy. The appellate court in its opinion on the last appeal expressed the view that upon fuller consideration plaintiff in error was a competent witness, but held it was bound by the view adopted and expressed upon this question in its first

the adverse party is the executor of a deceased person, as to matters transpiring before the death of such deceased person. *Bradley v. Kavanagh*, 12 Iowa, 273; *Stiles v. Botkin*, 30 Iowa, 60. And this provision does not disqualify a witness from testifying in favor of the representative of a deceased person, as to a personal transaction between the witness and the decedent, although the witness may be interested in the event of the suit. *Leasman v. Nicholson*, 59 Iowa, 259, 12 N. W. 270, 13 N. W. 289; *Frick v. Kabaker*, 116 Iowa, 494, 90 N. W. 498.

Although administratrix of the estate, a widow is not disqualified from testifying in favor of the estate of her deceased husband, by a statutory provision that no party shall be allowed to testify in his own behalf in respect of any transaction or communication had personally by such party with the deceased person, when the adverse party is the executor, administrator, etc., of such deceased person. *Jaquith v. Davidson*, 21 Kan. 341. And although interested in the estate, persons may testify in its behalf in actions against it to recover upon claims against the decedent. *McCartney v. Spencer*, 26 Kan. 62. But in a will contest the heirs cannot testify in their own behalf and against the will of the testator. *Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476.

A provision that, in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right of title by, through, or from any deceased person, or as a guardian or conservator of the estate of any insane person, etc., a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any such deceased or insane person, etc.,—excludes only witnesses who have an interest and are offered to testify adversely to the estate of a deceased person, and does not disqualify persons from testifying in favor of the estate, even though they may have an interest in the subject-matter of the suit or be a party to the record. 42 L.R.A. (N.S.)

*O'Connor v. Slatter*, 46 Wash. 308, 89 Pac. 885.

#### Statute excluding opposite party.

When the disqualifying statute is directed against witnesses of or parties to a transaction with a person since deceased testifying in favor of the opposite party, a witness is not incompetent to testify in favor of the personal representative.

Thus, where the disqualification relates to the opposite party to an action by the representative or the heirs of a deceased person, an heir is not thereby disqualified from testifying in favor of the estate of the decedent, although the testimony relates to a transaction between the deceased and the defendant. *Pendill v. Neuberger*, 64 Mich. 220, 31 N. W. 177. So, in an action by a deceased wife's estate for services rendered by her in her lifetime, her husband may testify in behalf of the estate that he consented to the rendition of the services of the wife in her own behalf. *Ashley v. Smith*, 152 Mich. 197, 115 N. W. 1052. So, where an heir does not stand in an antagonistic relation to the estate, and his testimony is offered in its behalf, it is admissible. *Moore v. Machen*, 124 Mich. 216, 82 N. W. 892. And in prosecuting a suit as heir of a decedent, to compel the execution of a deed of land to replace one formerly executed to the decedent by the defendant but wrongfully destroyed by the latter, the heir is not disqualified as a witness in behalf of the estate, by a statute providing that when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person. *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4. But where the contest is in reality a controversy between two estates in which the personal representatives are merely the nominal parties, the heirs are the opposite parties within the meaning of the statute, and hence are excluded as witnesses in be-

opinion, and that it was not at liberty to reverse the judgment upon that error.

We agree with the last opinion of the appellate court that plaintiff in error was a competent witness. The disqualification under the statute is not against the party suing or defending as administrator, but against the party suing or defending adversely to the administrator. *Illinois C. R. Co. v. Reardon*, 167 Ill. 372, 41 N. E. 871; *Steele v. Clark*, 77 Ill. 471. In *Patterson v. Collar*, 34 Ill. App. 632, it was held that, on the trial of a claim against an estate of a deceased person, the administrator is a competent witness, though his wife was an heir of the intestate. That case was affirmed by this court in *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604, but this question was not

discussed in the opinion. We think the ruling of the trial court in holding that plaintiff in error was an incompetent witness was clearly erroneous, and the error was so prejudicial in character that, if the question is presented for our review, it necessitates a reversal of the judgments of the appellate and circuit courts.

Defendants in error contend that the competency of the plaintiff in error as a witness was involved in the first appeal to the appellate court; he having been held incompetent at the first trial, and one of the grounds upon which a reversal of the judgment in his favor was urged by defendants in error, who were then appellants, was that when called by them to testify on other matters, and when called as a witness in rebuttal

half of their estate as to any facts equally within the knowledge of the decedent whose interests they oppose. *Penny v. Croul*, 87 Mich. 15, 13 L.R.A. 83, 49 N. W. 311.

Since this statute is intended to reach the real party in interest, and not a mere nominal party, it does not disqualify an executor who is not interested in the result of the allowance or disallowance of a claim against the estate of a deceased person, except as it becomes his duty as executor or administrator to prosecute or defend a suit in which the estate is interested. *Ibid.* So, where the controversy is between the estates of two deceased persons, an executor of one of the estates is not disqualified as a witness in behalf of his estate as the opposite party, within the meaning of this statute, where he has no personal interest in the proceeds of the estate as heir or legatee or devisee. *Duryea v. Granger*, 66 Mich. 593, 33 N. W. 730.

In an action against an estate, the administrator is not disqualified from testifying in behalf of the estate by a statute restricting the testimony of the opposite party as to transactions taking place before the appointment of an administrator, where the action is by or against the administrator. *Howe v. Merrick*, 11 Gray, 129. And the widow of a decedent may testify in behalf of his estate as to conversations between the decedent in his lifetime and the defendant in the action. *Robinson v. Talmadge*, 97 Mass. 171. The statutory provision that no party in his own behalf or interest, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transactions or communications by him personally with a deceased person, in any civil action or proceeding in which the opposite party derives his title or sustains his liability to the cause of action from, through, or under such deceased person, does not disqualify the executor and the proponent of an alleged will from testifying to personal transactions or communications with the deceased. *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437. It however disqualifies a residuary legatee from

testifying in support of the will, in proceedings to establish it as a will lost or destroyed subsequently to the death of the testatrix. *Re Valentine*, 93 Wis. 46, 67 N. W. 12. It is always in the discretion of the adverse party to waive the protection afforded him by the statute, either by refraining from objection where such testimony is offered, or by offering the testimony of his opponent. *Re Hoppe*, 102 Wis. 54, 78 N. W. 183.

**Statute excluding witness from testifying against personal representative, etc.**

A statute excluding the opposite party from testifying against an administrator does not render incompetent the testimony of a party to the contract in issue, whose only connection with the contract was to convey the property therein described as directed by the decedent. *Atkins v. Atkins*, 69 Vt. 270, 37 Atl. 746. Neither does it disqualify a party when called as a witness by a person claiming under a decedent, since the statute is for the benefit of the representative of a deceased party, and only prohibits the party from being a witness in his own behalf when the other party to the contract or cause of action in issue and on trial is dead, and it does not prohibit the representative of the deceased party from waiving the statute and calling the other party to the contract to testify in his favor. *Ainsworth v. Stone*, 73 Vt. 101, 50 Atl. 805; *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; *Linsley v. Lovely*, 26 Vt. 123.

A statutory provision excluding evidence when offered against a party, then defending the action as executor, administrator, heir at law, next of kin, assignee, devisee, legatee, or survivor of such deceased person, does not disqualify the administrator of a deceased person from testifying to a transaction between his intestate and the defendant in an action brought by the administrator. *Thompson v. Humphrey*, 83 N. C. 416. And it does not disqualify an executrix as a witness to what the defendant told her intestate in his lifetime, or as a witness to transactions between her

on his own motion, he volunteered statements of matters prior to the death of Alexander McCoy which the court held incompetent and struck out of the record, but it was contended on the appeal that defendants in error were prejudiced by such voluntary statements notwithstanding they were struck out. It is said that the plaintiff in error did not on said first appeal question, by assignment of cross errors, the correctness of the ruling of the trial court

in holding plaintiff in error to be an incompetent witness, and that he is now estopped from raising that question. We do not think the rule sought to be invoked here is applicable. The rule undoubtedly is that on a second appeal by the same party, where the case has been remanded with directions, he will not be permitted to assign for error any matter that occurred prior to the first appeal and which he could have assigned on said first appeal. It is the duty of a party

intestate and the defendant as to which she has personal knowledge. *Pittmann v. Camp*, 94 N. C. 283. Neither does it disqualify an administrator as a witness in behalf of his estate as to transactions between the payee of a note in suit, to which the maker is a defendant, and his intestate, tending to show the latter in his lifetime purchased the note and gave full value therefor. *Andrews v. McDaniel*, 68 N. C. 385. But while a testator or administrator may testify under this statute in favor of the estate in actions brought by or defended by him in his representative capacity, the giving of such testimony removes the disqualification of the opposing party as a witness to the matters to which the testimony relates. *Williams v. Cooper*, 113 N. C. 286, 18 S. E. 213; *Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24.

A statute excluding as witnesses parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of the deceased, does not apply to the testimony of an administrator or executor who is the plaintiff in the action to enforce a claim in behalf of the estate, where the testimony is in favor of the estate. *Chase v. Evoy*, 51 Cal. 618; *Todd v. Martin*, — Cal. —, 37 Pac. 872.

A provision disqualifying witnesses from testifying to establish their own claim or defense against the estate of a deceased person does not disqualify an administrator of an estate from testifying in favor of the estate, although he is incidentally interested therein as one of the distributees. *Cock v. Abernathy*, 77 Miss. 872, 28 So. 18.

A provision prohibiting parties from giving testimony in their own behalf, or against the personal representatives of a deceased person, concerning a personal transaction or communication with the deceased, does not prohibit an executor or administrator who is a party to the suit, from being examined in favor of the estate relative to such transaction, when the adverse party was present and participating therein, and when it is otherwise competent. It, however, opens the door for the admission of testimony from the adverse party that would otherwise be excluded. *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081. Under this section, in an action against an estate to enforce a claim contracted by the decedent, the testimony of the executrix is 42 L.R.A. (N.S.)

competent, although she is also a legatee, her testimony being in favor of the estate. *Klock v. Brennan*, 82 Hun, 262, 31 N. Y. Supp. 190. And in an action to recover money loaned a decedent, the administrator of his estate is a competent witness in behalf of the estate to conversations between the decedent and the defendant. *Wakefield v. Wakefield*, 47 Misc. 87, 93 N. Y. Supp. 554. But an executor of a deceased mortgagee cannot testify in behalf of the estate as to conversations and transactions with the deceased heir of the mortgagor, for the purpose of establishing an estoppel against such heir and her estate. *Gennerich v. Ulrich*, 58 Hun, 609, 35 N. Y. S. R. 144, 12 N. Y. Supp. 353.

An executor offering for probate the will of his testator is not such a party to the proceedings to prove the will as to preclude him from testifying to personal transactions with the deceased testator. *Re Wilson*, 103 N. Y. 374, 8 N. E. 731; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Re Babcock*, 27 N. Y. Week. Dig. 529, 12 N. Y. S. R. 841; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874. And in proceedings to contest a will, the heirs at law interested in the rejection thereof are competent witnesses in behalf of the proponent to testify in favor of the will. *Re Hedges*, 57 App. Div. 48, 67 N. Y. Supp. 1028.

Where the statute merely disqualifies a witness as to personal transactions with the deceased, an interested witness is not disqualified from testifying as to the time indorsements were made upon a note in suit; although evidence of a personal transaction with the deceased debtor, they are not themselves such transactions. *Mills v. Davis*, 41 Hun, 415.

Where disqualification is against person testifying for himself.

An administrator is not excluded from testifying in favor of the estate of the decedent, where his testimony does not relate to any transaction with the latter, but only tends to show injuries sustained by the decedent from the acts of the opposite party, and the statute merely prohibits a person from testifying for himself concerning any transaction with the decedent. *Chesapeake & O. R. Co. v. Perkins*, 127 Ky. 110, 105 S. W. 148. And an executor is not by this statute disqualified from testifying in behalf of the estate as to transactions of



appealing to direct the court's attention, by assignments of error, to all the errors claimed to exist in the record, and on a second appeal in the same case the appellant will not be permitted to allege an error contained in the record on the first appeal. In *Ogden v. Larrabee*, 70 Ill. 510, 513, this court said (p. 513): "The general rule on this subject is that where a cause has been heard in the circuit court, reviewed in the supreme court, and has been remanded with

directions as to the decree that shall be entered, a party cannot on a subsequent appeal assign for error any cause that accrued prior to the former decision. It is for the very satisfactory reason, as stated in *Semple v. Anderson*, 9 Ill. 546, 'it will be presumed, where a party sues out a writ of error and brings his case here for adjudication and the same is determined upon the merits and errors assigned, that he has no further objection to urge against the record,

the decedent with him, for the purpose of proving the purpose of the testator in making a gift to a legatee, since not being interested in the result, he does not testify for himself. *Swinebrod v. Bright*, 116 Ky. 514, 76 S. W. 365. But this statute disqualifies an executor of one estate who is interested therein other than as executor, when sued in his representative capacity, from testifying as to matters occurring between himself and another decedent whose representative is prosecuting the action. *Hobbs v. Russell*, 79 Ky. 61.

Where statute disqualifies the other party to the suit or transaction.

Under a statute providing that when one of the original parties to a contract in issue or on trial is dead or is shown to the court to be insane, or when an executor or administrator is a party in any proceeding on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor, the administratrix, the widow of the decedent, is a competent witness in behalf of the estate in an action by her on a note due the decedent. *Jackson v. Jackson*, 40 Ga. 150; *McIntyre v. Meldrim*, 40 Ga. 490. The administrator is a competent witness in behalf of the estate, but incompetent to testify against it. *Finch v. Creech*, 55 Ga. 124. And he cannot testify in his own individual interest. *Flowers v. Flowers*, 92 Ga. 688, 18 S. E. 1006. But an administrator defending a suit to recover property claimed by a third person is a competent witness in behalf of the estate as to transactions or communications with his intestate during his lifetime, although the administrator is endeavoring to regain the property for the purpose of having it used to pay himself as a creditor of the estate. *Moore v. Cline*, 115 Ga. 405, 41 S. E. 614.

In an action by one estate against another, a person interested in one of the estates as an heir is excluded as a witness in behalf of such estate, where by statute it is provided that where one of the original parties to a contract or cause of action in issue and on trial is dead the other party shall not be admitted to testify in his own favor. *Rice v. Shipley*, 159 Mo. 399, 60 S. W. 740; *Smith v. Brinkley*, 151 Mo. App. 494, 132 S. W. 301.

The administrator is not a party to a transaction within the meaning of a Code excluding as witnesses parties to transac-

tions where one of the parties has since deceased. *Ellis v. Harris*, 32 Gratt. 684.

Effect of testimony in favor of estate as removing disqualification.

In some jurisdictions the statute permits a personal representative to testify in behalf of his estate, but in such event the adverse or opposite party is also a competent witness in his own behalf. *Kempton v. Bartine*, 59 N. J. Eq. 149, 44 Atl. 461, affirmed in 60 N. J. Eq. 411, 45 Atl. 966; *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156; *Personette v. Pryme*, 34 N. J. Eq. 26; *Daw v. Vreeland*, 30 N. J. Eq. 542; *Bell v. Samuels*, 60 N. J. L. 370, 37 Atl. 613; *Haines v. Watts*, 55 N. J. L. 149, 26 Atl. 572; *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459; *Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317; *Perkins v. Perkins*, 46 N. H. 110.

And see *Williams v. Cooper*, 113 N. C. 286, 18 S. E. 213, and *Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24, holding that where a testator or administrator gives testimony in behalf of his decedent in suits brought or defended by him in his representative capacity, the giving of such testimony removes the disqualification of the opposing party as a witness in his own behalf with reference to the matters to which such testimony relates.

And see also *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081, holding that where an executor or administrator is examined in favor of the estate relative to a transaction between the deceased and the other party thereto, it opens the door for the admission of testimony from the adverse party that would otherwise be excluded.

And in Ohio the rule is, if the adverse and surviving party to a contract is compelled to testify by the executor or administrator of the deceased party with reference to the matter, he may then be examined fully in his own behalf on the subject of his examination in chief. *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N. E. 61.

In Massachusetts by a statute in actions against the executor or administrator when the cause of action is supported by oral testimony of a promise or a statement of the deceased, evidence of statements, written or oral, made by the deceased, tending to disprove or show the improbability of such statements or promises, is admissible. *National Granite Bank v. Tyndale*, 179 Mass. 390, 60 N. E. 927. A. G. S.

and that, if errors exist which are not so assigned, they are waived.' The error complained of existed in the former record. The party had an opportunity then to assign it and direct the attention of the court to it, but, having failed to do so, he ought to be estopped, upon every principle of justice, from alleging at any future period error in the same record. Had error intervened prior to the former adjudication it was his duty to assign it, otherwise he will be deemed to have waived it forever. He will not be permitted to have his cause heard partly at one time and the residue at another."

The above has always been the rule and has been repeatedly adhered to in subsequent decisions, but the question here presented is not within that rule. At the first trial of the case plaintiff in error secured a judgment with which he was satisfied. The opposite party prosecuted an appeal, and the appellate court reversed the judgment and remanded the case for a new trial without any directions. We have above set out the circumstances under which the competency of plaintiff in error as a witness was presented to the appellate court for decision, as shown by the opinion of that court. We are unable to see how the failure of plaintiff in error to assign cross errors in the appellate court on the first appeal places him in any different position from what he would have been in if he had assigned cross errors and they had not been sustained. If the holding of the appellate court on the first appeal, that plaintiff in error was an incompetent witness, was binding on that court on a subsequent appeal, this would have been the result whether cross errors were assigned or not. The question of plaintiff in error's competency does not appear to have been involved in the second and third appeals to the appellate court. Counsel say this was because he was not offered as a witness to testify to anything that occurred prior to the death of his intestate. On the last trial in the circuit court he was offered as a witness and his competency insisted upon. The trial court held him incompetent, to which ruling plaintiff in error excepted, and the ruling was assigned for error in the appellate court on the last appeal. That court sustained the trial court on the ground that it could not review its former decision on that question, that the question was *res judicata* in that court; and, although the court was of opinion it had been decided wrong on the first appeal, it was bound to follow its first opinion. Conceding the correctness of this view of the appellate court, and that its holding on the first appeal became the "law of the case" in that court, upon subsequent appeals it does not

follow that this court is bound by it. *Zerulla v. Supreme Lodge*, O. M. P. 223 Ill. 518, 79 N. E. 160. It seems clear that as the question is here presented the rule announced in *Ogden v. Larrabee*, supra, and other cases, can have no application; and there are no grounds upon which plaintiff in error can be held to be estopped from insisting upon his assignment of error in this court and having it decided.

This litigation has been so prolonged that we would not be disposed to interfere with this judgment except for clear and prejudicial error. The refusal to permit plaintiff in error to testify was such an error, and, however much we regret to do so, it is our imperative duty to reverse the judgments of the appellate and circuit courts and remand the case to the circuit court for a new trial.

Reversed and remanded.

**Vickers and Hand, JJ., dissenting:**

We do not concur in the majority opinion, which reverses the judgments of the circuit and appellate courts and remands the cause for another trial.

The only alleged error pointed out in the majority opinion is the refusal of the trial court to permit Harry V. Bailey to testify to facts occurring prior to the death of Alexander McCoy, of whose estate the witness was administrator. Conceding that the majority opinion correctly holds that Bailey was a competent witness, in our opinion the question of his competency is not properly preserved for review on this record. The circumstances under which it is assumed in the majority opinion that the question is saved for review, as shown by the abstract, are as follows: Bailey was sworn as a witness for the plaintiff below, and after stating his age and residence, and that he was the administrator of the McCoy estate, he was asked this question: "State if you have any acquaintance with a package said to contain notes that Dr. McCoy had on deposit in the Farmers' National Bank, in the city of Pekin, Illinois, before his death." Counsel for the defendants objected to the witness "testifying in this case, because he is an incompetent witness, he being the administrator of the estate of Alexander McCoy, deceased, and his wife being the sole heir of Dr. McCoy." Thereupon the court said: "What do the words 'before his death' refer to in the question, Judge Curran?—the acquaintance of the witness with that package before Dr. McCoy's death?" Upon receiving an affirmative answer from Judge Curran, the court further said: "The testimony in this case shows the administrator, Dr. Bailey, is the husband of the only heir to this estate, and it seems clear to me that under the authorities the administrator is

incompetent to testify to anything occurring before the death of Dr. McCoy. The objection to the last question will be sustained."

The plaintiff excepted, and thereupon counsel for the plaintiff said that he desired to ask several questions along the same line, in order to make a record, and the following questions were asked but not answered by the witness, the objection having been sustained to each one of the questions and an exception preserved to the ruling:

Q. State if you know who put the papers of Dr. McCoy into the package that you have mentioned, and placed that package in the Farmers' National Bank during the lifetime of Dr. McCoy.

Q. About what date was the package containing the papers of Dr. McCoy placed in the Farmers' National Bank during the lifetime of Dr. McCoy?

Q. Did you see the contents of the package of Dr. McCoy in the lifetime of Dr. McCoy and on and before the 28th day of December, 1901?

Q. Immediately prior to the 28th day of December, 1901, state if you know how many notes there were in the package you have been asked about belonging to Dr. McCoy and signed by A. L. Robison and Lida Robison, his wife, or signed by A. L. Robison alone. State how many there were and what were the various amounts of them.

Following these questions the witness was interrogated and permitted to answer in regard to transactions occurring after the death of Dr. McCoy. It will be noted that there is an entire absence of any offer on behalf of plaintiff below to prove any material fact by the witness Bailey. Unless it appears in some way that the witness would have given material evidence had he been permitted to answer the questions to which objections were sustained, it is impossible for this court to determine whether the alleged error was prejudicial to the cause of the party on whose behalf the witness was offered. If the witness had been permitted to answer the questions propounded to him, and his answers had been favorable to the other party or had shown that he had no knowledge of the subject concerning which he was interrogated, there could have been no injury resulting to plaintiff below from the ruling of the court in this regard.

In the case of *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562, 64 N. E. 1109, this court announced the familiar rule that, in order to justify a reversal on account of a ruling excluding evidence, the evidence must be material to the cause of the party offering it, and that the materiality of the evi-

dence must be made to appear in some way by the record. On page 565 in discussing this question, it was said: "If Ittner was a stockholder of the appellant at the time of the injury, under the repeated decisions of this court (*Thrasher v. Pike County R. Co.* 25 Ill. 393; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799; *C. H. Albers Commission Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075, he was incompetent to testify against the appellee, who was suing as the representative of James Askew, deceased. The question whether the witness was a stockholder was left in doubt, and it does not appear that the evidence was held incompetent by reason of the fact that he was a stockholder. In any event, as there was no offer made by counsel and no statement of what he expected the witness would answer, and the record is entirely silent as to what appellant expected to prove by the witness, it does not appear that the appellant was injured by reason of the rejection of the testimony. For aught that appears, the conversation sought to be elicited from the witness was immaterial, unimportant, or in favor of appellee, and therefore valueless to appellant. To overcome the presumption that the ruling of the trial court was right, the bill of exceptions must affirmatively show that error was committed. What appellant claims the answer would be must be made to appear before it can be determined that it was prejudicial error to exclude the answer."

The rule laid down in the foregoing case has often been applied by this court, and is so familiar that it is not necessary to cite all of the cases where it has been applied. See *Mallers v. Crane Co.* 191 Ill. 181, 60 N. E. 804; *Martin v. Hertz*, 224 Ill. 84, 79 N. E. 558.

We think the judgment should be affirmed.

#### NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS R. CLENDENNIN, Plff. in Err.,  
v.

THOMAS J. CLANCY, Exr., etc., of Francis O'Grady, Deceased.

(82 N. J. L. 418, 81 Atl. 750.)

**Witness — claim against decedent — assignment — effect.**

1. One who, in good faith, assigns a claim held by him against the estate of a decedent for services rendered the decedent in his lifetime, and who is not a party to the record in a suit brought by his assignee on such claim, against the executor of the es-

tate, is not disqualified by interest to testify in the case by reason of the fact that he accepted the assignee's note in part payment of the claim, and that the success of such assignee makes more probable the ultimate payment of the note.

**Trial — competency of witness — question for court.**

2. Where, in an action on an assigned claim against an executor, he pleaded that the assignment was not in good faith and for a valuable consideration, and that the assignor was the real owner, for the purpose only of raising the question of the competency of the assignor as a witness, which plea was traversed orally at the trial, the issue thus joined presented a preliminary question of fact for the court to decide.

(November 20, 1911.)

**Note. — Competency of assignor of claim in suit to testify as to transactions with or statements by deceased, where not expressly excluded by terms of statute.**

As indicated by the title, cases construing statutes expressly excluding the assignor of a claim in suit as a witness therein are excluded.

On the question whether the statutory rule excluding testimony of a transaction with a deceased person by a party or person in interest may be invoked against estate of decedent or person claiming under the estate, see note appended to *Bailey v. Robison*, ante, 305.

As to competency of interested witness to testify as to transactions with deceased in which he did not participate, see notes to *Mollison v. Rittgers*, 29 L.R.A.(N.S.) 1179, and *Griswold v. Hart*, post, 320.

**Rule sustaining right to testify.**

The right of an assignor of a claim in suit to testify as to transactions with or declarations of a deceased person whose estate or persons claiming thereunder are parties to the suit depends in a measure upon the language of the statute disqualifying interested persons from testifying in suits against the estates or the representatives of estates or persons claiming under estates, also upon the view taken by the different courts as to the construction of these statutes,—whether they should be strictly construed or should be construed in such a manner as to secure and enforce the purpose and object of the statutes.

In New Jersey the statute prohibits the giving of testimony by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness in his own behalf, etc. *Murphy v. Schmidt*, 80 N. J. L. 403, 79 Atl. 293. Under this statute the assignor of a claim against the estate of a 42 L.R.A.(N.S.)

**E**RROR to the Circuit Court for Bergen County to review a judgment in defendant's favor in an action brought by the plaintiff as assignee of a claim against the estate of deceased for services rendered to him by the assignor as nurse. Reversed.

The facts are stated in the opinion.

Messrs. Mackay & Mackay, for plaintiff in error:

The witness was competent.

Cullen v. Woolverton, 65 N. J. L. 279, 47 Atl. 626; *State v. Glatzmayer*, 79 N. J. L. 238, 75 Atl. 740; *Ordonez v. Manda*, 79 N. J. L. 236, 75 Atl. 740.

Mr. Peter W. Stagg, for defendant in error:

If the assignment was not made in good faith, but with a fraudulent intent, and

deceased person is a competent witness for the assignee in an action brought by the latter against the administrator of the decedent, where the consideration of the assignment is equal to the amount of the claim, and the assignor has no interest whatever in the recovery. *Cullen v. Woolverton*, 65 N. J. L. 279, 47 Atl. 626. And it is sufficient to sustain such an assignment and remove the disqualification of the assignor that the assignment be made in good faith, although the consideration in part is the assignee's note the payment of which depends in a large measure upon the success of the assignee's suit. *CLENDENNIN v. CLANCY*. (See infra, "where assignment is not made in good faith.")

But where one assigns his claim against a deceased person to himself and another, as the executors of another estate, the assignment does not operate to remove the disqualification of the statute, so as to render competent the testimony of the assignor concerning transactions with or statements by the deceased debtor in his lifetime. *Murphy v. Schmidt*, supra.

A statute providing that in civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statements by the testator or the intestate unless called to testify thereto by the opposite party, does not disqualify as a witness as to transactions between himself and a deceased, the assignor of a claim in a suit to which the administrator of the estate of such deceased person is a party, although such testimony would have been incompetent had the witness been the plaintiff in the action. *Witte v. Koeppen*, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831.

The statutory provision that in civil actions no witness shall be excluded because he is a party to the suit or interested in the issues to be tried, provided that in actions by or against executors, administra-

only to qualify the assignor as a witness, he is not competent.

Platner v. Ryan, 76 N. J. L. 239, 69 Atl. 1007.

Swayze, J., delivered the opinion of the court:

The plaintiff sues as assignee of a claim against the estate of O'Grady for services rendered to the deceased by Thomas O'Rourke, the assignor, as nurse. It was proved by the testimony of both O'Rourke and Clendennin that the assignment was bona fide, for a valuable consideration, consisting of the cancellation of a debt due from O'Rourke to Clendennin and the giving to O'Rourke of Clendennin's note for \$700. The amount of the consideration

was less than the face of O'Rourke's claim, and it was suggested that perhaps the note was to be paid out of the claim now sought to be recovered. The undisputed evidence was, however, that Clendennin was bound to pay the note at all events, and that in taking the assignment he took his chances of recovering a questioned claim against the estate. In this state of the proofs the learned trial judge conceived that O'Rourke had an interest in the claim now in suit, and excluded his evidence as to the services rendered the deceased; the necessary result was that he directed a verdict for the defendant. In this course he fell into error. Our statute has removed the common-law disability arising out of a witness's in-

tors, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements by the testator, intestate, or ward, unless called to testify thereto by the opposite party, does not disqualify the assignor of a note as a witness relative to transactions with the deceased maker, tending to prove the execution of the note, that it was based upon a valuable consideration, and that credits indorsed thereon were for payments actually made on the debts indicated, since by this statute interest does not disqualify. Collier v. Trice, 79 Ark. 414, 96 S. W. 174.

The assignor of a lease of lands who has been discharged as an insolvent from all obligations created thereby is competent to testify in relation to transactions with the deceased lessor, notwithstanding the statutory provision that when an original party to the contract or cause of action is dead, or when the executor or administrator is a party to the suit, action, or other proceeding, either party may be called as a witness by his opponent, but shall not be admitted to testify on his own offer, or upon the call of his coplaintiff or codefendant, unless a nominal party merely. Grand United Order, O. J. S. A. v. Merklin, 65 Md. 579, 5 Atl. 544.

In Mississippi it was at first held that a provision that no person should be a witness in any suit by or against himself, to establish his own claim against the estate of a deceased person, disqualifies the plaintiff in a suit upon such a claim from testifying as a witness therein, although after the institution of the suit he assigned his claim without recourse, it being the policy of the law that claims should not be established against the estates of deceased persons by the *ex parte* evidence of one of the parties to the transaction giving rise to the demand in suit. Reinhardt v. Evans, 48 Miss. 230. In a later decision this holding was reversed, the court holding that the statutory provision referred to does not disqualify a person who neither is a party

to the record nor interested in the event of the suit, and it is not sufficient that a party has been thus interested, and the disqualification does not apply to him if, at the time he is called to testify, his interest has been removed by release or otherwise. Rothschild v. Hatch, 54 Miss. 554. As evidencing the intent of the lawmaking body to include assignors within the scope of disqualifying statutes, it is of interest to note that immediately after the decision in Rothschild v. Hatch, the legislature enacted a law making applicable the rule therein asserted. Jones v. Sherman, 56 Miss. 559.

Where a party to a contract is not rendered incompetent as a witness by reason of the death of the other party, unless the party offered as a witness is also a party to the suit, the assignor of a claim against an estate in suit for services rendered the deceased during his lifetime is competent as a witness to prove the rendition of the services. Fyke v. Lewis, 15 Mo. App. 588.

An assignee of an insurance policy who subsequently assigns it may testify as against his assignee to statements and declarations of the deceased policy holder, where the purpose and tendency of such evidence is not to promote the interest previously owned by him, and the statute is directed only against evidence of that character. Westbury v. Simmons, 57 S. C. 467, 35 S. E. 764.

Where the statute excludes a witness from testifying for himself in regard to certain facts within the knowledge of a deceased person, a witness is incompetent as to the inhibited facts if he is introduced by the side on which his pecuniary interest lies; hence the assignor of a note, who is liable to the holder in case the money cannot be collected from the maker by due diligence, is interested in a suit against the maker, although not a party thereto; and therefore is incompetent as a witness; but the holder of a note who has assigned the same without recourse during the life of the maker, is not interested in the event of a suit on the note, and hence is compe-

terest, and permits that interest to be shown for the sole purpose of affecting his credit; his credit as a witness, however, is a question for the jury, and not for the court. The ruling cannot be justified on the ground that the defendant was sued in a representative capacity, for the witness is not a party to the record. The case is within the rule of *Cullen v. Woolverton*, 65 N. J. L. 279, 47 Atl. 626. The only difference between the two cases is that in *Cullen v. Woolverton* the consideration expressed in the assignment was equal to the amount of the claim, and in this case it is less. That difference does not affect the principle involved. What we decided in *Cullen v. Woolverton* was that the assignor was a competent witness when he had in fact parted with the claim to the assignee

in good faith. The present case differs from *Platner v. Ryan*, 76 N. J. L. 239, 69 Atl. 1007. There the court rejected evidence convincing, if true, that the assignment was made, not in good faith, but solely for the purpose of qualifying the assignor as a witness, and the supreme court said that, when such a condition was shown to exist, the court should stay proceedings until the declaration is amended by an averment in accordance with the fact, that the suit was brought for the use and benefit of the assignor. Here the evidence when the questioned ruling was made was uncontradicted that O'Rourke had in good faith parted with all interest in the claim. He may as a prudent man have been very willing to pay his debt and obtain Clendennin's note for an amount less than his claim, and

tent to testify for all purposes against the decedent's estate. *McKinney v. Hisle*, 4 Ky. L. Rep. 726.

#### Denial of right of assignor to testify.

A provision that in any suit or proceeding by or against executors or administrators, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator or intestate, unless called to testify thereto by the opposite party, disqualifies the assignor of a claim against a deceased person as a witness in behalf of the assignee in an action upon the claim by the latter against the executor or administrator of the deceased debtor. *Louis v. Easton*, 50 Ala. 470; *Drew v. Simmons*, 58 Ala. 463; *Goodlett v. Kelly*, 74 Ala. 213; *Sublett v. Hodges*, 88 Ala. 491, 7 So. 296.

In *Louis v. Easton*, 50 Ala. 470, it is said that the rule of the common law that the interested party could not testify in a suit, and could not, by releasing his interest, remove the objection, induces the holding that the transferrer of a chose in action on which, if no transfer had been made, suit must have been brought in his name, cannot render himself a competent witness against an executor or administrator, under the statute of this state. The court reasons thus: "He may not be within the letter, but he is within the spirit and policy, of the statute. The object of the statute is to extend to each party the right and privilege of testifying. This right and privilege must be mutual. It cannot exist in the one party, and not in the other. If death has closed the lips of the one party, the policy of the law is to close the lips of the other. In all actions on contracts for the payment of money, whether express or implied, which must, under our system, be instituted in the name of the party having the beneficial interest, the policy of the statute would be defeated if, by the machinery of a transfer, the party with whom the contract was made could render himself a competent witness against his deceased adversary. Nor can we think the 42 L.R.A. (N.S.)

fact that the transfer was made before the death of the party supposed to be bound by the contract varies the rule. His death destroys the mutuality the statute intends to preserve, and an advantage would thereby accrue to the party suing on the contract, which the statute guards against."

A third person is disqualified to testify as to statements by a deceased assignor of a party to a suit as to matters adverse to the interests of the assignee, where by statute a party to any civil action, or person directly interested in the event thereof, or any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, is disqualified as a witness when the adverse party sues or defends as guardian of any insane or incompetent person, or as executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian or assignee or grantee, directly or remotely from such heir, legatee, or devisee, as to any statement by or transaction with such deceased, or matter of fact whatever, etc. *Clawson v. Wallace*, 16 Utah, 300, 52 Pac. 9.

The statutory provision that no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding, but that this provision shall not apply to actions by or against executors, administrators, or guardians, disqualifies as a witness the assignor of a claim against the estate of a deceased person, in an action thereon. *Tinstman v. Croushore*, 104 Pa. 192; *Boustead v. Cuyler*, 116 Pa. 551, 8 Atl. 848; *Barbour v. Wiehle*, 116 Pa. 308, 9 Atl. 520.

Although not strictly within its terms, but construing the statute according to its true intent and meaning, a lessee who subleases, but remains liable on his covenants, and is entitled to a certain per cent of the income derived under the sublease, is incompetent as a witness as to matters occurring in the lifetime of the decedent whose estate is interested in litigation relative to the leased property. *Karns v. Tanner*, 66 Pa. 297, 5 Mor. Min. Rep. 289.

to leave the risk and expense of the necessary litigation to Clendennin. The fact that he may be interested in Clendennin's success in the litigation because it makes more probable the ultimate payment of the note is of no moment. The interest that under proper practice might disqualify him as a witness is not the indirect interest of a creditor of the plaintiff in the action, but a direct property interest in the recovery itself, so that the suit may be said to be in a legal sense for the use and benefit of the assignor.

The judgment must be reversed, and a venire de novo awarded.

Since this necessitates a new trial, we ought, in order to avoid possible misapprehension, add a word as to the second plea. This plea avers that the assignment was

not made in good faith and for a valuable consideration, and that the real owner and real plaintiff is O'Rourke. At the trial the plaintiff seems to have been allowed to traverse this plea orally. Without approving this practice, we think it enough to say that an issue thus joined, if meant, as it must have been, only to raise the question of the competency of the assignor as a witness, was not an issue for the jury. It was one of those preliminary questions of fact that are necessarily decided by the court, resembling the question of the admissibility of confessions in criminal cases (*State v. Young*, 67 N. J. L. 223, 51 Atl. 939) and of dying declarations (*State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016; *Wigmore*, Ev. §§ 487, 861, 1451, 2550).

So, where the assignment of a lease in express terms holds the lessee (the assignor) to his covenants, the latter is not a competent witness in a suit based on the lease, after the lessor is dead. *Whitney v. Shippen*, 89 Pa. 22.

And in a contest between the successors to the title of a deceased lessor and a lessee and his assignee, the latter are incompetent witnesses as to matters occurring during the lifetime of the lessor. *Duffield v. Hue*, 136 Pa. 602, 20 Atl. 526.

Where a person has an interest in a cause of action which an assignment of his interest in his father's estate would not divest, and his interest is adverse to plaintiff's intestate, he is incompetent as a witness in behalf of the defendant. *Keener v. Zartman*, 144 Pa. 179, 22 Atl. 889.

A distinction, however, is made between an interest that is collateral and an interest that is direct, as affecting the right of a person interested in a claim against a deceased person to qualify himself as a witness by assigning the claim, and it is said that in actions by or against an executor or administrator on claims against or in favor of the estate, a legatee or distributee who has parted with his interest either by release, payment, or assignment, is a competent witness unless there are some grounds of exclusion other than the fact that he is a distributee or legatee, and as such was previously interested in the result of the suit. *Heft v. Ogle*, 127 Pa. 244, 14 Am. St. Rep. 839, 18 Atl. 19; *Steinger v. Hoch*, 42 Pa. 432; *Carter v. Trueman*, 7 Pa. 315; *Com. use of Lawson v. Ohio & P. R. Co.* 1 Grant, Cas. 348. In the latter case, referring to this distinction, it is said: "When the interest of the witness is collateral, his competency may be restored by a release or transfer of it. The rule . . . applies only to persons who have assigned choses in action on which the recovery would have been for their own use if no assignment had been made. Its object is to prevent a party from transforming himself into a witness by the magic of a bit of paper. It forbids one who assigns a claim to sell his oath along with it. But a person who has a merely incidental interest in the result, an interest which arises entirely out of the fact that the record may be evidence for or against him in some other action, may divest himself of such interest, and if he does so at any time before he is offered as a witness, his testimony must be received. For instance, a stockholder in a corporation may transfer his stock and become a witness for the company; a legatee may dispose of his interest in the estate and testify for the executors; an attorney who has a contract for a contingent fee may release it and give evidence in favor of his client. The rule in question is not leveled against interested witnesses, but is found in the policy of stopping a disinterested party from testifying in favor of one who sues in his right." The case quoted from was not based upon the statute referred to, but upon the common-law rule disqualifying witnesses interested in the event of the suit. This distinction, however, is referred to in *Heft v. Ogle*, supra, and at the time of that decision this disqualifying statute was in force. The opinion in that case, however, does not clearly indicate whether it was based upon the statute or upon the common-law rule.

Under a statute in effect disqualifying the other party to a suit by or against an executor or administrator of an estate, the lessor of a demise, who has assigned his rights under the lease, is a competent witness to declarations by the deceased lessor in a former demise in a suit between the lessor in a third demise and the tenant in possession. *Priester v. Melton*, 123 Ga. 375, 51 S. E. 330. In a suit against the estate of his intestate, upon notes given by the latter in his lifetime, an heir who is not a party to the suit may testify, where he has assigned his interest in the estate. *Bower v. Thomas*, 69 Ga. 47.

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be a competent witness therein when the adverse party is an executor, administrator, or legal representative of a deceased person, a person interested in a pending cause of action against executors of a deceased person cannot, by assigning his interest, render himself competent as a witness for the plaintiff, to prove the claim in suit. *Magemau v. Bell*, 13 Neb. 247, 13 N. W. 277.

Where assignment is not made in good faith.

If an assignment is made for the purpose of rendering the assignor a competent witness as to matters equally within the knowledge of his decedent, it does not render him competent, even if he would have been competent had the assignment been in good faith. *Buck v. Haynes*, 75 Mich. 397, 42 N. W. 949.

It has been held that the competency of a witness to speak of transactions with a deceased person whose representatives are parties to the proceeding depends entirely upon the situation of the record; and therefore an assignor is a competent witness to give evidence of the character referred to, although the assignment is colorable merely, and made for the purpose of removing the disqualification of the statute against persons in interest testifying as to transactions with deceased persons. *Harrison v. Patterson*, — N. J. Eq. —, 50 Atl. 113.

This is not the view, however, of the supreme court of New Jersey, and it is there held that the admission of the plaintiff that the assignment of the claim to her was without consideration, and that she had no interest in the subject-matter of the litigation, is clearly material. The court said that, if true, it was convincing evidence that the assignment was made not in good faith, but solely for the purpose of qualifying the assignor as a witness; and it passed nothing to her except the bare legal title to the claim, and she was entitled to recover nothing by virtue of it from the defendant for her own benefit. And it is further remarked that, to permit the beneficiary owner of a claim against the estate of the decedent to avoid the disqualifying statute that the party to an action on such a claim shall not be permitted to give testimony as to any transaction of or statement by the deceased by any such scheme would be to connive to a fraud upon the statute. The rule of procedure in such a case is said to be that when such a condition is shown to exist at the trial, the court should stay further proceedings until the declaration is amended by the insertion of an averment that the suit is brought by the assignee for the use and benefit of the assignor, and the assignor is thereby made a party to the action within the meaning of this statutory provision, and hence disqualified as a witness to the extent therein provided. *Platner v. Ryan*, 76 N. J. L. 239, 69 Atl. 1007. A. G. S. 42 L.R.A.(N.S.)

## NEW YORK COURT OF APPEALS.

ELIZA E. GRISWOLD et al., Admrx., etc., of Oscar F. Ridgeway, Deceased, Resp'ts., v.

LOUISA B. HART, Admrx., etc., of Fred C. Hart, Deceased, Appt.

(205 N. Y. 384, 98 N. E. 918.)

Witness — transaction with deceased person — mere observer — competency.

A man claiming property as successor of his deceased wife is not competent to testify to a gift of the property to her by a person since deceased, although he merely witnessed the transaction without taking any part in it, under a statute making a person interested in the event of an action incompetent to testify against a representative of a deceased person concerning a personal transaction or communication between the witness and the deceased person.

(May 7, 1912.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, reversing a judgment of a Trial Term for Chemung County in defendant's favor in an action brought to recover two certificates of deposit and a bank book claimed by plaintiffs to belong to their intestate at the time of his death. Affirmed.

The facts are stated in the opinion.

Mr. E. W. Personius, with Messrs. Herendeen & Mandeville, for appellant:

The defendant, Fred C. Hart, was a competent witness under § 829 of the code; he was interested in the event, but he did not testify to a personal transaction or communication between himself and the deceased.

*Simmons v. Sisson*, 26 N. Y. 264; *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587; *Hutton v. Smith*, 175 N. Y. 375, 67 N. E.

*Note.* — *Competency of interested witness to testify as to transactions with deceased in which he did not participate.*

This note is supplemental to the note in 29 L.R.A.(N.S.) 1179.

As to whether the statutory rule excluding testimony of transactions with a deceased person by the party or person in interest may be invoked against the estate of a decedent or person claiming under the estate, see note appended to *Bailey v. Robison*, ante, 305.

As to competency of assignor of claim in suit to testify to transactions with or statements by deceased, where not expressly excluded by terms of statute, see note appended to *Clendennin v. Clancy*, ante, 315.



633; *Lawyer v. White*, 198 N. Y. 318, 91 N. E. 840; *Cary v. White*, 59 N. Y. 336; *Lobdell v. Lobdell*, 36 N. Y. 327; *Kraushaar v. Meyer*, 72 N. Y. 602; *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73; *Farrar v. Farmers' Loan & T. Co.* 85 App. Div. 367, 83 N. Y. Supp. 172; *Re Andrews*, 97 App. Div. 433, 89 N. Y. Supp. 965; *Spindler v. Gibson*, 75 App. Div. 446, 78 N. Y. Supp. 320; *Hildebrant v. Crawford*, 65 N. Y. 107; *Lane v. Lane*, 95 N. Y. 502; *Withers v. Sandlin*, 44 Fla. 253, 32 So. 829; *Denbo v. Wright*, 53 Ind. 226; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919; *Wright v. Reed*, 118 Iowa, 333, 92 N. W. 61; *Lucas v. McDonald*, 126 Iowa, 678, 102 N. W. 532; *Mallow v. Walker*, 115 Iowa, 244, 91 Am. St. Rep. 158, 88 N. W. 452; *Foreman v. Archer*, 130 Iowa, 49, 106 N. W. 372; *Drefahl v. Security Sav. Bank*, 132 Iowa, 565, 107 N. W. 179; *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771; *Ray v. Camp*, 110 Ga. 818, 36 S. E. 242; *Elliott v. Banks*, 115 Ga. 926, 42 S. E. 218; *Griffith v. Robertson*, 73 Kan. 686, 85 Pac. 748; *Norris v. Stewart*, 105 N. C. 455, 18 Am. St. Rep. 917, 10 S. E. 912; *State ex rel. Dobbins v. Osborne*, 67 N. C. 259; *Costen v. McDowell*, 107 N. C. 550, 12 S. E. 432; *Worth v. Wrenn*, 144 N. C. 662, 57 S. E. 388; *Sloan v. Hunter*, 56 S. C. 385, 76 Am. St. Rep. 551, 34 S. E. 658, 879; *O'Connor v. Slatter*, 46 Wash. 308, 89 Pac. 885.

Messrs. Baldwin & Allison, for respondents:

Fred C. Hart was not a competent

In *Mollison v. Rittgers*, 29 L.R.A.(N.S.) 1179, the Iowa court holds that a statute disqualifying parties to an action or proceeding, or persons interested in the event thereof, or any person from, through, or under whom any party or interested person derives his interest, from being examined as a witness as to any personal transaction or communication between such witness and a person deceased, does not apply to a person interested in the event of a suit of the character referred to from testifying as to a conversation in his presence between a party to the suit and the deceased where the witness did not participate in the conversation. The doctrine of this case is approved in *Erwin v. Fillenwarth*, — Iowa, —, 137 N. W. 502, and also in *Van Sickle v. Staub*, — Iowa, —, 136 N. W. 546, holding that where it appears upon cross-examination of such a witness that she had taken part in the conversation with reference to which she testified, it is proper to strike her entire testimony from the record upon motion to that effect.

The note in 29 L.R.A.(N.S.) 1179, is cited as supporting this doctrine in *Merck v. Merck*, 89 S. C. 347, 71 S. E. 969. The doctrine, however, is not applied in that case, the court holding the witness in ques-

witness to testify to the alleged gift, and his testimony was incompetent under § 829 of the Code of Civil Procedure.

*Price v. Price*, 33 Hun, 69; *Wadsworth v. Heermans*, 85 N. Y. 639; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Lawyer v. White*, 198 N. Y. 318, 91 N. E. 840; *Re Andrews*, 97 App. Div. 429, 89 N. Y. Supp. 965; *Holcomb v. Holcomb*, 95 N. Y. 327; *Van Vechten v. Van Vechten*, 65 Hun, 215, 20 N. Y. Supp. 140; *Boyd v. Boyd*, 164 N. Y. 234, 58 N. E. 118; *Wilber v. Gillespie*, 127 App. Div. 604, 112 N. Y. Supp. 20; *Re Eysaman*, 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613; *Re Dunham*, 121 N. Y. 575, 24 N. E. 932; *Re Bernsee*, 141 N. Y. 389, 36 N. E. 314; *Burdick v. Burdick*, 180 N. Y. 261, 73 N. E. 23.

Cullen, Ch. J., delivered the opinion of the court:

The action was brought to recover two certificates of deposit, one for \$1,000 and the other for \$500, and a deposit book in the Mechanics' Society, a savings bank, all of which instruments were in the name of the plaintiffs' intestate, but in the possession of the defendant's intestate, who was alive and testified on the trial in his own behalf, but died pending this appeal. There was no indorsement or written assignment of these securities. The defendant's intestate had married a daughter of the plaintiffs' intestate. She died intestate, without issue, before the death of her father. After the death of the father, his represen-

tion incompetent because he participated in the transaction.

As shown in the note referred to, the New York courts have been inconsistent in their position upon this question. The rule as now settled by that court in *GRISWOLD v. HART*, however, squarely places the New York court in favor of enforcing the disqualifying provision of such a statute according to its spirit, and therefore an interested witness to a transaction or conversation between a deceased person and a party to the suit is disqualified as a witness against the interest of the estate or person claiming thereunder, although such witness did not participate in the conversation or transaction. The doctrine of this case is approved by that court in *Brown v. Crossman*, — N. Y. —, 100 N. E. 42.

This is also the doctrine of *Wilder v. Wilder*, 138 Ga. 573, 75 S. E. 654, holding in a suit by an administrator that the defendant is an incompetent witness to testify in his own favor concerning transactions and communications with the deceased, whether the same were had with the witness or with any other person. The nature of the disqualifying statute applied is not stated in the opinion. A. G. S.

tatives brought this action to recover possession of the instruments mentioned. The defendant's intestate claimed to own them by virtue of a gift made by the plaintiffs' intestate to his daughter, to whose title the witness had succeeded by virtue of his marital rights, and on the trial was permitted to testify to a transaction or conversation between his wife and her father, at which the father gave the daughter the instruments in suit and the credits which they represented. Hart testified that in this transaction and conversation he took no part, but accidentally witnessed it as he passed through the room in which his wife and her father were. This evidence was admitted over the objection of the plaintiffs, who contended that the witness was incompetent under § 829 of the Code of Civil Procedure. The appellate division, by a divided court, held the admission of this testimony erroneous, and for the error reversed the judgment and granted a new trial.

This section, or its predecessor, § 399 of the Code of Procedure, has been in force for over half a century, and its interpretation the subject of numerous decisions in this and the other courts of the state. It might, therefore, be expected that the proper construction of the statutory provision had been authoritatively determined. Unfortunately the reverse is the case. The decisions are in irreconcilable conflict. The material part of the section of the present Code provision is as follows: "Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic. . . ."

In *Simmons v. Sisson*, 26 N. Y. 264, it was held that § 399 of the old Code did not prohibit a party sued by the personal representatives of deceased from testifying to a conversation overheard by him between the deceased and a third person. To the same effect is *Lobdell v. Lobdell*, 36 N. Y. 327. So, also, is the opinion in *Cary v. White*, 59 N. Y. 336; but it is to be remarked that the opinion received the concurrence of but one other member of the

court, and that there were other grounds on which the decision might have proceeded. *Hildebrant v. Crawford*, 65 N. Y. 107, follows the opinion in *Cary v. White*, supra. In *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263, it was held that a conversation between the deceased and a third party, to which the witness was merely a listener, was not a personal transaction or conversation between her and the deceased, and that as to it she was a competent witness. Thus far the current of authority had been uniform, and, had it continued so, there would be no difficulty in the disposition of this case. But at this point a marked change seems to have occurred in the views of this court.

In *Holcomb v. Holcomb*, 95 N. Y. 316, 326, 327, the action was to set aside an assignment of a bond and mortgage, alleged to have been secured by the defendant from the plaintiffs' intestate through undue influence, and because at the time the deceased was of unsound mind. On the trial, one of the next of kin of deceased, and therefore interested in the success of the suit, was allowed to testify, against the objection that the witness was incompetent under § 829 of the Code, to certain communications with the deceased, and also to occurrences transpiring in his presence. The admission of this evidence was held error, and the judgment below reversed. In the opinion of Judge Danforth, it is said: "The policy of the statute excludes the evidence of an interested witness concerning, 1st. Any transaction between himself and a deceased person, or in which the witness in any manner participated. 2d. All communications between the person deceased and the witness, including communications in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either one of two or more persons, if all were interested." p. 326. If this statement had covered the questions decided by the case, the departure from the previous decisions would be somewhat limited. But then the learned judge goes on to discuss the particular evidence admitted in the case, and holds that the testimony of the witness as to the deceased having spasms or fits was a violation of the statutory inhibition. He further held that the witness was not competent to testify as to what he heard his deceased father say. The learned judge said: "His testimony is not made admissible because his father did not solicit the interview, and was even ignorant of his presence. The words, when spoken, became a communication which he received. It was then a communication to him." p. 327. It is very clear that the *Holcomb* Case overrules the doctrine of the earlier cases, that an interested witness may

testify to a conversation or occurrence in which he took no part.

In *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73, *Cary v. White*, *supra*, is followed; but no reference is made to the much more recent case of *Holcomb v. Holcomb*, *supra*. *Re Eysaman*, 113 N. Y. 62, 73, 3 L.R.A. 599, 20 N. E. 613, was a proceeding for the probate of a will. Evidence similar to that admitted in the *Holcomb Case* was held to have been erroneously received, and the doctrine of that case, that the testimony of interested witnesses "as to conduct and actions of the deceased tending to show his enfeebled and dependent condition, and as to statements made by him, although not addressed to the witness, and made in ignorance of his presence," was improper, was reaffirmed.

The next case is that of *Re Dunham*, 121 N. Y. 575, 577, 24 N. E. 932. The proceeding was for the probate of a codicil to a will, contested on the ground of undue influence, restraint, and mental incapacity. The question was as to the competency of the witness, who was residuary legatee under the will, and interested in the defeat of the codicil, to testify to communications with the deceased, or made in his presence. The testimony was held incompetent, Judge Gray writing: "Therefore, while, as to any communications or transactions with the witness, the proposed evidence was plainly enough inhibited by § 829 of the Code, his testimony as to the conversations or transactions while he was present in the room, had between the deceased and other persons, was, under the circumstances, inadmissible." p. 577.

In *Devlin v. Greenwich Sav. Bank*, 125 N. Y. 756, 758, 26 N. E. 744, 745, it was said: "It is doubtful if the witness [the plaintiff in the action] could be permitted to testify as to a conversation in her presence between her uncle and Father Carew, relative to the gift she claimed. The cases of *Re Eysaman*, 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613, and *Re Dunham*, 121 N. Y. 575, 24 N. E. 932, have very greatly limited the old rule in regard to such conversation." The decision proceeded on another ground, so it must be admitted that the excerpt quoted was *obiter*.

*Petrie v. Petrie*, 126 N. Y. 683, 27 N. E. 958, was an action in partition, and the appeal involved the competency of the plaintiff to testify to a conversation she overheard between her father and a third person. It was held that the objectionable testimony was wholly immaterial on the point upon which the case was decided, and therefore should be disregarded. But the court said: "The ruling of the trial court upon the objection to the above question would 42 L.R.A. (N.S.)

present a somewhat important point under the construction which this court has given to § 829 in recent cases, if it could be held that the answers in any degree affected the result. *Holcomb v. Holcomb*, 95 N. Y. 326; *Re Eysaman*, 113 N. Y. 72, 3 L.R.A. 599, 20 N. E. 613; *Re Dunham*, *supra*."

The next case in this court was that of *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587, in which there was a return to the old doctrine. The action was to recover the amount of a savings bank deposit standing in the name of the plaintiff's testator as guardian for his daughter. The widow of the deceased, though interested in the action, was held a competent witness to a transaction between the deceased and another in her presence in which she took no part. The court cited *Cary v. White* and *Simmons v. Havens*, *supra*, but made no allusion to the later decisions. In the very next volume, in *Re Bernsee*, 141 N. Y. 389, 392, 36 N. E. 314, 315, which was a proceeding for the probate of a will, it was held that a legatee under the will was an incompetent witness to testify to any conversation or transaction in his presence at the time of the execution of the will. It was there said by Chief Judge Andrews: "What occurred at that time was a transaction between the testatrix and the witness, within the meaning of § 829 of the Code, although he took no actual part in the conversation, and it was wholly between the testatrix and the attesting witnesses. If active participation in the conversation was necessary to exclude an interested witness, and he should, as an observer, be permitted to testify to transactions in form between the deceased and third persons, although such transactions were in his interest, it would furnish an easy and convenient method in every case of evading the statute. The decisions have enforced the spirit of the statute by excluding such evidence, and have treated transactions between the deceased and third persons in the presence of interested parties, as if the witness actually participated therein. *Holcomb v. Holcomb*, 95 N. Y. 316; *Re Eysaman*, 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613; *Re Dunham*, *supra*."

*Boyd v. Boyd*, 164 N. Y. 234, 58 N. E. 113, is referred to only because the opinion in that case cites the *Holcomb Case* and the others to the same effect as being authoritative on the construction of § 829 of the Code. In *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633, the action was to declare a trust in certain savings deposits made in a savings bank by one Rose Ann Coyle in favor of the plaintiff. The plaintiff was permitted to testify to a conversation between his uncle and Mrs. Coyle in which the uncle said, "I will have that money, or I

will know the reason why," to which Mrs. Coyle replied: "I have it in trust for John, the orphan [meaning plaintiff], and you can't get it." The question was as to the competency of this testimony. Chief Judge Parker reviews the previous cases in this court on the much-debated question before us, and held that the testimony was erroneously admitted, but that the admission was not harmful. The plaintiff was further permitted to testify to conversations between Mrs. Coyle and the officers of the bank. It may be inferred from the discussion of the competency of this evidence that the learned chief judge did not consider its admission to be a violation of the statutory inhibition, but it was not so decided, the court saying that, if the admission of the testimony was error, it was not harmful; and it further stated that the transaction was in no way helpful to the plaintiff in establishing the existence of the trust and his right to enforce it.

In *Burdick v. Burdick*, 180 N. Y. 261, 264, 73 N. E. 23, 24, it was said: "The witness, being a party to the action, was incompetent to testify to such transactions under § 829 of the Code; and it is settled by authority that such a disqualification includes conversations or transactions between the deceased and third parties at which the witness was present, even though she did not take part therein. *Holcomb v. Holcomb*, 95 N. Y. 316; *Re Eysaman*, 113 N. Y. 62; *Re Dunham*, supra; *Re Bernsee*, 141 N. Y. 389, 36 N. E. 314." The decision in that case, however, is not controlling, because the testimony which was excluded embraced a personal transaction between the witness and the deceased. The case, if material at all, is only to show the belief of the judge writing the opinion that the construction of § 829 had been settled by the later authorities to the effect he stated.

In *Lawyer v. White*, 198 N. Y. 318, 91 N. E. 840, the action was in ejectment to recover possession of a farm. The controversy turned on an alleged destroyed or lost deed, and the plaintiff was permitted to prove conversations between herself and the defendant, her mother, relating to the deed. It was contended for the appellant that this testimony involved a personal transaction with the deceased, from whom the plaintiff claimed the deed. Plainly it did not. It went simply to prove the defendant's admissions, and those admissions were competent evidence against the party making them, whether they related to the acts of a deceased or any other person. So the court held. But the relevancy of the case lies in what was written by Judge Gray in the opinion then delivered: "It was finally held that they [transactions between the witness-

es and deceased person] might not be testified to by such witness, if he participated in the transaction or conversation, or was in any way a party to it, by reference or otherwise. In *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633, that question was considered and the cases reviewed. But the present case involves no such close question. The purpose of this provision of the Code is to prevent undue advantage, and that purpose is to be borne in mind when questions arise. *Wadsworth v. Heermans*, 85 N. Y. 639. If we are to give to the language 'concerning a personal transaction' so broad a signification as to exclude the evidence of facts not constituting the transaction, and not proving any communications between the parties, and which had nothing to do with their negotiations, we should be using the Code provision as an instrument to work inequality and therefore injustice." p. 323.

I think I have now referred to all the cases in this court dealing with the question before us, and the review seems sufficient to bear out the statement made at the inception of this discussion that the cases are in irreconcilable conflict.

An attempt was made by Justice Celona E. Martin, of the supreme court, afterwards a judge of this court, to frame some rule which would harmonize the authorities. That effort is to be found in the opinion in *Eighmie v. Taylor*, 68 Hun, 573, 23 N. Y. Supp. 248. All the cases which had been decided up to that time (which was before the decisions in 140th and 141st N. Y.) are collated and reviewed with the thoroughness and acumen which marked the work of that learned judge. He harmonized the authorities on the theory that there were two different rules, one that of the *Holcomb*, *Eysaman*, and *Dunham* Cases, which applied in cases where a will or other instrument was contested on the ground of undue influence, restraint, mental incapacity, or fraud, and another rule applicable to other cases. The objection to this view lies in the fact that the statute lays down but a single rule applicable to all cases alike; that in none of the conflicting decisions of this court has any distinction been drawn on account of the character of the litigation in which the question arose; and it is difficult to suggest any tenable ground on which such a distinction could be founded. The learned judge did not attempt to suggest any reason for the distinction. He felt his duty was to find some rule, if possible, by which the authorities could be reconciled.

A further ground is urged that a distinction can be drawn between two cases, one where the witness is interested at the time

of the transaction or conversation to which he testifies, and the other where the interest is acquired subsequently. The answer to this position is twofold. The statute draws no such distinction, but makes the disqualification dependent upon the interest the witness has at the time of testifying, either in the litigation or in its subject-matter. Next, the exact point has been determined by this court to the contrary. *Miller v. Montgomery*, 78 N. Y. 282. It is further to be observed that the witness in this case had at least as great an interest as the witness in the *Holcomb Case*. In the latter case the only interest of the witness was what he might acquire as one of the next of kin of the deceased on the latter's death intestate, without having made any further disposition of the bond and mortgage in suit. The interest of the witness in this case was the title he would acquire as surviving husband in case of the death of his wife intestate, without having parted with the property.

It seems to me that we have arrived at a point in this war of conflicting decisions in which the controversy should be settled, both in the interest of litigants and of the administration of justice, by laying down some rule by which the courts can be guided. I think we can consistently and logically enunciate but one of two rules,—that of the earlier cases, based on what is claimed to be a strict construction of the words of the statute, that a witness is disqualified from testifying only in a transaction or conversation in which he takes actual part; or the other rule, that whatever he derives from the personal presence of the deceased by the use of his senses is a communication from the deceased to him, within the meaning of the statute. The suggestion that if the witness is referred to in the communication, it is a communication to him, but otherwise not, seems to me untenable. If a witness eavesdropping at a keyhole overhears a conversation between the deceased and a third party, how can the question whether that conversation is a communication to the witness be dependent upon the fact that the deceased or the other party refers to the eavesdropper, though ignorant of his presence? The distinction is repudiated in several of the later decisions of this court. I have already quoted from Chief Judge Andrews in the *Bernsee Case*, that such a distinction "would furnish an easy and convenient method in every case of evading the statute," and from Judge Gray in the *Dunham Case*, that communications in the presence of the witness were inadmissible.

As between the two constructions of the statute to which, in my judgment, we are limited, I think we should adopt that which 42 L.R.A. (N.S.)

excludes the testimony of an interested witness to any knowledge which he has gained by the use of his senses from the personal presence of the deceased. This construction is the one more consistent with the later decisions of this court. Indeed, a very learned judge thought that the law had become "well settled" by the decision in the *Bernsee Case*, *supra*. See opinion of Bradley, J., *Ditmars v. Sackett*, 92 Hun, 381, 36 N. Y. Supp. 690. I think, also, it better carries out the object intended to be effected by the legislature. When the common-law rule which disqualified all interested witnesses from testifying was abolished, this exception to the general abrogation of the rule was enacted. The underlying reason of the exception is plain. While it was deemed wise to receive the testimony of witnesses, however biased by interest in the litigation, leaving their credibility to be determined by the court or jury, it was deemed unwise to allow an interested party to give testimony against the successor in interest of a deceased person, relating to matters which the death of the deceased had placed it beyond the power of the adverse party to contradict. In other words, the object was to retain the equality between the parties which otherwise, under the new rule, would have been destroyed by the death of the deceased. In *Wadsworth v. Heermans*, 85 N. Y. 639, 641, Judge Finch said: "The spirit and purpose of this provision of the Code [§ 829] is equality, to prevent undue advantage; and that purpose should be kept in view when border questions arise and lines of distinction are to be drawn." In *Re Dunham*, 121 N. Y. 577, 24 N. E. 932, *supra*, Judge Gray expresses the same view: "While the ruling may be said to be stretched to the extremest tension, it has the merit, possibly, of being in furtherance of justice. The evidence is intended to work here against the respondent, who derives her interest under the testator's codicil, and whose lips are sealed by the law as to the matters; and to permit a witness so much interested as this one was in the amount of the estate ultimately distributable, to testify to things said and done by testator, though with others, but while he was present, with the only supposable purpose of affecting the interests of the respondent, would certainly seem to be giving an undue advantage to the one as against the other." p. 577.

Referring to the contention that the section should be construed literally, Judge Andrews said in *Cliff v. Moses*, 112 N. Y. 426, 435, 20 N. E. 392, 395: "But this literal construction of the section has not been adopted by the courts. It has been held with general uniformity that the section

prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negating the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings, and permitting the survivor to testify to what on its face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction." This was cited with approval by Chief Judge Parker in *Richardson v. Emmett*, 170 N. Y. 412, 63 N. E. 440.

I appreciate that, on the other hand, many persons advocate the admission of interested witnesses to testify to all matters, whether with a deceased person or with others, leaving the credibility of the witnesses to be determined by the court or jury. Whatever may be said of this view, it certainly is not the view which has been taken by the legislature; and of all rules a rule that permits an interested witness to testify to an act or statement by the deceased on which his rights depend, if he takes no part in either, but excludes him if he does, would seem about the worst. It is most easily evaded by the dishonest witness, while often fatal to the conscientious. Nor is the broad exclusion declared in the later cases of this court clearly an enlargement of the statute. Communication is not necessarily confined to conversations. Anything imported by one to another is communicated by him, even disease. A personal communication, within the meaning of the section, was well defined by the supreme court, in *Price v. Price*, 33 Hun, 69, 73, as "any one which the surviving party claims to have received, directly or indirectly, from the deceased person, and which the deceased person, if living, could contradict or explain. Nor, in our judgment, is the mode of making the communication by the deceased to the survivor at all controlling." As § 399 of the old Code read before the amendment of 1862 (chapter 460), it inhibited the witness from testifying to "any transactions had personally between the deceased person and the witness." By that amendment, it was extended to "any transaction or communication." Paraphrased in § 829 of the present Code, it reads, any "personal transaction or communication between the witness and the deceased person or lunatic." "Transaction," as the provision stood originally, would have included a conversation, and the addition of the term "communication" must have been intended to extend the scope of the provision.

Under the views here expressed, the admission of the testimony of the witness Hart,

relative to the alleged gift by the plaintiffs' intestate to the witness's deceased wife, was an error, and for that reason the judgment was properly reversed.

The order of the Appellate Division should be affirmed, and judgment absolute given against the appellant on the stipulation, with costs in all courts.

**Gray, Haight, Vann, Werner, Hiscock, and Collin, JJ., concur.**

#### INDIANA SUPREME COURT.

STATE BANK OF GREENTOWN, Appt.,  
v.  
CHARLES LAWRENCE.

(— Ind. —, 96 N. E. 947.)

#### Bills and notes — for unlicensed services — validity.

1. A note executed in payment of professional services rendered by one without a license to practise medicine is, where practice without a license is forbidden by statute, unenforceable in the hands of the payee.

#### Same — assignee — duty to inquire.

2. A bank to which is offered a note payable to a nonresident whom it knows to be practising medicine in the state, which he is not permitted to do without a license, and who has offered it many similar notes, is bound to inquire into the consideration for the note, and in case it fails to do so, and the note was in fact given for professional services and the payee was unlicensed, it cannot enforce payment of the instrument.

(January 3, 1912.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Huntington County in defendant's favor in a suit on a note executed by defendant in payment for professional services. Affirmed.

The facts are stated in the opinion.

Messrs. Watkins & Butler and Blackledge, Wolf, & Barnes for appellant.

Messrs. John Q. Cline and Claude Cline, for appellee:

A note given in payment of medical services to one who fraudulently represents him-

**Note.** — The question as to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry is considered in the note to *Mee v. Carlson*, 29 L.R.A. (N.S.) 351. And see also cases *Pierson v. Huntington*, 29 L.R.A. (N.S.) 695; *Dollar Sav. & T. Co. v. Crawford*, 33 L.R.A. (N.S.) 587; *Vaughn v. Johnson*, 37 L.R.A. (N.S.) 816; and *Citizens' Trust & Sav. Bank v. Stackhouse*, 40 L.R.A. (N.S.) 454

self to be a licensed physician, but who is illegally practising without a license, is void.

Hill v. Ward, 45 Ind. App. 458, 91 N. E. 38.

Where the facts are sufficient to put a purchaser of a note on inquiry, it is his duty to make such inquiry.

Shirk v. Neible, 156 Ind. 73, 83 Am. St. Rep. 150, 59 N. E. 281.

Morris, Ch. J., delivered the opinion of the court:

Suit by appellant on note for \$120 executed by appellee on September 12, 1905, to W. A. Magee, due one year after date, payable at a bank of Hammond, and indorsed by Magee and delivered to appellant before maturity. Several paragraphs of answer were filed, among which was one alleging that the note was procured by fraud, and another that the sole consideration of the note was medical services rendered by Magee, who, at the time, had no license to practise medicine. There was a trial by jury resulting in a verdict and a judgment for defendant. Appellant filed a motion for a new trial, in which 142 causes therefor were alleged. This motion was overruled, and this action of the lower court is the only error assigned here.

Appellee claims that the verdict is fully sustained by undisputed evidence, and that the judgment should be affirmed regardless of intervening errors, if any. The uncontroverted facts are that for some years prior to September, 1905, the payee of the note, "Doctor" W. A. Magee, was a resident of Chicago, Illinois, and claimed to be a medical and surgical specialist. He had no license to practise in Indiana. He carried on an extensive system of swindling operations in a number of counties in Northern Indiana. His scheme was somewhat similar to the Bohemian oats swindle, which was used extensively in this state some years ago. The "doctor" plan was to call on people in the country who were in ill health, and assure them he could cure them in a definite time, the patient to execute him a note due at the end of such time, for the treatment, and he to execute a written agreement to return the note when due if no cure were effected. He then sold the note before maturity. When the note in issue was executed, Magee was driven to appellee's farm residence in Jefferson township, in Huntington county. Appellee was lying on a couch. Magee told him he was from Chicago, and was a specialist, with a capital of \$175,000; that he was out on a vacation, advertising his business, and he had heard appellee was ill. He examined appellee, and told him he had catarrh and kid-

ney trouble, and was in a very dangerous condition, and would soon be beyond relief; that he could cure appellee in one year. Appellee's wife was present, and the "doctor" found her also in great need of his treatment. For \$120 he agreed to visit appellee and wife once per month for a year, and furnish them medicine to take and insure a cure. As a result of his solicitation, appellee executed this note, and Magee gave appellee a written agreement signed by himself, by the terms of which the note was to be returned to him in case appellee and his wife were not cured within the year. They never saw the doctor again. He sent them medicine which they took for some time. Each time they took it, however, it made them worse. Finally, after about eight months, they quit taking Magee's medicine, called in a local physician who prescribed for them, and their ailments readily yielded to his treatment. Shortly after the note was executed Magee sold and indorsed it to appellant for \$108.

When the note was executed, the practice of medicine without a license was prohibited in this state, under penalty of fine. Burns's Anno. Stat. 1908, § 8410. Consequently the note in the hands of Magee was not enforceable, because the consideration therefor was an illegal one.

The bank purchased the note before maturity for value. The note was not void. In the hands of an innocent holder it was enforceable. Schmueckle v. Waters, 125 Ind. 265, 268, 25 N. E. 281. Appellee claims that, if it be conceded that appellant had no actual notice of the note's infirmity, the uncontroverted evidence discloses such facts as legally put appellant on inquiry into its consideration, and, if inquiry had been made, appellant could not have failed to discover the illegality of the consideration and fraud in its procurement.

The law is well settled in this state that persons dealing in commercial paper are required to use reasonable diligence where the paper is offered for sale under circumstances that are calculated to excite the suspicion of a reasonably cautious person. Citizens' Bank v. Leonhart, 126 Ind. 206, 25 N. E. 1099; Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306.

Where the circumstances show that the purchaser refrained from making inquiry lest he should thereby become acquainted with the transaction out of which the note originated, he cannot occupy the position of a holder in good faith without notice. Schmueckle v. Waters, supra; Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281; Coffin v. Anderson, 4 Blackf. 408.

In *State Nat. Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551, that court said of the above doctrine: "The rule thus laid down we regard as an extremely equitable and salutary one. No man should be permitted to wilfully close his eyes, and then excuse himself upon the ground that he did not see." When the illegality of the consideration of the note was shown, the burden devolved on appellant to show the purchase was made in good faith without notice. *Schmueckle v. Waters*, supra.

It is shown by the evidence that appellant bank was located in Greentown, Howard county; that it was organized in 1903, and was the successor of the Commercial Bank, a private institution, which did business in the same building since 1896. In the latter year Frank R. Hill became cashier of the old bank, and continued as such until the reorganization in 1903, since which time he has been appellant's cashier. Dr. S. T. Murray was president of appellant bank since its incorporation. Both Murray and Hill were directors. In this case the note was offered for sale to the cashier, who consulted the president about it. After consulting, these officers investigated appellee's solvency through the auditor of Huntington county and the Bank of Warren, in the same county. The president and cashier then purchased the note for the bank. No inquiry was made except as above stated. The bank frequently purchased commercial paper, and the purchases were always made by Hill and Murray. At the trial, which occurred in 1908, Dr. Murray testified that, before he became president of the bank, he was, for many years, practising medicine in Greentown and vicinity, and was a member of the Howard County Medical Association. "Dr." Magee was not a member of the society. About six years ago, the witness heard, through his patients, that Dr. Magee, a traveling specialist from Chicago, was practising in that vicinity, and since that time Magee has made frequent visits there, did not become acquainted with him personally until after he became president of the bank, when he was introduced to him by the bank's bookkeeper at the bank as "Dr. Magee." Witness knew Magee as a Chicago specialist, and did not know that he had any other profession or business in that vicinity.

Hill, the cashier, testified, in substance, as follows: "About six or eight years ago Dr. Magee had a note which, I think, was purchased by the Commercial Bank. In this note the name of Magee, as payee, was printed, and there was also printed therein 'The Commercial Bank of Greentown' as the place of payment. I told him that we would not allow anybody like that to use

our name in a blank. He got it printed without our consent. The above note had a perforated edge, but I did not suspect that a contract might have been torn off where the edge was perforated, and made no inquiry. This note was signed by one Runyan. The Commercial Bank had two of the Magee notes signed by a Mrs. Burns, and I think also by her son. Mrs. Burns has been dead three or four years. The son did tell me his mother had been swindled by Magee, but this conversation I think was after the Lawrence note was purchased. We had for collection a Magee note on Frank Kilander for \$60. Settled it for \$30 or \$35; authorized to do so by Magee. I proposed the compromise because I did not regard Kilander as entirely solvent. I had no recollection that Kilander told me that Magee had swindled him. We collected a good many Magee notes. We bought a number of his notes, and sent them to other banks for collection. I thought Magee was an eye specialist. In 1903 or 1904 . . . he always carried a case like that. He told me if I had any trouble with my eyes or anything, . . . needed an operation or anything like that, he would make me a price. And he exhibited his case, and I told him my eyes didn't need anything like that at all. Magee came to the bank frequently before and after 1903. He occasionally loafed without invitation, in the space inclosed in the bank by the railing. He was at my residence three or four times as a visitor. Once he was a guest there at supper. He was greatly interested in my little boy. At one time, about when the note in issue was purchased, a loan of \$200 was made to Magee by the bank, and he assigned several notes as collateral for the loan, aggregating \$800 or \$900 in face value. These notes were in various amounts ranging from \$40 to \$75, and were executed by various persons, some of whom lived in Grant, Huntington, and Wells counties. Some of these notes were good, others bad. The bank employed a collector to collect them, and told him to get what he could on them. The bank had authority to compromise them, and got enough on them to pay the \$200 note. Don't recollect when the note in issue was purchased, but think in September, 1905; knew that some of the notes handled by the bank were given 'for spectacles and fitting their eyes.' I have known people to pay as high as \$120 for having their eyes treated and spectacles fitted; though the notes handled were given, some for having spectacles fitted and others for treatment of the eyes and fitting also."

The officers of the bank knew, or believed, that Magee was a Chicago specialist, and



that he was offering to treat eyes and perform operations thereon, and that some of the notes handled by the bank were given for the treatment of eyes. They knew he called himself a doctor. The treatment of the eyes, either by medicine or by surgical operation, is prohibited by our statute unless the physician or surgeon is licensed. Burns's Anno. Stat. 1908, §§ 8401, 8405, 8409, 8410. Section 8408 prescribes under what contingencies a physician or surgeon licensed in another state may practise here. The evidence does not disclose any fact that would have warranted Magee in practising in Huntington county, even if he had a license to practise in Chicago. The note in suit shows on its face that appellee's postoffice address was in Huntington county.

The evidence introduced by appellee showed that Magee had no license to practise in Huntington county, and that he was a resident of Chicago, Illinois. This was sufficient to prove prima facie the allegation that Magee was unlicensed. Melville v. State, 173 Ind. 352, 89 N. E. 490, 90 N. E. 467; Witty v. State, 173 Ind. 404, 25 L.R.A. (N.S.) 1297, 90 N. E. 627. There was no evidence tending in any way to show that Magee had a license to practise medicine or surgery anywhere. Burns's Anno. Stat. 1908, § 700, provides that no judgment shall be reversed where it appears that the merits of the cause have been fairly tried and determined in the court below. We think that the statute is applicable here. Whatever, if any, errors were committed by the trial court, could not have affected the verdict. Appellant, under the facts disclosed by the evidence of its president and cashier, who bought the note, was, in the exercise of ordinary care, under the legal duty to inquire into the consideration of the note. No inquiry was made. Such inquiry would have resulted in disclosing the illegality of the consideration.

Judgment affirmed.

Petition for rehearing denied.

## KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,  
Appt.,  
v.  
JAMES REFFITT.

(149 Ky. 300, 148 S. W. 48.)

### Evidence — rumors — duress.

1. In a prosecution for selling pooled tobacco contrary to statute, evidence is admissible, in support of a defense that the

pooling contract was signed under duress, that night riders had inflicted personal injury upon, and destroyed the property of, those who had refused to pool, and that accused had been approached and told that it would be best for him to pool.

### Duress — night riders — threats — sufficiency.

2. A contract to pool tobacco may be found to have been executed under duress, so as to constitute a defense to a prosecution for selling pooled tobacco contrary to a statute, from the facts that depredations had been committed upon the persons and property of those who failed to pool by night riders, and that accused had been warned that it would be best for him to pool.

(June 21, 1912.)

**A**PPEAL by the Commonwealth from a judgment of the Circuit Court for Montgomery County acquitting defendant of the charge of selling pooled tobacco contrary to statute. Affirmed.

The facts are stated in the opinion.

Messrs. James Breathitt, Thomas B. McGregor, and James Garnett, Attorney General, for the Commonwealth.

Mr. John A. Judy, for appellee:

Defendant could not be convicted for violation of his contract unless the jury believed it to be valid.

Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Douthart v. Congdon, 197 Ill. 349, 90 Am. St. Rep. 168, 64 N. E. 348; State v. Wilson, 73 Kan. 343, 117 Am. St. Rep. 479, 80 Pac. 639, 84 Pac. 737.

Mr. Lewis Apperson also for appellee.

Lassing, J., delivered the opinion of the court:

On the 25th of September, 1909, James Reffitt pooled his tobacco, consisting of some 5½ acres, with the Nicholas County Board of Control. Afterward, he hauled

**Note.** — This case seems to be one of first impression as to whether duress may be predicated upon fear of disorderly elements in community.

The decision however that the pooling contract was entered into under duress seems to be in accord with principle and justice and warranted by the facts.

As was said in Galusha v. Sherman, 105 Wis. 263, 47 L.R.A. 423, 81 N. W. 495, duress in its broad sense now includes all instances where a condition of mind of a person caused by fear of personal injury or loss of limb or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

this same tobacco to Mt. Sterling and sold it. At the April term following, he was indicted by the grand jury of Montgomery county, under § 3941a of the Kentucky Statutes, upon a charge of selling pooled tobacco. At the September term of court, he was tried and found not guilty. The commonwealth, conceiving that his acquittal was due to errors committed by the trial court in the introduction of evidence and the instructions given, has prosecuted an appeal, with the view of having the law settled.

Appellee admitted signing the contract, but alleged that he was compelled to do so under the belief that his failure or refusal to enter into it would result in his suffering bodily harm or having his property destroyed. The evidence complained of was that to the effect that night riding had been going on in Nicholas county, plant beds destroyed, the canvas over them torn up and arranged over the center of the bed in the shape of a coffin or grave, people had been taken from their homes and whipped, one man in that county had been called to his door at night and killed, that barns had been burned and personal property destroyed, in cases where the owners of tobacco had refused to join the society and pool their crops, or had taken positions antagonistic to the society. It is common knowledge that, shortly after the organization of the Society of Equity, a highly excited condition prevailed throughout the tobacco-growing belt; the civil authorities were, in many instances, wholly unable to preserve the peace and prevent acts of violence and lawlessness and the destruction of property; that the local authorities, even when supplemented by the aid of the entire military power of the state, were still unable to restore order and prevent the perpetration of gross outrages upon the persons of individuals who were antagonistic to the success of the society, and the destruction of their property. In the rarest instances, those subjected to such indignities or the loss of their property were able to identify the persons guilty of these outrages, for they usually came upon their intended victims in the nighttime, and were so masked or disguised as to render their identity impossible of detection. As only those who were opposed to the society, or had refused to join it, were subjected to such treatment, it was generally understood that these punishments, so inflicted, were brought about by a lawless element in sympathy with the society, if not the members of it.

Appellee had heard these outrages discussed with frequency in that locality. He was not a member of the Society of Equity, did not want to become such, but was in

constant dread that some injury would be done him, or his crop would be destroyed. He testified that, while he was engaged in cutting his tobacco, a man named Blount came to him and told him that he would be in danger if he did not pool, and shortly thereafter, upon an occasion when he visited a blacksmith shop in the neighborhood to have some work done, a prominent Equity man said to him, in response to the question, had he pooled his tobacco, "Why don't you?" to which he gave an evasive answer, whereupon this man said, "The best thing you can do, by God, is to pool your tobacco." He testified that these statements, coming to him in the way and at the time they did, when taken in connection with the general knowledge of conditions existing throughout the tobacco-growing belt, caused him to sign the contract pooling this tobacco. He was a poor man, a tenant. This crop of tobacco represented his year's work. It was not in condition to sell at that time, only a part of it being in the house. In this condition he found himself at the time that the advice from the Equity man, which he construed as a threat, was given him to pool. Under these circumstances, it was the province of the jury to say whether or not, in signing the contract, he had been forced to do so under the belief that any other course on his part would result either in the loss of his property or personal injury to himself. The evidence complained of was not hearsay, but competent, substantive evidence, tending to show, and introduced for that purpose, not the truth or falsity of the reported outrages committed by night riders throughout the tobacco belt, but the fact that it was currently reported that such outrages had been committed. The object of all this evidence on the part of appellee was to show that the contract pooling his tobacco was not his free and voluntary act. His fear that the failure on his part to pool would result in the loss of his property or personal injury was superinduced and brought about, in the main, by the circulation of these reports of punishment inflicted upon nonpoolers in other localities in the tobacco belt. The evidence merely went to the effect that it was reported and understood that such outrages had been committed. It was these reports, according to appellee's contention, that exercised a controlling influence over his mind and caused him to pool his tobacco, and, in order to make out his defense, it was incumbent upon him to show that such reports were current. The evidence introduced by him tended to establish this fact, and for this purpose was entirely competent. In 1 Greenleaf's Evidence 16th ed. § 101, in dealing with evidence of this char-

acter, the author says: "Upon the same principle, it is considered that evidence of general reputation, reputed ownership, public rumor, general notoriety, and the like, though composed of the speech of third persons not under oath, is original evidence, and not hearsay, so far as it is offered, not to prove the fact reputed to be true, but merely the probability that through the reputation, rumor, or other communication a party has become aware of a certain fact if it existed. Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility, and hence it is no objection to its admission that it was not given under the sanction of an oath, or that the opposite party had not the opportunity of cross-examining the informant. . . . Such evidence is admitted merely for the purpose of establishing the utterance of the words, and not their truth."

All of this evidence, which was in fact but a matter of current history, was competent for the purpose of establishing the current rumors relative to the night rider outrages in the tobacco belt.

This brings us to a consideration of the next point raised by appellant, to wit: That, even though it be conceded that the statements alleged to have been made by Blount and the Equity man be construed to be a threat to destroy appellee's property if he did not pool, nevertheless such a threat does not constitute duress within the meaning of the term as usually understood, and that the instruction given by the court upon this point was erroneous. The instruction complained of is as follows: "By the term 'duress,' as used in this instruction, is meant such violence or threats made by the Burley Tobacco Society, or the Nicholas County Board of Control, or persons acting for or through them, or by their advice and counsel, as are calculated to operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation, or property; and if the jury believe from the evidence that the defendant signed the writing referred to in the first instruction under duress, they will find him not guilty."

It is urged that there was no evidence conducing to show that the Nicholas County Board of Control or the Burley Society were guilty of any acts of violence or unlawfulness, or were threatening the destruction of property or the injury of people through the instrumentality of night riders. It is true that the evidence does not show that the Burley Society or the Nicholas County Board of Control, neither of which institutions could speak except through their orders entered upon the minutes of their meetings, authorized or directed any-

one to resort to these means in order to further the interests of the society; but the communications received by appellee, and which inspired in him the feeling of fear that resulted in his signing the contract, were made by those interested in the society, by Equity men; and every man who joined the society became at once a member or part of the body politic. It is not necessary that these threats, acts of violence, and intimidation were committed and done by the Equity Society or the Nicholas County Board of Control. It is sufficient if they were done by those interested in the society, or members of the society, for the supposed purpose of furthering its interest. The society may not be held for acts of violence done by individual members thereof in furtherance of what they conceive to be the interests of the society; but where a contract has been obtained from one by reason of threats of personal violence or the destruction of his property, the society is in no position, in good conscience and fair dealing, to ask that such contract be upheld and enforced.

In 14 Cyc. 1123, "duress" is defined to be: "A condition which exists where one, by the unlawful act of another, is induced to make a contract, or perform or forego some act, under circumstances which deprive him of the exercise of free will; a condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party, and causes him to do an act or make a contract not of his own volition; personal restraint or fear of personal injury or imprisonment; . . . unlawful detention of the property of any such person."

Under the evidence in this case, it appears that appellee was advised that, if he did not enter the pool, he was in danger of being subjected to personal violence or of having his property destroyed.

But it is urged that in *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445, this court, in defining "duress," held that "the withholding of a man's property illegally does not place him under fear or duress." A very different state of facts was presented there from those under consideration. The sheriff in that case had seized the property of one man as belonging to another. The real owner of the property requested the sheriff to surrender it to him. He declining to do so, the owner signed the forthcoming bond for the debt in order to have his property released. When proceeded against on the bond, he attempted to excuse himself from liability on the ground that it had been procured under duress; but the court held otherwise, and properly so. No such case as that is here presented. There the owner

knew who had his property. He had a perfect legal remedy had he chosen to exercise it. He was not placed in fear, and he was in no danger of losing his property, or of having it destroyed, or of being subjected to physical punishment because he was demanding it or asserting his rights to it. In this case, however, appellee was confronted with a condition with which he could neither cope nor hope to control, and if, under these circumstances, he executed the contract, he was not acting as a free agent, but was constrained to do, by reason of these threats of bodily violence and loss of his property, that which he neither desired to do, nor would have done had he been free to act in the matter.

Where one, in dealing with his property rights, is forced by stress of circumstances to part with money or enter into an agreement against his will, courts have with a degree of uniformity held that such contracts are void, and money paid thereunder is recoverable. These decisions, as said in *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21, "are not uniform in their expression of the law, but they all rest upon the proposition that the duress of the property was such as to render the contract or payment involuntary." Continuing, it is said in that opinion: "It seems to be well settled that where a party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made or money paid by the owner under such circumstances, to emancipate the property, is to be regarded as made under compulsion."

The case of *Astley v. Reynolds*, 2 Strange, 915, is regarded as the leading English case. There a pawnbroker refused to deliver goods pawned, except upon payment of excessive interest. The owner having paid this to obtain possession of his property, he was allowed to recover back the excess.

The supreme courts of Main (in *Briggs v. Lewiston*, 29 Me. 472), Pennsylvania (in *Grim v. Weissenberg School Dist.* 57 Pa. 433, 98 Am. Dec. 237), and Massachusetts (in *Amesbury, Woollen & C. Mfg. Co. v. Amesbury*, 17 Mass. 461) have held that the exaction of illegal taxes and tolls constitutes a class of cases in which a recovery may be had upon the same principle. In *Scholey v. Mumford*, 60 N. Y. 498, it was held that illegal commissions demanded and paid to secure the surrender of bonds were recoverable. And in *White v. Heylman*, 34 Pa. 142, it was held that money paid to secure a transfer of patents wrongfully withheld might be recovered.  
42 L.R.A. (N.S.)

A much stronger case is here presented than that in either of the cases from which we have quoted, for here the fear which induced the making of the contract was not alone the loss of property, but of physical punishment as well.

We are of opinion that the instruction presented for the consideration of the jury fairly and fully covers the law of the case, as warranted by the facts proven; that the instruction defining duress, as given by the court, was correct.

This opinion is certified as the law of the case.

Winn, J., not sitting.

## MAINE SUPREME JUDICIAL COURT.

MARY A. WHITE

v.

JAMES E. MANTER.

(— Me. —, 84 Atl. 890.)

### Corporation — inspection of books — purpose.

1. A proper purpose need not be shown to entitle a stockholder to inspect the books of a corporation, under a statute providing that they shall be open at all reasonable times to the inspection of persons interested, who may take copies of such portions as concern their interest.

### Mandamus — to assist inspection of corporate books.

2. Mandamus will lie to compel a corporation to permit a stockholder to inspect

### Note. — Right of a stockholder to inspect books of the corporation.

The earlier cases on this question are gathered in notes appended to *Weihenmayer v. Bitner*, 45 L.R.A. 446; *Kuhback v. Irving Cut Glass Co.* 20 L.R.A. (N.S.) 185; and *State ex rel. Brumley v. Jessup & M. Paper Co.* 30 L.R.A. (N.S.) 290.

The material question of inquiry in cases involving the application of statutes or the common-law rule giving to stockholders the right to inspect the books of the corporation is whether or not the right of the stockholder to the enforcement of the right of inspection is absolute or conditional. This is generally not so much a question of statutory construction as it is a question of practice; hence, although the right may be given in the most specific manner by the express provisions of the statute, the stockholder may nevertheless be denied a mandamus to enforce this right on the theory that mandamus is a discretionary writ, and the court is under no duty to issue it even to enforce an absolute legal right; and as mandamus is the only remedy of a stockholder to secure an inspection of the books of the corporation, in some jurisdictions it may happen that while he has the strict

its books, although her purpose is to ascertain the amount of stock held by her former husband, from whom she is attempting to secure alimony, and the value of property conveyed by him to the corporation, for the purpose of establishing a dower interest therein, where the statute gives a right of inspection to all persons interested.

**Appeal — question not raised below — scope of word.**

3. A decree following the wording of a statute cannot be attacked on appeal, because it did not limit the meaning of a word used therein, if the point was not raised and passed upon in the trial court.

(October 15, 1912.)

legal right of inspection, he is unable to procure the enforcement of this right by mandamus because his motive is inimical to the interests of the corporation, and ulterior to the protection of any rights he may have as a stockholder. This situation confronts a stockholder in New York state. In this jurisdiction if his case is proper in other respects, a stockholder may recover from a corporation the statutory penalty for denying him the right to inspect its books, without reference to his motive for the inspection (*People ex rel. Britton v. American Press Asso.* 148 App. Div. 651, 133 N. Y. Supp. 216; *Hollaman v. El Arco Mines Co.* 137 App. Div. 862, 122 N. Y. Supp. 852); but the right to mandamus to compel the corporation to permit an inspection not being specifically given by law, and the issuance of mandamus being otherwise discretionary with the court, mandamus to enforce the statutory right of inspection may be denied a stockholder where his purpose and motive is inimical to the interests of the corporation and to promote some ulterior purpose of his own apart from his interests as a stockholder (*People ex rel. Britton v. American Press Asso.* supra; *People ex rel. Lehman v. Consolidated Fire Alarm Co.* 142 App. Div. 753, 127 N. Y. Supp. 348); and see cases in the notes heretofore referred to.

In Pennsylvania in sustaining the right of a director of a corporation to a mandamus to force the corporation to permit him to inspect its books without reference to his motive, a distinction has been made in this respect between the right of a director and the right of a stockholder, the court saying, "The right of a director to inspect the books of the corporation, like that of a stockholder, exists at common law; but the right of the former is unqualified, while the latter, to a certain extent, is a qualified right. The reason is that the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern. The protection of the interests of the company, therefore, require that his right to an inspection of the books be absolute. The inspection by a stockholder is primarily for 42 L.R.A.(N.S.)

**EXCEPTIONS** by defendant to rulings of the Supreme Judicial Court for Cumberland County rendered in a mandamus proceeding to compel defendant as clerk of a corporation to allow petitioner as stockholder to inspect the books of the corporation. Overruled.

The facts are stated in the opinion.

Messrs. Verrill, Hale, & Booth, for defendant:

A writ of mandamus should not issue unless the petitioner's right is clear and unquestionable.

*Dennett v. Acme Mfg. Co.* 106 Me. 476, 76 Atl. 922; *Townes v. Nichols*, 73 Me. 515;

the purpose of protecting his individual interest, and is not with the view of enabling him to perform his duty as a manager of the corporation. It is therefore a qualified right, and depends in each instance upon the facts of the particular case. It may, and frequently does, interfere with and affect the internal affairs of the corporation; and, when it does, the domestic court will withhold its aid, and not grant the relief." *Machen v. Machen & M. Electrical Mfg. Co.* 237 Pa. 212, — L.R.A.(N.S.) —, 85 Atl. 100.

In applying this doctrine it becomes a question of importance to determine what facts are sufficient to justify a court in refusing a writ of mandamus to compel enforcement of the right of inspection. In a recent case it is held that the fact that the stockholder was interested in a rival and competing company did not necessarily indicate an improper and unlawful purpose in asking inspection of the books of account and records, where he expressly waived any right to see the formulas or become informed of the process by which the remedies manufactured by the corporation were prepared, and had no intention or desire to see the list of the names of the salesmen of the corporation; and that in these matters he was willing to submit to any reasonable restriction consistent with the due and adequate protection of his own interest which the court had power to impose. *Furst v. Rawleigh*, 154 Ill. App. 522.

In Illinois the general rule has been asserted that this right of a stockholder to examine the books of the corporation is secured him by statute. *People ex rel. Bajohr v. Weber Co.* 159 Ill. App. 588.

And that the right is enforceable by mandamus, rather than by injunction. *Heitkamp v. American Pigment & Chemical Co.* 158 Ill. App. 587.

But it has been held that it is the duty of the court by mandamus to enforce this statutory right without reference to the motive of the stockholder in seeking it, where the right is expressly and unequivocally given by statute. *Kimball v. Dern*, — Utah —, 35 L.R.A.(N.S.) 134, 116 Pac 28.

And see *WHITE v. MANTER*, and also the notes referred to. A. G. S.

*Davis v. York County*, 63 Me. 396; *Gardner v. Templeton Street R. Co.* 184 Mass. 294, 68 N. E. 340.

Under the statutes of this state, a stockholder in a corporation has no absolute right to examine the records and stock book of the corporation, regardless of his motive or purpose in seeking such inspection.

2 Clark & M. Priv. Corp. 1649; *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989; *State ex rel. O'Hara v. National Biscuit Co.* 69 N. J. L. 198, 54 Atl. 241; *People ex rel. Lorge v. Consolidated Nat. Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Foster v. White*, 86 Ala. 467, 6 So. 88; *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326; *Weihenmayer v. Bitner*, 88 Md. 325, 45 L.R.A. 446, 42 Atl. 245.

The exception to the ruling of the presiding justice, overruling the motion to quash the alternative writ on the ground that neither that writ nor the petition set forth the petitioner's motive in desiring an inspection of the books of the New England Land Company, should be sustained.

*Hoxie v. Somerset County*, 25 Me. 333; *Dane v. Derby*, 54 Me. 95, 89 Am. Dec. 722.

The petitioner is seeking to inspect the records and stock book of the New England Land Company for an improper motive; hence, the respondent's exception to the *pro forma* decree of the presiding justice that a peremptory writ of mandamus shall issue should be sustained.

*State ex rel. O'Hara v. National Biscuit Co.* 69 N. J. L. 198, 54 Atl. 241; *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989.

A peremptory writ of mandamus should not issue, since it was awarded for purposes partly legal and partly not.

*Hartshorn v. Ellsworth*, 60 Me. 276.

Mr. John Burke also for defendant.

Mr. Charles E. Gurney, for plaintiff:

Plaintiff having brought herself within the terms of the statute in that she is a party interested, to wit, a stockholder, and that she made demand at reasonable hours, is entitled to see the records and stock book, and the motive is not material.

*Henry v. Babcock & W. Co.* 196 N. Y. 302, 134 Am. St. Rep. 835, 89 N. E. 942; *Hollaman v. El Arco Mines Co.* 137 App. Div. 862, 122 N. Y. Supp. 852; *People ex rel. Gunst v. Goldstein*, 37 App. Div. 550, 56 N. Y. Supp. 306; *Althause v. Giroux*, 56 Misc. 511, 107 N. Y. Supp. 193; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Furst v. Rawleigh*, 154 Ill. App. 522; *Venner v. Chicago City R. Co.* 246 Ill. 170, 138 Am. St. Rep. 229, 92 N. E. 613, 20 Ann. Cas. 607; *Foster v. White*, 42 L.R.A. (N.S.)

86 Ala. 467, 6 So. 88; *State ex rel. Wilson v. St. Louis & S. F. R. Co.* 29 Mo. App. 301; *State ex rel. Spinney v. Sportsman's Park & Club Asso.* 29 Mo. App. 326; *Hub Constr. Co. v. New England Breeders' Club*, 74 N. H. 287, 67 Atl. 574; *Kimball v. Dern*, — Utah, —, 35 L.R.A. (N.S.) 134, 116 Pac. 30; *Ellsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; *State ex rel. Bergenthal v. Bergenthal*, 72 Wis. 314, 39 N. W. 566; *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033; *Weihenmayer v. Bitner*, 88 Md. 331, 45 L.R.A. 446, 42 Atl. 245; *Huylar v. Cragin Cattle Co.* 40 N. J. Eq. 398, 2 Atl. 274.

If motive be material it is incumbent upon the respondent to allege improper motive as a matter of defense.

*Foster v. White*, 86 Ala. 471, 6 So. 88; *State ex rel. Weinberg v. Pacific Brewing & Malting Co.* 21 Wash. 451, 47 L.R.A. 208, 58 Pac. 584; *Hub Constr. Co. v. New England Breeders' Club*, 74 N. H. 287, 67 Atl. 574; *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

If motive be material, petitioner has shown a sufficient and proper motive.

Clark, Corp. § 134; Clark & M. Priv. Corp. § 530; 10 Cyc. 954; *Re Steinway*, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103; *Heath, Maine Corp.* pp. 122, 123; 4 Thomp. Corp. § 4406; *Harrison v. Williams*, 3 Barn. & C. 162; *Lewis v. Brainerd*, 53 Vt. 519; *Re O'Neill*, 47 Misc. 495, 95 N. Y. Supp. 964; *Richmond v. Hill*, 148 Ill. App. 179.

*Savage, J.*, delivered the opinion of the court:

Petition for mandamus to compel the defendant, as clerk of the New England Land Company, a corporation, to allow the petitioner to examine the records and stock book of the corporation, and to take copies and minutes therefrom of such parts as concern her interests.

The petitioner is a stockholder in the defendant corporation. In her petition she does not state the purpose for which she desires to examine the books. And for this reason the defendant moved to quash the alternative writ. The motion was denied, and the defendant took an exception. After hearing, a peremptory writ was ordered to issue, and to that order the defendant excepted.

It is provided by Rev. Stat. Chap. 47, § 20, that all corporations existing by virtue of the laws of the state shall have a clerk and a clerk's office within the state, where shall be kept their records and a book showing a true and complete list of all stock-

holders, their residences, and the amount of stock held by each. "Such records and stock book shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests."

The common law gave to stockholders the right to examine the books, records, and papers of the corporation, when the inspection was sought at proper times and for proper purposes. 10 Cyc. 954; *Re Steinway*, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103. And it is generally held at common law that the purpose must relate to the interest of the stockholder as such. *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989, and cases cited; *Re Steinway*, supra; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Venner v. Chicago City R. Co.* 246 Ill. 170, 138 Am. St. Rep. 229, 92 N. E. 643, 20 Ann. Cas. 607.

The defendant contends that the statute above cited is affirmatory of the common law, and that the right under the statute to inspect is subject to the same limitations as the right under the common law. Starting with this premise, the defendant contends: First, as to pleading, that the petitioner must allege and prove a proper purpose; and, secondly, as to the merits, that the petitioner's purpose is not a proper one.

We think that the statute is affirmatory of the common law, and that it is more. It adds to the common-law right; it removes some of the common-law limitations. In other words, the statute right of inspection of corporate records and of the list of stockholders, by a stockholder, is absolute and unlimited. The statute does not make the purpose material, and we cannot. We are now speaking of the statutory right, and not of any particular remedy. Where the right is guaranteed by statute, the great weight of authority is to the effect that the motive or purpose of seeking to exercise it is not the proper subject of judicial inquiry. The court, in *Henry v. Babcock & W. Co.* 196 N. Y. 302, 134 Am. St. Rep. 835, 89 N. E. 942, said: "No doubt the legislature could make the stockholder's privilege of inspection dependent upon the motive or purpose with which it is sought; but it has not seen fit to do so. The language of the statute is plain and mandatory. It recognizes an absolute right in the stockholder, and imposes an absolute duty upon the corporation and the custodian of the stock book. The law requires no statement or proof of any particular intent upon the part of the person demanding the inspection. He must be a stockholder, and must prefer his request during business

hours; that is all." So in *Venner v. Chicago City R. Co.* 246 Ill. 170, 138 Am. St. Rep. 229, 92 N. E. 643, 20 Ann. Cas. 607, the court, pointing out the distinction between the common-law right and an unlimited right given by the statute, said: "When the right is conferred by statute in absolute terms, the purpose or motive of the stockholder in making the demand for an inspection is not material; and he cannot be required to state his reasons therefor." To the same effect are *Foster v. White*, 86 Ala. 467, 6 So. 88; *State ex rel. Wilson v. St. Louis & S. F. R. Co.* 29 Mo. App. 301; *Hub Constr. Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574; *Ellsworth v. Dorward*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156; 67 Pac. 1050; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033; *Weihenmayer v. Bitner*, 88 Md. 331, 45 L.R.A. 456, 42 Atl. 245. According to the tenor of these cases, which we approve, the petitioner was not required to allege and prove her purpose, and the refusal to quash the writ for that reason was right.

The foregoing discussion applies to the main question, whether the peremptory writ was properly ordered to issue. The stockholder's right to inspect is unlimited. The purpose he seeks to promote is not confined to his interest in the corporation as a stockholder. It has been held that the fact that he is a competitor in business is not a sufficient reason for denying the right. *Weihenmayer v. Bitner*, supra. And so, when the purpose is to enable the stockholder to enforce a claim against the corporation itself.

But to avoid any misconstruction it should be observed that, while the right of stockholders to inspect the records of the corporation and the list of stockholders is unlimited, the right "to take copies and minutes therefrom" is limited to such parts "as concern their interests." It has been frequently held that the right to make copies and minutes is, at common law, necessarily incidental to the right to inspect. However this may be, the statute in this state is restrictive. The stockholder has no statutory right to make copies or minutes of more than concerns his interests.

Although we have used the language of the cases in saying that the motive or purpose of seeking to exercise the right is immaterial upon the question of right, the courts are not agreed that it is compulsory upon the court in all cases to enforce the right by mandamus, which is a discretionary writ, and not a writ of right. Some courts seem to hold that when the right to

inspect is guaranteed by statute, mandamus must issue as a matter of course; and that nothing is left to the discretion of the court. See *Re Steinway*, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103; *Venner v. Chicago City R. Co.* 246 Ill. 170, 138 Am. St. Rep. 229, 92 N. E. 643, 20 Ann. Cas. 607; *Ellsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; 10 Cyc. 956. It is elsewhere held that the statutory right, while absolute in terms, is subject to the implied limitation that it shall not be exercised from idle curiosity, or for a merely vexatious or an unlawful purpose. *Foster v. White*, 86 Ala. 467, 6 So. 88; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *State ex rel. O'Hara v. National Biscuit Co.* 69 N. J. L. 198, 54 Atl. 241; *Weißenmayer v. Bitner*, 88 Md. 325, 45 L.R.A. 446, 42 Atl. 245. It is impossible as yet to extract a rule that may be called well settled.

But whatever may be the precise limitations, if there are any, we find no case under a statute that goes farther than *Foster v. White*, supra, except *O'Hara v. National Biscuit Co.* supra. In the last case cited the court attaches to the statute guaranty the common-law limitation that the inspection must relate to the stockholder's rights as a stockholder. This is contrary to the great weight of authority. We are not called upon in this case to fix the limitations; for if we assume that we have the authority to deny the writ, when to issue it would be merely to serve curiosity, or to promote a vexatious or unlawful purpose,—in other words, enable the petitioner to abuse the writ, rather than use it,—we do not think the facts in this case warrant any such limitation. The petitioner swears that her purpose in inspecting the records is to enable her to judge better of the value of her stock. The defendant contends that her real purpose is to find out what amount of stock is owned by her former husband, from whom she has been divorced, and against whom proceedings are now pending to determine the amount of her alimony; that another purpose is to gain from the records information which will assist her in litigation hostile to the corporation, in which she is seeking to recover a dower interest in certain real estate which her husband has conveyed to the corporation; and that she is looking for information which may assist her brother, who is a competitor of the corporation. This last contention is not supported by the evidence. Assuming that the other contentions of the defendant are well founded, we do not think that under the broad right of inspection given by the statute the purpose should be adjudged 42 L.R.A.(N.S.)

vexatious, improper, or unlawful, even if that question is open. Accordingly, we hold that the power of the court was properly exercised in this case.

The defendant's last contention is that the form of the peremptory writ which was ordered to issue should be modified so as to command the defendant to permit an inspection of the corporation records only, as distinguished from the records of the directors' meetings. We cannot order the decree modified. In the form in which the case comes up, we can only sustain or overrule the exceptions. But the decree below was that a peremptory writ issue as prayed for, and the prayer of the petition was that the defendant be commanded "to allow the petitioner to inspect the records and stock book" of the corporation, and "to take copies and minutes thereof of such parts as concern her interest." The prayer follows the language of the statute precisely. So will the peremptory writ. It does not appear that the court was asked to define the word "records" in the statute, or to limit its meaning in the peremptory writ, or that the point was made in any form at the hearing. When a decree, otherwise properly ordered, follows the language of the statute upon which it is based, it cannot be held to be erroneous in law, on exceptions, on the ground that the court failed to limit or define the meaning of a statutory term which is susceptible of two meanings. If a limitation is desired, it must be asked for and denied, or the point otherwise ruled upon, before error can be predicated. So, without expressing any opinion as to whether the term "records" in the statute is intended to include more than the records of the meetings of a corporation, we merely decide that the exception cannot be sustained.

Exceptions overruled.

#### OKLAHOMA SUPREME COURT.

J. H. CONNELL, President of the Oklahoma Agricultural and Mechanical College, et al., Plffs. in Err.,

v.

RUTH GRAY, by Next Friend.

(— Okla. —, 127 Pac. 417.)

College — state — fees — uniform — validity.

The board of regents of the Agricultural and Mechanical College of this state have authority, where not prohibited, either express or implied, by law, to collect an in-

Headnote by WILLIAMS, J.



cidental fee to bear expenses necessary and convenient to accomplish the object for which the institution was founded.

(a) All males and females who are citizens of the state, and who are between the ages of twelve and thirty years, are entitled to be admitted to all the privileges of the institution and instruction therein.

(b) No incidental expense may be charged and collected as a condition precedent to entrance.

(c) A reasonable sum may be required to be deposited by each student as a condition precedent to entrance, to be held as earnest money for all negligent breakage or damage to the property of said institution whilst a student, to be refunded at the end of the term or session, provided it is not consumed by breakage or damage to the property of the institution by such student.

(d) The board is authorized to prescribe a uniform and require it to be worn by the students.

(e) It may require that each student shall be provided with such uniform prior to entrance, or that a reasonable deposit be made to procure the same.

(October 8, 1912.)

**E**RROR to the District Court for Payne County to review a judgment in plaintiff's favor in an action brought to enjoin defendants from compelling payment of any

money by plaintiff as a condition to her admission as student in the defendant college. Modified.

The facts are stated in the opinion.

Mr. Charles West, Attorney General, and Mr. W. C. Reeves, Assistant Attorney General, for plaintiffs in error:

The regents have authority to exact fees for admission, instruction, or incidental expenses, except in so far as such power is from time to time expressly limited by the legislature.

State ex rel. Priest v. University of Wisconsin, 54 Wis. 159, 11 N. W. 472; Bryant v. Whisenant, 167 Ala. 326, 140 Am. St. Rep. 41, 52 So. 525; New Orleans v. Tulane Educational Fund, 123 La. 550, 49 So. 171.

Mr. Freeman E. Miller for defendant in error.

Williams, J., delivered the opinion of the court:

The defendant in error, as plaintiff, instituted an action in the district court of Payne county, by her next friend, alleging in her petition that the plaintiff in error J. H. Connell was the duly selected, appointed, and acting president of the Agricultural and Mechanical College of the state of Oklahoma, a public educational in-

**Note.**—*Right to require or prohibit the wearing of uniforms or religious garb in public school or college.*

CONNELL v. GRAY seems to be the first case in which the validity of a requirement that a student in a public educational institution must pay for and wear a uniform has been determined.

But the question as to the right to forbid the wearing of religious garb in public schools has arisen in a few cases, among which are O'Connor v. Hendrick, 184 N. Y. 421, 7 L.R.A. (N.S.) 402, 77 N. E. 612, 6 Ann. Cas. 432, and Hysong v. Gallitzin School Dist. 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482, reference for which is made to in 7 L.R.A. (N.S.) 402. The only other case which seems to have passed upon this point is Com. v. Herr, 229 Pa. 132, 78 Atl. 68, Ann. Cas. 1912 A, 422, wherein the constitutionality of a statute imposing a fine upon public school directors who should permit the wearing in the public schools by any teacher thereof of any dress, insignia, marks, or emblems indicating the fact that such teacher is an adherent or member of any religious order, sect, or denomination, and providing that no teacher, while engaged in the performance of his duty as a teacher, should wear any such dress or article, and that, upon notice to the board of directors of a violation of the act, the offending teacher should be suspended for one year, and upon a second offense permanently disqualified from

teaching in the school,—was attacked upon several grounds, it being held that the act did not subject an individual school director to punishment for the refusal of his associates as a body to enforce the statute when he was not responsible therefor, in violation of the 5th and 14th Amendments of the Constitution of the United States; that it did not violate either the mandate of the Pennsylvania Constitution, that "all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences; . . . no human authority can in any case whatever control or interfere with the rights of conscience, and no preferences shall ever be given by law to any religious establishments or modes of worship," or the provision that "no person who acknowledges the being of a God and a future state of rewards and punishment shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth," since the inhibition against wearing religious dress or insignia is directed against acts, not beliefs, and only against acts of the teachers while engaged in their duties as such; and that the right of an individual to clothe himself in whatever garb his taste, his inclination, or tenets of his sect, or even his religious sentiments, may dictate, is no more absolute than his right to give utterance religious or otherwise, both being subject to restraint by statute. G. J. C.

stitution established and maintained by said state under and pursuant to the Constitution and laws of said state, and is and has been such president thereof at all times mentioned in said petition, and as such president is and has been at all such times the chief executive officer of said college, under the laws of said state, and the rules and regulations pertaining thereto, ordained and established by the board of regents of said college, and the duties for him prescribed by the said board of regents; and that the defendant J. E. Hasselle, plaintiff in error, is the duly selected, appointed, and acting registrar of said college, and that as such registrar it is his duty, as prescribed by the board of regents of said college, to enroll, admit, register, and certify as a student entitled to instruction therein, under the direction, control, advice, and authority of the president of said college, all persons being citizens of the state, of Oklahoma, and between the ages of twelve and thirty years, if they apply as students therefor; and the plaintiff states that on the 2d day of September, 1912, she, being a citizen of Oklahoma, and of the age of sixteen years, and having applied for instruction as a student in said institution, did then and there comply with all the lawful rules and regulations prescribed by the board of regents and the faculty of said institution, and did present her certificate of qualifications entitling her to admission as such student to the committee on entrance of said college, and the said committee on entrance of said college did then and there examine the same and in all things approved the same, and by its chairman did duly certify her as entitled to admission as a student in said college; that thereafter, in compliance with and in conformity to the rules and regulations prescribed by the board of regents of said college, she duly presented said certificate to the said president and said registrar (plaintiffs in error) on the 2d day of September, 1912, and her application for admission therein to instruction, and demanded, requested, and prayed that she be enrolled as a student in said college and admitted to instruction therein, and registered and certified, as required by the laws of the state and the rules and regulations of said board of regents, as a student of said college, and entitled to instruction therein; but the plaintiff states that the defendants, acting together and conspiring to deprive her of her lawful right to admission as a student to the privileges of said college and to instruction therein as provided by law, and in violation of their duties as provided by law, did on said day refuse to admit her to instruction in said college, or to enroll, reg-

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ister, or certify her as a matriculated student in said institution, and as such student entitled to instruction in said college; that, notwithstanding this plaintiff had complied with all the lawful rules and regulations relating or pertaining to the admission of citizens of the state of Oklahoma as students entitled to be admitted to instruction therein, the said defendants, unlawfully conspiring and acting together for the purpose of depriving plaintiff of her property, did unlawfully, illegally, wilfully, without authority of law and in violation of law, demand of the plaintiff that she pay over to and deposit with the said president and said registrar, or some other person acting in collusion with them, the sum of \$5 in good and lawful money of the United States, worth and of the value of \$5, as a condition precedent to the admission of the plaintiff as a student of said college, and as a condition precedent to enrolling her as a student thereof and admitting her to instruction therein.

Plaintiff further states that said defendants further demand the payment of other and further fees from the plaintiff and others in like situation with her as conditions of admission to instruction in said institution, to wit, a deposit of \$6, with which the defendants shall purchase for her a certain dress and equipment for use by her in the gymnasium of said institution, and a like fee of all other students for like dress and equipment for such use; also from all male students a deposit of \$17 for the purchase of a suit or uniform for use in the military department of the said college while receiving instruction in said department, such gymnasium and military instruction being compulsory under the rules and regulations of such college; also a fee of \$2 per term for the use of a typewriting machine by students in the commercial department, and \$2 per term for the use of a piano in the music department from each student about to take instruction, said pianos and said typewriting machines being the property of said college and a part of its equipment, and being owned by it as fully and to the same extent as it owns its grounds, campus, and other buildings, all such fees in the various classes and departments being demanded and required from students applying for instruction in said college, and being exacted by defendants before said defendants will register, accept, admit, or certify any such student as entitled to admission to instruction therein.

Defendants, answering, admit "that the said Ruth Gray, on September 2, 1912, applied to the defendants for admission into the said Oklahoma Agricultural and Me-

chanical College, and that admission into the college was denied said Ruth Gray for and on account of her failure and refusal to pay the term fees of \$5 to be charged all students, of which \$2.50 is not returnable, and the balance to become a trust fund which may be returned at the end of the term, unless absorbed by charges for breakage and repairs made against the individuals and the student body, as provided by the orders, rules, and regulation promulgated by the faculty of said college, and duly approved by the state board of agriculture of the state of Oklahoma, the board of regents of said college. That said defendants, in demanding such term fee of \$5, acted under and by virtue of the following proceedings of the faculty, of April 11, 1912, which was confirmed by the college committee of the board of regents on August 14, 1912, which proceedings were in words and figures as follows: 'Moved that a fee of \$5 per term be charged all students, of which \$2.50 shall not be returnable, the balance to be a trust fund which may be returned at the end of the term, unless absorbed by charges for breakage and repairs made against individuals and the student body. This to take the place of all fees, with the exception of music and typewriting fees; and that the change be published in the catalogue.' Further answering, defendants state that the said term fee of \$5 is in no sense a tuition, and will not be used for that purpose. The funds arising from the collection of this fee will be expended for the purchase of supplies and materials consumed by students and for services rendered and for the support of student organizations necessary to the highest efficiency of the college, viz., the Y. M. C. A., the Y. W. C. A., student literary societies, the students' college paper, the athletic association for women, the athletic association for men, and similar student enterprises. That the fund arising from the collection of such fee will be wholly insufficient to meet all the expenses incident to the enterprises named."

On application, a temporary injunction was granted the plaintiff (defendant in error) against the defendants (plaintiffs in error), which is, in part, as follows: ". . . It is considered and ordered by the court that the defendants herein, J. H. Connell, president of the Oklahoma Agricultural and Mechanical College of the state of Oklahoma, and J. E. Hasselle, registrar thereof, be, and the same are hereby, enjoined and restrained until the further order of the court herein, from demanding, requiring, or compelling the payment of any money or sum of money to them or into their hands or into the hands of anyone else by the plaintiff as a condition for her

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admission to instruction as a student in the said Agricultural and Mechanical College of the state of Oklahoma; that they be, and they are hereby, enjoined and restrained from demanding, requiring, and compelling the payment of any money or sums of money to them or into their hands or into the hands of anyone else, by any person being a citizen of the state of Oklahoma and entitled to admission to instruction under the rules and regulations prescribed by the board of regents of said college, other than prescribing the payment of money as a condition for admission. It is further ordered by the court that the said defendants may, and they are hereby expressly permitted to, require from students taking military drill or gymnasium instruction in said institution, proper uniforms and clothing as prescribed by the board of regents and faculty, and necessary and proper for use in said instruction, and may accept from persons taking any such instruction deposits of money for the furnishing of such uniforms and equipment for such purpose, and may require deposits from students taking instruction in any department of the college wherein breakage to equipment and supplies may occur, or other damages that are liable to be made, the same to be held as a trust fund, and to be repaid to the student depositing the same in case the student shall not cause sufficient damage or breakage to absorb the amount thereof, and in case he shall cause such damage or breakage, same shall be prorated and the balance returned to him."

This proceeding in error is prosecuted to reverse this order. The Oklahoma Agricultural and Mechanical College was organized or provided for by the first legislative assembly of the territory of Oklahoma. Okla. Stat. 1890, pp. 82, 85; Comp. Laws (Okla.) 1909, chap. 103, art. 12. The provisions of the act of Congress approved July 2, 1862 (act July 2, 1862, chap. 130, 12 Stat. at L. 503, 2 Fed. Stat. Anno. p. 850), and the supplemental act approved March 2, 1887 (act March 2, 1887, chap. 314, 24 Stat. at L. 440; 1 Fed. Stat. An. p. 9, U. S. Comp. Stat. 1901, p. 3218), were accepted; the territory of Oklahoma obligating itself to comply with all of the provisions of said act. The state is obligated to carry out these provisions. Const. § 4, art. 1; §§ 1 and 2 of the Schedule. Nothing in said acts of Congress, or the act creating said institution, requires said college to be maintained free of tuition, and that students be admitted therein for instruction free from all fees and charges, unless it be § 25 of said act (§ 253, Stat. Okla. Terr. 1890), which provides: "Males and females shall be admitted to all the privileges of the institution

hereby established, and all citizens of the state of Oklahoma between the ages of twelve and thirty years shall be admitted to instruction therein, if they apply as students therefor." In Kansas the statute provides: "Admission into the university shall be free to all the inhabitants of the state, but a sufficient fee shall be required from nonresident applicants, to be fixed by the board of regents; and no person shall be debarred on account of age, race, or sex." Kansas Laws 1889, § 11, chap. 258.

In *State ex rel. Little v. University of Kansas*, 55 Kan. 389, 29 L.R.A. 378, 40 Pac. 656, it was held that the board of regents had no power to collect a fee of \$5, or any other fee, for the use of library, or exclude students from the use of the library for the nonpayment of such fee, and that the assumption by the board of the power to collect such fees and to exclude students from the library for the nonpayment thereof was an unwarranted assumption of corporate powers, from the exercise of which they will be ousted by that court in a suit brought in the name of the state by the attorney general. In the opinion it is said: "It is contended that the board of regents may yet collect a reasonable fee for the wear and tear of the books; that the word 'free' must be taken with qualifications; that in the nature of things there must be rules and regulations; that each and every student cannot be permitted to occupy the chancellor's seat at his desk, or any other place in the university he may choose at his own sweet will, but that the regents and the chancellor have a right to make proper regulations; and that the fee imposed is no more than is reasonable to preserve and protect the library. We fully agree with so much of the claim of the learned counsel as asserts the right of the regents and the chancellor to make all necessary and proper rules and regulations for the orderly management of the school, the preservation of discipline therein, and the protection of its property, but that it may require the payment of money as a condition precedent to the use of the property of the state is another and a different claim, with which we do not agree. If the regents may collect \$5 for the use of the library, why may they not collect also for the use of the rooms of the building and of its furniture? Why may they not impose fees for walking in the campus, or for payment for instructors? All these things have cost money. There are expenses incurred by the state on behalf of the students in connection with every department of the school. If they may collect for one thing, it is not apparent why they may not collect for another. It is suggested that sup- 42 L.R.A. (N.S.)

plies are furnished in the laboratories for the use of students, which are destroyed; that vessels and implements may be broken; and that the students should certainly be required to pay for these things. No question of that kind, however, is now presented, and express provision therefor is made by chapter 226, Laws of 1895. The library is provided for permanent use. Each volume, with proper care, may be used by a great number of students and for a long term of years. The library as a whole is subjected to wear and tear, but only in the same manner as furniture and other properties furnished by the state. The buildings, furniture, library, and apparatus, as well as the services of the faculty, are furnished and paid for by the state. These, we hold, under the provisions of the statute quoted, are free to all residents of the state who are entitled to admission into the university. The regents have no power to raise a fund, to be managed and disposed of at their discretion, by charging fees for the use of the library, or under any other claim for any other purpose, unless expressly authorized to do so by law."

The following cases are cited by counsel for plaintiffs in error as supporting their contention. *State ex rel. Priest v. University of Wisconsin*, 54 Wis. 159, 11 N. W. 472; *New Orleans v. Tulane Educational Fund*, 123 La. 550, 49 So. 171; *Bryant v. Whisenant*, 187 Ala. 325, 140 Am. St. Rep. 41, 52 So. 525.

In the Wisconsin case the question turned largely upon the construction of legislative acts, and has weight as an authority in this case only to show that the board of regents, where not prohibited, either express or implied, by law, have the power to collect incidental fees to bear expenses necessary and convenient to accomplish the objects for which the institution was founded. There the board were permitted to levy and collect incidental fees for the heating and lighting of the public halls and rooms of the university; no provision having been made by law for such to be done at the expense of the state.

In the Louisiana case it was held that free tuition was a bar to the collection of the registration fee, but not to the collection of a laboratory fee. In the opinion the court said: "An amount is claimed as a laboratory fee. There is a difference between the laboratory fee and the matriculation fee. The last is general, but entirely proper; while, as relates to the laboratory fee, each student admitted to the laboratory has a direct personal interest. He is brought in direct contact with the department. He is a consumer of the articles placed before him for his use. He uses,

breaks, and destroys them, and he at other times keeps them in a safe and entire state. It may be said that they are in the nature of personal expenses. No student should object to paying them. They are more particularly personal, because not all students enter or are admitted to the laboratory. There are those who remain content enough never to enter the laboratory rooms with a view of availing themselves of the opportunities for self-improvement offered. The more ambitious for self-improvement are admitted, and these can, we imagine, extend their ambition slightly further, and provide the pittance, the payment of which will only make them more appreciative of the benefit conferred."

In the Alabama case it was held: "Code 1907, §§ 1678-1993, relating to the public school system, contemplates free tuition to all minor residents more than seven years old; but in the absence of statutory provision for a fund for heating and lighting schoolrooms, the county boards of education may prescribe a reasonable method for raising such fund, *e. g.*, by imposing a reasonable incidental fee upon pupils, and delegate its authority to the district boards and teachers to enforce the method adopted." In the opinion it is said: "And when the statute makes no provision for a fund for this purpose, the county boards have the right to prescribe a reasonable method for the raising and collection of this fund, and to delegate the authority to the district boards and teachers to enforce said rules. We also think that the requirement of a reasonable incidental fee for this purpose, as a condition precedent to attendance, is contemplated by the statute, in the absence of any special provision for same."

The board of regents are authorized to dispose of "all moneys appropriated by the state legislature and by Congress." Comp. Laws (Okla.) 1909, § 8364.

Section 3, art. 1, chap. 3, Session Laws of 1907 and 1908, p. 5, provides as follows: "The board of agriculture shall be the board of regents of all agricultural and mechanical colleges; it shall select the professors, presidents, and other employees of each of said schools, fix their salaries, and prescribe their respective duties. It shall prescribe the course of study in each of said schools, and shall ordain and establish such rules and regulations for the management thereof, not inconsistent to (with) the laws of the state, as they may deem necessary and proper."

The board of regents have the implied power to do everything necessary and convenient, where it is not prohibited, either express or implied, by law, to accomplish the objects for which the institution was found-

ed. To do this the property, grounds, buildings, halls, and apparatus, furniture, etc., must be reasonably preserved against negligent destruction. To require a reasonable deposit by each student as a condition precedent to entrance, to cover any such breakage or damage thereto, to be refunded at the close of the term or session in the event no breakage or damage is done by such student, appears to be necessary and reasonably within the implied powers of said board. The fee of \$2.50 for such purpose is not unreasonable.

It is conceded by counsel for all parties in this proceeding that the board has authority to prescribe the kind of uniform and require same to be worn by the students. Such being the case, it is within the power of said board to require the students, at the time of entrance, to provide themselves with such uniform, or make a reasonable deposit to cover the cost of same.

As to the Young Men's and the Young Women's Christain Associations, it is not permissible for said board to make it compulsory upon any student in said institution to contribute to the maintenance of the same. Section 5, art. 2, of the Constitution of this state, provides: "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

The first legislative act passed toward the separation of church and state was that by Virginia in 1786, entitled "An Act for Establishing Religious Freedom," which was brought about by Thomas Jefferson. In the Virginia Constitution of 1830 (§ 11, art. 3) it is provided: "No man shall be compelled to frequent or support any religious worship place or ministry whatsoever; nor shall any man be enforced, restrained, molested, or burdened in his body or goods, or otherwise suffer, on account of his religious opinions or belief; but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise affect, diminish, or enlarge their civil capacities. And the legislature shall not prescribe any religious test whatever; nor confer any peculiar privileges or advantages on any one sect or denomination; nor pass any law requiring or authorizing any religious society, or the people of any district within this commonwealth, to levy on themselves or others any tax for the erection or repair of any house for public worship, or for the support of any church or ministry, but it shall be left

free to every person to select his religious instructor, and make for his support such private contract as he shall please." This constitutional provision was but an embodiment of the act of 1786, establishing religious freedom. Section 5, art. 2, § 7, Mo. Const. 1875. The first prototype of it, however, seems to be in the Constitution of Michigan of 1835, article 1, § 5, which was reincorporated in article 4, § 40, of the Michigan Constitution of 1850. In Michigan it has been held that the reading of extracts from the Bible emphasizing the moral precepts of the Ten Commandments, as a supplemental text-book, which was used at the close of the sessions, and from which any pupil might be excused upon the application of parents or guardian, was not violative of such constitutional provisions. *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250. The following states support the Michigan rule: *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Billard v. Board of Education*, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422; 2 Ann. Cas. 521; *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Spiller v. Woburn*, 12 Allen, 127; *Church v. Bullock*, — Tex. —, 16 L.R.A.(N.S.) 860, 109 S. W. 115. The following states support the contrary rule: *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A.(N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220.

But the question here for determination is as to whether the board of regents of the Agricultural and Mechanical College have authority to levy a fee on every proposed student as a condition precedent to entrance therein, to be used for the maintenance of the Young Men's and the Young Women's Christian Associations. Said § 5 of article 2 is self-executing, and requires no act of the legislature to become operative, but by itself controls all legislation upon the subject of appropriating money or other property for such purposes. *Dakota Synod v. State*, 2 S. D. 366, 14 L.R.A. 418, 50 N. W. 632. Obviously it would not be permissible for said board to use any funds appropriated by the state for the purpose of maintaining these associations teaching and promulgating a system of religion. If the legislature is powerless to appropriate a fund for the purpose of maintaining such associations, or to authorize said board to use said funds for such purposes, it follows that it is not 42 L.R.A.(N.S.)

within its power to authorize said board to require a fee to be paid by the student as a condition precedent to entrance, to be used by said board for said purposes. For other authorities on this subject, see citations under §§ 3 and 13 of Williams's Annotated Constitution of Oklahoma.

It is not only within the power of said board to provide for athletics to be taught, but also for an athletic association of the students in said institution. It is also within the power of said board to provide for a college magazine. But to say that it was reasonably within the implied powers of said board, as a condition precedent to entrance, to require a deposit to be made for the maintenance of said athletic association and magazine would be equivalent to saying that it was within the power of said board to require a deposit by each student for the payment of all books and appliances necessary to be used by such students in said institution as a condition precedent to entrance.

If there is no appropriated fund available for the replacing of broken vessels or apparatus in the laboratory, or for the support of the gymnasium or the athletic association, or for the publication of the college magazine, or for the repair of the musical instruments and the typewriting machines, then, as to such students in their course of study and training that use the laboratory or the gymnasium or the magazine, or participation in the athletic association, within their college course, a reasonable incidental fee may be required after admission. All citizens of this state between the ages of twelve and thirty years are entitled to be admitted to instruction in this institution. The board of regents are permitted to prescribe only such rules relative to admission when not prohibited, expressly or impliedly, by law, as may be necessary and convenient to carry out the purposes of the institution. To require a reasonable deposit to reimburse the institution for breakage and injury negligently done by the students in the institution, such deposit to be refunded if no injury is done by the student, is reasonable and necessary and conducive to carrying out the purposes of the institution. To require the supplying of the required uniform as a condition precedent to entrance comes also within the same rule; but if the proposed student has supplied himself with such uniform, then there is no necessity for a deposit for such purpose. The other matters arise after the entrance of the student, and come within the powers of the regulation of the institution after such entrance.

The order, as modified to conform to this opinion, will be affirmed.

All the Justices concur

## VERMONT SUPREME COURT.

NATIONAL METAL EDGE BOX COMPANY  
v.

JEAN J. VANDERVEER et al., Appts.

(— Vt. —, 82 Atl. 837.)

**Incompetent person — mortgage by lunatic — enforceability.**

A mortgage may be enforced against one who, at the time it was executed by himself and his wife, was in fact insane, but who had not been so adjudged, to take up a prior purchase-money mortgage on his property, by a mortgagee having no knowledge of the insanity, either actual or constructive.

(March 20, 1912.)

*Note. — Right to enforce mortgage given by an incompetent who had not been declared such.*

As to the validity of a deed made by an insane person, see note to *Riley v. Cater*, 19 L.R.A. 489; and upon the question whether a deed of real property, executed by an incompetent, not judicially declared such, may be avoided in an action at law, see note to *Smith v. Ryan*, 19 L.R.A. (N.S.) 461.

In a few jurisdictions, mortgages executed by persons mentally incompetent to contract seem to be considered wholly void and unenforceable. Thus, it has been held that a mortgage executed by an insane person is void and cannot be enforced, although no advantage was taken of the mortgagor by the mortgagee. *Boyd v. Mulvihill*, 61 Neb. 878, 86 N. W. 922.

And in *Curtis v. Brownell*, 42 Mich. 165, 3 N. W. 936, it was held that a mortgage given by one who, at the time, was mentally incompetent, though he had not been so adjudged, will be set aside after his death, at the suit of his heirs, although the mortgagee was guilty of no fraud in the transaction.

Likewise, in Mississippi, a deed of trust executed by one who was at the time insane, to secure his note given at the same time for money borrowed from a bank, cannot be enforced by foreclosure, although the mortgagee neither knew, nor was chargeable with knowledge, of the mortgagor's mental condition. *Bates v. Hyman*, — Miss. —, 28 So. 567.

And in *Cook v. Parker*, 4 Phila. 265, it was held that a mortgage executed by a monomaniac, who was or may have been unduly influenced by the delusion under which he was suffering, is equally void with that of a lunatic, and cannot be enforced, although the mortgagor reasoned correctly in all that related to the execution of the instrument, and was aware of the consequences that would follow from its execution, and the mortgagee had no knowledge or notice of his delusion.

On the other hand, the weight of authority 42 L.R.A. (N.S.)

**A** PPEAL by defendants from a decree of the Chancery Court for Bennington County in plaintiff's favor in a suit to foreclose a mortgage. Affirmed.

The facts are stated in the opinion.

Messrs. Chase & Daley, for appellants:

The deed of an insane person is void without tendering back the money received for the deed.

*Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Baker v. Stone*, 136 Mass. 405; *Valpey v. Rea*, 130 Mass. 384; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

ity seems to be in accord with NATIONAL METAL EDGE BOX CO. v. VANDERVEER, to the effect that a mortgage of an incompetent person is voidable only, and may be enforced under proper circumstances. As said in *Merritt v. Merritt*, 43 App. Div. 68, 59 N. Y. Supp. 357: "Whatever question there may be as to deeds, it is well settled that a mortgage executed by a lunatic is voidable only."

And "whatever may be the rule as to conveyances, it seems, upon both reason and authority, that a mortgage executed under such circumstances [i. e., by an incompetent person, without fraud or unfairness, to one who had no knowledge or notice of the insanity, and where the parties cannot be put *in statu quo*] should be held valid; at least so far as the consideration was for the benefit of or on account of the mortgagor." *Mahoney v. Goepper*, 8 Ohio Dec. Reprint, 154.

So, a mortgage executed by a person of unsound mind, before he had been so adjudged, may be enforced, where the mortgage money was honestly paid to or for the mortgagor or on his account, and the mortgagee had no knowledge and took no advantage of the insanity. *Campbell v. Hooper*, 3 Smale & G. 153, 24 L. J. Ch. N. S. 644, 1 Jur. N. S. 670, 3 Eq. Rep. 727, 3 Week. Rep. 528.

And a mortgage executed by a lunatic before he had been adjudged to be such, to secure the payment of a reasonable loan of money, may be enforced by foreclosure, where the mortgagee made the loan in good faith, in the ordinary course of business, without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry, and his money was had by the mortgagor and appropriated to the latter's use, and the parties cannot be put *in statu quo*. *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 541; *Hardy v. Berger*, 76 App. Div. 393, 78 N. Y. Supp. 709.

Likewise, a purchase-money mortgage executed by an insane person and his wife, before the former had been adjudged insane, may be enforced by foreclosure, if it

Messrs. O. E. Butterfield and H. G. Barber, for appellee:

The executed contract of an insane person is to be regarded very much like that of an infant; and therefore, when goods have been supplied to him which were necessities, or were suitable to his station and employment, and which were furnished under circumstances evincing that no advantage of his mental infirmity was attempted to be taken, and which have been actually enjoyed by him, he is liable in law as well as in equity for the value of the goods.

2 Greenl. Ev. § 369; 1 Parsons, Contr. 313; Niell v. Morley, 9 Ves. Jr. 478; 2 Kent, Com. 451; Molton v. Camroux, 12 Jur. 800, 18 L. J. Exch. N. S. 68, 2 Exch. 487; Sergeant v. Sealey, 2 Atk. 412, 9 Mod. 370;

was taken by the mortgagee fairly and in good faith, and without knowledge or any notice of the mortgagor's incapacity. Myers v. Knabe, 51 Kan. 720, 33 Pac. 602.

And in Brown v. Cory, 9 Kan. App. 702, 59 Pac. 1097, it was held that a mortgage executed by an insane person who had not been declared or adjudged insane by a competent or legal tribunal may be enforced by foreclosure, although the mortgagee knew of the mortgagor's incompetency at the time of the execution of the mortgage, if the mortgagee paid to the mortgagor in good faith the amount of the loan evidenced by the note secured by the mortgage, and used no fraud or undue influence in the transaction, and there has been no offer made to return to the mortgagee the money loaned by him.

In Abbott v. Creal, 56 Iowa, 175, 9 N. W. 115, it was held that a mortgage of a homestead, which, by statute, is of no validity unless concurred in and signed by both husband and wife, may be enforced, if thus signed, although at the time of the execution thereof the wife was mentally incompetent, where the mortgagee, at the time, had no actual knowledge of that fact, and parted with his money in good faith, relying upon the mortgage as security, and the husband has no other property, and the parties cannot be placed in *statu quo*.

And a mortgage, fair in itself, executed by an insane woman and her husband upon land owned by her, before she had been judicially declared insane, may be enforced to the extent that the consideration was paid to her, or for her benefit, or on her account, or by her direction, if the mortgagee, at the time of taking the mortgage, had no knowledge or notice of the insanity, and acted fairly in the transaction. Mahoney v. Goepper, *supra*.

So, also, a mortgage executed by an insane person may be enforced to the extent, at least, that the consideration therefor went to pay off a prior mortgage upon the property of the mortgagor, with interest thereon and costs. McCracken v. Levi, 24 Ohio C. C. 584.

And a mortgage executed by an incom-

Loomis v. Spencer, 2 Paige, 153; Lincoln v. Buckmaster, 32 Vt. 657; Richardson v. Strong, 35 N. C. (13 Ired. L.) 106, 55 Am. Dec. 430; Pearl v. McDowell, 3 J. J. Marsh. 658, 20 Am. Dec. 199; Skidmore v. Romaine, 2 Bradf. 122; Ballard v. McKenna, 4 Rich. Eq. 358; Sims v. McLure, 8 Rich. Eq. 286, 70 Am. Dec. 196; Dodds v. Wilson, 1 Treadw. Const. 448.

Rowell, Ch. J., delivered the opinion of the court:

This is a petition in chancery to foreclose a mortgage given to the petitioner by the defendant Jean J. Vanderveer and his wife the 15th of January, 1909, at which time he was insane, and had been from and including July 16, 1908, and could not un-

petent person who was not, at the time, under guardianship, to secure payment of a note given at the same time for money borrowed of the mortgagee by the mortgagor, which was used and applied for the latter's benefit in payment of a note previously given by him, may be enforced, if, at the time of the execution of the mortgage, the mortgagee had no knowledge whatever of the mortgagor's disability to contract, but believed him to be mentally sound, and the transaction was bona fide, and no part of the loan has been repaid or offered to the mortgagee. Copenrath v. Kienby, 83 Ind. 18.

But a mortgage executed by an insane woman and her husband cannot be enforced against her, although she had not been adjudged insane, and the mortgagee had no knowledge or cause for suspicion as to her mental condition, and acted without legal negligence or fraud, where she did not receive the money loaned upon the mortgage, or any benefit or advantage therefrom, but her husband, with whom the mortgagee dealt, received the check representing the loan, appropriated the proceeds, and abandoned her immediately thereafter. Jordan v. Kirkpatrick, 251 Ill. 116, 95 N. E. 1079.

And a mortgage executed by an insane wife and her husband, on lands of the latter, to secure a loan to him, cannot be enforced against the wife's interest, after the death of the husband, she continuing insane, although she was apparently sane when the mortgage was executed, was never judicially declared insane, and the mortgagee had no notice of her insanity, and took the mortgage in good faith, and it has never been disaffirmed, and a sale of the whole of the mortgaged lands will be required to repay the loan. North-Western Mut. F. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185.

Nor can a mortgage executed by an insane woman and her husband, upon land owned by her, be enforced against her, if given simply to secure an old debt of her husband, already due to the mortgagee, without any new or other consideration,



derstand the nature and quality of his acts so as to comprehend the results that might flow from them. But he had not been adjudged insane, and was not till about a year and a half afterwards, when he was so adjudged and his wife appointed his guardian, and she is defending as such and as a signer of the mortgage, which was given to secure the money the petitioner paid at the special instance and request of Vanderveer, to take up a mortgage on the same premises, given by Vanderveer the 16th of July, 1908, to secure a part of the purchase price of the premises, and which he was being pressed to pay. The petitioner did not know, and the case shows nothing to charge it with knowing, that Vanderveer was insane when he gave it the note and mortgage; but, on the contrary, it is found by the master that the giving of them to the petitioner was a sane act, and a proper and prudent proceeding to take up the former mortgage, and was such a transaction as any man of sound judgment would be expected to do, and was necessary, to protect his interest in the property.

Such being the case, the decree of foreclosure appealed from is right; for when, as here, no inquisition nor adjudication of lunacy precedes the transaction, courts of equity do not, as a general rule, set aside the contracts of lunatics that have been executed, if made in the ordinary course of business, on sufficient consideration, of which the lunatic had the benefit, and are fair and reasonable in the particular case, and the parties cannot be placed in their former state, unless the mental condition of the lunatic was known to the other party, or he is chargeable with knowing it. This is undoubtedly the rule in England, and the prevailing rule in this country, we think; and we are committed to it in

although it was executed before she had been judicially declared insane, and the mortgagee had no knowledge or notice of her insanity. *Mahoney v. Goepper*, supra.

And likewise, a mortgage executed by an imbecile on his homestead, to secure a debt created long before, cannot be enforced, although he had not been adjudged to be a person of unsound mind at the time of the execution of the mortgage. *Smith's Committee v. Forsythe*, 28 Ky. L. Rep. 1034, 90 S. W. 1075.

Nor can a mortgage executed by an imbecile on his homestead, before he had been adjudged to be a person of unsound mind, to secure a new debt, be enforced, although the mortgagee did not know that the mortgagor was mentally unsound, if the former did not act in good faith, in that he knew that a third person, who advised the giving of the mortgage, and negotiated the transaction with him, on behalf of the mortgagor, received more than half of the con-

this state, and have been for more than fifty years, as shown by *Lincoln v. Buckmaster*, 32 Vt. 652, decided in 1860, in which the rule above stated was discussed, approved, and acted upon, though the contract was set aside because of the foolhardiness and folly of the other party in leading the lunatic into such a contract as he did, from which the lunatic derived no benefit.

The *Mutual L. Ins. Co. v. Hunt*, 79 N. Y. 541, was for the foreclosure of a bond and a mortgage. The case was tried below on the assumption that, when the mortgagor executed the papers, she was of unsound mind, and not capable of executing them; yet it was there held that as the case presented a contract executed on a valuable consideration of which the lunatic had the benefit, made by the plaintiff in good faith, without fraud or unfairness, without knowledge of the insanity, and without notice or information calling for inquiry, the plaintiff was entitled to recover. That holding was sustained by the court of appeals, both on principle and authority. On principle, because the plaintiff's money was had by the defendant, appropriated to her use, and thus tended to increase the body of her estate; and though in some cases a man may now, notwithstanding the old common-law maxim to the contrary, be admitted to stultify himself, yet he cannot do so to the prejudice of others, for he would thus make his own misfortune an excuse for fraud, against which the doctrine of that maxim stands unaffected. On authority the court refers to *Molton v. Camroux*, 2 Exch. 487, 18 L. J. Exch. N. S. 68, 12 Jur. 800, affirmed in error, 4 Exch. 17, 18 L. J. Exch. N. S. 356, 6 Eng. Rul. Cas. 71, as very much in point and similar in circumstances. There a lunatic bought annuities for his own life of a society that had no knowledge of

consideration, and he himself shared in the advantage being taken of the mortgagor. *Ibid*.

If the mortgagee, at the time of taking a mortgage executed by an insane person, had knowledge of the mental incapacity of the mortgagor, the mortgage cannot be enforced, although the mortgagee practised no actual fraud or undue influence on the mortgagor in the execution of the mortgage. *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994.

And a deed of trust executed by an insane person to secure payment of a promissory note will be set aside at the suit of his subsequently appointed guardian, without a restitution of the consideration, where the mortgagee had notice of the insanity, and was guilty of unfairness and fraud in the transaction, and the consideration received by the mortgagor has been wasted or has passed beyond his control. *Ricketts v. Joliff*, 62 Miss. 440.

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his lunacy, the transaction being in the ordinary course of the affairs of human life, and fair and bona fide on the part of the society. Chief Baron Pollock said that, while they were not disposed to lay down so general a proposition as that all executed contracts bona fide entered into must be taken as valid though one of the parties be of unsound mind, yet they thought they might safely conclude that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property that is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored, so as to put the parties *in statu quo*, the contract cannot afterwards be set aside by the lunatic nor those who represented him. In *Elliot v. Ince*, 7 De G. M. & G. 487, 26 L. J. Ch. N. S. 821, 3 Jur. N. S. 597, 5 Week. Rep. 465, the Lord Chancellor referred to *Molton v. Camroux* as very sound in principle, namely, that an executed contract, when the parties have been dealing fairly and in ignorance of the lunacy, should not afterwards be set aside; and said that it was a decision of necessity, and that a contrary doctrine would render all ordinary dealings between man and man unsafe; and went on to say that the result of the authorities seemed to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being of competent understanding. And the New York court of appeals, in the case above referred to, after quoting what the Lord Chancellor said of the soundness of *Molton v. Camroux*, goes on to say that so it has been held, and like contracts enforced upon the same principle, in repeated instances in that and other states, citing cases from different jurisdictions, and saying that they stand on the maxim that he who seeks equity must do equity, which was applicable to the case then in hand, for the defendant sought to deprive the plaintiff of its remedies to enforce the security while she retained the benefit of the contract; which, it said, was so plainly inequitable and unjust as to render further discussion unnecessary. *Flach v. Gottschalk Co.* 88 Md. 368, 42 L.R.A. 745, 71 Am. St. Rep. 418, 41 Atl. 908, is a well-considered case on this subject, and says that the principle that holds the lunatic liable in cases of this kind has long been acted upon in equity, and that such contracts are enforced against the lunatic, not so much because they possess the legal essential of consent, as because by means of an apparent contract he

has gained an advantage or a benefit that cannot be restored, and that therefore it would be inequitable to permit him, or those in privity with him, to repudiate it.

But there are cases holding the other way, and among them, and as strong as any, perhaps, is *Gibson v. Soper*, 6 Gray, 279, 68 Am. Dec. 414, which is much relied upon by the defendants. But we cannot adopt the view taken in those cases, for, as we have said, we are committed to the other view, which we think the more just and equitable view. Moreover, our best text writers adopt that view. Thus, Judge Story says that fraud is the ground on which courts of equity now set aside the contracts of lunatics; that those courts deal with the subject on the most enlightened principles, and watch with jealous care every attempt to bargain with them; and that when, from the nature of the transaction, there is not evidence of entire good faith, or the contract is not seen to be just in itself, or not for the benefit of the lunatic, they will set it aside or make it subservient to his just rights and interests. But that when the contract is made in good faith, without knowledge of the incapacity, with no advantage taken of the lunatic, and is for his benefit, and the parties cannot be placed *in statu quo*, the contract will not be set aside. 1 Story's Eq. Redf. ed. §§ 227, 228. So Mr. Pomeroy says that when a contract is made in ignorance of the insanity, with no advantage taken, and in perfect good faith, a court of equity will not set it aside if the parties cannot be restored to their original position, and injustice would be done. 2 Pom. Eq. § 946.

It is unnecessary to consider the subject further, and the result we have reached precludes the idea of intervention by the minor daughter as a creditor.

Decree affirmed and cause remanded. Let a new time of redemption be fixed.

## IOWA SUPREME COURT.

HENRY L. WHITE, Appt.,

v.

INTERNATIONAL TEXT-BOOK COMPANY et al.

(— Iowa, —, 136 N. W. 121.)

Appeal — ruling on former appeal — law of case.

1. A ruling by an appellate court that

Note. — As to when action is sufficiently at an end to support a suit for malicious prosecution, see notes to *Graves v. Scott*, 2 L.R.A. (N.S.) 927, and *Wilkerson v. Wilkerson*, 39 L.R.A. (N.S.) 1215

there is evidence to take the case to the jury under the issues as presented is the law of the case on a second appeal.

**Malicious prosecution — termination of proceedings — sufficiency.**

2. A prosecution is sufficiently terminated to sustain an action for malicious prosecution by the dismissal of the proceeding and taxing of costs against the county.

**Same — settling case — duress.**

3. The court cannot say as matter of law that one who has been arrested for the purpose of obtaining a sum of money in his possession as agent voluntarily compromises the claim, so as to bar an action for malicious prosecution, by the fact that, to avoid being taken to the county jail, and to secure his release from custody, he turns over the money under protest, without being able to obtain a full settlement of his accounts.

(May 7, 1912.)

**A** PPEAL by plaintiff from a judgment of the District Court for Linn County in defendants' favor in an action brought to recover damages for alleged malicious prosecution. Reversed.

**Statement by Deemer, J.:**

Action for malicious prosecution. At the conclusion of plaintiff's testimony, the trial court, upon defendants' motion, directed a verdict for the defendants. Plaintiff appeals.

**Messrs. John N. Hughes and C. R. Sutherland, for appellant:**

The money was turned over by plaintiff under circumstances that amounted to duress.

*Callender Sav. Bank v. Loos*, 142 Iowa, 1, 120 N. W. 317; *Kwentsky v. Sirovy*, 142 Iowa, 399, 121 N. W. 27; *Kennedy v. Roberts*, 105 Iowa, 528, 75 N. W. 363; *King v. Williams*, 65 Iowa, 167, 21 N. W. 502; *Galuska v. Sherman*, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495.

The former decision is the law of the case.

*White v. International Text-book Co.* 144 Iowa, 98, 121 N. W. 1104.

The question as to whether or not the settlement was obtained through duress of the arrest was a question for the jury; and assuming that it was a jury question, there ought to be no doubt that this suit may be maintained.

*Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Smith v. Markensohn*, 29 R. I. 55, 69 Atl. 311; *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 565; *White v. Apsley Rubber Co.* 194 Mass. 97, 8 L.R.A.(N.S.) 484, 80 N. E. 501.

The prosecution having been ended in such 42 L.R.A.(N.S.)

a way that it could not be revived except by the institution of a new action, the suit for malicious prosecution can be maintained.

*Hurgren v. Union Mut. L. Ins. Co.* 141 Cal. 585, 75 Pac. 168.

**Messrs. F. L. Anderson and David C. Harrington, for appellees:**

The discontinuance of a prosecution, when it is granted at the request of the defendant, is not such a final termination of the matter in his favor as will support an action for malicious prosecution.

*Morton v. Young*, 55 Me. 27, 92 Am. Dec. 565; *McCormick v. Sisson*, 7 Cow. 715; *Cooley, Torts*, 186; *Hamilburgh v. Shepard*, 119 Mass. 30; *Marks v. Gray*, 42 Me. 86; *Rounds v. Humes*, 7 R. I. 535; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *Rosenberg v. Hart*, 33 Ill. App. 262; *Gallagher v. Stoddard*, 47 Hun, 101; *Clark v. Cleveland*, 6 Hill, 345; *Gano v. Hall*, 42 N. Y. 67; *Swartwout v. Dickelman*, 12 Hun, 358; *Wilkinson v. Howel*, *Moody & M.* 495; *Welch v. Cheek*, 115 N. C. 311, 20 S. E. 460; *Langford v. Boston & A. R. Co.* 144 Mass. 431, 11 N. E. 697; *Craig v. Ginn*, 3 Penn. (Del.) 117, 53 L.R.A. 715, 94 Am. St. Rep. 77, 48 Atl. 192.

**Deemer, J., delivered the opinion of the court:**

This is the third appearance of the case before this court. Opinions on the other appeals will be found in 144 Iowa, 98, 121 N. W. 1104, and 150 Iowa, 27, 129 N. W. 338. In these two opinions it was held that there was enough testimony to take the case to the jury upon every issue tendered on the last trial in the district court save one, and that was a plea to the effect that the criminal proceeding was settled and dismissed at plaintiff's instance and request, and that, having been so disposed of, the action was not determined in such a manner as to entitle plaintiff to sue for malicious prosecution. That question was argued on the second appeal, but we did not decide it, because no such issue was made by the pleadings as they then stood. To the issue thus tendered on the last trial plaintiff filed a reply in which he denied the alleged settlement, and further pleaded that the money which he paid to defendant or its agent was obtained from him by duress, that the payment was involuntary and against his will, and, because of his then imprisonment, that the payment was under protest and with knowledge on the part of the defendant Text-Book Company that he did not owe it anything. After hearing plaintiff's testimony, the trial court thought the showing conclusive against a right to

recover, and it refused to submit the issue of the nature of the payment to the jury. If the verdict was directed upon any other ground, then the order was erroneous, because on former appeals we held that, under the issues as then presented, there was enough testimony to take the case to the jury on each and every proposition. This made the law for the case; and, whether correct or not, it was the duty of the trial court to observe and follow our previous decisions. This is too fundamental to require the citation of authorities in its support, but see *Hensley v. Davidson Bros. Co.* 135 Iowa, 106, 112 N. W. 227, 14 Ann. Cas. 62; *Russ v. American Cereal Co.* 121 Iowa, 639, 96 N. W. 1092, and cases cited.

The sole question which we may consider upon this appeal is the effect to be given the testimony as to the payment made the plaintiff while he was under arrest and in jail. It is true, of course, as a general rule, that a settlement or attempted settlement of a debt with accused does not of itself show that the proceedings were instituted without probable cause, and it is also true as a general rule that a dismissal of the proceedings by procurement of the accused, or by reason of a settlement between the parties, is not a sufficient termination of the proceedings to justify an action by the defendant therein for malicious prosecution. *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Emery v. Ginnan*, 24 Ill. App. 65. But it is also true that, if one arrests another on a criminal charge for the purpose of compelling the payment of an indebtedness, an agreement not to prosecute further upon payment of the debt is prima facie evidence of want of probable cause, and conclusive in the absence of satisfactory evidence to the contrary. *Prough v. Entriken*, 11 Pa. 81. Now, while there is an apparent conflict in the cases as to the effect of a settlement and dismissal of a criminal action upon an action for malicious prosecution, the great weight of authority seems to favor the proposition that where a criminal proceeding is dismissed or abandoned by procurement of the party prosecuted, by settlement or compromise with the prosecutor, it is not such a final determination of the matter in his favor as will support an action for malicious prosecution. *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Craig v. Ginn*, 3 Penn. (Del.) 117, 53 L.R.A. 715, 94 Am. St. Rep. 77, 48 Atl. 192; *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 565; *Langford v. Boston & A. R. Co.* 144 Mass. 431, 11 N. E. 697; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *McCormick v. Sisson*, 7 Cow. 715; *Lamprey v. Hood*, 73 N. H. 384, 62 Atl. 380; *Welch v. Cheek*, 125 N. C. 353, 34 S. E. 531; *Russell v. Morgan*, 24 R. I. 42 L.R.A. (N.S.)

134, 52 Atl. 809. In an early case Lord Tenterden said: "I think this mode of termination does not furnish any evidence that the action was without probable cause. If this should be allowed, the defendant would be deceived by the consent, as, without that, he would certainly have gone on with the action, and might have shown a foundation for it. I have no doubt about it." *Wilkinson v. Howel*, Moody & M. 495. The reason for the rule seems to be that where the termination of the case is brought about by a compromise or settlement between the parties, understandingly entered into, it is such an admission that there was probable cause that the plaintiff cannot afterwards retract it and try the question which by settlement he waived. *Emery v. Ginnan*, supra.

But in many of these cases exceptions are created to the effect that the settlement must have been voluntary and understandingly made. For instance, in *Morton v. Young*, supra, the supreme court of Maine said, among other things: "The same legal consequences do not follow acts done under duress of arrest and protest as when done freely and voluntarily,—under the abuse as under the legitimate use of legal process. Suppose that, instead of settling the defendant's demand, the plaintiff had given him a deed or bond; how could he defend an action brought on such instrument if the fact of his giving it is conclusive evidence that the defendant had a valid claim against him? Is the plaintiff the worse off for having paid his money than he would have been if he had given a deed or bond to get his liberty? . . . These is nothing in principle, and we have not found anything in authority, which places a party upon less favorable footing who pays his money to procure his release from arrest on a groundless suit than he who gives his bond or deed for the same purpose. If he may avoid the latter, he may recover the former. . . . The law does not make successful wrong a shield to protect its perpetrator from liability to afford redress to the injured party. If the wrongdoer has his hour of triumph, his hour of retribution is sure to come at last. The man who falsely, maliciously, and without probable cause sues out a process, arrests another, and compels him to pay money to procure his liberty, commits a wrong for which the law affords the sufferer redress in damages. The suing out of legal process is an abuse of the law to cover the fraud, the very wrong which the action for malicious prosecution was instituted to redress. It would be a reproach upon the law if it should allow the payment of the money thus wrongfully and illegally extorted from the plain-

tiff to have any legal effect against him. In *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170, the court, Parsons, Ch. J., held, not only that a deed given to procure the deliverance of a party from unlawful arrest and imprisonment on a groundless claim was void, but that an action of malicious prosecution might properly be maintained. *Pierce v. Thompson*, 6 Pick. 193."

Again in *Marcus v. Bernstein*, 117 N. C. 31, 23 S. E. 38, the supreme court of North Carolina said: "In *Langford v. Boston & A. R. Co.* 144 Mass. 431, 11 N. E. 697, it was held that 'where a nol. pros. is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution.' We do not think, however, that the facts in the present case make an exception to the general rule. The plaintiff protested all the time that his arrest was malicious and without just cause. There was no compromise, as the plaintiff only paid his debt, which he was in duty bound to do, and the defendant paid the cost of the prosecution. This was the arrangement or agreement, and nothing appears to show that the plaintiff procured the nol. pros., any more than that the defendant entered it on his own motion. In fact, his paying the costs rather indicates his desire to have a 'stet processus,' as it is called in the early books, and also indicates that his action was instituted more for the purpose of collecting his debts than because of any criminal offense, or from any patriotic motive, which purpose can receive no sanction in this court, and should not be encouraged in any court. It is an unauthorized mode of the strong controlling the weak. 'Procure' means 'to contrive, to bring about, to effect, to cause.' Webster's Dict. Procure means action, and the nol. pros. must have been at the instance or request of the plaintiff. If it cannot be seen at whose instance the dismissal was entered, then the general rule prevails, because the reason and the grounds upon which the exception is based do not appear."

In *Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977, the court of appeals of New York said: "The rule requiring that before an action for malicious prosecution can be maintained the plaintiff is bound to show a termination of the criminal proceeding has for its foundation that it cannot be known that the prosecution was unjust or unfounded until it is terminated; and, if the action for malicious prosecution were allowed to be maintained before the termination of the criminal proceeding, the plaintiff might be found guilty in that proceeding, and yet maintain her action for malicious prosecution on the ground that she was not guilty,

and that the defendant had no probable cause to believe her guilty; and thus there might be two conflicting determinations as to the same transaction. The law so far encourages criminal complaints as to protect the complainant against a civil action for damages in case the criminal proceedings, fairly conducted, results in the conviction of the person charged with crime. Such conviction, fairly obtained, without fraud or conspiracy, is held to be conclusive evidence of probable cause. But where the criminal proceeding is terminated favorably to the accused, or without his conviction, so that there can be no further proceeding upon the complaint or indictment, and no further prosecution of the alleged offense without the commencement of a new proceeding, then there has been a sufficient termination thereof to enable him, proving the other requisite facts, to maintain an action for a malicious prosecution. It cannot, in reason, make any difference how the criminal prosecution is terminated, provided it is terminated and at an end. Take a case like this: A poor and helpless woman is arrested, and the police justice informs her, before he makes his final decision, that he is inclined to hold her to bail, and she, being friendless and unable to furnish bail, promises good behavior in the future if he will discharge her, and then he enters a discharge. What reason can there be for holding, in such a case, if she can show that the criminal proceeding was instituted maliciously and without probable cause, that she may not maintain her action for malicious prosecution? The circumstances under which she was discharged may furnish competent evidence upon the issue of probable cause and malice and on the question of damages; but proof that the discharge was made under such circumstances cannot, upon principle, furnish an absolute bar to the action. The motive of the judge or justice in making the discharge is wholly immaterial. The real foundation of the action is the malicious prosecution without probable cause, and the termination of the criminal proceeding is a mere technical matter, in no way concerning the merits of the action, and is a mere condition precedent to its maintenance. Therefore any termination such as we have above mentioned, as a general rule, furnishes the condition precedent."

Some of the expressions found in this opinion we do not approve, for to our minds they carry the rule too far. We cite the case for what it is worth, and as an authority which recognizes an exception to the general rule already stated. *Craig v. Ginn*, 3 Penn. (Del.) 117, 53 L.R.A. 715, 94 Am. St. Rep. 77, 48 Atl. 192, contains a review

of the authorities upon the proposition, and the suggestion is there made that, if the settlement is procured by fraud or duress, the dismissal of the proceedings by the prosecutor is such a termination of the cases as will authorize an action for malicious prosecution. In *White v. Apsley Rubber Co.* 194 Mass. 97, 8 L.R.A.(N.S.) 484, 80 N. E. 500, the court said: "A warrant having been issued, he was arrested at his home, and, after being detained in custody for an appreciable time by the officer serving the process, he was released, while no further steps were ever taken in the prosecution of the case. Upon conflicting evidence, the weight of which was wholly for the jury, they further could find that the criminal proceedings were instituted solely for the purpose of coercing the plaintiff to abandon any claim or right he might have to occupy the house as a tenant, and that when this object had been accomplished by a surrender of his tenancy, and the removal of his family and household goods, he was released from arrest. Indeed, it must have been perfectly plain, if either his evidence or that of his wife was accepted as substantially stating what occurred, that the criminal law was invoked, not for the purpose of vindicating justice, but to get rid of a troublesome tenant. If so found, there was an abuse of criminal process, and this is sufficient to support an action against the instigator and promoter of the wrong. *Wood v. Graves*, 144 Mass. 365, 366, 59 Am. Rep. 95, 11 N. E. 567; *White v. Apsley Rubber Co.* 181 Mass. 339, 63 N. E. 885."

In *Smith v. Markensohn*, 29 R. I. 55, 69 Atl. 311, the supreme court of Rhode Island said: "There was conflicting testimony as to whether the rent was due at the time of the plaintiff's arrest, and as to whether he then denied it to be due. The jury evidently found that the plaintiff was not indebted to the defendant when arrested, and that he did not so admit, but the contrary. They also apparently found that the defendant either did not believe, or was not reasonably entitled to believe, that the plaintiff was indebted to him when he caused his arrest. Upon the testimony and the appearances of the witnesses on the stand, I think the jury amply warranted in so finding, and upon such findings and fact duress by imprisonment might be construed to exist. *Stong v. Grannis*, 26 Barb. 122; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Richardson v. Duncan*, 3 N. H. 508; 9 Cyc. 444, and cases cited; 10 Am. & Eng. Enc. Law, 2d ed. 322, 324. If a person arrested while protesting that he is not indebted to the person causing his arrest pays the money demanded simply to procure his freedom, he is not thereafter debarred from main-

taining an action for malicious prosecution. *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 565. The cases cited by the defendant are not necessarily inconsistent with the case last named as to the law. In the present case the testimony in my judgment required the submission of the question to the jury as to whether the payment of the \$20 was made in settlement or under duress to obtain his liberty. The verdict of the jury is, in effect, that the payment was made under duress and protest, and that there was want of probable cause. I think that the jury might properly so find upon the evidence."

In this connection, and to the end that our conclusions may not be misunderstood or misinterpreted, it is deemed important to differentiate some of the cases cited in support of the general rule, and elaborate somewhat upon the rules obtaining in this jurisdiction with reference to the action of malicious prosecution. As a general rule, such an action will not lie in this state for the prosecution of a civil suit, no matter how malicious the plaintiff may have been in bringing it. *Smith v. Hintrager*, 67 Iowa, 109, 24 N. W. 744; *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870. But, if there be a seizure of goods or an arrest of the defendant, then such an action will lie, although the original proceedings be of a civil nature. In many of the cases which announce the general rule above stated, the doctrine prevails that one may be held liable for maliciously prosecuting a civil action, although there be no arrest or seizure or detention of goods. Again, we have recognized a distinction between the malicious suing out of a writ and an improper use of the writ after it has been sued out, although distinctly pointing out that the actions are of the same general character.

To be entitled to recover for malicious prosecution, a plaintiff must show (1) the previous prosecution; (2) the instigation or procurement thereof by the defendant; (3) the termination thereof by the acquittal or discharge of the plaintiff; (4) want of probable cause for the prosecution; and (5) that it was malicious. There must be such a disposition or termination of the original case as that it cannot be renewed, but the prosecutor, if he proceeds further, must be driven to a new proceeding. A verdict of acquittal in a criminal case, a discharge of the defendant after a preliminary examination, or a voluntary dismissal of the action either by the prosecuting witness or by the prosecuting officer, is held in this state to be a termination of the suit. *Farmer v. Norton*, 129 Iowa, 88, 105 N. W. 371; *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138; *Green v.*

Cochran, 43 Iowa, 544; Miller v. Runkle, 137 Iowa, 155, 114 N. W. 611. Upon the last proposition, however, authorities are conflicting. See *contra*, Bacon v. Towne, 4 Cush. 217; Cardinal v. Smith, 109 Mass. 159, 12 Am. Rep. 682; Langford v. Boston & A. R. Co. 144 Mass. 431, 11 N. E. 697. But see Graves v. Dawson, 133 Mass. 419.

Even if there be a conviction in the main case, the plaintiff in an action for the malicious prosecution thereof may still recover if he shows that the testimony upon which the conviction was had was false and without foundation in law. Bowman v. Brown, 52 Iowa, 437, 3 N. W. 609; Olson v. Neal, 63 Iowa, 214, 18 N. W. 863.

In the event of acquittal, the defendant in a suit for malicious prosecution may show that plaintiff was in fact guilty of the crime charged, and such showing will be a complete defense to the action. Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864.

Of course, in any case, if the defendant can show that he had probable cause for prosecuting the action, this is a complete defense. So that, as we understand the cases, if one is being prosecuted for maliciously prosecuting a civil suit, a compromise and settlement of that suit by the payment of money, either upon defendant's procurement or by a settlement understandingly made and without duress, is a distinct admission of liability on his part, and the dismissal of the suit pursuant to such a settlement is not a termination thereof in defendant's favor, but, on the contrary, a distinct admission on his part that something is due.

It is a universal rule that, if one makes use of the criminal law for same collateral or private purpose rather than to vindicate the law, as to compel the delivery of property or the payment of a debt, such proceedings will be deemed to be malicious. And, if one institute a criminal prosecution knowing that a civil wrong only has been committed, he will be deemed to have acted maliciously. Williams v. Keys, 9 Colo. App. 220, 47 Pac. 839; Ross v. Langworthy, 13 Neb. 492, 14 N. W. 515; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101.

Ordinarily, when one begins a criminal proceeding in good faith, it should be prosecuted to the end that the law may be vindicated; and our statutes make it a crime for one to compound an offense. See Code, §§ 5301, 4889, 4890. But the statutes also provide that certain offenses may be compounded. The sections permitting this read as follows: "When a defendant is prosecuted in a criminal action for a misdemeanor for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be

compromised as provided in the next section, except when it was committed: (1) By or upon an officer while in the execution of the duties of his office; (2) riotously; or (3) within an intent to commit a felony." Code, § 5622. "If the party injured in such a case appear before the court to which the papers on a preliminary examination are returned, at any time before trial on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein and entered upon the minutes." Code, § 5623. "The order authorized by the last section is a bar to another prosecution for the same offense." Code, § 5624. "No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed except as provided in this chapter." Code, § 5625.

By the express language of these statutes no public offense can be compounded nor proceedings stayed except as provided in the acts quoted. There is no claim that these sections were followed in this case, and it also appears from the record made before the justice that the case against the plaintiff was dismissed and the costs taxed to Marshall county. This was a sufficient termination of the proceedings under the authorities already cited.

The only question left, then, is this: Was there such a settlement of the criminal case as to preclude the plaintiff from maintaining the action for malicious prosecution? This is a mixed question of law and fact, and we may assume for the purpose of the case that, if the plaintiff voluntarily procured the dismissal, and intentionally, understandingly, and without duress settled the matter, he has no standing in court with his action for malicious prosecution, although the action was a criminal one, and the necessary steps were not taken which would authorize a compromise and compounding of the offense. This concession is made simply *arguendo* and without the purpose or intent of holding that one may bring a criminal action for the purpose of enforcing the collection of a debt, and, having been successful in getting the money, may then dismiss the action, and be free from liability. Admitting for the purpose of the discussion that one may be precluded from prosecuting such an action by voluntarily procuring its settle-

ment and dismissal, it is quite clear, we think, under the later and more modern authorities, that this must be voluntarily and understandingly done and for the purpose of putting an end to the proceedings. If the settlement is brought about by duress, then it should not be held a bar to an action for the malicious use of the processes of the criminal law. Going now to the testimony, we find the following with reference to the alleged settlement and compromise. These excerpts are taken from the record for the purpose of showing the nature of the alleged settlement according to the plaintiff's contention.

Plaintiff testified in substance as follows: "In the afternoon of that day I went to my brother-in-law's house on the east side, and between 6 and 7 o'clock Mr. Crane and Mr. Wilson, the constable, I think it was, came up to the house. Mr. Crane came up, and said: 'The constable is coming down, and I will give you another chance to turn this money over.' I did not see the constable while he was talking. I said I was willing to turn it over if they were willing to settle with me for everything. He said he couldn't do that; he didn't have that authority; that the constable was coming down there, and, unless I turned it over, he would let the constable arrest me. After that the constable came up and served his warrant and took me away. Mr. Crane started off with us. He walked down the street with us, down town to the police station, and, when we got down there, he said, 'I will give you another chance to turn this money over,' and I said, 'I have told you how I would turn it over, when you are ready to settle with me.' That was just as we turned into the police station, and about 8 o'clock at night. They took me into the police station and put me in a cell, searched me, and took my money and watch and whatever I had in my pocket. I asked to telephone to an attorney, and they would not allow me to do that. They said they would telephone, but I heard from no one. In about two hours the constable came down and took me to Crane's office. I went into his office. I was not taken up to his office at my request. I did not request it. His office was located about a block and a half from the police station. I was taken into the office and into the presence of Mr. Crane, and Mr. Crane said, 'White, if you will turn over this money, we will release you and let you go;' and I said to him that I would turn it over if they wanted to settle with me the same as I said, in full. He said they wouldn't do that. Well, I said, I would like to have a chance to get bonds if I could. He said he would call the thing off, and he called the constable in, and the

constable said that the best thing for me to do was to turn the money over, and Mr. Crane would see that I would not have to go to Marshalltown. Mr. Hench was there, and said my wife was crying and was very nervous, and that it was the best thing I could do. I wasn't able to get any bail, so that I thought that was the best thing, to turn the money over to them. The constable was out in the hall. He was walking up and down the hall past the door, and I was in his custody all the time. I turned the money over and went home about 10 o'clock. I went to my brother-in-law's house. My family were up there. . . . 'Mr. Crane,' I said, 'I would rather let it go into court, or something, give bond.' And Mr. Crane said: 'If that is the way you are going to do, we will not go any further with it. We will call it off, or something of that kind.' . . . I don't know just what he did mean. He said, unless the money was turned over, he would call it off. I don't know what he meant. Those were the particular words. I did not understand that he would call off a settlement. After he said that we will call it off, he called the constable in, and the constable said that, unless the money was turned over, he would have to take me to Marshalltown with him; and, after that, the money was turned over. He spoke those words shortly after I went in there. I wanted Mr. Crane to allow me the \$20 on the trunk, and he would not do it. I said that I would prefer to let it go on, or something to that effect. Mr. Crane allowed me the commission and my salary check, also for the two days, but did not allow for the \$20 on the trunk outfit. The only thing unsettled at that time was pertaining to the trunk outfit."

Another witness, a brother-in-law of the plaintiff, also testified as follows:

Mr. Crane had been to my house that forenoon about getting Mr. White to return the money. He was there when the arrest was made.

Q. Did you telephone to Crane's house that night after Mr. White had been arrested?

A. Yes; and talked to Mr. Crane over the phone. I asked him if we put up that money if he would release Mr. White or get him released from jail. He said he would, to come over there, or he would come over to the office and see about it.

Q. Did he ask you to come to the house?

A. I don't recall that he did. I think I said to him that I would rather see him at the office. My object in calling Mr. Crane was not to settle the prosecution. I offered to furnish the money if he would



release Mr. White, and get him released that night, on account of his family. I did not want to settle any prosecution. I did not want to settle anything, only to get Mr. White out of jail. That was all I was attempting to do. Mr. Crane told me to come to the office. I went over to Crane's office. I had money with me. I do not remember how much. . . . I did not know the amount that they were claiming from Mr. White. I knew somewhere near the amount. My idea was that it was somewhere around \$80 or \$90. I did not have that amount with me. I did not go at the suggestion of Mrs. White. She did not talk to me about going over. I did not talk with any member of the family about going over. I simply went on own motion. I wanted to get Mr. White released. Mr. Crane was not at his office when I got there. I met him at the foot of the stairs. I think nothing was said in regard to this matter until we got into the office. I think Mr. Griswold and Mr. Kupfer were there. When I got into the office, I think I made the remark that it was rather a mean thing to do to have him arrested. Mr. Crane got very angry, took off his coat, and said he would beat my head. . . .

Q. Did you ask Mr. Crane, "Can't this matter be settled up?" or words to that effect?

A. I think so. I don't know whether that was the next remark or not. I asked him if he would not release White if the money was put up, and he said he would; and I said, "Then send for Mr. White."

Q. You asked him to send for Mr. White?

A. I think I did. I asked to have him sent for to get him released. When Mr. White got over there, he turned over some money.

Q. At your request Crane sent for White, didn't he, Mr. Hench, in order that enough money might be put up there?

A. Yes, sir.

Q. White and the officer came in?

A. Yes, sir. I think there was present White, Crane, the officer, and myself.

Q. Mr. Crane had two checks there, didn't he?

A. They had some papers I believe. Mr. White indorsed those two checks, I believe.

Q. Mr. Crane explained to him that he could indorse the two checks and turn them in as cash?

A. Yes. I think Mr. White consented to sign the two checks. He did sign them as a matter of fact, and gave them to Mr. Crane. Mr. White paid a part of the money, and I made up the balance.

Q. After you made up the \$89.10, there was due something for court costs, about \$10?

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A. Yes. The whole amount was made up there between us. I put up about \$26 and Mr. White the balance. I did not know that Mr. White got a receipt. I did not see Crane sign a receipt. They were at a table. I was off quite a little ways, and paid no attention to their settlement. I was not there to settle the thing for them. Mr. White and Mr. Crane did the figuring. Mr. White had a pencil in his hand, writing. I did not pay much attention to the conversation. I did not know that they had passed receipts. I was in the office probably an hour. They talked about the amount of the costs and his release, and the right of the constable to release him.

Q. It was understood that White was to turn over the money and the amount of the costs and the constable was to release Mr. White?

A. Yes. He was released. I testified on the former trial that I wanted to pay up the money and get him released. I do not know what he means by settlement.

Q. Wasn't this question asked you, "It was understood at that time between you and Mr. Crane and Mr. White that White was to be released from custody of the officer and this criminal prosecution dismissed," and you answered that "Yes?"

A. Yes; that is correct.

Q. Now the amount that was allowed Mr. White there over and above what was included in the checks was for two days' salary for work done the week he was discharged?

A. I believe it was.

Q. Was not this question asked you at the other trial in this case: "Q. You wanted to settle the matter for him, White?" And did you say, "Yes?"

A. Yes.

Q. Was not this question asked you:

"Q. It was at your instance and request that Mr. Crane sent for Mr. White, wasn't it?" And didn't you answer, "Yes?"

A. Yes, sir.

Q. Was not this question asked you: "You told Mr. White there when he was brought over, 'White, you must settle this up,' or words to that effect, didn't you?"

A. Yes, sir.

Q. Was not this question asked you: "You told him you would furnish the money?" And didn't you answer that, "Yes?"

A. Yes, sir.

Q. When Mr. White was brought up there, did he do or say anything in the way of protest against his owing this claim?

A. He protested against this settlement. He said he did not want to settle that way. He said he wanted to settle the way

he first wanted to settle with Mr. Crane, less the amount that was due him. I cannot say whether Mr. Crane gave him a receipt in full of all matters. I did not know what any of the papers signed contained. I did not look them over. Mr. Crane came to the house to have Mr. White sign some papers later in the night, after Mr. White had been released. He said then that he hadn't think Mr. White meant to take the money or embezzle it.

From this testimony a jury was justified in finding that the alleged settlement was not by plaintiff's procurement; that the money was paid under protest and for the purpose of securing plaintiff's release and to prevent his being taken to Marshalltown; that the payment was not voluntary, but under duress, and that the whole proceeding was resorted to, not for the purpose of vindicating the law, but to compel plaintiff to make a settlement of his accounts with the defendant Text-Book Company, or rather such a settlement as the company's agent insisted the plaintiff should make. There was not a complete adjustment of all matters between the parties, nor was the payment of the money intended as a final adjustment. Some matters were still left open. The trunk account was left unsettled, and it seems that plaintiff agreed to "stand certain attorneys' fees to be taken from his trunk refund." Surely under such a state of facts it should not be held as a matter of law that plaintiff secured his release by his own procurement, or that he voluntarily settled his account with the Text-Book Company and compromised their difficulties. To so hold would be a reproach to the law. Assuming, without deciding, that one charged with a crime may, without authority of court, compromise and compound it, or procure his release from the charge in such a manner as to bar him from maintaining an action for malicious prosecution, it must appear, we think, that the one accused voluntarily procured his release, that his payment was in full settlement of his accounts and for the purpose of extinguishing a conceded indebtedness, and that this payment was freely and voluntarily made; that is to say, not under protest or by reason of duress. Any other rule would encourage resort to the criminal law for the purpose of enforcing a debt, and the greater wrong the less the liability to punishment. It may be that some of the courts whose opinions we have cited would hold plaintiff barred of relief by reason of the claimed compromise and settlement; but we are not prepared to go to that extent. Our view is that the question as to the nature and effect of the settlement should have gone to the jury under proper in-

structions, leaving it to that body to say whether or not there was a voluntary compromise and settlement brought about by plaintiff's procurement.

For the error pointed out, the judgment must be, and it is, reversed.

### ARKANSAS SUPREME COURT.

SPEER HARDWARE COMPANY, Appt.,

v.

BRUCE BROTHERS.

(— Ark. —, 150 S. W. 403.)

#### **Mechanics' lien — water service — pipe laid on stranger's property.**

Property in which a water service is installed may be subjected to a lien for pipe laid across land belonging to a third person to reach the main, under a statute giving a lien to anyone who shall perform work upon or furnish material for any improvement upon land.

(October 14, 1912.)

**A**PPEAL by defendant from a decree of the Chancery Court for Sebastian County in plaintiff's favor in an action brought to enforce a lien for the contract price of work done in installing a water service. Affirmed.

*Note. — Mechanics' lien upon premises for an improvement not placed thereon but having a physical or beneficial connection therewith.*

This note does not purport to cover cases where the improvement was made upon one of two or more contiguous lots or parcels owned by the same person, and the question was as to the extent of the property to which the lien would attach. For such cases, see note in 26 L.R.A. (N.S.) 831. The cases included in the present note are those where the improvement was made in the street or upon premises not contiguous to the parcel involved, and the question was not as to the extent, but as to the existence, of a lien.

The note does not of course include cases involving projections upon adjoining lots, or passing upon the question whether a lien can be enforced upon a building for the construction of another building on the same lot or tract, or whether one may have a lien upon buildings for building fences, setting hedges, or digging wells upon the premises. And the note does not include cases which deny liens upon the ground that the statute is not applicable for reasons involving other than the location of the improvement. For instance, note Kentucky Lead & Oil Co. v. New Albany Waterworks, 62 Ind. 63, denying a lien upon the plant of a water company upon the ground that such company was not a

Statement by Kirby, J.:

This action was brought by Bruce Brothers to recover \$90 and interest, the contract price for installing a water service in a certain building in the city of Ft. Smith, at the time the property of B. C. Bates, now owned by appellant, and to have a mechanics' lien against the property foreclosed. The complaint alleges that Bates was the owner of a certain tract of land in the city of Ft. Smith, describing it, upon which was situated a corrugated iron building; that appellants, on September 27, 1911, entered into a contract with him to install a water service and meter upon said property for \$90, and installed said service, and, not being paid for same, they duly filed their claim for mechanics' lien;

that after the filing of the lien appellant became the owner of the property by purchase at a sheriff's sale.

The answer denies that Bruce Brothers, entered into the contract to install the water service upon the premises described in the complaint, and alleges "that the contract with Bates was for the laying of 227 feet of pipe; that only 75 feet of said pipe were laid on the premises described in the complaint, and upon which the lien is claimed; that the balance of said pipe was laid upon the property of other persons;" that the value of the pipe, meter, and faucet on the premises was only \$31.25, and that appellees were entitled to a lien for more than that sum, with interest and costs, which was tendered in court.

manufacturing company within the meaning of the statute.

#### Generally.

The lienability of work necessary for the protection of buildings which adjoin that under construction is not affected by the fact that the work was done upon the adjoining lot, and not upon the lot improved. *Caldwell v. Schmulbach*, 175 Fed. 429.

And it is held in *Wirsing v. Pennsylvania Hotel & Sanitarium Co.* 226 Pa. 234, 26 L.R.A. (N.S.) 831, 75 Atl. 259, that a mechanics' lien on a hotel and sanitarium will extend to a lot which is separated from the hotel lot by other property, but which contains a mineral spring which is intended as a part of the sanitarium property, where the statute permits the lien to attach to such curtilage as is reasonably needed for the general purpose for which the structure is erected, and which belongs to the same owner.

But in *Adams v. Central City Granite, Brick & Block Co.* 154 Mich. 448, 129 Am. St. Rep. 484, 117 N. W. 932, in which a manufactory was erected upon one of several city blocks, the court excluded many of the platted lots from the operation of the lien though they contained deposits of raw materials from which the manufacturing was to be done; and the court confined the lien to the lot on some portion of which the building was placed, the statute giving a lien upon the lot or lots upon, around, or in front of which the improvement was made.

And a mechanics' lien for work and materials used in repairing a mill upon a lot will not attach to lots across the street, upon the theory that they are appurtenant to the mill property, merely because a corncrib has been built upon such lots for storing corn to be ground in the mill, and a shed is located on them where delivery horses and wagons of the mill sometimes stand. *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182, affirming 22 Ill. App. 65.

So, one who constructs a kiln for drying lumber for a company which also owns 42 L.R.A. (N.S.)

across the street therefrom property consisting of a sawmill, a boiler house, and a planing mill, together with the three lots upon which they are situated, the only physical connection between the kiln and the opposite property being a pipe through which steam is conducted, obtains by a judgment extending his lien to the boiler house and the lot upon which it stands, at least all that he is entitled to claim with respect to the milling property, under a statute giving a lien upon the mill, manufactory, or other building or appurtenances constructed. *McDonald v. Minneapolis Lumber Co.* 28 Minn. 262, 9 N. W. 765.

And in *Salt Lake Hardware Co. v. Chainman Min. & Electric Co.* 137 Fed. 632, the court stated, without discussing the question, that a contractor who furnished and installed machinery in a mill at a mine was not entitled to a lien on an electric power plant situated some miles from the mine, on land not connected therewith, although power therefrom operated the mill, where the statute gave a lien upon a mine to any person performing labor or furnishing material for the erection of any building thereon, and extending the lien to the building, together with a convenient space above the same or so much as might be required for the convenient use and occupation.

Lien upon pumping or power plant for pipes, wires, or tracks laid in street.

A mechanics' lien for material and labor furnished in laying pipes for a refrigerating company which supplies vapor for cold storage to customers at a distance, through pipes in the ground, extends to the whole plant as an entirety, and may be enforced against the ground upon which the factory is located, although the pipes are laid in the street. *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 11 L.R.A. 580, 14 S. W. 1087.

And piping laid in the streets and connected with a pumping plant becomes a part of the apparatus located on the premises of the water company so as to render the plant and the land on which it is situ-

The agreed statement of facts shows that it became necessary to have a water supply upon the premises, and the best method of obtaining it was to tap the city main, about 227 feet distant; that, with the consent of the intermediate owners, the main was tapped and the pipe laid in the ground to the premises, and over them to the place where it entered the building, and the meter and faucet were attached; that only about 75 feet of the pipe was placed on the premises described in the complaint, the cost of said 75 feet, with the meter and faucet, being \$31.25; that appellant acquired the ownership of the building through a sale under attachment after a lien was filed in the office of the clerk.

The lower court found that appellees were

ated subject to a lien in favor of the person furnishing the pipe, under a statute providing that every person who furnishes any material in or about the construction of any building, or any machinery constructed so as to become a part of the freehold upon which it is to be situated, shall have a lien upon the interest of the owner of the building and machinery, in the land upon which the same is situated. *National Foundry & Pipe Works v. Oconto Water Co.* 52 Fed. 43, affirmed without opinion in 7 C. C. A. 603, 18 U. S. App. 380, 59 Fed. 19.

And poles planted in streets, on which are placed electric light wires and lamps connected with the machinery and premises of an electric light company, are such an appurtenance as will support a lien upon the premises for furnishing them, under a statute providing that any person who shall furnish material for erecting, altering, or repairing any building or the appurtenance of any building shall have a lien upon the whole piece or tract of land, the buildings, and the appurtenances. *Badger Lumber Co. v. Marion Water Supply, E. L. & P. Co.* 48 Kan. 182, 15 L.R.A. 652, 30 Am. St. Rep. 301, 29 Pac. 476.

But it was held in an Alabama case that, even conceding that pipe laid and connected with a waterworks plant was necessary for the use and enjoyment of the plant, no lien in favor of the person furnishing the pipe could be enforced against the plant and the lot upon which it was situated for pipe which was not laid upon the lot itself, under a statute providing that every person who should furnish any material for any improvement upon land should have a lien on such improvement and on the land on which the same was situated. *Eufaula Water Co. v. Addyston Pipe & Steel Co.* 89 Ala. 552, 8 So. 25. However, this case was criticized because of its narrow construction of the statute, in *National Foundry & Pipe Works v. Oconto Water Co.* supra.

And one who furnishes labor and materials for the construction of a cable railway in the street can have no lien therefor 42 L.R.A. (N.S.)

entitled to a lien for the entire amount sued for,—\$92.30,—including the value of all the pipe laid, and rendered a decree for foreclosure of a lien for that amount. From this judgment the appeal comes.

Messrs. Kimpel & Dally, for appellant:

Plaintiff is only entitled to a lien for \$31.25, the agreed value of the materials furnished and work done upon the property belonging to the owner, and is not entitled to a lien for the 200 feet of pipe laid upon the land of other persons, although done with the latter's consent, and under contract with Bates.

*Pratt v. Nakdimen*, 26 Ark. Law Rep. 413; *Eufaula Water Co. v. Addyston Pipe & Steel Co.* 89 Ala. 552, 8 So. 25; *Parmelee*

upon the power house and the lot upon which it stands, under a statute giving a lien for labor and materials furnished or used in the construction of any railroad, and providing that the land upon which any building, improvement, or structure is constructed shall be subject to the lien if the same belong to the person who caused the improvement to be constructed. *Pacific Rolling Mills Co. v. James Street Constr. Co.* 16 C. C. A. 68, 29 U. S. App. 698, 68 Fed. 966. Should the language of the statute be thought insufficient to justify the result in this case, it might be argued, to support the decision, and to distinguish it from these immediately preceding, which reach a contrary result,—that the railway proper, that is the trackage, is the principal thing and the power plant is the auxiliary, and that there is less reason for permitting a lien upon an auxiliary for the improvement of the principal thing, than for permitting a lien in the reverse situation; as, for instance, where a lien is sought against a water or telephone plant for the construction of its lines.

Sidewalks, paving, or water or sewer connections in street—generally.

In some jurisdictions improvements of this kind are held to warrant a lien upon abutting property, while in others it is held that there can be no lien. This difference is, of course, largely due to the language of the varying mechanics' lien acts.

—decisions permitting liens.

One who, under a contract with an abutter, furnishes materials for a sidewalk in which the public has an easement, may have a lien thereon and upon the abutting lot, under a statute providing that every person who shall furnish materials for any improvement upon land under a contract with the owner shall have a lien upon the improvement and upon the land belonging to such owner, on which the same is situated. *Leiper v. Minning*, 74 Ark. 510, 86 S. W. 407, 4 Ann. Cas. 1013.

And when a sewer is laid under con-

v. Hambleton, 19 Ill. 615; Leiper v. Mining, 74 Ark. 510, 86 S. W. 407, 4 Ann. Cas. 1013.

Mr. H. C. Mechem, for appellee:

Plaintiff was entitled to a lien for the full amount sued for, including the value of the pipe laid on the property of others as well as that laid on the premises.

Philbrick v. Ewing, 97 Mass. 133; Lampman v. Milks, 21 N. Y. 505; Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108; Mulrooney v. Obeare, 171 Mo. 613, 71 S. W. 1019; Steger v. Arctic Refrigerating Co. 89 Tenn. 453, 11 L.R.A. 580, 14 S. W. 1087; Wells v. Christian, 165 Ind. 662, 76 N. E. 518; National Foundry & Pipe Works v. Oconto Water Co. 52 Fed. 43, affirmed in 7 C. C. A. 603, 18 U. S. App. 380, 59 Fed.

tracts with abutters, each lot is subject to a lien for both the portion of the main sewer laid in front of it and the branches placed for its benefit, under a statute providing that any person who, at the request of the owner of any lot, improves the same or makes any improvement in connection with it, has a lien thereon for his work or materials. Williams v. Rowell, 145 Cal. 259, 78 Pac. 725.

Irrespective of whether or not the fee of the street is in the owner of the abutting lot, a lien may be enforced for laying a drain pipe extending from the cellar of the house to the street sewer, and included in the contract for building the house. Beatty v. Parker, 141 Mass. 523, 6 N. E. 754, cited with approval in Reid v. Berry, 178 Mass. 260, 59 N. E. 760.

The Missouri supreme court holds that a lien may be enforced against a lot and buildings thereon for stone used in the construction of sidewalks and areas, a part of which are on the lot and a part on the street and all of which were built under one contract, the statute giving a lien for materials used for making any improvements upon land, and extending it to such improvement and the lot or land upon which the same is made. Dugan Cut Stone Co. v. Gray, 114 Mo. 497, 35 Am. St. Rep. 767, 21 S. W. 854, reversing 43 Mo. App. 671.

And it also holds that where sidewalks in the street are constructed under one entire contract for the erection of a building on a lot abutting on the street to the center of which the lot owner owns, a lien for labor and materials expended on the walks may be enforced against the lot. McDermott v. Claas, 104 Mo. 14, 15 S. W. 995, citing Henry v. Plitt, 84 Mo. 237.

It was held in Marshall v. Bank of Archie, 76 Mo. App. 92, in view of the decisions in Henry v. Plitt, and McDermott v. Claas, supra, that to justify a lien for fences and sidewalk there must have been an entire contract for constructing or repairing the building and sidewalk.

In an early decision of the Missouri appellate court it was declared in general terms that a mechanics' lien will not attach 42 L.R.A. (N.S.)

20; O'Neil v. Taylor, 59 W. Va. 370, 53 S. E. 471; Meek v. Parker, 63 Ark. 367, 58 Am. St. Rep. 119, 38 S. W. 900.

Kirby, J., delivered the opinion of the court:

The question for determination is whether appellees are entitled to a lien on the premises for the contract price of the work done, some of the materials not being placed upon the property, or only for the value of the pipe and fixtures actually put upon the premises. The statute provides (§§ 4970-4972, Kirby's Dig.):

"Sec. 4970. Every mechanic, builder," etc., "or other person who shall do or perform any work upon or furnish any material . . . for any building, erection,

for work done on a public highway, though such work be absolutely necessary to render the work done on the property sought to be charged, of any use, and is immediately connected therewith. Kershaw v. Fitzpatrick, 3 Mo. App. 575. This case was not fully reported, but in a subsequent case (Pullis v. Hoffman, 28 Mo. App. 666) the court said that it was held in the former that a mechanics' lien does not attach for the laying of a lead pipe under a public street for the purpose of connecting the building with a water main in the city. In the Pullis Case, the other was distinguished upon the ground that the decision that a water pipe was not essential to the use of the building as a residence, was not authority upon the question whether a transparent covering extending from the front line of a building across a sidewalk, and made for the purpose of lighting an area under the sidewalk, and the cellar connected therewith, was an essential part of a building so as to support a lien thereon for laying the transparency, which in the Pullis Case was held to be lienable.

And adopting the rule of earlier cases, the Missouri appellate court in Seeny v. Rothbaum, 155 Mo. App. 331, 137 S. W. 82, held that pipes leading from a building to the street where they are connected with water, gas, or sewer pipes were lienable articles.

In McDermott v. Palmer, 8 N. Y. 383, involving a suit to enforce liens for flagging sidewalks, yards, areas, etc., of a building constructed, the court held that the plaintiff had no lien under a statute giving a lien to persons performing any work toward the erection, construction, or finishing of buildings, though it was intimated that the plaintiff would have had a remedy if he had proceeded under another statute giving a lien to persons performing labor or furnishing material in building any house or other building or the appurtenances to any building.

In Moran v. Chase, 52 N. Y. 346, the court merely declared that the terms of the act of 1862 were sufficiently comprehensive to cover a claim for flagging the sidewalk

improvement upon land . . . under and by virtue of any contract with the owner or proprietor thereof, or his agent, contractor," etc., "upon complying with the provisions of this act, shall have for his work or labor done, or materials . . . furnished, a lien upon such building, erection, or improvement and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of 1 acre; or if such building, erection, or improvement be upon any lot of land in any town, city, or village, then such lien shall be upon such building, erection, or improvements and the lots or land upon which the same are situated.

"Sec. 4971. The entire land, to the extent aforesaid, upon which any building, erection, or other improvement is situated, including as well that part of said land which is not covered with such building, erection, or other improvements as that part thereof which is covered with the same, shall be subject to all liens created by this act, to the extent and only to the extent of all the right, title, and interest owned therein by the owner or proprietor of such building, erection, or other improvement for whose immediate use or benefit the labor was done or things furnished.

"Sec. 4972. The lien for the things aforesaid, or work, shall attach to the buildings, erection, or other improvements for which they were furnished or work was done, in

preference to any prior lien," etc., "existing upon said land before said buildings, erections, improvements," etc., "were erected or put thereon, and any person enforcing such lien may have such building, erection, or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter," etc.

Appellant contends that it is only liable for the agreed value of the material furnished and the work done upon the property belonging to the owner and actually placed thereupon, and that no lien could be fixed against it for work done and the materials furnished in laying the pipe through the lands of other persons, with their consent, to reach the water main. The premises and appurtenances passed to appellant by the conveyance thereof, and it is not disputed that the water service was installed upon the property, as already indicated, and in use when it was conveyed. It became, when constructed, an appurtenance to the property, and passed with it, so far as the rights of the original owner were concerned.

In *Philbrick v. Ewing*, 97 Mass. 133, the court held that a pipe line running from a sink in a house, across the lot upon which it was situated, and across the lot of another by his consent, to a source of water supply in which he had rights, passed to the grantee of the owner of the building as appurtenant thereto, although it was not men-

in front of buildings constructed, but the language of the act is not disclosed. This case was followed in *Kenney v. Appar*, 93 N. Y. 539, which, though not disclosing the language of the statute, declared that a sidewalk in front of premises was an appurtenance so as to justify a lien under the act of 1862, even though the abutter had no title to the street.

So, following the last case, *Fredericks v. Goodman Street Homestead Assn.* 61 N. Y. S. R. 650, 29 N. Y. Supp. 1041, held that grading and laying out roadways and sidewalks on a tract intended for building lots was a lienable work under the act of 1885, including within its purpose, not only buildings, but lots and appurtenances.

In *Waples-Painter Co. v. Ross*, — Tex. Civ. App. —, 141 S. W. 1027, the court, after referring to a constitutional provision that mechanics and materialmen of every class shall have a lien upon the building and articles made or repaired by them for the value of their labor done or materials furnished, went on to say that while respectable authority to the contrary might be found, the weight of the authority, as well as the better reasoning, supported the position that a lien existed in favor of persons furnishing labor or material for the construction of a sidewalk in the street adjacent to the lot upon which the lien is sought.

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A mechanics' lien may be acquired for the construction of a drain pipe from the cellar of a house into a sewer in the street, since such pipe is a part of the house. *O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471. It appears in this case that the West Virginia statute gave a lien for constructing, altering, etc., a house or other building, appurtenances, fixtures, etc.

#### —decisions denying liens.

A sidewalk laid in a public street is not deemed to have been laid upon the abutting lot so as to render it subject to a lien for labor and materials furnished, under a statute giving a lien to any person who shall do any work or furnish any material by contract with the owner of any land, for the construction or repair of any building or other structure upon the land, or in making any other improvement, or in doing any other work upon such land. *Fleming v. Prudential Ins. Co.* 19 Colo. App. 126, 73 Pac. 752, following *Seeman v. Schultze*, 100 Ga. 603, 28 S. E. 378, reaching the same conclusion under a statute allowing liens for work done and material furnished in building, repairing, or improving any real estate.

Likewise, it was held in *Parmelee v. Hambleton*, 19 Ill. 615, that no lien for the

tioned in the deed of conveyance; and that he could not, after a sale, enter upon the lot of the other person and take the pipe therefrom and carry it away, saying: "The pipe was put in by his tenant and afterward purchased from the tenant by him as one entire thing. It was designed for the use of the plaintiff's house, and for no other purpose. If it extended into the land of a third person and into the highway, it does not appear that the owner of that land objects to its continuance or authorized or required the defendant to remove it. We are therefore of opinion that the whole of it, at the time of his conveyance to the plaintiff, was a fixture annexed to the house, and passed by the deed. . . . We suppose it is a common thing in cities for the owner of a house to connect it by a pipe with the pipe in the street belonging to a water company, and that such a pipe would pass by the sale of the house, although the owner of the house did not own the soil of the street. So, in case of a drain pipe connected with a common sewer, on a sale of the house the vendor could not take it away." See also *Lampman v. Milks*, 21 N. Y. 505; *Paine v. Chandler*, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18; *Mulrooney v. Obear*, 171 Mo. 613, 71 S. W. 1019; *Beatty v. Parker*, 141 Mass. 523, 6 N. E. 754.

In this last case, a mechanics' lien was enforced against the property for the whole

cost for putting a drain pipe therein from the house to the sewer in the street; the court saying: "The drain pipe was part of the house. The house was built upon a street in which there was a sewer, and was fitted for the use of the city water, to which connection with the sewer was essential. The piping inside of the house and outside of it to the sewer was necessary to the use of the house, and a part of it, and was included in the contract for building it. The house would be incomplete and unfinished without the pipe, and it would pass by a deed of the house as a part of it. . . . It is immaterial also whether the fee of the land in the street was or was not in the owner of the lot. It must be assumed that the pipe was rightfully laid to the sewer, even if the fee of the street was not in the respondent. The pipe did not become the property of the owner of the fee of the street, but belonged to the owner of the house, and he had an interest in the soil of the street to sustain his pipe, which could pass by a deed of the lot. Currier was employed by the respondent to erect the house, including the laying of the pipe."

It will not be questioned that the owner of the fixtures and service had the right to the use of it, after its construction, to supply the premises with water, the purpose for which it was constructed, and that it was an improvement thereon within the meaning of the statute. Neither will it be ques-

construction of a vault under a sidewalk in a public street could be enforced against the abutting premises, under a statute giving a lien to one furnishing labor or materials for erecting or repairing "any building or the appurtenances of any building on such land or lot."

And no lien for curbing, grading, and paving a street, though done under a contract with an abutting owner, can be asserted against his premises under a statute giving a lien to any person who shall furnish labor or material in building, altering, or repairing or ornamenting any house or appurtenance thereto on such lot, or upon any street or alley and connected with such building or appurtenance. *Smith v. Kennedy*, 89 Ill. 485.

No lien for the construction of a pavement in front of a lot can be enforced under a statute giving a lien to all persons performing labor or furnishing materials for the construction or repair of any building. *Knaube v. Kerchner*, 39 Ind. 217.

And no lien upon an abutting lot can be enforced by one who furnishes lumber for the construction of a sidewalk on the street adjacent to the lot, under a statute providing that every person who shall furnish any material for any building, erection, or other improvement upon land shall have a lien upon such building, erection, or im-

provement, and upon the land belonging to the owner on which the same is situated. *Coenen v. Staub*, 74 Iowa, 32, 7 Am. St. Rep. 470, 36 N. W. 877.

And in *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21, it seems to have been taken for granted that there could be no lien for materials for flagging the sidewalks in front of the houses constructed.

In *Hershey v. Gohn*, 1 Pennyp. 40, the court held merely that so long as bricks were furnished on the credit of the building they constituted the subject of a lien thereon though used for pavement, gutter, and outhouse. And this case was cited with approval in *Clymer Paving Co. v. Weir*, 3 Pa. Dist. R. 32, holding that in view of the statute giving a lien to persons furnishing curb-stones for the pavement of any building a lien might be enforced for furnishing materials for sidewalks and pavements in the street upon which the property abutted.

But the greater number of Pennsylvania decisions, including one by the supreme court, take the view that there can be no lien against abutting property for sidewalks, paving, and curbing, etc. *Clymer Paving Co. v. Donegan*, 4 Pa. Dist. R. 243, followed in *Bradley v. Gaghan*, 208 Pa. 511, 57 Atl. 985; *Edelkamm v. Comly*, 12 Pa. Co. Ct. 371; *Cloud v. Kendrick*, 1 W. N. C. 601. L. A. W.

tioned that it will pass appurtenant to the premises upon a conveyance thereof, so far as the owner is concerned, nor that upon a sale of the premises under the mechanics' lien law the owner's right, title, and interest therein would pass to the purchaser at such sale. Appellants, therefore, have the right to such service and improvement with the property so purchased, so far as the record here shows; it not being claimed that the adjacent owners, through whose lands the pipe extended beyond this property to the main, have complained or objected to the use thereof. The purpose of the mechanics' lien law is to secure the workmen and mechanic for the labor done and materials furnished in the improvement to the property, and it is to be liberally construed to effectuate this purpose. It was necessary to lay the line of pipe from the building to the main, in order that the service could be installed and the improvement made, and it is assumed that the pipe was rightfully laid through the lands of the adjoining owners to the water main. It did not thereby become their property, and the right to the use thereof belonged to the owner of the house upon which the improvement was made, and passed to appellants under their purchase. The lien attached to the premises, building, and ground upon which it was situate for the entire value of the improvement, notwithstanding part of the pipe line was situated off the property on adjoining lands. For other cases permitting a mechanics' lien for pipes laid in the streets, and not entirely upon the premises upon which the lien was sought to be foreclosed, see *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 11 L.R.A. 580, 14 S. W. 1087; *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518; *O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471; *National Foundry & Pipe Works v. Oconto Water Co.* (C. C.) 52 Fed. 43.

Appellants rely strongly upon the case of *Eufaula Water Co. v. Addyston Pipe & Steel Co.* 89 Ala. 552, 8 So. 25, in support of their contention. That suit was to recover for piping materials furnished to be used in the construction of waterworks in the city of Eufaula, and to fix a lien therefor, and enforce it against a 1-acre lot of the water company situated just beyond the corporate limits of the city. The lot was the site of the water company's pumping station, which forced the water into its standpipe,  $\frac{1}{2}$  mile distant, and the piping furnished was used in making the line between the pumping station and the standpipe, a distance of 3,000 feet, and extended from a point 25 feet within the lot in question, outside the building thereon, to the reservoir, or standpipe, being for its whole

length, except 25 feet, on land which did not belong to the water company, but in which it had an easement for the purpose of laying the pipe. The court denied the lien for the full amount of the claim. That was an attempt, however, to enforce a mechanics' lien for materials furnished, which were used in the construction of a waterworks system for a city, against a particular part of it, the lot on which was situated the pumping station, when the improvement was not made upon the particular lot, but was an improvement of the entire water plant; and a sale of the particular part of the property against which the lien was attempted to be enforced, if the purchaser were permitted to remove the property bought, would have destroyed the water supply system in which the entire city was interested. There is no analogy between that case and this, and we regard it as entitled to little weight in favor of appellant's contention here.

The decree is affirmed.

**CALIFORNIA SUPREME COURT.**  
(Department No. 2.)

**LILLY-BRACKETT COMPANY, Respt.,**  
v.

**A. H. SONNEMANN, Appt.**

(— Cal. —, 126 Pac. 483.)

**Judgment — on judgment — merger.**

A judgment of the courts of one state is not merged in a judgment entered upon it by the court of another state, so as to prevent an action to enforce it in a third state.

(August 27, 1912.)

**A** PPEAL by defendant from a judgment of the Superior Court for Riverside County in plaintiff's favor in an action brought to enforce a judgment recovered in another state in an action to foreclose a mortgage. Affirmed.

The facts are stated in the opinion.

**Note. — Judgment upon judgment of sister state as merger of the original.**

The case of *LILLY-BRACKETT Co. v. SONNEMANN* is apparently the first case where the solution of the question has been determinative of the right to recover upon the original judgment in a third state. As indicated by the few cases in point, appended below, the cases are not all in accord, and, as indicated by the opinion and authorities cited in *LILLY-BRACKETT Co. v. SONNEMANN*, the authorities are in more evenly divided conflict upon the general question as to whether any judgment upon a judgment works a merger of the original.



Mr. J. W. McKinley, for appellant.  
Messrs. Herbert Cutler Brown and  
George H. Moore, for respondent:

A judgment of one state is not merged in, extinguished, or satisfied by a judgment recovered in another state upon the first judgment.

*Weeks v. Pearson*, 5 N. H. 324; *Griswold v. Hill*, 2 Paine, 492, Fed. Cas. No. 5,836; *Mumford v. Stocker*, 1 Cow. 178; *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809; *Armour Bros. Bkg. Co. v. Addington*, 1 Ind. Terr. 304, 37 S. W. 100; 23 Cyc. 1474, 1550; *Planters' Bank v. Calvit*, 3 Smedes & M. 143, 41 Am. Dec. 616; *Springs v. Pharr*, 131 N. C. 191, 92 Am. St. Rep. 775, 42 S. E. 590.

In *Weeks v. Pearson*, 5 N. H. 324, it was held that the procuring upon a New Hampshire judgment of a judgment in New York was no bar to the institution in the former state of an action of debt upon the former judgment; and in *Bates v. Lyons*, 7 Paige, 85 (expressly overruling contrary *dictum* in *Mitchell v. Bunch*, 2 Paige, 620, 22 Am. Dec. 669), that the procuring upon a New York judgment of an Indiana judgment did not invalidate the former as the foundation of a creditor's bill in the former state; in *Armour Bros. Bkg. Co. v. Addington*, 1 Ind. Terr. 304, 37 S. W. 100, that the procuring upon an Indian Territory judgment of a judgment in Oklahoma territory did not prevent the former judgment from being a valid basis of receivership proceedings in the former jurisdiction against the judgment debtor; and in *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809, that to an action in the nature of a creditors' bill to set aside a fraudulent conveyance and subject the property so conveyed to the satisfaction of a Colorado judgment, it was no defense that plaintiff had recovered thereon a judgment in Missouri.

Analogously, in *Andrews v. Smith*, 9 Wend. 53, a judgment before a justice, rendered upon a judgment before another justice, was held not to extinguish the judgment first obtained.

While, in *Griswold v. Hill*, 2 Paine, 492, Fed. Cas. No. 5,836, it was held that a judgment of a Federal circuit court in New York is not satisfied by an unsatisfied judgment thereon in the New York court of common pleas, so as to entitle one proceeding in equity in the former court to foreclose a mortgage on the real estate of the judgment debtor, to have the judgment in the Federal court vacated of record.

Contrarily, in *Gould v. Hayden*, 63 Ind. 443, it was held that an Ohio judgment based upon an Indiana judgment so absorbed the Indiana judgment as to "destroy the lien, vitality, and other qualities" thereof, and to entitle the assignees of the judgment debtors' Indiana lands to a perpetual injunction stopping execution proceedings by

Melvin, J., delivered the opinion of the court:

Plaintiff brought suit upon a judgment against defendant, obtained in the state of Massachusetts. Defendant answered, alleging that a judgment, based upon the Massachusetts judgment, had been obtained by plaintiff against him, and had become final in the state of Washington. The court gave judgment for plaintiff on the pleadings, and from it this appeal is taken.

The only question presented is whether or not the judgment rendered in Massachusetts was merged in the judgment based upon it, which was given in favor of plaintiff in Washington. This is a new question in California, so far as we are advised, and the authorities in other jurisdictions are in con-

an assignee of the Ohio judgment, based upon the liens upon such lands arising from such judgment.

In *Bank of Old Dominion v. Allen*, 76 Va. 200, the question was expressly left undecided. In that case the holder recovered in Virginia separate and distinct judgments against the maker and the indorser of a note, and subsequently, upon the judgment against the indorser, recovered a judgment in Illinois, which the indorser paid. It was held that the indorser's rights as subrogee of the Virginia judgment against the maker were not defeated on the theory that the Illinois judgment had worked an extinguishment of such Virginia judgment and the liens incident thereto. Under the view of the case taken by the court (see note in 63 L.R.A. 560), it was unnecessary to decide whether the Illinois judgment extinguished the other Virginia judgment, since the point could be assumed either way with the same result.

The case of *Van Winkle v. Owen*, 54 N. J. Eq. 253, 34 Atl. 400, is hardly actual authority for any point within the scope of this note, but, as a whole, inclines toward the view that a judgment does not merge into a foreign judgment recovered thereon. The court said: "I think that Mr. Bigelow's criticism is just, and I am unable to see any reason in law or in public policy why, if A recovers a judgment against B in the state of New York, and acquires a lien by virtue of it upon property insufficient to pay it, and immediately afterwards brings a suit on that judgment, and recovers upon it in the state of New Jersey, he must, as a condition of recovering that judgment in New Jersey, lose his lien by virtue of his judgment in New York, and all remedy thereunder." And the case is fair authority for the proposition that in such a case, where B has notice of the lien for attorney's fees upon the New York judgment, the recovery by A of the New Jersey judgment (or such recovery and payment of the judgment by B) would not prejudice the rights of the attorney to proceed on his lien against B. E. K. M.

flict. Appellant, in commending to our attention the authorities favoring the theory of merger, says that if the original judgment or "debt of record" is to remain of full vitality in the state in which it was originally obtained, and judgments in other states, based upon it, are also to be enforceable, a debtor may be harassed in various states in which he may own property, and prevented from selling it to advantage by the existence of the creditor's judgments. Respondent's answer is that this hardship may be avoided by the payment of the debt. *Ames v. Hoy*, 12 Cal. 19.

In 23 Cyc. at page 1474, the rule is thus stated: "According to the weight of authority, where an existing judgment is sued on as a cause of action, and a new judgment recovered on it, there is no merger of the first judgment; nor is it extinguished without satisfaction of the second." Lawson, in his work on Rights, Remedies, and Practice (vol. 5, p. 2580), says: "No merger takes place where the two securities are of equal degree." The leading case holding the contrary doctrine has been followed in some jurisdictions by the courts and adopted as convincing authority by some text writers. In 92 Am. St. Rep. at page 778 is a note reviewing the decisions, and announcing the better rule to be that a judgment is extinguished when, by its use as a cause of action, it grows into another judgment. This view is also approved by Mr. Freeman, in his work on Judgments (as indicated in the note in 92 Am. St. Rep. cited above), and to the same effect is the text in 15 Am. & Eng. Enc. Law, 330. After stating this doctrine and the authorities for it, the supreme court of Colorado, in *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 537, 48 Pac. 810, says: "The contrary doctrine is announced in other authorities, and proceeds upon the theory originally given for the rule that merger takes place only where a security or indebtedness of an inferior passes into one of a superior degree. *Weeks v. Pearson*, 5 N. H. 324; *Mumford v. Stocker*, 1 Cow. 178; *Bates v. Lyons*, 7 Paige, 85; 2 Black, Judgm. § 864; *Hogg v. Charlton*, 25 Pa. 200; *McLean v. McLean*, 90 N. C. 530; *Andrews v. Smith*, 9 Wend. 54. It is said, however, that the later authorities predicate this doctrine of merger upon the ground that the allowance of a new suit is superfluous and a vexatious encouragement to litigation injurious to the defendant, and of no benefit to the plaintiff. Without further pursuing the inquiry, we content ourselves by saying that it seems more in consonance with principle to base the doctrine upon the reason originally given

for its establishment, and that, so long as the indebtedness is unsatisfied, successive suits in different states may be prosecuted." In *Armour Bros. Bkg. Co. v. Addington*, 1 Ind. Terr. 304, 37 S. W. 102, this language is used with reference to the same problem as that before us here: "But a second judgment obtained upon the first is of no higher security than the first. Both should stand until the debt which is evidenced by them is fully paid off and satisfied. The first judgment is neither satisfied, merged, nor extinguished by a second judgment on the same cause of action, or by an affirmance thereof by a superior court. 'Satisfaction' is a technical term, and in its application to a judgment it means the payment of the money due on the judgment, which must be entered of record; and nothing but this is a legal satisfaction of the judgment." In *Weeks v. Pearson*, 5 N. H. 325, the court said: "The reason why a former recovery for the same cause is a bar to a second action is that the cause of action has passed in *rem judicatum*, and is determined by the judgment. But this reason does not exist where there has been a recovery in another state in debt upon a judgment rendered here. For one judgment being of as high a nature as another, a judgment in another state cannot extinguish or determine a judgment rendered here." In *Springs v. Pharr*, 131 N. C. 193, 92 Am. St. Rep. 775, 42 S. E. 590, the rule was thus phrased: "We must concur in this conclusion that a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a cause of action is merged in the judgment." See also *Griswold v. Hill*, 2 Paine, 492, Fed. Cas. No. 5,836; *Mumford v. Stocker*, 1 Cow. 178. Mr. Bigelow, in his note to § 599a of Story on Conflict of Laws, says: "It may be inconvenient that two judgments should subsist in the same state against the same person on the same demand; but no such inconvenience can exist in the case of judgments rendered in different states; and there is no sufficient reason for the application of the purely technical doctrine of merger, subversive of substantial justice, as it would be, in such cases. Indeed, in view of the fact that one satisfaction would satisfy both judgments, there is little to be said in favor of the doctrine of merger, reasonable as that doctrine may be in ordinary cases, by a second judgment obtained upon the first, even in the same state."

We can add nothing to the reasoning of these cited authorities, except to say that, in our opinion, it is sound, in accordance with justice, and should be adopted in Cali-

fornia as establishing a rule that comports with reason. Judgment affirmed.

We concur: Lorigan, J.; Henshaw, J.

Petition for rehearing denied September 26, 1912.

## IDAHO SUPREME COURT.

F. B. RUSSELL, Resp't.,

v.

T. K. LITTLE, Appt.

(— Idaho, —, 126 Pac. 520.)

### Landlord and tenant — implied covenants.

1. There are no implied covenants on the part of a landlord to repair the premises let, or to keep them in repair; and the landlord is not bound to repair the premises let, unless he has expressly covenanted so to do in his lease.

### Same — defective flue — fire — liability.

2. Where a tenant loses a stock of merchandise stored in the leased premises, and there was no covenant in the lease whereby the landlord was obligated to repair the premises or keep them in repair, and the tenant seeks to recover from the landlord the value of the goods destroyed by fire oc-

curing in the building, on the ground that the fire was caused by defects in the heating plant or flue, or the negligent operation and management of the furnace and heating plant, held, that the recovery, if any shall be had, must be founded upon the law of negligence, and cannot rest upon the theory of an implied contract.

### Damages — negligent destruction of merchandise.

3. Where a tenant sues a landlord for the loss of merchandise, caused by a fire which the tenant alleges resulted from the carelessness and negligence of the landlord, but it is not alleged or shown that the negligence was criminal, or that the loss was caused through any fraud on the part of the landlord, and it was not shown or contended that the tenant had an old and well-established business and business reputation at the particular place, held, that the measure of damages is the value of the goods at the time of the loss, and that injury to the business or loss of profits cannot be taken into consideration in assessing damages.

### Evidence — damages — sufficiency.

4. In an action for destruction of a stock of goods, where the plaintiff testifies that the invoice was destroyed, and that she cannot particularize or enumerate the goods, but that they were of the aggregate value of \$1,250, held, that such evidence, though indefinite, is sufficient upon which to rest a verdict in favor of the plaintiff.

Headnotes by AILSHIE, J.

(September 7, 1912.)

### Note. — Liability of landlord for loss of tenant's property by fire.

On the general question of liability of landlord for injury to tenant from defects in leased premises, see notes in 34 L.R.A. 824, and 34 L.R.A. (N.S.) 798; on the general question of implied covenants of fitness of premises for the purpose intended, see note in 33 L.R.A. 449; as to duty and liability of a landlord relative to the premises upon which has existed a contagious disease, see note in 6 L.R.A. (N.S.) 977; as to the landlord's liability for injury to tenant by the escape of water, see note in 15 L.R.A. (N.S.) 545; as to the liability of the landlord for injury to the tenant's property from breach of covenant to repair, see note in 16 L.R.A. (N.S.) 738; as to the liability of a landlord in tort for personal injury to tenant, based on breach of agreement to repair, see note in 11 L.R.A. (N.S.) 504; as to the landlord's responsibility for the condition of portions of the leased property remaining under his control, see note in 3 L.R.A. (N.S.) 316; as to the liability of a landlord for injuries from defective conditions of the foundation walls, chimneys, or roof of the building, different floors of which are let to different tenants, see note in 4 L.R.A. (N.S.) 1142.

But few cases have considered the specific question as to the liability of a landlord 42 L.R.A. (N.S.)

for the destruction of the tenant's goods by fire. By the weight of authority, in the absence of warranty, deceit, fraud, or negligence on the part of the landlord, he is not liable for the loss occasioned his tenant by the destruction of his property by fire while in the leased premises. The question as to when negligence may be imputed to a landlord is discussed in the notes in 34 L.R.A. 824, and 34 L.R.A. (N.S.) 798, already referred to. In this connection, however, it may be said that before negligence in this regard may be imputed to a landlord, there must be some duty cast upon him in the performance of which, or in the failure to perform which, he has been guilty of negligence. Applying this general rule to the specific question here raised, it is clear that the landlord is not liable to the tenant for the destruction of his property by fire unless the fire was occasioned by some defect in the leased premises which it was the landlord's duty to repair, or where the fire was the direct result of some negligent act of the landlord with reference to the leased premises; and it may be regarded as doubtful whether the negligent failure of the landlord to repair defects where his duty in that regard depended upon his covenant to repair may be made the basis for a recovery for a loss to the tenant of the character under consideration, unless it also appears that the landlord's duty to repair

**A**PPEAL by defendant from a judgment of the District Court for Canyon County in plaintiff's favor in an action brought to recover damages for loss of a stock of merchandise by fire alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Smith & Scatterday and Cavanah, Blake, & MacLane, for appellant.

Where there are no covenants to repair in a lease, the landlord is not liable upon contract or quasi contract for damage to the tenant's goods or person, resulting from a defective condition of the demised premises; but such liability, where it exists, arises solely from negligence; and such negligence must be affirmative and positive,

not merely negative negligence or failure to repair, but positive misfeasance.

Jones v. Millsaps, 71 Miss. 10, 23 L.R.A. 155, 14 So. 440; Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113, 78 S. W. 1112; Gately v. Campbell, 124 Cal. 520, 57 Pac. 567; Angevine v. Knox-Goodrich, — Cal. —, 18 L.R.A. 264, 31 Pac. 529; Ward v. Fagin, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738; Brewster v. DeFremercy, 33 Cal. 341; Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; Kuhn v. Sol. Heavenrich Co. 115 Wis. 447, 60 L.R.A. 585, 91 N. W. 994; Raiton v. Taylor, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980; Doyle v. Union P. R. Co. 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333; Bowe v. Hunk-

arose from his retention of the use of that portion of the property in which the defect existed, for the benefit of his tenants generally. (See note in 11 L.R.A. (N.S.) 504.) Indeed, RUSSELL v. LITTLE is the only case found sustaining the landlord's liability for the destruction of the tenant's goods, even where guilty of negligence in failing to keep in repair portions of the property reserved by him, where such failure resulted in the fire complained of. In a case very similar, where a fire was occasioned by a failure to keep clean the chimney flue used by a tenant, the right to recover was denied the tenant although he was the lessee of only a portion of the premises; the court holding that the flue in question being for his separate use, and he having a right to use the halls and stairways for the purpose of ingress and egress, he had the right to use them for the purpose of going to the roof to sweep the flue clean, and it was his duty, rather than the landlord's, to do so. Cooper v. Lawson, 139 Mich. 628, 103 N. W. 168. An obvious distinction between RUSSELL v. LITTLE and the Michigan case referred to is that, in the latter case, the flue was used by the tenant, while in the former it was used by the landlord.

And it has been held that the landlord is not responsible for the destruction of the tenant's goods by fire caused by the explosion of a boiler in the leased premises under the control of the landlord, although the boiler was defective, which defect the landlord was, at the time, through competent servants, undertaking to repair, the defect not being of a nature to indicate that it was dangerous or unsafe. The court said if there was any negligence on the part of the person employed to repair the boiler, which resulted in the disaster, the landlord was not chargeable therewith, since the person so employed was a skillful mechanic, and the work was left entirely with him, he being employed to obviate the difficulty discovered, and hence the relation of master and servant did not exist between him and the landlord. Perkins v. Eighmie, 53 Hun, 634, 2 Silv. Sup. Ct. Rep. 497, 6 N. Y. Supp. 156.  
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And the landlord is not liable for the destruction of the tenant's goods by fire merely because he did not keep the doors and halls in a condition on Sundays and nights which would admit of the removal of a tenant's furniture, where the building was an office building, located in the business portion of the city, and was rented out for offices. The court said that the reasonable use of the outer doors, halls, and stairways of such a building required that they should be kept open and free from improper obstruction during such hours of the day and evening as their tenants and persons having business with them might reasonably be expected to desire access to their offices, but did not require that the outer doors should be kept open on nights and Sundays, so that large pieces of furniture might be removed from the building. Whitcomb v. Mason, 102 Md. 275, 4 L.R.A. (N.S.) 565, 62 Atl. 749.

And a landlord is not responsible for the loss of a tenant's goods by fire, although caused by the use by the landlord of a candle in one of the rooms of the leased building in which he kept some articles, it not appearing that he was negligent in using the candle. It is, however, asserted in this case that the tenant could not recover even had the landlord been guilty of negligence, the court basing its opinion upon the common-law rule that exempts a person from liability for damages caused by fire that accidentally begins in his own house or other building, through the carelessness of himself or his servant, unless the fire was caused by his wilful act or his wrongful entry in or upon the property. Lansing v. Stone, 37 Barb. 15, 14 Abb. Pr. 199.

But the landlord is liable to the tenant for the destruction of his goods by fire where the fire is caused by his negligence in repairing the leased premises, where, in making such repairs, he wrongfully invades the tenant's possession. Butler v. Cushing, 46 Hun, 521.  
A. G. S.

ing, 135 Mass. 330, 46 Am. Rep. 471; Keates v. Cadogan, 10 C. B. 591, 20 L. J. C. P. N. S. 76, 15 Jur. 428; Rosenfield v. Newman, 59 Minn. 156, 60 N. W. 1085; Kneeland v. Beare, 11 N. D. 233, 91 N. W. 56; Thum Bros. v. Rhodes, 12 Colo. App. 245, 55 Pac. 264.

Plaintiff having testified as to the value of the stock of goods, any evidence as to her profits or as to the value of her business was not relevant in any way to show what the goods were worth, and was not appropriate to any issue in the case; but the admission of such testimony permitted the jury to add damages for purely speculative matters, not recoverable under the law.

Weick v. Dougherty, 139 Ky. 528, 3 L.R.A.(N.S.) 348, 90 S. W. 966; Casper v. Klippen, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; Cincinnati v. Evans, 5 Ohio St. 594.

The evidence was insufficient to justify the verdict.

Schwartz v. Schendel, 24 Misc. 733, 53 N. Y. Supp. 829; Brooke v. Cunard S. S. Co. 93 N. Y. Supp. 369; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96.

Messrs. Griffiths & Griffiths, for respondent:

If the defendant retained control of the premises, he was an insurer of their safe condition as against the negligence, not only of his own tenants, but also of the whole world.

Butler v. Cushing, 46 Hun, 521; Roussinet v. Rebout, 76 Cal. 454, 18 Pac. 423; Pike v. Brittan, 71 Cal. 159, 60 Am. Rep. 527, 11 Pac. 890; Hysore v. Quigley, 9 Houst. (Del.) 348, 32 Atl. 960; Warren v. Kauffman, 2 Phila. 259; Davis v. Pacific Power Co. 107 Cal. 563, 48 Am. St. Rep. 156, 40 Pac. 950; Railton v. Taylor, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980; Rice v. Whitley, 115 Iowa, 748, 87 N. W. 694; Nahm v. Register Newspaper Co. 120 Ky. 485, 87 S. W. 296, 9 Ann. Cas. 209.

The loss of the business was an item of damage for which respondent could recover.

Evans v. Murphy, 87 Md. 498, 40 Atl. 109; James Sheehan & Co. v. Maison Barberis, 41 Wash. 671, 84 Pac. 607; Levinson v. Myers, 24 Pa. Super. Ct. 481; Talcott v. Crippen, 52 Mich. 633, 18 N. W. 392; Pereira v. Smith, 79 Cal. 232, 21 Pac. 739; Parke County v. Sappenfeld, 10 Ind. App. 609, 38 N. E. 358.

Plaintiff was entitled to recover the sum of \$800, which was much too small to compensate her for her loss, but a sum, nevertheless, fairly determined by the jury from the evidence submitted, and of which determination neither plaintiff nor defendant now have the right to complain.

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Shafer v. Wilson, 44 Md. 268; Allison v. Chandler, 11 Mich. 542; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Walter v. Post, 6 Duer, 363; Menard v. Stevens, 12 Jones & S. 515; San Antonio v. Royal, — Tex. —, 16 S. W. 1101; Hine v. Cushing, 53 Hun, 519, 6 N. Y. Supp. 850.

Allshie, J., delivered the opinion of the court:

The respondent, who was plaintiff in the lower court, commenced her action for the recovery of damages for loss of a stock of merchandise, caused by fire, and procured a judgment for the sum of \$800. The defendant appealed.

The plaintiff had been the defendant's tenant for some months, occupying a room on the first floor, or street grade, in which she had a stock of millinery goods and was conducting her business. The building in which plaintiff was engaged in business was rented to various tenants, and the landlord, the defendant herein, had control of certain rooms in the basement, in which he kept a heating plant for heating the various rooms of the building, and he had under his control and management the operation of the heating plant. About the 4th of January, 1910, a fire started, either in the furnace room, or the room occupied by the plaintiff. The room she occupied was immediately above the furnace room, and the flue to which the furnace was connected passed through this room, or rather, was in one of the walls of the room. The fire which occurred destroyed her entire stock of millinery, of the value of about \$1,250. She sued her landlord for the value of the stock of goods destroyed and the additional sum of \$500 for loss of profits and damage to her business. The evidence was not positive, but rather circumstantial, as to the cause of the fire. The plaintiff contended that the fire had started from the furnace; that the landlord had left an 8 or 10 inch hole open in the flue between the floor and the place where the pipe from the furnace entered the flue. The pipe had previously entered the flue through this opening, and when the pipe was removed, the opening was simply covered with a piece of tin or galvanized iron, nailed onto the side of the flue. It was also contended by the plaintiff, and evidence was introduced to that effect, that the walls of the flue were too thin for the size of the furnace. The defendant, on the other hand, introduced evidence tending to indicate that the fire might have started from an electric iron left with the current on in the millinery store. The evidence produced tended most strongly, however, to indicate

that the fire had started from the furnace room.

The only instruction given in the case, with reference to this particular cause of action and the plaintiff's right of recovery and the defendant's liability, was incorporated in the following instruction, to which the defendant took exception: "You are further instructed that, regardless of the condition of the flue, the defendant is not liable for damages, unless you also find that the fire was, in fact, caused by the flue on account of its defective condition." The defendant asked the court to give the following two instructions, which were refused:

1. "You are instructed that, in the absence of an express agreement by the landlord to make repairs, the landlord is not liable to the tenant for damages caused by defects in the building existing at the time the lease was entered into."

2. "You are instructed that, under the facts in this case, the defendant is not liable to the plaintiff for damages caused by defects in the building, unless the defendant had knowledge thereof, or unless the defect was so apparent that he was presumed to have notice thereof."

It is contended by the defendant, who is appellant in this court, that the court erred in giving the instruction which was given and in refusing to give the instructions requested. This, in a measure, involves the question as to the liability of a landlord to his tenants for repairs to the premises, and that question has been briefed quite exhaustively by the appellant.

It is unnecessary to attempt to analyze or quote from the authorities at any length on this subject, as they are well-nigh uniform to the effect that there are no implied covenants on the part of a landlord to repair the premises, or to keep them in repair, and that the landlord is not bound to repair, unless he has expressly covenanted so to do by his lease, and is not liable for an injury arising from a failure on his part to repair.

In *Railton v. Taylor*, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980, the action was brought by a tenant to recover for damages sustained on account of the negligent and careless management and operation of a heating plant in the defendant's building, of which the plaintiff was a tenant. The Rhode Island supreme court, in passing upon the liability of the defendant in that case, called attention to the fact that the liability of the landlord must be predicated upon his negligence, rather than upon any implied covenant to change or repair the premises. "The mere fact," said the court, "that the building, together with said apparatus, was not properly constructed,

gives the plaintiff no cause of action, as the defendant had the right to construct his building as he saw fit, so long as he violated no one's rights; and she does not allege that the condition of the premises has been changed since the commencement of the tenancy. See *Henson v. Beckwith*, 20 R. I. 169, 38 L.R.A. 716, 78 Am. St. Rep. 847, 37 Atl. 702. If, however, he used a defective appliance in said building, to the plaintiff's damage as tenant, that might constitute actionable negligence on his part."

The same question is dealt with at considerable length in the note to *Hines v. Willcox*, 34 L.R.A. 824, 832. It will be observed that the *Hines-Willcox* Case is one of the very few cases that go to the extent of holding the landlord to any implied obligation to repair or improve the premises. Other cases indicating a similar view are *Bissell v. Lloyd*, 100 Ill. 214, and *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295. Among the cases cited supporting the general rule, the following are, perhaps, the leading and most interesting ones: *Jones v. Millsaps*, 71 Miss. 10, 23 L.R.A. 155, 14 So. 440; *Franklin v. Tracy*, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113, 78 S. W. 1112; *Gately v. Campbell*, 124 Cal. 520, 57 Pac. 567; *Ward v. Fagin*, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 447, 60 L.R.A. 585, 91 N. W. 994; *Rosenfield v. Newman*, 59 Minn. 156, 60 N. W. 1085.

*Kuhn v. Sol. Heavenrich Co.* supra, is a very clear and illuminating case on this question. In the course of the opinion, Justice Marshall, speaking for the court, said: "That there is a duty resting on the landlord in such a situation to not cause injury to his tenant, and to prevent such injury, has been held in many jurisdictions in actions grounded on negligence. But there is no authority, worthy of our consideration, to support the idea that the duty is one resting in contract. The distinction between the obligations of a contract and the obligation which one owes to another respecting that other's personal safety and the safety of his property has been many times lost sight of in considering this question, as what follows will demonstrate."

After reviewing and analyzing the authorities, he added: "Enough has been said, even if the question were entirely new in this state, to demonstrate that the common-law rule that there is no implied covenant on the part of the landlord of fitness, present or future, of leased premises, forming a part of the contract between him and his tenant, is universal; that it ap-

plies as well to a lease of part of a structure, other parts being let to others in severalty, and to parts thereof common to all, as to leased premises constituting an entire building."

It is clear, therefore, upon both reason and authority, that, whatever liability may be chargeable to the appellant in this case, it must rest upon the law of negligence. The jury should have been instructed on this subject. The mere fact that the flue may have been defective was not sufficient. The appellant must have been guilty of actionable negligence. He must have known of the defect, or it must have been such a defect, or of such a nature, as to impute knowledge, and charge him with notice of the condition. In other words, the general law of negligence in such cases is the rule of law to be applied to this case. The court should have instructed the jury on the law of negligence in such cases. The mere instruction that the fire must have been caused from the flue and on account of its defective condition was not enough. This was too vague and uncertain. It did not carry with it any suggestion of negligence. It is true that upon the evidence introduced in this case the jury might have found with the plaintiff, had they been correctly instructed; but with the evidence conflicting, as it is, we cannot say, and would not be justified in conjecturing, what conclusion the jury would have reached, had they been correctly instructed in the law of this case. For these reasons the judgment must be reversed.

Since this case must again be tried, we find it necessary to consider one or two other questions that have been presented. Upon the trial, counsel for plaintiff asked the plaintiff the following question: "About what was the average of the daily sales you were making in this business?" To this the defendant interposed an objection, which was overruled, and the witness was allowed to answer, "About \$30." Counsel also asked the plaintiff the following question: "What was its value—the value of the business, I mean?" to which an objection was interposed and overruled, and the witness answered, "\$500." In other words, the plaintiff was allowed to introduce evidence as to the value of her stock of goods, and also as to the value of the business and the daily receipts from the business. She testified that her net profit was about \$15 per day.

It will be seen from the foregoing questions and answers that the plaintiff was allowed to introduce evidence, both as to the value of her stock of goods which was destroyed, and also as to the value of the business as a distinct and separate item from the value of the goods. No evidence

was introduced in this case tending to prove that this particular location was any better than any other location in the town of Caldwell for such a business; nor was there any evidence to show that this was an old established business, with an established reputation throughout the community. On the contrary, the plaintiff had only been in business some four or five months in this place. No contention was made that she could not have procured another place equally desirable. Neither was there any proof whatever tending to show any fraud or criminal negligence on the part of the appellant in the destruction of this stock of goods and place of business. Under such circumstances, the only recovery that could be had would be for the value of the goods and property at the time destroyed. See *Sears v. Lydon*, 5 Idaho, 358, 49 Pac. 122; *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; *Cincinnati v. Evans*, 5 Ohio St. 594.

The objection urged by appellant that there was no competent proof as to the value of the stock of goods destroyed, is not well taken. The respondent testified that she had lost her invoice, and could not enumerate or give a detailed description of the property destroyed, but that it aggregated about \$1,250. While this was not a very satisfactory kind of proof, still it was sufficient upon which to rest a verdict.

The judgment is reversed, and a new trial ordered. Costs awarded in favor of appellant.

Sullivan, J., concurs. Stewart, Ch. J., concurs in a reversal.

#### INDIANA SUPREME COURT.

PITTSBURGH, CINCINNATI, CHICAGO,  
& ST. LOUIS RAILWAY COMPANY,  
Appt.,

v.

LYDIA O. TERRELL.

(— Ind. —, 95 N. E. 1109.)

**Pleading — duty of railroad to give signals.**

1. To hold a railroad company liable for injury to a traveler on a street crossing,

**Note.**—The general question of the duty of a traveler approaching a railway crossing as to the place and direction of observation is covered in a note to *Wallenburg v. Missouri P. R. Co.* 37 L.R.A.(N.S.) 135, and at page 144 of that note his duty to go ahead of his team to look is considered, showing that, aside from the Pennsylvania cases, it is not generally considered to be the traveler's duty to take such precaution.

by a train which failed to give the statutory signals for the crossing, it is not necessary to allege the duty to give the statutory signals in the complaint.

**Railroad — crossing signals — train on switch.**

2. That a train starts to back over a highway crossing at a point nearer to the crossing than that which the statute fixes for the giving of crossing signals does not relieve it of the duty to ring the bell for the crossing, if the statute requires the bell to be kept ringing from the point where the giving of the signals begins until the crossing is passed.

**Same — absence of signals — negligence.**

3. A railway company is negligent in backing a train over a highway crossing without giving any signal whatever of its approach.

**Pleading — absence of crossing signals — proximate cause.**

4. One seeking to hold a railroad company liable for an injury through collision with its train at a highway crossing which failed to give any signals of its approach need not allege that, had the signals been given, they would have been heeded.

**Railroad — crossing accident — duty of traveler to leave vehicle.**

5. A traveler who, upon approaching a railroad crossing after dark, finds his view of the track obstructed, is not, as matter of law, bound to alight from the vehicle and go forward onto the track to ascertain whether or not a train is approaching, failure to do which will be negligence *per se*; at least, with respect to a train which is running backward without lights or signals.

**Same — duty to know that crossing is safe.**

6. A traveler on a highway is not bound to know that it is safe to cross railroad tracks before attempting to do so.

(October 5, 1911.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Wabash County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Affirmed.

The facts are stated in the opinion.

Mr. G. E. Ross, for appellant:

The failure to sound the whistle, etc., could not have been the proximate cause of plaintiff's injury unless she could have heard them had they been given; hence it was necessary for her to allege that she could or would have heard them had they been given.

Baltimore & O. S. W. R. Co. v. Young, 146 Ind. 374, 45 N. E. 479; Chicago & E. R. Co. v. Thomas, 147 Ind. 35, 46 N. E. 73.

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Messrs. Manley & Stricler, Byron K. Elliott, and William F. Elliott, for appellee:

The complaint sufficiently shows a duty and a negligent breach thereof.

Pittsburgh, C. & St. L. R. Co. v. Martin, 82 Ind. 476; Chicago, I. & L. R. Co. v. Barnes, 164 Ind. 150, 73 N. E. 91; Ohio & M. R. Co. v. Heaton, 137 Ind. 6, 35 N. E. 687; Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761.

It was negligence *per se* to violate the statute, and even in its absence, it was negligence not to give any signals, and, if it caused the injury without contributory negligence on plaintiff's part, she is entitled to recover.

Lake Shore & M. S. R. Co. v. Johnsen, 135 Ill. 641, 28 N. E. 510; Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761; Pittsburgh, C. & St. L. R. Co. v. Martin, 82 Ind. 476; Mitchell v. Union Terminal R. Co. 122 Iowa, 237, 97 N. W. 1112; Spiller v. St. Louis, M. & S. R. Co. 112 Mo. App. 491, 87 S. W. 43; Stotler v. Chicago & A. R. Co. 200 Mo. 107, 98 S. W. 509; Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554; Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Cincinnati, W. & M. R. Co. v. Hiltzhauer, 99 Ind. 486; Duggan v. New England R. Co. 172 Mass. 337, 52 N. E. 519; Pittsburgh, C. C. & St. L. R. Co. v. Lynch, 43 Ind. App. 177, 87 N. E. 40; Cleveland, C. C. & St. L. R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985; Troy v. Cape Fear & Y. Valley R. Co. 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77; Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; Kentucky C. R. Co. v. Smith, 18 L.R.A. 63, note; Chicago, R. I. & P. R. Co. v. Sharp, 11 C. C. A. 337, 27 U. S. App. 334, 63 Fed. 532; Chicago Terminal Transfer R. Co. v. Walton, 165 Ind. 642, 74 N. E. 988; Lake Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 641, 45 N. E. 812.

Appellee was not obliged to stop, nor to get out and lead her horse.

Pittsburgh, C. & St. L. R. Co. v. Martin, 82 Ind. 476; Baltimore & O. S. W. R. Co. v. Rosborough, 40 Ind. App. 15, 80 N. E. 869; Pittsburgh, C. & St. L. R. Co. v. Wright, 80 Ind. 236; Kelly v. St. Paul, M. & M. R. Co. 29 Minn. 1, 11 N. W. 67.

Cox, J., delivered the opinion of the court:

Appellee recovered a judgment in the lower court against appellant for personal injuries alleged to have been inflicted upon her by the negligence of appellant's employees in the movement of one of its switching trains across a public street in the city of Marion, whereby the train was backed into



a wagon in which appellee was riding with her husband, who was driving.

From this judgment of \$2,250, appellant prosecutes this appeal, and charges error on the part of the trial court in overruling its demurrer to the complaint of appellee, its motion for a new trial, and its motion in arrest of judgment. By the first and last specifications of error, the sufficiency of the complaint is brought in question by appellant.

The complaint is substantially as follows:

"The plaintiff complains of the defendant, and says that said defendant is now, and has been for more than ten years last past, a corporation duly organized and incorporated, and has, during the last past ten years or more owned and operated and controlled a line of railroad from the city of Pittsburgh, in the state of Pennsylvania, in and through the said county of Grant, in the state of Indiana, to the city of Chicago, in the state of Illinois, running into and through a large number of intervening cities, towns, and stations; that in operating and managing its said road said defendant has, during said time, and did, on the 17th day of December, 1906, own and use, and still owns and uses, a large number of locomotive engines and trains of cars, both freight and passenger; that said defendant runs over its said road daily a large number of freight and passenger trains, hauled and drawn by its said locomotive engines; that it has and maintains, and did have and maintain, at the city of Marion, in Grant county, in the state of Indiana, on or about the 17th day of December, 1906, side tracks, switches, and spurs, and all the usual and necessary conveniences for managing and operating its said road; that on the 17th day of December, 1906, one of the defendant's said side tracks, switches, or spurs extended across a public street and highway in the western part of the city of Marion, known and called second street, or Delphi avenue; that the defendant's said tracks and railroad in crossing said Second street, or Delphi avenue, run nearly due north and south, or at about right angles with said street, and that said Second street, or Delphi avenue, runs east and west in said city of Marion; that said Second street, or Delphi avenue, is about 40 feet wide, and is paved with brick up to the east line of defendant's said track; that where said railroad crosses said Second street, or Delphi avenue, in the city of Marion, people are constantly passing and repassing and crossing said tracks of said railroad company.

"Plaintiff further avers that on the 17th day of December, 1906, just at dark, in the 42 L.R.A. (N.S.)

evening, she, in company with her husband, was driving in a one-seated, one-horse wagon, along and upon said Second street, or Delphi avenue, as travelers thereon; that when about 100 feet from said crossing, and approaching the same from the east, her said husband driving, he (her said husband) checked the horse and drove in a slow walk, and she and her said husband looked and listened to see and hear if a train of cars or an engine were approaching said crossing; that she and her said husband looked both to north and south, up and down said railroad track and continued to so look and listen for any signal or any sound of an approaching train or engine; that they neither of them saw or heard any train or engine approaching, and not seeing or hearing any locomotive engine or train, and not hearing or seeing any signals given, they started to drive across said track, approaching the same from the east; that as the horse the plaintiff and her husband were driving approached defendant's said tracks, and just as plaintiff and her said husband entered upon said track at said crossing, the defendant carelessly and negligently ran and operated a certain locomotive engine and cars along, over, and upon its said track and road at said crossing, in a south or nearly south direction, and so operated and ran said locomotive and cars backward, over, and across said crossing, at a dangerous and reckless rate of speed, to wit, about 30 miles per hour, and without having any light on the rear end of said train of cars, as a signal of its approach to travelers; that the defendant, its agents and servants, in the operation and management of said train of cars and engine, carelessly and negligently failed to sound the whistle, or ring the bell, or to have any light on the front end of said train of cars (the end that was in front in the moving of said train of cars), and carelessly and negligently failed to give any signal whatever of the approaching of said cars or train; that on the east side of said railroad track, and on the north side of said Second street, at said point where said accident occurred at said crossing, there are buildings projecting out to the east side of said railroad track, and to the north of said Second street, which obstruct the view of said railroad tracks and its train to the north of said railroad track, as approached from the east; that by reason of the said obstruction, and by reason of the rapid speed at which said train was run, and by reason of the defendant, its agents and servants, failing to sound the whistle or ring the bell, and by reason of said defendant, its agents or servants failing to have a light on the rear of said train when it was pushing the same across a

public street when it was dark, and by reason of the defendant, its agents or servants, failing to give any signals whatever of the approach of its said train at said time and place, and for the further reason that said train approached said crossing so quietly and so silently that its approach could not be heard or seen by this plaintiff or by her companion, although they and each of them have good eyesight and good hearing; that as said engine and train of cars approached said crossing in said careless and negligent manner as aforesaid, just as this said plaintiff and her companion were crossing said railroad track, they were run against and over by said train of cars at and on said crossing; that plaintiff was thrown from the wagon in which they were riding with great force and violence, and was hurled a great distance by reason of being struck by said train of cars at said crossing, and badly injured thereby by having her spinal column injured and sprained, her ribs broken, her ankle fractured, sprained, and broken, and the ligaments thereof torn loose, her shoulder and back mashed, bruised, and injured, by reason of which she (the plaintiff) has received lasting, permanent injuries; that she is now crippled, and will, as she believes and is informed by her doctors, remain a cripple during the remainder of her natural life; that she is unable, and has been ever since the injury aforesaid, to do her work as housekeeper and to attend to her home duties; that she has been under the doctor's care ever since said injury, and is still the object of his care and treatment, and will so continue to remain.

"Wherefore, by reason of the facts heretofore stated, she has been damaged in the sum of \$5,000; that said injuries were received without any fault whatever of the plaintiff or her companion, who was with her at the time, but wholly on account of the careless and negligent manner in which defendant was running and operating its said locomotive engine and cars, by running upon said crossing of said street, as aforesaid, without giving any signal, sounding any whistle, without having any light or lights thereon, so that they could have been seen by persons crossing said tracks, and without having any person or persons on the rear end of the car being pushed across said crossing, or in any manner or way making any provisions for the safety of the traveling public at said crossing. Wherefore she prays for judgment," etc.

It is the contention of counsel for appellant that the complaint does not allege facts showing a duty owing to appellee in the operation of its train, and the violation of it. 42 L.R.A. (N.S.)

While it may be at once conceived that the complaint is not a model of clear, concise, and orderly allegation of actionable facts, it is quite clear that it does directly allege facts sufficient to show a violation of both a statutory and a common-law duty to give warning of the approach of the train to a highway crossing. It is alleged that appellee, together with her husband, was a traveler at dark of a winter evening on a public highway, a much traveled street of the city of Marion, riding in a horse-drawn vehicle thereon, and approaching the point where the street was intersected by appellant's railroad tracks, and that when they had entered upon the tracks at the street crossing in pursuing their journey as travelers along the street, appellant drove one of its locomotive engines with a train of cars backwards over and across the crossing at a speed of 30 miles an hour, without a light, without sounding a whistle or ringing a bell, or giving other signal to warn that the train was approaching the crossing, and that just as the plaintiff and her husband were crossing said railroad track, they were run against and over by said train of cars at and on said crossing, causing plaintiff's injuries.

It has long been settled by many decisions of this court that the failure of a railroad company in the operation of its road to give the signals enjoined by statute of the approach of its trains to public highways crossed by its tracks, in a violation of its duty owing to travelers on such highway, constitutes negligence giving rise to a cause of action in favor of such a traveler, who has been injured thereby without negligence on his part which contributed to his injury. Indeed, the statute itself expressly makes the railroad company in such case liable. *Burns's Anno. Stat. 1908, §§ 5431, 5432; Chicago & E. I. R. Co. v. Boggs (1885) 101 Ind. 522, 51 Am. Rep. 761; Cincinnati, H. & I. R. Co. v. Butler (1885) 103 Ind. 31, 2 N. E. 138; Baltimore & O. & C. R. Co. v. Walborn (1891) 127 Ind. 142, 26 N. E. 207; Greenawaldt v. Lake Shore & M. S. R. Co. (1905) 165 Ind. 219, 74 N. E. 1081; Cincinnati, I. St. L. & C. R. Co. v. Grames (1893) 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; New York, C. & St. L. R. Co. v. Robbins (1906) 38 Ind. App. 172, 76 N. E. 804; Chicago & E. I. R. Co. v. Coon (1911) — Ind. App. —, 93 N. E. 561.*

That the statutory duty of giving warning of the approach of trains to highway crossings applies to the crossings of streets in cities and towns, unless the statutory signals are prohibited by ordinance passed pursuant to the power granted to cities and towns to regulate the running of trains

therein, has been recognized and impliedly decided by many of our cases. *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Baltimore & O. R. Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207; *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790; *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; *Chicago, St. L. & P. R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1; *Pittsburgh, C. C. & St. L. R. Co. v. Shaw*, 15 Ind. App. 173, 43 N. E. 957; *Lake Shore, & M. S. R. Co. v. Boyts* (1897) 16 Ind. App. 640, 45 N. E. 812; *Aurelius v. Lake Erie & W. R. Co.* (1898) 19 Ind. App. 585, 49 N. E. 857; *Cleveland, C. C. & St. L. R. Co. v. Carey* (1904) 33 Ind. App. 275, 71 N. E. 244; *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459, 70 N. E. 834; *Chicago & E. I. R. Co. v. Coon* (1911) — Ind. App. —, 93 N. E. 563. And it has been expressly so decided in the case of *Cleveland, C. C. & St. L. R. Co. v. Carey* (1904) 33 Ind. App. 275, 282, 71 N. E. 244, wherein it was held that the statute was in force in a city, notwithstanding the fact that there was then in force in such city an ordinance prohibiting the sounding of railroad whistles, except to give "such danger signals as are necessary for the protection of life and property."

But it is argued by counsel for appellant that, because it is not specifically alleged that the train in question was one running between given points on the main track, or that it came from beyond a point 80 rods from the crossing, it fails to allege facts showing a violation of the statutory duty imposed on appellant. In other words, as we understand appellant's contention, it is that the statute requiring signals to be given does not apply to a train of cars on a switch, pushed by a locomotive attached to it, especially when started at a point less than the required statutory distance for giving signals, and that, as it appears from the complaint that the train which it is alleged struck plaintiff was backed over the crossing on a switch, it was at least necessary to allege facts showing that the train came from a distance more than 80 rods away to show a violation of the statutory duty. The reason for the application of the statute to a train running over a switch track which crosses a highway is as obvious as that for applying it to a train running on a main track. A railroad company at common law is under a duty, in the operation of its trains over highway crossings, of using reasonable and ordinary care to avoid injury to travelers at and on highways

which are interested by its tracks. The statute requiring the giving of signals of the approach of trains to crossings is said to be the expression of the minimum care required. That the approach of a backing train, with the locomotive at the end farthest from the point of crossing, would ordinarily be less readily observed by a traveler on a highway, is clear to the mind, and that the statute should apply to such a train is at once evident. The statute requires that the engineer or other person in charge of or operating a locomotive shall, when such engine approaches a highway crossing, and not less than 80 and not more than 100 rods therefrom, sound the whistle three times, and ring the bell continuously thereafter until the crossing is passed. We know of no case in this state which has considered and determined whether, when a train begins to move towards a highway crossing from a stop less than 80 rods from the crossing, the statutory duty of blowing the whistle arises. In some other jurisdictions under like statutes, it has been held that in such case the statute requires the sounding of the whistle. See *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641-653, 26 N. E. 510; *Spiller v. St. Louis, M. & S. R. Co.* 112 Mo. App. 491, 87 S. W. 43; 33 Cyc. 966.

But, conceding that the statutory duty to sound the whistle in each case does not arise, there still remains the duty to ring the bell continuously until the crossing is passed; and it would be wholly contrary to the plain purpose of the statute to say that, in so far as the duty to ring the bell is concerned, the statute does not apply to a train that is being backed over a highway crossing from a point less than 80 rods therefrom. That the duty to ring the bell in warning does flow from such a statute has been frequently held by the courts of other states. *Gulf, C. & S. F. R. Co. v. Hall*, 34 Tex. Civ. App. 535, 80 S. W. 133; *Ft. Worth & R. G. R. Co. v. Greer*, 32 Tex. Civ. App. 606, 75 S. W. 552; *Mitchell v. Union Terminal R. Co.* 122 Iowa, 237, 97 N. W. 1112; *Spiller v. St. Louis, M. & S. R. Co.* supra; *Herring v. Wabash R. Co.* 80 Mo. App. 562; *Canada Atlantic R. Co. v. Henderson*, 29 Can. S. C. 632. As the complaint in this case directly alleges that no whistle was sounded or bell rung, or any other signal given by appellant's employees in charge of the engine in question, it at least charged the violation of a statutory duty in failing to ring the bell.

But, independently of the statute, it is the duty of those in charge of a railroad train to give reasonable and timely warning

of its approach to a street or highway crossing. *Indianapolis, C. & L. R. Co. v. Hamilton* (1873) 44 Ind. 76; *Pittsburgh, C. & St. L. R. Co. v. Martin* (1882) 82 Ind. 476; *Pittsburgh, C. C. & St. L. R. Co. v. Burton* (1894) 139 Ind. 357-377, 37 N. E. 150, 38 N. E. 594; *Cleveland, C. C. & St. L. R. Co. v. Miles* (1904) 162 Ind. 646, 70 N. E. 985. And especially is this true in the case of a backing train. *Lake Shore & M. S. R. Co. v. Boyts* (1897) 16 Ind. App. 640, 45 N. E. 812; *Cleveland, C. C. & St. L. R. Co. v. Carey* (1904) 33 Ind. App. 275, 279, 71 N. E. 244. See also *Elliott, Railroads*, §§ 1153-1158. The complaint directly alleges a failure to give any signals of any character, by whistle, bell, or light on the rear, while the train was backing toward and over the crossing at the rate of 30 miles an hour, at dark. This was a gross and culpable violation of appellant's common-law duty, and consequently negligence.

It is finally argued by appellant's counsel that the complaint does not show that appellant's negligence was the proximate cause of appellee's injury, because it does not directly allege that she would have heard a signal, if given, or seen a light, if displayed, on the backing car. Such allegations were not required; the general averments sufficiently show that appellant's negligence as alleged was the proximate cause of the injury to appellee. *Greenawaldt v. Lake Shore & M. S. R. Co.* (1905) 165 Ind. 219, 223, 74 N. E. 1081.

The overruling of appellant's motion for a new trial is assigned as error. The motion for a new trial states numerous causes, but all are waived by appellant by a failure to state any proposition, point, or authority in support thereof, except those questioning the sufficiency of the evidence to sustain the verdict, and the action of the trial court in giving and refusing certain instructions.

As to the contention of counsel for appellant that the evidence does not prove the breach of a duty by appellant owed to appellee, it may be said that the evidence amply sustains every allegation of the complaint as to the failure to signal the approach to the crossing of appellant's backing train at dark, by whistle, bell, or a light on the coal car, which was the nearest part of the train. Indeed, on the trial appellant's counsel expressly conceded that no whistle was blown or light displayed. The evidence fairly sustains the charge that the train moved over the crossing at a speed of about 30 miles an hour, struck the vehicle in which appellees were riding, and carried it forward from 50 to 75 feet, when the car which struck the vehicle was derailed. And

it appears that the train was making little noise as it approached. There was testimony for appellant from the conductor and brakeman that the bell was rung, and that the speed was not more than 8 miles an hour. But the weight of the evidence sustains the complaint in these particulars. The fact that the testimony of neither the fireman nor engineer was given is not without significance, particularly as to the ringing of the bell.

It is contended by counsel for appellant that, as it appears that appellee did not require her vehicle to be stopped before entering upon the crossing of appellant's tracks, alight therefrom, and go upon the tracks in quest of an approaching train, she, in failing to so do, was guilty of negligence as a matter of law, which was the proximate cause of her injury. To sustain such a contention in this case would be to practically deprive the public of the use of the streets of cities and towns, where they are crossed by the tracks of railroads. The evidence shows that appellee and her husband were traveling on a much used street at dark of a winter evening, going to their home near the city of Marion. The street was crossed by appellant's main track and switch track, over which they were compelled to travel to reach their home. They were familiar with the crossing, having passed over it many times in safety. Their view of the tracks of appellant in the direction from which the train which struck them came was obstructed by coal sheds and other buildings, so that for a distance of about 100 feet from the switch on which the train ran to a point within from 6 to 10 feet of the switch, a train approaching thereon could not have readily been seen. They were sitting together on a seat in the front of a florist wagon, which was drawn by a gentle horse. The husband was driving. The seat was open, so that they could see and hear. On approaching the crossing, the horse was pulled down to a very slow walk, about a mile and a half or two miles an hour. The eyesight and hearing of both were unimpaired. Both of them kept looking in both directions for an approaching train, and listened continuously, and heard or saw none, until the horse had entered upon the switch track, and the coal car of the backing train, running quietly, without light or signal of any kind, appeared out of the dusk, and almost at once struck them. If the signals had been given, they could have heard them, and if a light had been displayed they could have seen it. Under these circumstances, it was for the jury to determine whether appellee was guilty of

contributory negligence. It cannot be said, as a matter of law, that her failure to stop, or to stop entirely, and go upon the track in advance of the horse, was negligence which contributed to her injury. In the absence of signals or light, it is not sure that either would have been effective in avoiding the collision. *Pittsburgh, C. & St. L. R. Co. v. Martin* (1882) 82 Ind. 483; *Pittsburgh, C. & St. L. R. Co. v. Wright* (1881) 80 Ind. 236; *Malott v. Hawkins* (1902) 159 Ind. 127, 63 N. E. 308; *Greenwaldt v. Lake Shore & M. S. R. Co.* (1905) 165 Ind. 219, 74 N. E. 1081; *Chicago, I. & L. R. Co. v. Turner* (1904) 33 Ind. App. 265, 69 N. E. 484; *Baltimore & O. S. W. R. Co. v. Rosborough* (1907) 40 Ind. App. 15, 80 N. E. 869; *Pittsburgh, C. C. & St. L. R. Co. v. Lynch* (1909) 43 Ind. App. 177, 87 N. E. 40.

Counsel for appellant complains at some length of a number of instructions given by the court of its own motion and at the request of appellee, and of the refusal of the court to give a number of instructions requested by appellant. While there may be some technical inaccuracies in one or more of the instructions given, an examination of them discloses none that was calculated to mislead the jury to prejudice the substantial rights of appellant. Taking all of the instructions given together, they were quite as favorable to appellant as the case made warranted.

Instruction No. 3, requested by appellant and refused by the court, told the jury that appellee had no right to proceed to cross the tracks "until she knew it was safe to do so," and that she could not recover for an injury sustained because of her failure "to ascertain and know that no train was coming close to the crossing." The law did not require the high degree of care of appellee, practically insuring her own safety, that this instruction would have held her to.

Instruction No. 4, requested, was correctly refused, because the same vice inheres in it. Instructions Nos. 13, 16, and 18, in so far as they state the law correctly, were covered by other instructions given. Moreover, they contained incorrect statements of the law as to appellee's duty. As before stated in this opinion, it cannot be said, as a matter of law, that appellee's failure to stop the horse and to precede it upon the track, and there look and listen, made her guilty of contributory negligence.

The case seems to have been fairly tried and substantial justice reached in the trial court, and its judgment is affirmed.

Petition for rehearing denied.  
42 L.R.A. (N.S.)

## IOWA SUPREME COURT.

JOHN ADAMS

v.

CHICAGO GREAT WESTERN RAILROAD  
COMPANY et al., Appts.

(— Iowa, —, 135 N. W. 21.)

### Carrier — intoxicated passenger — ejection — liability.

1. A railroad company cannot, in the absence of wilfulness or wantonness, be held liable for ejecting from its train at a station a passenger intoxicated, but not helpless, who refuses to pay fare, where the statute expressly authorizes it to do so.

### Same — expulsion of trespasser from depot — care — liability.

2. A railroad company which compels a trespasser whom it knows to be intoxicated to such an extent that he cannot care for himself, to leave its depot building on an extremely cold night, without thought as to where he will find shelter, fails to exercise ordinary prudence, and will be liable for injury inflicted upon him by the cold.

### Evidence — admission — laying foundation.

3. Admissions made by one injured by another's negligence are admissible in evidence against him at the trial without calling his attention to them while he is on the stand, as would be necessary to render them admissible for purposes of impeachment against an ordinary witness.

### Carrier — expulsion of trespasser — offer of shelter — effect.

4. No liability attaches to a railroad company for turning an intoxicated trespasser out of its station on an extremely cold night, if its agent offered him shelter which, with an understanding of the offer, he declined.

(March 15, 1912.)

**A**PPEAL by defendants from a judgment of the District Court for Wright County in plaintiff's favor in an action brought to recover damages for the alleged wrongful act of defendants in compelling plaintiff to leave its station on a cold night. Reversed.

### Note. — Liability of carrier for turning one other than passenger out of depot.

The liability of carrier for turning a waiting passenger out of depot is discussed in note to *Texas Midland R. Co. v. Geraldson*, 29 L.R.A. (N.S.) 799.

Generally, as to the duty of railroad company towards sick, infirm, disabled, and otherwise helpless persons with whom no contract relation is sustained, see note to *Union P. R. Co. v. Capier*, 69 L.R.A. 513.

It is generally held that a railroad company may eject from its station or depot,

Statement by Ladd, J.:

Action for damages resulted in judgment against both defendants, from which they appeal.

Messrs. Carr, Carr, & Evans and Bird-sall & Birdsall for appellants.

Messrs. J. W. Henneberry and McGrath & Archerd for appellee.

Ladd, J., delivered the opinion of the court:

In the afternoon of December 7, 1909, plaintiff was discovered lying on the floor in a box car in a train which had just reached Lehigh over a branch line of the defendant from Ft. Dodge to that place. The attention of the train crew being directed to him, he was assisted to the depot platform. Though he testified to having

boarded a passenger car at Ft. Dodge, the conductor and brakeman denied having seen him there, and he offered on explanation of his exit from a passenger car to the box car in which he was found on the way. He remained at the depot in Lehigh until the train was ready to return to Ft. Dodge, nearly two hours, and then boarded the passenger car. Upon demand for fare, he tendered a ticket from Ft. Dodge to Eagle Grove, which was declined, and, though requested twice thereafter, failed and refused to pay the same, and was directed to leave the train at Evanston, the next station. This was about 5 o'clock P. M. of the same day. He did as required, and, after standing on the platform a few minutes, entered the depot. After the agent, defendant Evans, had completed his work, about thirty minutes later, and was ready to go

using only such force as is necessary for that purpose, any person having no business there or whose conduct so warrants, if on request he refuses to leave. *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337 (*dictum*), and other cases in this note.

So it is held in *Weiler v. Pennsylvania R. Co.* 12 Pittsb. L. J. N. S. 347, that railroad officers having reason to suspect that a person is in the depot on improper business have a right to demand what his business is, and to order him to leave if he refuses to disclose it; and if, when ordered, he refuse or neglect to go, they have a right to remove him by such force as is necessary for the purpose, adding the reasonable force necessary to overcome a violent resistance, he having no right to complain if injury results to him therefrom. In this case the court, in relieving from liability the company which had been sued for assault and battery and for unlawful arrest and imprisonment, said that "if, after being warned to leave and refusing to do so, he forcibly resisted the attempt to remove him, violently resisted and struck the officers, and was noisy and abusive, he then and thereby became guilty of a breach of the peace, for which he was liable to arrest by the officers. They would then have a right to arrest him and carry him to the lockup (without a warrant), using such force and appliances as were reasonably necessary under the circumstances to accomplish the purpose, and in that case they would only be responsible for injury caused by excessive force."

So, where a person was intoxicated and soon after coming into the waiting room vomited on the floor, it was held in *Chicago & A. R. Co. v. Randolph*, 65 Ill. App. 208, that his conduct warranted expulsion, and that his ejection with no more force than was proper and necessary was justifiable.

It seems that the waiting rooms of railway stations are for the accommodation of incoming and outgoing passengers, not a place of resort for the general public; and 42 L.R.A. (N.S.)

while one not entering them as a passenger or on business with the company is not a trespasser, yet, upon a request to leave, it is his duty to do so, whether disorderly or not, and upon his refusal to go, it is the right of the agent to eject him. Consequently, it is held in *Johnson v. Chicago, R. I. & P. R. Co.* 51 Iowa, 25, 50 N. W. 543, that where a person enters the waiting room with no intention of taking a train, if he is noisy, drunken, and profane, or otherwise disorderly, it is the right and duty of the station agent, upon his refusal to leave the the room, to remove him, using no more force than is reasonably necessary for that purpose.

It was said in *Com. v. Power*, 7 Met. 596, 41 Am. Dec. 465, an action, however, against a railroad superintendent and his assistants for assault and battery, that by opening the doors of its depot a railroad company gives an implied license to all persons to enter; but that all such licenses are in their nature revocable, and if actually revoked, and due notice given to an individual or class of individuals, and they still persist in entering, it is without a license, and the owner has a right to exclude them, using only the necessary force. Consequently, in this case the superintendent was held justified in ejecting from its depot an innkeeper who in fact had a ticket and intended to board a train, but when asked his business there, refused to inform the superintendent, who thought that he had come to solicit patronage as he had repeatedly done before, in violation of the rules of the company and after being specially notified not to do so by the superintendent.

But the superintendent of a railroad depot has no right to order a person to leave the depot and not to come there any more, and to remove him by force if he does come, merely because such person, in the judgment of the superintendent and without proof of the fact, had violated the company's regulations, or had conducted himself

to his evening meal, plaintiff was required to leave the depot so that it could be locked, and started on foot toward Ft. Dodge, about 8 miles distant. After walking along the railroad track for some distance, he appears to have entered a corn-crib, and to have slept there until about 5 o'clock the next morning. At that time he called at a house in Evanston where it was discovered that both his feet were frozen, and also two fingers of his right hand. Both feet and one finger subsequently were amputated. Two grounds of negligence are charged: (1) In ejecting plaintiff from the train at Evanston, knowing that he was intoxicated to such an extent as to be unable to care for himself, and that the weather was cold; and (2) in ejecting plaintiff from the depot and premises of the railway company at Evanston,

knowing him to be in the condition stated, and unable to take care of himself, in the cold, and that there was no hotel or other place where he could obtain shelter from the inclemency of the weather.

That the plaintiff was in a state of intoxication when required to leave the passenger car at Evanston is undisputed. Section 2 of chapter 141 of the Acts of the Thirty-Third General Assembly provides that "any conductor of a railway train or street car carrying passengers shall have the right to refuse to permit any person not in the custody of an officer, to enter any passenger car on his train or street car in his charge, who shall be in a state of intoxication; and shall have the further right to eject from his train at any station or from his street car at any regular stop any person found in a state of intoxication,

offensively against the superintendent. Hall v. Power, 12 Met. 482, 46 Am. Dec. 698.

The court in McKernan v. Manhattan R. Co. 22 Jones & S. 354, recognizes the right of a railway company to eject a person from its depot on refusal to leave when requested, using such force, not illegal in its kind, as is necessary to enforce a compliance with the request, but says that an intending passenger, after having failed to buy a ticket, is still lawfully in the station with a duty of leaving it with ordinary promptness, and of not loitering there, or of using it for any other purpose than that of leaving it. In this case defendant's ticket seller refused plaintiff's application for a ticket on the ground that he was drunk, when in fact he was not, and on his turning to go out of the station the agent gave him a hurrying push, whereby he fell over the stair railing and upon the pavement below receiving severe injury. It was held a question for the jury whether or not the ticket seller was attempting to force the plaintiff to leave the station, and whether or not the ticket seller in such an attempt was acting within an employment by the defendant.

Where, contrary to the regulations of the railroad company, a man went into the ladies' waiting room without a lady, and from there into the ladies' private room, it was held in Toledo, W. & W. R. Co. v. Williams, 77 Ill. 354, that his removal from the depot without personal injury or damage to his clothing, on refusal to go, would not sustain an action against the company. It seems, however, that this person had procured a ticket with the intention of taking a train.

An omnibus proprietor who carries passengers and their baggage for hire to and from a railway station cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station yard. Barker v. Midland R. Co. 18 C. B. 46, 25 L. J. C. P. N. S. 184.

So a depot watchman was, in Landrigan 2 L.R.A. (N.S.)

v. State, 31 Ark. 50, 25 Am. Rep. 547, held improperly convicted of assault and battery where he ejected from the platform without unnecessary violence a hotel runner who was soliciting patronage for his hotel, against a regulation of the company of which he had knowledge.

So it has been held that a railway company may exclude from its stations all persons other than travelers, and consequently a hotel runner wearing a distinctive badge or livery. Perth General Station Committee v. Ross [1897] A. C. 479, 66 L. J. P. C. N. S. 81, 77 L. T. N. S. 226.

So it was held that a railway company could permit one cab proprietor to ply for hire within its station and exclude another, the court refusing an application for an injunction on the ground that no inconvenience was inflicted upon the public. Beadell v. Eastern Counties R. Co. 2 C. B. N. S. 509, 26 L. J. C. P. N. S. 250, 5 Week. Rep. 650. To the same effect is Case v. Story, L. R. 4 Exch. 319, 38 L. J. Mag. Cas. N. S. 113, 20 L. T. N. S. 618, 17 Week. Rep. 802, and Painter v. London, B. & S. C. R. Co. 2 C. B. N. S. 702.

In Bucknam v. Great Northern R. Co. 76 Minn. 373, 79 N. W. 98, plaintiff with her husband went into the ladies' waiting room of a railroad depot to await the arrival of a person coming on a train, when an employee authorized to preserve order in the waiting room, supposing that plaintiff's husband was not in fact her husband, ordered him to leave the room, using harsh, violent, and abusive language towards him; whereupon plaintiff suffered a nervous shock and became faint and sick, remaining so for several days. The language used by defendant's employee was not addressed to plaintiff, nor was there any physical injury inflicted upon her or her husband, and at no time was she in peril or danger from defendant's employee. It was held that, for the language so used, an action would not lie in behalf of the plaintiff as for a private wrong. J. D. C.

or drinking intoxicating liquors as a beverage, or using profane or indecent language on any passenger car of his train or any street car under his charge, and for that purpose may call to his aid any employee of the railway or street car company." This conferred on the conductor the ample authority to expel plaintiff from the train. He might have excluded him from the car when he undertook to enter at Lehigh, had he elected to have done so, but the circumstance that plaintiff succeeded in getting aboard through the oversight of members of the train crew, or for any other reason, did not deprive the conductor of the right expressly conferred by this statute to eject him therefrom. Nor is a conductor in ejecting such passenger bound to select any particular station at which to do so. The statute in the plainest possible terms authorizes this to be done "at any station." Of course, this will not justify the use of excessive force in accomplishing what may be done, nor does such a statute afford any protection against the wilful or wanton conduct of a conductor in ejecting a person even at a station. The condition of an intoxicated person doubtless might be such that to leave him to find his way even to the nearest house or the station would imperil his life or limb, and in that event the conductor would not be excusable in knowingly exposing him to such danger. *Roseman v. Carolina C. R. Co.* 112 N. C. 709, 19 L.R.A. 327, 34 Am. St. Rep. 524, 16 S. E. 766. But this is not such a case. The plaintiff in leaving the car walked erect and reached the station, which was open, safely, and, though there was no hotel in the place, there were ten or twelve dwelling houses not far from the depot, and, in the absence of all proof, it is not to be assumed, nor was the conductor bound to assume, that a person, even in plaintiff's condition then could not have found shelter from the inclemency of the weather at the station, or in some of these dwellings. If the conductor was then aware that plaintiff was in a helpless condition, the record does not disclose the fact. A passenger testified that he sat straight in the seat and walked erect in leaving the car, but that she thought him kind of stupid, and that he did not seem to know what he was doing, for that, when the conductor refused the ticket from Ft. Dodge to Eagle Grove, he fumbled in trying to get his hand into his pocket. Undoubtedly this conduct was an indication of intoxication, but it alone should not be accepted as establishing helplessness.

Common carriers are required to exercise a very high degree of care in the protection of travelers being transported 42 L.R.A. (N.S.)

against the misconduct of drunken and disorderly persons, and the manifest design of this statute is to enable them to guard against the dangers incident to their conveyance by authorizing them to refuse such persons as passengers, or after becoming such to expel them from their passenger coaches.

The plaintiff, not only was intoxicated, but had refused to pay his fare. The defendant did not owe him the duty of carrying him gratuitously, and might ordinarily eject him at the first station reached. The record is without evidence from which it could rightly have been found that the conductor in doing so violated any duty owing plaintiff, and the first ground of negligence ought not to have been submitted to the jury.

2. The plaintiff, in declining to pay his fare, had ceased to be a passenger, and, when ejected, cannot be assumed to have entered the depot for the purpose of taking a train. Even if he did, however, the agent was not bound to keep it open until the next train passed through on the following day. The waiting room is for the accommodation of incoming and outgoing passengers, and not a place of resort for the general public, and, though one entering it not as a passenger or on business with the company is not to be regarded as a trespasser, yet, upon a request to leave, it is his duty to do so, whether disorderly or not, and upon his refusal to go, it is the right of the agent to eject him, using such force as is reasonably necessary. *Johnson v. Chicago, R. I. & P. R. Co.* 51 Iowa, 25, 50 N. W. 543; *Beeson v. Chicago, R. I. & P. R. Co.* 62 Iowa, 173, 17 N. W. 448; *McDonald v. Illinois C. R. Co.* 88 Iowa, 348, 55 N. W. 102.

As the plaintiff was not there on business connected with the company, the agent owed him no affirmative duty. In the absence of information to the contrary, he might assume that plaintiff was capable of taking care of himself, and was not bound, before ordering him out of the depot on closing, to ascertain his actual condition. If, however, the apparent condition of plaintiff was that of helplessness or of intoxication, such as to render him incapable of caring for himself, in view of the inclemency of the weather, and he was in such condition actually, then it devolved upon the agent to exercise such care, and take such precautions for his safety, as an ordinarily prudent person would under like circumstances. In short, he was not charged with notice of his actual condition, same as this was apparent from his conduct or talk or appearance. And even though plaintiff may have been in a drunk-



en condition, he was not bound to play the good Samaritan and minister to his wants; but when the station agent required him to leave the depot and go out in the cold night, the duty or obligation immediately arose to exercise ordinary care in what he did. In other words, though the agent may have had the legal right to require the plaintiff to vacate the room he was occupying, yet, in doing so, he was bound to take into consideration the plaintiff's condition, and to exercise ordinary care for his protection. Undoubtedly the plaintiff's condition was due to his past misconduct, but this did not excuse the defendants, when brought in relation with him, from exercising due care in availing themselves of their legal right with respect to his expulsion. They were required to exercise ordinary care in the immediate action in which they were engaged, and if that action was calculated to create circumstances which would imperil human life or limb, they must guard against such contingencies as an ordinarily prudent person would under the circumstances.

In other words, though the defendants had the legal right to exclude persons from the depot, save within a reasonable time before, during, and after the arrival and departure of trains, in exercising that legal right, they might not do so in a manner to imperil the life or limb of persons who were in the depot. In *Depue v. Flatau*, 100 Minn. 299, 8 L.R.A.(N.S.) 485, 111 N. W. 1, the plaintiff, who was a stock buyer, called at the defendant's house to look at cattle, but, as it was late, proposed to remain overnight, and examine them more carefully in the morning. His request was refused, but he was invited to and did remain for supper. After eating, he was taken sick. Though this was known to defendants, they refused to permit him to remain overnight, put him in his cutter, and, though he was unable to drive the team, started it off toward his destination. After going about a half mile, he fell from the cutter, and lay in the snow all night, to his great injury, and the court held that a case was made out on which damages might be allowed, saying, after quoting from *Union P. R. Co. v. Cappier*, 66 Kan. 649, 69 L.R.A. 516, 72 Pac. 281; "The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such dan-

ger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect. This principle applies to varied situations arising from noncontract relations. It protects the trespasser from wanton or wilful injury. It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, though it does not embrace those sentimental or social duties often prompting human action. 21 Am. & Eng. Enc. Law, 471; Barrows, Neg. 4. Those entering the premises of another by invitation are entitled to a higher degree of care than those who are present by mere sufferance. Barrows, Neg. 304. The rule stated is supported by a long list of authorities, both in England and this country, and is expressed in the familiar maxim, *Sic utere tuo*, etc. They will be found collected in the works above cited, and also in 1 Thompson on Negligence, 2d ed. § 694. It is thus stated in *Heaven v. Pender*, L. R. 11, Q. B. Div. 503, 19 Eng. Rul. Cas. 81: "The proposition which these recognized cases suggest, and which is therefore to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." It applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them." The cases bearing on the proposition stated are collected in 69 L.R.A. 513. See also *Haley v. Chicago & N. W. R. Co.* 21 Iowa, 15; *Weymire v. Wolfe*, 52 Iowa, 533, 3 N. W. 541; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L. R. A. 664, 73 Am. St. Rep. 727, 77 N. W. 97; *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979; *Black v. New York, N. H. & H. R. Co.* 193 Mass. 448, 7 L.R.A. (N.S.) 148, 79 N. E. 707, 9 Ann. Cas. 485. The principle is not different from that involved in the ejection of a person from a passenger train upon refusal to pay for transportation.

The agent required plaintiff to leave the depot at about 5 o'clock in the afternoon, walked up with him to the elevator near by, then returned to the depot before going to supper. After the evening meal, he returned to the depot about one-half or three-quarters of an hour, and then called upon a sick person for about an hour and a half, and returned to the depot to put out the lights at about half past 10 o'clock. It is not our purpose, nor is it necessary, now to determine what the defendants should have done in the exercise of reasonable care. All we do hold is that if, from the evidence, it appeared that the plaintiff was in such a drunken and sodden condition that he was unable to take care of himself, either by walking to Ft. Dodge, 8 miles distant, as it is claimed he started out to do, or to obtain reasonable shelter from the inclemency of the weather, and if the defendants, knowing him to be in such condition, compelled him to leave the depot and thereby expose himself to the dangers of an extremely cold night, instead of allowing him to remain in the depot until it was finally closed for the night or longer, or assisting him to some place where he might be sheltered from the cold, and therein they failed to pursue the course which an ordinary prudent man would have under like circumstances, then they are liable. The instructions of the district court were in harmony with the rules as stated, and we think were correct.

3. Some time after the accident the defendant's claim agent called upon the plaintiff and asked him questions which he answered, and these were taken down in shorthand, and subsequently transcribed by a stenographer. The plaintiff read over and signed the translation. Many of these answers were inconsistent with plaintiff's testimony on the trial, and the transcript of questions and answers as signed by him was offered in evidence. An objection that his attention when a witness had not been called to portions of these in cross-examination, and that it was not proper for impeaching purposes, was interposed and sustained. As the transcript was offered as disclosing admissions by the plaintiff, a party to the suit, it was admissible as substantive evidence, and it was unnecessary to first direct his attention thereto. The ruling was erroneous.

4. The agent, Evans, testified that when plaintiff left the depot, he walked with him as far as the elevator, and that on the way he said to him: "You are a stranger to me. I don't know you, but you can go home with me. You can stay at my

house. We have two beds that are not used,—nobody sleeps in them at all. You are perfectly welcome to one, and it won't cost you a cent." And he went off. He said, "I can walk to Ft. Dodge just as well as not." If this occurred and plaintiff understood the offer and declined it, then defendants did all required of them. If he did not understand, and the agent was aware he did not, then, of course, this tender would not relieve them from any liability otherwise incurred.

The plaintiff testified that he knew of nothing which happened from shortly after he had left Ft. Dodge until the following morning, so that whether he understood was fairly in issue, but it is said that there was no evidence tending to show that the agent might have been aware of this. Powers testified that the agent spoke to plaintiff four or five times in the depot, and received only a mumbling response of "wait a minute," and that he finally got him out of the depot by taking him by the collar. Ferguson testified that, after the agent came back from the elevator, he asked him what had become of the man, and the answer was that he did not know, guessed he had gone to Ft. Dodge, and said he told him the way up, and that there was no place to stay in Evanston; that the witness said it was a pretty cold night to have to be out in his shape, and the agent responded that he would not have the drunken pup around; that he insisted upon him going out of the depot, though he did not want to go, and argued with him; and that he told him several times to go, and finally took him by the collar and led him out. This evidence was sufficient to carry the issue to the jury both as to whether the offer was made, and, if made, whether the agent knew whether it was understood by the plaintiff. There are some other rulings complained of, but of a nature not likely to occur on another trial.

Because of the errors pointed out, the judgment is reversed.

Petition for rehearing denied.

## IOWA SUPREME COURT.

LUCINDA HUSTED et al.

v.

CALEB ROLLINS et al.

(— Iowa, —, 137 N. W. 462.)

Descent — children of first marriage — issue.

1. A woman leaving children only by her first marriage is not without issue as

to property purchased after the second marriage, within the meaning of statutes fixing the rights of her surviving husband in the property.

**Deed — conveyance by habendum.**

2. Although the statute provides that words of inheritance are not necessary to convey a fee, a grant to a man and his wife, habendum to them for life, remainder to another by name, passes the fee to the latter.

**Election — husband — homestead and distributive rights — mistake — effect.**

3. A man who, after the death of his wife, attempts to assert homestead rights in a parcel of land which did not belong to her, under a mistaken belief as to her title, does not, in case she had no title thereto, elect to waive his distributive rights in other parcels which she did own.

(September 21, 1912.)

**Note. — Effect of other language in deed to cut down estate conveyed by granting clause.**

Only those cases in which the grantor, in other clauses of the deed, has attempted to convey a lesser estate than that conveyed in the granting clause, are within the scope of this note.

This subject has been fully treated in the notes to *Carl-Lee v. Ellsberry*, 12 L.R.A.(N.S.) 956, and *Triplett v. Williams*, 24 L.R.A.(N.S.) 514, and the purpose of the present note is merely to add the more recent decisions. These, in a large measure, accord with what has already been said in the note to the *Triplett Case*.

Thus, upon consideration of the whole deed, in the following cases, the intent of the grantor was found to be clearly and unmistakably expressed, and subsequent clauses in the deed were given effect to curtail the estate conveyed by the granting clause: *Jacobs v. All Persons*, 12 Cal. App. 163, 106 Pac. 896; *Sterling v. Huntley*, — Ga. —, 76 S. E. 375; *Harkness v. Meade*, 148 Ky. 565, 147 S. W. 10; *May v. Justice*, 148 Ky. 696, 147 S. W. 409; *Dinger v. Lucken*, 143 Ky. 850, 137 S. W. 776; *Wilson v. Moore*, 146 Ky. 679, 143 S. W. 431; *Acker v. Pridgen*, 158 N. C. 337, 74 S. E. 335; *Midgett v. Meekins*, — N. C. —, 75 S. E. 728; *Johnson v. Barden*, — Vt. —, 83 Atl. 721.

But where there is an irreconcilable conflict between the granting clause and other parts of the deed, and it is impossible to discover with anything like certainty the intention of the parties, the granting clause will prevail over the other clauses of the deed. *Prindle v. Iowa Soldiers Orphans Home*, 153 Iowa, 234, 133 N. W. 106; *Hughes v. Hammond*, 130 Ky. 694, 26 L.R.A.(N.S.) 808, 125 S. W. 144.

And in *Dickson v. Wildman*, 105 C. C. A. 618, 183 Fed. 398, affirming 175 Fed. 580, the court, although of the opinion that 42 L.R.A.(N.S.)

**C**ROSS APPEALS from a decree of the District Court for Madison County establishing the interests of the various parties and ordering a sale of the property in an action for partition of real estate; defendant William Pleasant Rollins appealing from so much as awarded each of the defendants a two-ninths interest in track B; and plaintiffs appealing from so much as gave them but one ninth instead of one sixth of the tract. Reversed on defendant's appeal. Affirmed on plaintiffs' appeal.

**Statement by Deemer, J.:**

Action for the partition of real estate. From a decree establishing the interests of the various parties and ordering a sale of the property, all parties appeal. As defendant William Pleasant Rollins first perfected

the deed in suit disclosed the grantor's intention to convey the estate conveyed by the granting clause, made use of the following language: "If it were conceded that there was repugnancy between the granting clause on the one side and the preliminary recitals and the habendum on the other, and that the conflict was such that the true intent of the grantor could not be ascertained, it is manifest that the court must decide which part of the deed shall prevail. The rule in such case is that the granting clause determines the interest conveyed, and when it is clear and unambiguous, as in the deed in question here, it prevails over introductory recitals in conflict with it, and prevails also over the habendum if that is in conflict with it. The reason sometimes given for the rule is that a deed founded upon a valuable consideration is to be construed most strongly against the grantor, and, when the conflict is in the habendum, that the grantor, in the latter part of the deed, will not be permitted to deny or retract the grant previously made. The rule is very old, and it may be that it is founded on an effort to enforce the cardinal rule, to ascertain and give effect to the intention. The granting clause is naturally looked to, to see what it was intended to convey, whereas recitals are often merely introductory, and are not a necessary part of the deed. The granting clause is the very essence of the contract. It is required to transfer title, but the habendum clause is not absolutely necessary to make a deed effective. Where a conflict exists, therefore, in the different parts of a deed, the true intent of the grantor as to what was intended to be conveyed is more likely to be found in the granting clause. The settled rule of construction in Alabama and in many other jurisdictions is that, in case of repugnancy between the granting clause and other parts of the deed, the former will prevail." The deed under consideration in this case was before the supreme court of Alabama in *Dickson v.*

his appeal, he will be called appellant. Reversed on defendants' appeal. Affirmed on plaintiffs' appeal.

**Mr. J. P. Steele**, for defendant William Pleasant Robbins:

If the intention of the grantor can be ascertained from an inspection of the whole instrument and the attending circumstances, the deed will be construed so as to carry out the intention of the grantor, unless it would be impracticable to carry out his intention, or unless the giving effect to his intention would be a violation of public policy.

*Beedy v. Finney*, 118 Iowa, 276, 91 N. W. 1069; *Saunders v. Saunders*, 115 Iowa, 275, 88 N. W. 329.

**Mr. W. S. Cooper**, for plaintiffs:

Caleb Rollins waived his right to a distributive share in the real estate of Jane Rollins, and elected to occupy the homestead for life.

*John Deere & Co. v. Meyer*, 131 Iowa, 172, 108 N. W. 230; *Stoddard v. Kendall*, 140 Iowa, 688, 119 N. W. 138.

The interest intended to be conveyed is determined from the granting clause, which will prevail over the introductory statement, a subsequent provision, the habendum, or a warranty or covenant.

*Budd v. Brooke*, 3 Gill, 108, 43 Am. Dec. 321; *Lamb v. Medsker*, 35 Ind. App. 662, 74 N. E. 1012; *Green Bay & M. Canal Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382; *Smith v. Smith*, 71 Mich. 633, 40 N. W. 21; *Marsh v. Morris*, 133 Ind. 548, 33 N. E. 290; *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486; *Palmer v. Cook*, 159 Ill. 300, 50 Am. St. Rep. 165, 42 N. E. 796; *Hughes v. Ham-*

*mond*, 136 Ky. 694, 26 L.R.A.(N.S.) 808, 125 S. W. 144; *Carl Lee v. Ellsberry*, 82 Ark. 209, 12 L.R.A.(N.S.) 956, 118 Am. St. Rep. 60, 101 S. W. 407; *Adams v. Dunkler*, 19 Vt. 382; *Hafner v. Irwin*, 20 N. C. 570 (4 Dev. & B. L. 433), 34 Am. Dec. 390; 1 Jones, *Conveyancing*, ¶¶ 562, 565; *Wilkins v. Norman*, 139 N. C. 40, 111 Am. St. Rep. 767, 51 S. E. 797; *Case v. Dwire*, 60 Iowa, 442, 15 N. W. 265; *Teany v. Mains*, 113 Iowa, 53, 84 N. W. 953.

**Deemer, J.**, delivered the opinion of the court:

Three separate and distinct tracts of land are involved in this appeal: One, consisting of 13½ acres of land, known as tract "A;" another, consisting of 12½ acres, known as tract "B;" and a third, consisting of 7 acres, known as tract "C." Plaintiffs are the sole and only heirs of N. J. (or Jane) Rollins, now deceased, children by a former husband, Thomas Foster, who died December 29, 1870. N. J. Rollins died in September of the year 1910, and at the time of her death she was the wife of Caleb Rollins. No children resulted from this last marriage, and after the commencement of this suit, which was brought against Caleb Rollins alone, he died, and by supplemental petition his heirs were brought into the case and made parties defendant. Plaintiffs claim that at the time of the death of N. J. Rollins she was the owner in fee of tract A, the owner of an undivided one half of tract B, her husband Caleb being the owner of the other one half, and that N. J. Rollins had a life estate in tract C, the fee of which had been conveyed to her first husband, Thomas Foster, in the year 1870. In virtue of the

*Van Hoose*, 157 Ala. 459, 19 L.R.A.(N.S.) 719, 47 So. 718, which is cited in the note to the *Triplett Case*, supra, and the court here expressly concurred in the reasoning and conclusion of the state court in that case.

In *Holmes v. Nelson*, 148 Ill. App. 554, it is held that, although the granting clause of a deed uses the words "convey and warrant" (which is apparently the statutory form for a conveyance in fee in that jurisdiction), a limitation in the habendum clause, restricting the estate to the grantee for life, with power to dispose of the land for her support, is not repugnant to the granting clause, and that the grantee takes a life estate.

In *McDill v. Meyer*, 94 Ark. 615, 128 S. W. 364, where it was provided by statute that all deeds should be construed to convey a complete estate in fee, unless limited by appropriate language, it was held that a deed to the grantee, habendum to him and his heirs, etc., followed by a provision that on the death of the grantee without 42 L.R.A.(N.S.)

children, the title should revert to the grantor and his heirs, otherwise to the lawful children of the grantee, conveyed to the grantee only a life estate. This was on the theory that the subsequent clause did not contradict the language of the granting clause, which did not define the estate granted, but simply supplied what had been omitted therefrom, and removed the necessity of resorting to implication to ascertain the intention of the parties.

In *Hopkins v. Hopkins*, 103 Tex. 15, 122 S. W. 15, reversing — Tex. Civ. App. —, 114 S. W. 673, in which the granting clause in the deed in suit conveyed a fee simple title, subsequent provisions were given effect to reduce the estate conveyed to one for life, the court being of the opinion that it was the intention of the grantor, as gathered from the instrument as a whole, to use the word "heirs" in the granting clause in the sense of the words "children" and "issue" appearing in the later clauses of the deed.

W. W. A.

ownership of tract C, they claim that Caleb Rollins never had any interest therein. They admitted that Caleb Rollins, as surviving husband, was entitled to one third of tract A. They also admitted that Caleb Rollins was the owner of an undivided one half of tract B, and also one third of the other half as surviving spouse; but, as already stated, they denied that Rollins had any interest in tract C. During his lifetime Caleb Rollins filed an answer to this petition, in which he admitted the allegations as to tract A, but denied the allegations as to tract B. As to this latter tract he averred that N. J. Rollins had no interest therein but a life estate, and that he himself had none other than a life estate, the fee being in William Pleasant Rollins. As to tract C he denied that the property was ever conveyed to Thomas Foster. He averred that these lands were conveyed by quitclaim deed to N. J. Rollins in the year 1887, and that they were occupied by himself and his wife, the grantee, from that time until her death, as their homestead. In virtue of these facts he claimed that he was entitled to either one third of tract C in fee, or to occupy the same during life as his homestead. We here quote this further allegation from his answer: "That this defendant and Jane Rollins, as husband and wife, adversely and peaceably occupied said land for more than twenty years, under color of title, as and for their homestead, and this defendant is now occupying said land as his homestead, and here and now and hereby elects to occupy said land, designated as tract C, as and for his homestead during the remainder of his life."

William Pleasant Rollins, who was made a party defendant, filed an answer in which he claimed title to the whole of tract B, subject to a life estate in his father, under and in virtue of a deed from his grandfather, Pleasant Rollins, of date December 21, 1894. The material parts of the deed under which he claims are as follows: "I, Pleasant Rollins (unmarried), of the county of Madison and state of Iowa, in consideration of the sum of \$100, in hand paid by Caleb Rollins and N. J. Rollins, of Madison county, state of Iowa, do hereby sell and convey unto the said Caleb Rollins and N. J. Rollins, the following described premises, situated in the county of Madison and state of Iowa, to wit: (Land designated as tract B described). And I hereby covenant with the said Caleb Rollins and N. J. Rollins that I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and encumbrances whatsoever. And

I covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. This deed is to take effect at the death of Pleasant Rollins, and then Caleb Rollins and N. J. Rollins to have it their lifetime, and then it falls to William Pleasant Rollins." This deed was signed in the presence of two witnesses and was acknowledged on the day it was made. William P. Rollins asked that his estate therein be quieted, subject to the life estate in his father, Caleb.

It should be stated in this connection that Pleasant Rollins, the grantor in this deed, died many years ago. So the issues stood until the death of Caleb Rollins, when plaintiffs filed an amended and supplemental petition in which they set forth the death of Caleb Rollins, and, in lieu of the allegations of the original petition, stated, with reference to tract B, that Caleb and N. J. Rollins were each the owner of an undivided one half thereof down until the death of N. J., and that upon her death Caleb, instead of taking his distributive share of his deceased wife's estate, elected to use and occupy the same for life as part of the homestead of himself and wife, and they averred that they, as the heirs of N. J. Rollins, were each entitled to an undivided one sixth of all the land in tract B, and the substituted defendants, the heirs of Caleb Rollins deceased, three in number, were each entitled to an undivided one sixth. They further averred that, in virtue of the election made by Caleb Rollins during his lifetime, both by conduct and in the answer filed by him, plaintiffs were the owners and entitled to the whole of tract A. The substituted defendants in their answer admitted that upon the death of N. J. Rollins, plaintiffs each became the owners of an undivided two ninths of the land in tract A, but averred that they had no interest in tract B, averring that the title was in William Pleasant Rollins, but further claiming that, if Caleb Rollins had any interest in this land, they were each entitled to an undivided one sixth thereof. As to tract C, they averred that N. J. Rollins during her lifetime elected to occupy the same as her homestead after the death of her first husband, but further stated that on the death of N. J. Rollins each of the plaintiffs, three in number, became the owner of an undivided one third of tract C. They each and all denied any election by Caleb Rollins during his lifetime to take a homestead in tract C in lieu of his distributive share. William Pleasant Rollins, in his answer to the supplemental petition, adhered to his claim of title to tract B, and denied that his father, Caleb, had made any election which de-

prived him of his right to take distributive share, and as an heir of Caleb he claimed a one ninth interest in tract A. On these issues and the testimony adduced in support thereof, the trial court rendered a decree finding that N. J. Rollins died seized of tract A and was also the owner in fee of a one-half interest in tract B, and that she also had the right during her natural life to occupy the tract known as C. Other findings were made, and on the strength thereof the title to tract C was found to be in plaintiffs, and each was awarded an undivided one-third interest therein. They were each awarded a two-ninths interest in tract A, and defendants were each given a one ninth thereof. And plaintiffs were each awarded a one-ninth interest in tract B, and each of defendants was given a two-ninths interest therein. Defendant William Pleasant Rollins appealed from this decree, as also did all the plaintiffs from that part of it which gave them but one ninth instead of one sixth of tract B.

We shall first consider the appeal of defendant Rollins. He insists that he became the owner in fee of tract B in virtue of the deed which we have heretofore set out. He also claims that, as tract A was purchased by N. J. Rollins after her marriage to Caleb, each of the defendants should have been given a one sixth of that tract, or in all one half of it, on the theory, as we understand it, that N. J. Rollins died without issue. The second of these contentions is without merit. It is true that Mrs. Rollins did not acquire the title to tract A until after her marriage; but when she died she was not without issue, for plaintiffs were her legal heirs, although not the heirs of her husband. Her husband, Caleb, therefore, could not have taken one half of her estate. At most, he was entitled to one third, and, he having departed this life, his heirs, three in number, would on the face of it each be entitled to but one third of one third, or one ninth. Code, §§ 3378, 3379.

The other proposition is more difficult of solution. It is claimed for this appellant that, under the deed which we have set out, he became the owner in fee of tract B, in virtue of what is denominated the habendum clause, reading as follows: "This deed to take effect at the death of Pleasant Rollins, and then Caleb Rollins, and N. J. Rollins to have it their lifetime, and then it falls to William Pleasant Rollins." No claim is made that the instrument is testamentary in character, and, as all parties treat it as a deed conveying present interest taking effect not later than the death of the grantor, we shall so consider it. Were it not for this final clause,

there could be no doubt that it conveyed an estate in fee simple to the grantees named. True the word "heirs" does not appear in the granting clause, but this is not essential under our law. Section 2913 provides that the term 'heirs' or other technical words of inheritance are not necessary to create and convey an estate in fee simple." It is also provided in § 2914: "Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used."

While it is true, of course, under these statutes, that words of inheritance are not necessary to create an estate of inheritance, and that it will be presumed every conveyance of real estate passes all the interest of the grantor therein, unless a contrary interest can reasonably be inferred from the terms used, it is nevertheless true that the absence of words of inheritance may be full of significance, for the law does not say in express terms that every conveyance where these words are omitted shall create an estate in fee simple. As we view it, § 2914 of the Code has no application here, for the reason that, no matter what construction be put upon the deed, it is conceded that it passed all the grantor's estate. The real question is: Who took under the deed, and what is the nature of the estate conveyed? Section 2913 is important; but, as already suggested, it does no more than to supply by implication or presumption the word "heirs" or other equivalent terms. Recognizing this rule, appellees contend that the last clause is in the nature of a habendum, and, as it is repugnant to the estate granted in the granting clause, it is void. Something is said in argument to the effect that it is a restraint on alienation: but this is not true as we view it. Whether it grants a life estate or a fee to Caleb and N. J. Rollins, there is nothing in the habendum which places any restraint upon their power to sell whatever estate they may have. In this respect the case differs from *Teany v. Mains*, 113 Iowa, 53, 84 N. W. 953; *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. 571; *Case v. Dwire*, 60 Iowa, 442, 15 N. W. 265, and other like cases relied upon by appellees. *Case v. Dwire* is nearest in point; but in that case the conveyance was either of a fee simple absolute, or of a base or determinable fee, and the court expressly held that, as there was no particular estate, there could be no remainder, for there was no estate upon which a remainder could rest. It was also suggested that if the only question to be considered was what parties took the estate under devises passing title, a different question would arise,

Under the common law, and indeed under all statutes with which we are familiar, the object of a habendum clause is to define the grantee's estate. But it was also true that if the premises, meaning all that part of the deed which went before the habendum, granted an estate in fee simple, as "to the grantee and his heirs," or "to the grantee, his heirs and assigns," the estate conveyed was in fee simple, although there was no habendum. Again, under the same law, if the granting clause was either silent or ambiguous as to the estate intended to be conveyed, the habendum was resorted to in order to ascertain the nature of the estate. At common law the rule quite generally announced was that while the habendum might be resorted to to explain, enlarge, or qualify the estate granted, it would not be allowed to contradict or defeat the estate granted in the premises. At common law, if the word "heirs" or its equivalent was not used, the grantee took a life estate only by implication; but here the presumption might be enlarged or qualified by the habendum clause. But if the premises expressly granted an estate in fee, the conveyance could not be wholly annulled by anything in the habendum. *Kelly v. Hill* — Md. —, 25 Atl. 919; *Breed v. Osborne*, 113 Mass. 318; *Faivre v. Daley*, 93 Cal. 664, 29 Pac. 256; *Karchner v. Hoy*, 151 Pa. 383, 25 Atl. 20.

Notwithstanding these somewhat arbitrary rules, common-law courts have almost universally given effect to both the granting clause and the habendum whenever it was possible to do so by fair construction. *Thompson v. Carl*, 51 Vt. 408; *Rowland v. Rowland*, 93 N. C. 220; *Tyler v. Moore*, 42 Pa. 374; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159. Again if the estate is briefly defined in the premises and more specifically in the habendum, the latter will control, for that is its office. *Karchner v. Hoy*, 151 Pa. 383, 25 Atl. 20; *Doren v. Gillum*, 136 Ind. 134, 35 N. E. 1101. The modern rule, and the one we have adopted, is to construe the whole instrument without reference to formal divisions, in order to effectuate, if possible, the grantor's intent. *Beedy v. Finney*, 118 Iowa, 276, 91 N. W. 1069. That decision fully reviews the authorities, and we need only quote therefrom as follows: "Where, however the premises purport to convey without qualification or description, there can be nothing inconsistent with it in the habendum declaring the character or quality of the thing transferred, for that is not elsewhere defined. The repugnancy, to defeat the habendum, must be such that the intention of the parties either cannot be ascertained from the whole instrument, or, if

ascertained, cannot be carried into effect. If, from the entire instrument and attending circumstances, it appears that the grantor intended to enlarge, restrict, or even repugn the conveyancing clause, the habendum will control. It is then to be regarded as an addendum or proviso to the granting clause, which will control it even to the extent of destroying its effect. In short, the modern rule requires the consideration of the deed as a whole, and not in separate and distinct parts, as was formerly done, and the finding of repugnancy avoided whenever all the provisions of the instrument may, without ignoring the accepted canons of construction, be given force and carried into effect. . . . The estate may be limited in the habendum, although not mentioned in the premises of a deed, and without the use of the word 'remainder.' . . . And the latter part of a deed has been allowed to control, and rendered what seemed to be a fee, a life estate in the first taker. *Prior v. Quackenbush*, 29 Ind. 475."

In view of this our latest pronouncement upon the subject, our path seems reasonably clear, for there can be no reasonable doubt as to the grantor's intent in making the deed. He evidently did not intend to pass the fee to the parties named as grantees in the premises. The only remaining doubt is: Did he convey the remainder to William Pleasant Rollins? Had Rollins been named in the granting clause, there would be no doubt here. But his name appears only in the habendum. The inquiry naturally arises: Is he entitled to take the remainder in fee under this habendum? Of course, if no grantee is named in the premises, the grantee named in the habendum takes the estate. *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Irwin v. Longworth*, 20 Ohio, 581. And if two or more are named in the premises and one only in the habendum, he alone will take. See cases just cited. We also find that under the strict rules of the common law a remainder may be declared in the habendum to one not mentioned in the premises. *McCulloch v. Holmes*, 111 Mo. 445, 19 S. W. 1096; *Farrar v. Christy*, 24 Mo. 453; *McLeod v. Tarrant*, 39 S. C. 271, 20 L.R.A. 846, 17 S. E. 775.

While there is some conflict in the cases where a new grantee of a present estate is first introduced in the habendum, the universal holding seems to be in accord with the rule already stated where the habendum gives an estate in remainder to the person whose name is there for the first time introduced. *Blair v. Osborne*, 84 N. C. 417; *Shep. Touch*, 151; *Berry v. Billings*, 44 Me. 416, 60 Am. Dec. 107; 3 Washb. Real Prop. 5th ed. p. 468.

It follows from what we have said that William Pleasant Rollins took an estate in remainder under this deed and that as simple absolute.

II. As to plaintiffs' appeal: The only points presented here are that, as Rollins elected to take a homestead in the lands known as tract C, which we have already referred to, he waived his distributive share, and none of the defendants are entitled to anything out of tracts A and B. Under the construction we placed upon the deed to tract B, Caleb Rollins had the right to occupy that property during his natural life. He got nothing from his wife under any election as to tract C, for her interest terminated with her death, and plaintiffs took title to the entire tract as heirs of their father. As he obtained nothing from her, there surely was no election on his part, and, if he was mistaken as to her title or his own at the time he filed his answer, this mistake should not prejudice either him or his heirs, who have the same rights in the property as he would have had had he lived. He had the right to hold the property during his wife's life as his homestead, and he received nothing under his election, even conceding that he made one.

The finding of the trial court as to interests of the respective parties in tracts A and C seems to be correct. It follows that on the appeal of defendant Rollins the decree must be reversed, and on plaintiffs' appeal affirmed. Appellant will pay one fourth and plaintiffs three fourths of the costs of this appeal.

#### KENTUCKY COURT OF APPEALS.

R. B. CARSON, Appt.,

v.

J. W. TURK.

(146 Ky. 733, 143 S. W. 393.)

**Water — adverse possession of shore — title to bed.**

1. An adverse holding of land on the shore of a river does not attach to itself the accretion as it forms on the river bot-

**Note.** — A search shows that the cases are few upon the question whether the adverse possessor of riparian or littoral lands takes title to land accreting thereto during the running of the statute. In its application to the point, the general statement, as such, in *CARSON v. TURK*, that "to obtain a title to land by adverse possession, the person in possession must hold to a well-defined boundary, and he cannot move his boundary out year by year, and claim at the end of the statutory period all the land then within the boundary," is out of har-

mony with the spirit of the few decisions upon the subject, which will be found collected in a note in 58 L.R.A. 209. The case of *Barre v. New Orleans*, 22 La. Ann. 612, also, is suggested as being more or less corroborative of those cases holding that accretions forming during the adverse possession of the riparian tract go to the adverse possessor thereof at the time of the ripening of his title thereto, notwithstanding that such accretions may not then have been attached during the full period.

**Trespass — defense — failure of title — right to raise question.**

2. A trespasser having no color of title to real estate cannot defeat an action for the trespass upon the ground that plaintiff was claiming under a patent invalid because signed by a person claiming to be governor, but who had no title to the office.

(February 13, 1912.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Carlisle County in plaintiff's favor in an action brought to recover damages for an alleged trespass by defendant, and the cutting of timber by him on a tract of land alleged by plaintiff to be in his ownership and possession. Affirmed.

The facts are stated in the opinion.

Messrs. Shelbourne & Shelton and W. J. Webb for appellant.

Messrs. John E. Kane and Robbins & Thomas for appellee.

Hobson, Ch. J., delivered the opinion of the court:

J. W. Turk brought this suit against R. B. Carson to recover damages for an alleged trespass by Carson and the cutting of timber by him on a tract of land which Turk alleged he owned and had in possession. Carson filed an answer, in which he controverted the allegations of the petition as to Turk's ownership or possession of the land, and pleaded affirmatively that it was his land. On a trial of the case the circuit court practically instructed the jury that the land was the property of Turk, and the jury having returned a verdict in Turk's favor, fixing the damages, the court entered judgment upon the verdict, and Carson appeals.

In April, 1900, a patent issued from the land office to J. S. Atkins for 100 acres of land, and on May 14, 1900, a patent issued to W. H. Ponder for 200 acres of land. Atkins and Ponder conveyed these surveys to J. W. Turk. They cover the land in dispute. On the other hand, the title of Car-

mony with the spirit of the few decisions upon the subject, which will be found collected in a note in 58 L.R.A. 209. The case of *Barre v. New Orleans*, 22 La. Ann. 612, also, is suggested as being more or less corroborative of those cases holding that accretions forming during the adverse possession of the riparian tract go to the adverse possessor thereof at the time of the ripening of his title thereto, notwithstanding that such accretions may not then have been attached during the full period.



son to the land comes in this way: About the year 1884 a man named Josiah Adams put up a cabin on the lower end of island No. 3 in the Mississippi river. Adams had a small clearing around his cabin, but he does not appear to have had any marked boundary. He was simply a squatter, and had no title. On December 31, 1894, he executed a deed to Carson and certain other parties for the lower end of the island, beginning at six cottonwood trees and running east across the island to an elm tree, containing according to the deed 200 acres. Carson has since acquired the title of his associates in the land covered by the deed. At that time there were about 200 acres in this lower end of the island below the line running east from the six cottonwood trees. But the Mississippi river has gradually cut into the Missouri shore, and as a result several thousand acres of land have formed on the Kentucky side of the river in what was formerly the bed of the river. Between 500 and 600 acres of this land lie south of the line extended west from the six cottonwood trees. Carson contends that he is entitled to all the land formed in the river south of this line as an accretion to island No. 3. On the other hand, Turk contends that the title to this land was in the commonwealth, and passed to his grantors under their patents, so far as it was covered by them.

Adams had no color of title to the 200 acres which he conveyed to Carson and his associates, as he had no marked boundary, and he had not been in possession long enough to acquire title to any part of the land. In *Stanberry v. Mallory*, 101 Ky. 49, 72 Am. St. Rep. 389, 39 S. W. 495, the court held that the owner of the shore who acquires title only by adverse holding is confined to his actual occupancy on the shore. In that case the same contention was made as is made here, and in answer to it the court said: "A complete answer to this contention is that the Stanberrys are the owners of the shore only by adverse holding. And it seems to be well settled that one who so holds is confined to his actual occupancy on the shore, unless by notorious acts of ownership, in so far as he may be able to exercise them, he furnishes evidence of his intention to claim and hold to the middle of the stream. This case affords an illustration of the wisdom of this limitation on the general rule. If the owners of Towhead island and its accretion opposite the land of appellants had sued the shore owners in ejectment, the answer may well have been: 'We have not encroached on you. We are in the occupancy of the shore, and have a right to be.' And yet, if the patentees did not

sue, it is contended the adverse holding of the shore ripened into a perfect title to the thread of the stream."

The facts of this case well illustrate the wisdom of the rule there laid down. The defendant, who has a deed for 200 acres, is now claiming between 700 and 800 acres, when his grantor and he have no right to any of the land, except such as is acquired by adverse possession. To obtain a title to land by adverse possession, the person in possession must hold to a well-defined boundary, and he cannot move his boundary out year by year, and claim at the end of the statutory period all the land then within the boundary. The land in dispute lies some distance from the island as it was when Adams took possession, and is no part of the land which he could have then claimed.

While Carson has color of title to the 200 acres of land covered by his deed, it is very clear from the proof that this deed was not intended by the parties to cover the land now in controversy, and as to this land he is simply a trespasser without color of title. He has never made any settlement upon it, and had no possession of it which the law can recognize. His possession was of land outside of the survey under which the plaintiff claims. There is authority to the effect that, where a person takes possession of an island and holds it adversely, he is entitled to all the accretions subsequently formed on the island, and that his title to them will relate back to the date when he took possession of the island. *Benne v. Miller*, 149 Mo. 228, 50 S. W. 824; *Campbell v. Laclede Gaslight Co.* 84 Mo. 352; *Chicago & N. W. R. Co. v. Groh*, 85 Wis. 641, 55 N. W. 714. But we do not think that these authorities should be applied to a case like this, or that they are applicable in this state under the rules governing land in this commonwealth. There can be no adverse possession of land without a marked or well-defined boundary; and when possession is taken to a well-defined boundary, the title thus acquired must be confined to that boundary. Neither Adams nor Carson took any right beyond the island. The title to the soil of the river beyond the island was in the commonwealth, and when this land was entered and surveyed by Atkins and Ponder, Carson could acquire no title to the land within their surveys by an adverse possession held without the lap.

It is insisted, however, for Carson, that the patent to Atkins is signed by W. S. Taylor, as governor of the state, that Taylor was not then governor *de facto* or *de jure*, and that the patent is void. It is conceded that Atkins regularly entered and

surveyed the land, that he filed his papers in the land office, and that the register issued to him a patent. The only defect claimed in the proceedings is that the patent was not signed by the right person as governor; there being at that time two persons acting as governor, and each claiming to be the governor *de facto* and *de jure*. But, whether the patent was valid or not, the patentee having entered under his survey and having conveyed the land to Turk, Turk has at least color of title to the land, and, being in possession, he may maintain an action against a trespasser without color of title. The land lies little above the water in the Mississippi river, and it is so subject to overflow that a person cannot live on it. It is valuable for the timber on it. Under all the evidence we conclude that Turk has such possession of the land as it is capable of, and that, being in possession under his deed, he may maintain this action against Carson, who is simply a trespasser.

On the whole case, we are satisfied that the judgment complained of is clearly right on the merits, and that there was no error in the trial to the prejudice of the substantial rights of appellant.

Judgment affirmed.

Petition for rehearing stricken from the files of the court.

#### KENTUCKY COURT OF APPEALS.

S. S. DOUGLAS, Appt.,

v.

G. W. STOKES and Wife.

(149 Ky. 506, 149 S. W. 849.)

**Privacy — misuse of photograph — damages.**

One who employs a photographer to

**Note. — Right of photographer or artist to use picture for his own purposes.**

As shown in the notes which this one supplements, to be found in 50 L.R.A. 397 and 7 L.R.A.(N.S.) 362, it has been frequently held that a photographer may be held liable to his patron for using the latter's likeness for his own personal profit; and that this liability is often made to rest upon the contractual relation between the parties. In addition to the cases cited in those notes very little authority has been found.

In some respects there is a similarity between *DOUGLAS v. STOKES* and *Murray v. Gast Lithographic & Engraving Co.* 8 Misc. 36, 28 N. Y. Supp. 271. The latter, however, holds that a parent cannot sue to en-

photograph the dead body of his malformed child may recover damages in case the latter copyrights the picture and attempts to use it for his own purposes.

(September 27, 1912.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Whitley County in plaintiffs' favor in an action brought to recover damages for the copyrighting by defendant of a photograph of plaintiffs' child, against their will and consent. Affirmed.

The facts are stated in the opinion.

Messrs. Sharp, Gatliff, & Smith for appellant.

Messrs. P. Watt Hardin and R. S. Rose for appellees.

Hobson, Ch. J., delivered the opinion of the court:

In December, 1908, there were born to G. W. Stokes and wife twin boy children. The children were together from the shoulders down to the end of their bodies. They had one set of bowels, breast bone, and sternum, but were otherwise twins, and not one baby. They died, and after they were dead, Stokes employed S. S. Douglas, a photographer, to take a photograph of the corpse in a nude condition; it being agreed that Douglas was to make for him twelve photographs and no more. Douglas made the photographs and delivered them to Stokes, but, contrary to his agreement, made other photographs from the negative, and one of these he filed in the copyright office of the United States, and a copyright was issued to him thereon on January 12, 1909. This action was brought by Stokes and wife against Douglas to recover damages for this use of the negative; they charging it had been done against their will and consent, and that by the exposure of the photographs they had been humiliated, and their feelings

join the publication of a portrait of his infant child, or for damages caused thereby. The court discussed the question from two angles; namely, upon the assumption that the action was brought by the plaintiff as *conjuncta persona*, and second, upon the theory of proprietary rights of the plaintiff in the portrait. The court disposed of the latter theory by saying merely that it was shown that the portrait did not belong to the plaintiff, the father, but belonged to the mother of the child. With respect to the first theory, the court said: "If, still pursuing the same theory of the action, it be insisted that the parent has suffered a personal injury,—one to his mental sensibility, by the invasion of his child's right to the enjoyment of personal privacy, and the indiscriminate distribution of her portraits,—the answer is that the law does

and sensibilities had been wounded. They prayed judgment against him for ten thousand (\$10,000) dollars damages. Douglas by his answer put in issue the allegations of the petition, and the case was submitted to a jury; the trial resulting in a verdict and judgment for the plaintiffs in the sum of twenty-five hundred (\$2,500) dollars. Douglas appeals.

The above are the facts as they were evidently found to be by the jury under the instructions of the court, and appellant does not insist that the verdict of the jury is against the evidence. Principally the only question made is that the facts do not make out a cause of action in favor of Stokes and wife against Douglas. It is insisted that the photographer has the right to copyright a photograph, as it represents his skill in his art, and we are referred to the case of *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279, as sustaining this conclusion. In that case a photographer who had copyrighted a photograph sued a lithographer for using his copyrighted photograph without his consent. The subject of the photograph used was not a party to the litigation. No question was made in that case as to the rights of the person whose photograph was taken, and it may be inferred from the facts stated by the court in that case that the person whose photograph had been taken had no objection to his photograph being copyrighted and exposed to the public. The cases of

*Bolles v. Outing Co.* 46 L.R.A. 712, 23 C. A. 594, 45 U. S. App. 449, 77 Fed. 966; *Snow v. Laird*, 39 C. C. A. 311, 98 Fed. 813, and *Werckmeister v. Springer Lithographing Co.* (C. C.) 63 Fed. 809, are similar; but in this case the question arises between customer and the photographer.

The question was before the English Supreme Court in *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345, and it was held upon very full consideration of the authorities that the photographer has no right to make other copies of his customer's photograph without his consent. The court said: "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say, 'express or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative,—that a photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtain-

not take cognizance of, and will not afford compensation for, sentimental injury, independent of redress for a wrong involving physical injury to person or property. 'The law protects the person and the purse. The person includes the reputation. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of everyone, by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain, without disturbance, any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give, in moral law, and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological 42 L.R.A.(N.S.)

injuries.' *Lumpkin, J.*, in *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901."

But, adopting the principle of *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345, 5 Times L. R. 157, 58 L. J. Ch. N. S. 251, 60 L. T. N. S. 418, 37 Week. Rep. 266, which is cited in the earlier notes, the English case of *Stedall v. Houghton*, 18 Times L. R. 126, held that where a wife acted as the agent of her husband in having herself and children photographed, he was entitled to an injunction restraining the photographer from exhibiting the photograph in public.

And an analogous though quite distinctive question is that of the right of one person to use the photograph or name of another to whom he does not bear a contractual relation, for advertising purposes; such question involving the so-called doctrine of privacy. On this question see the notes in 24 L.R.A.(N.S.) 991 and 34 L.R.A.(N.S.) 1137.

As to libel by publication of photograph as that of another person, see note in 6 L.R.A.(N.S.) 919.

As to publication of one's photograph in connection with scandalous matter concerning another, see the note in 35 L.R.A.(N.S.) 595.

L. A. W.

ed; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and, further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." The ruling in this case has been followed in America uniformly, so far as we have seen. *Corliss v. E. W. Walker Co.* (C. C.) 31 L.R.A. 283, 57 Fed. 434; *Press Pub. Co. v. Falk* (C. C.) 59 Fed. 324; *Moore v. Rugg*, 44 Minn. 28, 9 L.R.A. 58, 20 Am. St. Rep. 539, 46 N. W. 141; *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076.

The corpse of the children was in the custody of the parents. The photographer had no authority to make the photographs, except by their authority, and when he exceeded his authority he invaded their right. We do not see that this case can be distinguished from those involving the like use of the photograph of a living person, and this has been held actionable. See *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 34 L.R.A. (N.S.) 1137, 135 Am. St. Rep. 417, 120 S. W. 364; *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725; *Peck v. Tribune Co.* 214 U. S. 185, 53 L. ed. 960, 29 Sup. Ct. Rep. 554, 16 Ann. Cas. 1075; *Henry v. Cherry*, 30 R. I. 13, 24 L.R.A. (N.S.) 991, 136 Am. St. Rep. 928, 73 Atl. 97, 18 Ann. Cas. 1006. The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and hurt. L.R.A. (N.S.)

miliation. See *Renihan v. Wright*, 125 Ind. 536, 9 L.R.A. 514, 21 Am. St. Rep. 249, 25 N. E. 822; *Louisville & N. R. Co. v. Hull*, 113 Ky. 561, 57 L.R.A. 771, 68 S. W. 433; *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, 18 So. 565; *Hockenhammer v. Lexington & E. R. Co.* 24 Ky. L. Rep. 2383, 74 S. W. 222; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Pavesich v. New England L. Ins. Co.* 122 Ga. 190, 69 L.R.A. 101, 106 Am. St. Rep. 104, 50 S. E. 68, 2 Ann. Cas. 561.

If the defendant had wrongfully taken possession of the nude body of the plaintiff's dead children and exposed it to public view in an effort to make money out of it, it would not be doubted that an injury had been done them to recover for which an action might be maintained. When he wrongfully used the photograph of it, a like wrong was done; the injury differing from that supposed in degree, but not in kind.

No question of copyright, under the statutes of the United States, is involved.

Judgment affirmed.

#### KENTUCKY COURT OF APPEALS.

JAMES McCURE, Appt.,

v.

JAMES D. MCCLINTOCK et al.

(150 Ky. 265, 773, 150 S. W. 332, 849.)

**Bond — causing withdrawal of surety — liability.**

1. One who makes false statements to a bonding company which result in its withdrawing from the bond of a bank cashier is liable for the damages caused thereby, which may be increased if he acted maliciously.

**Evidence — letter — causing withdrawal of surety.**

2. In an action to hold one liable in damages for securing the withdrawal of the surety from plaintiff's bond, the letter is admissible in evidence upon which the surety acted in reaching its decision.

**Deposition — authority to issue commission — extrajudicial officers.**

3. A court has inherent power to issue a commission to an officer in another state to take a deposition necessary to secure evidence for the trial of an action pending before it.

**Note. — Liability for causing withdrawal of surety from bond.**

But one case has been found which is at all similar to *McCURE v. MCCLINTOCK*. The case referred to, *Sunley v. Metropolitan L. Ins. Co.* 132 Iowa, 123, 12 L.R.A. (N.S.) 91, 109 N. W. 463, involved an action of libel, and held that the jury might find that

**Evidence — suppression of — effect.**

4. The suppression by one accused of causing a surety to withdraw from a bond, of a letter alleged to have contained the false statement causing such action, and failure to produce it in response to a subpoena duces tecum, are sufficient to support a verdict against him.

(October 29, 1912.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Bourbon County in defendants' favor in an action brought to recover damages for securing the withdrawal of the surety upon plaintiff's bond. Reversed.

The facts are stated in the opinion.

Mr. E. M. Dickson, with Messrs. Talbott & Whitley, for appellant:

Whether a conspiracy formed for the purpose of injuring or driving one out of business be lawful or unlawful so far as the purpose is concerned, of unlawful means are used in effectuating that purpose, the conspiracy becomes actionable, and any loss or damage suffered in consequence may be recovered.

Standard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Van Horn v. Van Horn, 52 N. J. L. 284, 10 L. R.A. 184, 20 Atl. 485; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 So. 429; Passaic Print Works v. Ely & W. Dry-Goods Co. 62 L.R.A. 701, note; 8 Cyc. 651; 1 Kinkead, Torts, 1903, § 45.

Messrs. E. P. Humphrey, Field McLeod, and Denis Dundon for appellees.

Nunn, J., delivered the opinion of the court:

Appellee James D. McClintock and appellant, James McClure, resided in Paris, Bourbon county, Kentucky, for many years next prior to the alleged cause of this litigation. McClintock conducted a fire insurance business in that city and also represented, as agent, his coappellee the American Bonding Company. McClure was cashier of the First National Bank of that city and also trustee of Sarah Lewis Whitehead and guardian of Frankie Thompson. He ex-

cuted bond for the faithful performance of his duties, etc., in all three of these positions, and the American Bonding Company signed them as surety. On December 5, 1908, the bonding company took steps to be released on each of these bonds, and was released shortly thereafter. This act of the bonding company caused considerable trouble and annoyance, and, the bank directors not knowing the cause for the act of the bonding company, or whether it would be safe to continue McClure as its cashier, they, and also appellant, wrote the company and asked for its reasons for declining to remain surety for McClure. The bonding company declined to give its reasons, but stated that it did not desire to remain upon McClure's bond, and secured its release in accordance to its rights reserved in the contract at the time the bonds were executed.

Appellant brought this action against James D. McClintock, Thomas W. Satterwhite, Tracy Underhill, who were partners representing the American Bonding Company, and the American Bonding Company of Baltimore, Maryland. He alleged in his petition, among other things, the following: "That said defendant James D. McClintock, moved by ill-will and malice towards plaintiff, and said Thomas P. Satterwhite, Tracy Underhill, and the American Bonding Company of Baltimore, did subsequent to July 1, 1908, maliciously, wrongfully, and unlawfully conspire, combine, confederate, and agree together and among themselves to injure plaintiff in his occupation, employment, standing, and business, and especially in his trust and fiduciary relations herein above set out, and to ruin, oppress, impoverish, annoy, humiliate, and harass plaintiff, and to drive him out of the business in which he was engaged, and to deprive, or to cause him to be deprived, of his position as cashier, and of his position as trustee and of guardian as aforesaid, by canceling, or causing to be canceled, without just cause or excuse, the said cashier bond, and by withholding from the plaintiff and from the directors of said bank, and the patrons thereof and the persons interested therein, the alleged cause for the cancellation of said bond; and by withdrawing from

the loss by an employee of a situation was the direct result of the wrongful act of a former employer in reporting a fictitious claim to the surety on his bond, who then withdrew from the bond to the new employer, reporting to him the claim made, which resulted in the discharge of the employee. And it was also held in this case that the presentation by an employer to the surety on his agent's bond, of a claim in excess of that reported due by the officer

in charge of the accounting, followed by an acknowledgment that it had not made proper credits and had in its hands sufficient unpaid salary to satisfy demands, would justify an inference of malice, so as to render the employer guilty of libel. To this case, in 12 L.R.A. (N.S.) 91, is appended a note on the question of whether malice which will preclude qualified privilege may be inferred from publication alone.

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liability on said fiduciary bonds, and withholding from the persons interested in said estate the alleged cause thereof." He also alleged that James McClintock had been for many years, and was at that time, engaged in the fire insurance business in the city of Paris; that he had been for some time, and was at that time, the local agent for his co-appellee the American Bonding Company; that shortly before the acts complained of, he, appellant, and Roy Clendenin, a brother-in-law of McClintock, entered into a partnership and conducted a fire insurance business in Paris; that his entering into this business caused McClintock, who was moved by ill will and malice towards him, and who desired to injure him, to make the statements complained of and to make false statements to his co-appellee the American Bonding Company, through Thomas Satterwhite and Underhill, its state agents, which resulted in the bonding company asking for and obtaining a release from the bonds when it had already been paid in full for signing the bonds.

It seems from the evidence that the bonding company sought to be released from the bond on account of information it had received from McClintock through its state agents, Satterwhite and Underhill. It had a right, under the contract, to be released with or without cause. Appellant endeavored to show that McClintock stated, in substance, in the letter he wrote to the bonding company or to its state agents, that McClure was traveling a good deal and neglecting his business; that he was spending money too fast; and that he was likely to become insane. McClintock denied making such statements, and claimed that he only said that McClure's father became insane and was sent to the asylum in Lexington. He stated that he wrote no falsehood whatever, and that it was not his purpose to have the bonding company obtain a release from the bonds, but to have them to refuse to renew the bonds when they ran out. The testimony showed that McClintock was embittered towards McClure. McClintock at one time had an office in the bank, and the United States inspector complained of his holding his office there, and he was caused to move, and he claims that McClure caused the action of the inspector in this matter; and it appears that he was further embittered because McClure set up in the fire insurance business in opposition to him. It matters not, however, how angry he was with appellant, if he told the truth in the letter to the bonding company, he is not liable; but if he told falsehoods to accomplish his purpose, he is liable. If McClintock made false statements in order to accomplish a result, and the result did actually follow 42 L.R.A. (N.S.)

by reason thereof, he was liable in damages, although he acted without malice; but if he acted with malicious motives, the jury had a right to increase the damages on account thereof, and therefore the letter which he wrote to the bonding company was important as evidence on the trial of this case.

Soon after the filing of the action, appellant gave notice to take the deposition of Underhill and Satterwhite in Louisville, by way of cross-examination. They stated that they received the letter referred to and had it, but refused to produce it. They were asked many questions as to the contents of the letter, and asked if it contained the matters heretofore spoken of; but they declined to answer all questions with reference to the contents of the letter. The matter was referred to the court for opinion as to whether they should produce the letter and answer the questions. The court's ruling on this matter was favorable to appellant. The judge, however, was sick or absent at the next term of the court, and it appears that in the meantime McClintock went to the city of Louisville and obtained this letter and four or five others which he had written Satterwhite and Underhill; therefore they could not answer the questions or produce the letter as required by the court. Just before McClintock obtained the letters, Underhill severed his connection with the firm of Satterwhite & Underhill. When McClure learned that McClintock had secured the letter, he asked for a rule against Satterwhite to show cause why he should not be punished for contempt; but the court declined to issue it. It is unnecessary to pass upon the question as to whether or not the court erred in this respect, as it will not likely occur again. But Satterwhite evidently committed a wrong in surrendering this letter to McClintock when he knew the matter was pending before the court as to whether he should produce it, or whether he should answer questions with reference to its contents. He had no right to place it out of his power to comply with the order of the court.

The next question for our consideration is an effort upon the part of McClure to obtain the testimony of certain officials of the bonding company in Baltimore, Maryland. He gave notice to take the depositions, and McClintock appeared on that day by counsel; but the witnesses named did not appear, and the matter was continued until the next day, upon which they again failed to appear, and the officer refused to issue an attachment for them, or to in any manner compel their attendance. The officer's reason for not doing this was that he had no right to do so without a com-

mission from the court authorizing him to take the depositions. An attorney of Baltimore, who represented appellant, also stated that, under the law of that state, the commissioner had no right to issue compulsory processes for witnesses without a commission having been issued authorizing him to take the depositions. Appellant then moved the court to issue a commission to this officer in Maryland, directing him to take the depositions of the persons named in the original notice. This the court refused to do, and we think erred in so refusing. It is true, as claimed by appellees' counsel, there is no authority in the statute or Code requiring commissions to be issued authorizing depositions to be taken in a foreign state, except § 571 of the Civil Code, which is as follows: "If more than three days' notice to take a deposition be required by § 567, the party to whom the notice is given may, by notice to the adverse party or his attorney, served on the day when the first notice is given, or on the following day, require the deposition to be taken upon interrogatories." This section leaves the matter with the party upon whom notice was served. If he desires them taken upon interrogatories, he may give notice within the time specified in the section. Appellees did not take advantage of this section; therefore appellant could not take the depositions upon interrogatories. In our opinion, the court had the inherent power in the due administration of justice to issue the commission to some officer to take the depositions. This appears to have been the only way to obtain the depositions, and, certainly, the court had a right to obtain this testimony in some way. At common law the ordinary mode of obtaining depositions was by commission. In 13 Cyc. p. 882, it is said: "At common law the ordinary mode of procuring depositions is by commission, and this mode of procedure is usually required by statute, especially where the witness is beyond the jurisdiction. It follows that except where the common-law rule had been abrogated, or special circumstances exist which require despatch, if the issue of a commission is a prerequisite to the right to take testimony by deposition, testimony cannot be so taken without a commission." This rule had not been abrogated by our statute; it only requires the clerk to issue commissions when the depositions are to be taken upon interrogatories. The common-law rule still prevails in this state. In Greenleaf on Evidence, vol. 1, § 320, it is said: "If the witness resides abroad, out of the jurisdiction, and refuses to attend, or is sick and unable to attend, his testimony can be obtained only by taking his deposition before a magistrate, or

before a commissioner duly authorized by an order of the court where the case is pending. . . . The writ or commission is usually accompanied by interrogatories, filed by the parties on each side, to which the answers of the witnesses are desired. . . . The court of chancery has always freely exercised this power, by a commission, either directed to foreign magistrates, by their official designation, or more usually, to individuals by name; which latter course, the peculiar nature of its jurisdiction and proceedings, enables it to induce the parties to adopt, by consent, where any doubt exists as to its inherent authority."

As before stated, Satterwhite testified that he gave the letter spoken of and others to McClintock after the attempt to take his deposition. McClintock testified that he did not receive the original, but took a copy of it, which he kept for a while and destroyed, and then later secured another copy, which was purloined from his desk shortly before the trial. According to appellant's testimony, there is hardly a scintilla of evidence that it contained the matters he claimed, and there was no testimony whatever showing a conspiracy or combination of appellees to injure him. In view of the testimony, the lower court properly sustained a motion for a peremptory instruction in so far as the bonding company and Satterwhite & Underhill were concerned; but as to McClintock we have arrived at a different conclusion. There is no doubt from the testimony that McClintock used all the power he had in preventing this letter from being introduced upon the trial. Subpœna duces tecum calling for this letter was issued and served, and as said in Greenleaf on Evidence, vol. 1, § 37: "The presumption of innocence may be overthrown, and a presumption of guilt be raised, by the misconduct of the party in suppressing or destroying evidence which he ought to produce, or to which the other party is entitled. . . . A similar presumption is raised against a party who has obtained possession of papers from a witness after the service of a subpœna duces tecum upon the latter for their production, which is withheld. The general rule is, *Omnia præsumuntur contra spoliatores*. His conduct is attributed to his supposed knowledge that the truth would have operated against him."

There was sufficient evidence to convince this court that it was within the power of McClintock to obey the subpœna duces tecum and produce the letter upon the trial, and, as he failed, the presumption is that it contained false and damaging statements to the detriment of appellant, and these statements caused the bonding company to

obtain its release from the bonds; and the case as to McClintock should have been submitted to the jury under proper instructions.

For these reasons, the judgment of the lower court is reversed, and cause remanded for further proceedings consistent herewith.

Judge Winn not sitting.

A motion for correction of the opinion having been made, Nunn, J., on November 26, 1912, filed the following response:

Appellees, the bonding company and Satterwhite and Underhill, move that the opinion be corrected in this: That instead of reversing the case as to all the appellees, it be affirmed as to them and reversed as to McClintock only, for the reason that it is stated in the opinion that there was no evidence connecting them with McClintock in the conspiracy, or showing them guilty of any wrong in regard to the matter.

This matter was considered by the court before the opinion was prepared. Ordinarily the correction asked for would be granted; but, as stated in the opinion, it appears in the record that appellees, although they had the correspondence, refused to produce or relate the contents of it until ordered by the court, and in the meantime had placed it where it could not be or was not produced. It seems to the court that they aided McClintock in every way they could to avoid the pertinent facts from being produced as evidence. In view of these facts, the court concluded that they should undergo another trial, and if nothing developed to implicate them as charged in the petition, then the lower court should give a peremptory instruction in their behalf; but if the developments do implicate them as charged in the petition, then the case should be submitted to the jury.

The motion is overruled.

#### MICHIGAN SUPREME COURT.

GEORGE SAROS, Appt.,

v.

AVENUE THEATER COMPANY.

(— Mich. —, 137 N. W. 559.)

**Landlord and tenant — ejection of tenant by gas — liability.**

1. The injection of a poisonous gas by

*Note. — Liability of landlord for personal injuries inflicted in attempting to dispossess tenant.*

The general question of the liability of a landlord for forcibly dispossessing a tenant after the expiration of his term is 42 L.R.A. (N.S.)

the landlord into a leased room at a time when he knows that the tenant is present therein renders him liable for the resulting injury to the tenant, whether it was done to drive the tenant out, or merely to disinfect the premises.

**Trial — instruction — assumed facts.**

2. It is error in an action to hold a landlord liable for injury to a tenant by forcing formaldehyde into his room to eject him therefrom, to instruct the jury as to the measure of liability in case it merely aggravated an existing condition in the tenant if there is no evidence that such a condition did exist.

(October 2, 1912.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Wayne County in defendant's favor in an action brought to recover damages for physical injury resulting from the injection by defendant of a poisonous gas into plaintiff's room. Reversed.

The facts are stated in the opinion.

Mr. Guy A. Miller for appellant.

Mr. Dennis B. Hayes for appellee.

Brooke, J., delivered the opinion of the court:

Plaintiff, as lessee under defendant, had occupied the premises at No. 72 Woodward avenue, Detroit, for some five years prior to May 1, 1908. The lease under which plaintiff held was in writing, and according to its tenor expired on said date. Plaintiff, however, contended (apparently in good faith) that he had a right to continue in possession up to September 1, 1908. Between May 1 and May 6, 1908, one Frank Drew, defendant's manager, in company with a number of other men, made an abortive attempt to gain possession of the premises by force. As a result of this attempt, plaintiff, with a number of his employees, remained in the building during the night of May 6 and 7, 1908. The leased premises consisted of a single room, about 20 by 26 feet, with a ceiling about 20 feet high. Behind the rear partition of the room is located the stage of the Avenue Theater. About 11:30 P. M. May 6th, said Drew, with several employees, went upon the stage of the theater, bored a hole through the partition separating the stage from the room occupied by plaintiff, and, using a bicycle pump for that purpose, injected about two quarts of liquid formal-

treated in the note to Whitney v. Brown, 11 L.R.A. (N.S.) 468. And as to liability of property owner for compelling removal of sick person, see note to Tucker v. Burt, 17 L.R.A. (N.S.) 510.

As to right of landlord to render tenement uninhabitable under provision of lease



dehyde into the room where plaintiff and his employees were dozing upon chairs and shoeshining seats. The formaldehyde ran down the wall and stood in pools upon the floor. This drug is highly volatile, and when exposed to air gives off a poisonous gas which is dangerous to human life, if inhaled for any considerable length of time. It acts directly upon the mucous membranes,—the throat, nasal passages, and eyes. The record does not disclose how long the formaldehyde had been in the room before its presence was detected by plaintiff and his associates. It does show, however, that some three or four minutes elapsed after its discovery before the inmates were able to reach and open the door to the street, which was the only opening the room contained.

Plaintiff claimed and offered medical tes-

timony tending to support the claim that, as a result of inhaling the poisonous gas, he became afflicted with an acute inflammation of the throat and eyes, which, after some days, assumed a chronic condition, and continued in some degree up to the time of the trial.

Defendant, through its responsible agent, Mr. Drew, admitted that he introduced the formaldehyde into the room, but claimed that his purpose in doing so was to disinfect the premises; complaint having been received by him as to their unsanitary condition.

Upon cross-examination, he testified:

Q. So that on the night of the 6th and 7th of May you knew that they were in there?

A. No, sir.

reserving the right of re-entry for condition broken, see note to *Howe v. Frith*, 17 L.R.A. (N.S.) 672.

As to right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession, who has dispossessed him, see note to *Wilson v. Campbell*, 8 L.R.A. (N.S.) 426.

The question under annotation is controlled by statute in many jurisdictions, but, in the absence of statute, the general rule is that the landlord is not liable in damages for personal injuries inflicted in dispossessing or attempting to dispossess a tenant wrongfully withholding possession, where no greater force is used than is necessary to dispossess him; but that a liability arises where the force is either excessive or is wantonly or maliciously applied. Some diversity of opinion as to the correct rule arose among the early cases, but this will be pointed out hereinafter.

This note, of course, does not cover the question of criminal liability of the landlord as for a breach of the peace, where the resumption of possession is forcible.

But one case has been found which involves a state of facts similar to that of *SAROS v. AVENUE THEATER CO.* and that is *Huggins v. Bridges*, 29 Pa. Super. Ct. 82, wherein it was held that a landlord who wantonly stopped up a chimney for the purpose of forcing smoke and gases back into the demised premises, so as to compel the tenant to vacate, was liable in trespass for personal injuries resulting from such acts.

And there is a surprising dearth of authority as to the effect of using force sufficient to cause personal injuries. The law is well settled, however. Thus, it is the generally accepted common-law rule that no civil action can be maintained against the landlord by the tenant for forcibly taking possession of demised premises to which the landlord was entitled, unless there was an excess of force, even though the force used amounted to a breach of the peace. *Vinson v. Flynn*, 64 Ark. 453, 39 L.R.A. 42 L.R.A. (N.S.)

415, 43 S. W. 146, 46 S. W. 186; *Twombly v. Monroe*, 136 Mass. 464; *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364; *Allen v. Keily*, 17 R. I. 731, 16 L.R.A. 798, 33 Am. St. Rep. 905, 24 Atl. 776; *Harvey v. Bridges*, 9 Jur. 759, 3 Dowl. & L. 55, 14 L. J. Exch. N. S. 272, 14 Mees. & W. 437 (*dictum*); *Meriton v. Coombes*, 9 C. B. 787, 1 Lowndes, M. & P. 510, 19 L. J. C. P. N. S. 336. But where there is an excess of force which results in injury, recovery may be had for injuries caused by such excess. *Vinson v. Flynn*, 64 Ark. 453, 39 L.R.A. 415, 43 S. W. 146, 46 S. W. 186; *Sampson v. Henry*, 11 Pick. 379, on subsequent appeal, 13 Pick. 36; *Twombly v. Monroe*, 136 Mass. 464; *Gregory v. Hill*, 8 T. R. 299. It has been intimated, however, that no matter what the force, the landlord cannot be made to answer in damages for injuries to one wrongfully in possession (*Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258); but there seems to be no justification for such a holding.

In a few early cases it was held that a landlord, in turning a tenant out of possession, must do so peaceably and without force, or render himself liable for any resulting injuries, although the force exercised was no more than was necessary in order to dispossess the tenant. The case upon which this line of decisions is founded is *Newton v. Harland*, 2 Jur. 350, 1 Mann. & G. 644, 1 Scott, N. R. 473, wherein it was held that a landlord was liable in damages in an action of trespass for assault for injuries inflicted in dispossessing a tenant, notwithstanding excessive force was not used. So, in *Edwick v. Hawkes*, L. R. 18 Ch. Div. 199, 50 L. J. Ch. N. S. 577, 45 L. T. N. S. 168, 29 Week. Rep. 914, the court, relying upon *Newton v. Harland*, supra, held that the infliction of personal injuries in ejecting a tenant amounted to a wrong independent of the forcible entry, and that damages could be recovered therefor. And in *Todd v. Jackson*, 26 N. J. L. 525, it was held that the landlord cannot resort to personal violence in retaking pos-

Q. You knew that they had slept in there before?

A. I did not know; I was told.

Q. You just knew from what your night watchman had told you?

A. I imagined that they were in there.

Q. You had a suspicion that they were sleeping in there?

A. Yes; I thought maybe they were sleeping in there.

Q. You thought maybe they were sleeping in there on the night of the 6th and 7th of May? . . .

A. I thought maybe they were.

Q. How long did it take you to get this formaldehyde in the room?

A. Not any length of time. It takes as long as to bore a hole through a partition

and afterwards pumping in with a bicycle pump. We shot it in. I don't know how many times. I don't know how much they hold.

Q. What made you go around to the front door after you had fumigated it?

A. I wanted to see if they were in there. My night watchman told me that they were sleeping on the premises, he thought, and I imagined they were.

Q. You thought it would be a good way to wake them up and move them out?

A. I thought if they wanted to get out, they could. I wanted them out. I would like to have them out. I would not be trying to get them out if I did not want them out.

Q. That is the reason you put it in there?

session, the court saying: "If a tenant's term is expired, upon what just pretext should he keep the owner out of the enjoyment of his own property? What should prevent such owner from resuming his property? Nothing but public policy can be interposed. The law abhors breaches of the peace and personal encounters, and hence it will not protect the owner of property out of his possession in obtaining the possession by force and strong arm, leading to a breach of the peace, or hazarding such a consequence. Therefore, a landlord cannot go into his house at the end of the year, and turn his tenant out of doors, or remove his goods into the street, against his consent and upon resistance. But being entitled to possession, if he can obtain it without a breach of the peace, and without injuring his tenant's person or his property, he may do so." And see *Beddall v. Maitland*, L. R. 17 Ch. Div. 174, 50 L. J. Ch. N. S. 401, 44 L. T. N. S. 248, 29 Week. Rep. 484, wherein it was held that where there is an independent wrong committed by a landlord in forcibly entering, recovery may be had. *Sampson v. Henry*, 11 Pick. 379, contains an oft-quoted statement to the effect that the law does not allow anyone to break the peace, and that, being dispossessed, there is no right to recover possession by force; but this statement is broader than the facts of the case require, as the case was one of excessive force. But these latter cases have been repeatedly criticized, disapproved, and overruled, in effect, at least, and cannot be regarded as good law.

And where a landlord has entered "peaceably" during the temporary absence of tenants who are in default, it has been held that the landlord may defend such possession against the tenant, and that he will not be liable for personal injuries inflicted in making such defense, provided he uses no more force than is necessary. *Smith v. Detroit Loan & Bldg. Assn.* 115 Mich. 340, 39 L.R.A. 410, 69 Am. St. Rep. 575, 73 N. W. 395.

Under statutes prohibiting all persons from taking possession of land and detain-

ing or holding the same except where an entry is given by law, and then only in a peaceable manner, it is held that recovery may be had for the damages occasioned by injury to the person, committed in making the entry and dispossessing or attempting to dispossess the tenant. *Vinson v. Flynn*, 64 Ark. 453, 39 L.R.A. 415, 43 S. W. 146, 46 S. W. 186; *Westcott v. Arbuckle*, 12 Ill. App. 577; *Reeder v. Purdy*, 41 Ill. 279; *Wilder v. House*, 48 Ill. 279; *Doty v. Burdick*, 83 Ill. 473; *Levy v. McClintock*, 141 Mo. App. 593, 125 S. W. 546; *Thiel v. Bull's Ferry Land Co.* 58 N. J. L. 212, 33 Atl. 281; *Mosseller v. Deaver*, 106 N. C. 494, 8 L.R.A. 537, 19 Am. St. Rep. 540, 11 S. E. 529. But it has been held that the enactment of a statute making it an indictable offense forcibly to expel a tenant does not change the common-law rule that as much force may be used as is necessary to dispossess the tenant, so as to render the landlord liable to an action of tort for damages or for an assault committed in expelling a tenant where no more force was used than was necessary. *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258; *Beddall v. Maitland*, L. R. 17 Ch. Div. 174, 50 L. J. Ch. N. S. 401, 44 L. T. N. S. 248, 29 Week. Rep. 484. But this rule has not been universally adhered to. See *Dustin v. Cowdry*, 23 Vt. 631.

And under a covenant that in case the tenant holds over, the landlord may enter and use such force as is necessary to expel the tenant and regain possession, the tenant cannot recover for injuries to the person where only reasonable and necessary force was used. *Page v. DePuy*, 40 Ill. 506; *Kavanagh v. Gudge*, 7 Mann. & G. 316, 7 Scott, N. R. 1025, 1 Dowl. & R. 928, 13 L. J. C. P. N. S. 99, 8 Jur. 362. But it seems that if excessive force is used, recovery may be had of damages resulting therefrom. *Kavanagh v. Gudge*, supra. And in *Jenner v. Carpenter*, — Tex. Civ. App. —, 48 S. W. 46, where a landlord entered and removed doors and windows, in consequence of which tenants became sick, it was held that, in the absence of a stipulation in the

A. Not that reason altogether, to fumigate the place, and at the same time if they wanted to get out they could. That is what I put it in there for; that is the purpose of it. I don't ask you to believe that that is the reason I put it in there. I put it in there to fumigate the place, and incidentally to make them uncomfortable if they wanted to get out. I knew that they would not desire friendliness. I have made inquiry as to whether formaldehyde was poisonous or not of John Mahon.

A member of the police force of the city, who visited the scene of the transaction at the time of its occurrence, testified: "I had a talk with Mr. Drew, and he admitted that

they had been pouring it into the hole there to drive the Greeks out; and he said that he thought if he could get them outside that he could take possession."

We think that this record shows conclusively that the claim of defendant that the poisonous drug was injected for the purpose of disinfecting the room was made in bad faith. But whether the claim was made honestly or otherwise, defendant's liability would remain the same. The time and method chosen for the performance of the work, coupled with Drew's knowledge of the fact that plaintiff was in the room, was sufficient to make the defendant liable for all damages resulting from the wrongful act.

lease, giving the right of re-entry for default, the lessor was liable in damages for such consequential injury. But it has been held that a license to eject the tenant without process of law, which gives power to enter for that purpose, and to use all necessary force, is void where there is also a statute making it a criminal offense forcibly to enter premises in the actual possession of another, the ground being that the instrument in effect licensed the commission of that which was contrary to public law. *Edwick v. Hawkes*, L. R. 18 Ch. Div. 199, 50 L. J. Ch. N. S. 577, 45 L. T. N. S. 168, 29 Week. Rep. 913.

In early times there was some question as to the proper form of the action where recovery was sought as for trespass, the exact controversy being as to whether or not trespass *quare clausum fregit* would lie. A few early cases (set out *infra*) lay down the rule that damages for personal injuries could be recovered in such an action where the trespass was to the person as well as to the realty, but such decisions can no longer be considered good law. A case illustrative of those which draw a distinction between an action for injury to the realty and an action for personal injuries is *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258, wherein it was said that "very different considerations are applicable to an action for assault and battery, and an action of trespass *quare clausum fregit*. In an action for the personal injury the defendant who is not in possession cannot justify an entry and the exercise of personal violence; but in an action for injury to the land itself, he may justify the force as respects the possession." Another apt discussion of the question is found in *Levy v. McClintock*, 141 Mo. App. 593, 125 S. W. 546, the court saying that "much of the confusion in the law on the subject arises from a failure to give heed to the character of action involved. The statements of the law just mentioned [relating to the criminal and civil statutes of forcible entry and detainer and the broad common-law rule that no civil entry existed for forcible entry] should only be intended as applying to actions for trespass *quare clausum fregit*. In such an

action the plea that the realty was that of the defendant, *liberum tenementum*, is a good plea. It is therefore quite reasonable to say that for the mere dispossession, and for any injury to the realty in gaining possession, no damage can result to the tenant, since he has no right to the former and no property in the latter, and therefore has not suffered injury. . . . But if the action is another character of trespass, as for assault and battery or destruction of personal property in gaining possession, a different case is presented and it receives a different answer. If one has the right of entry, and, to dispossess another who is wrongfully in possession, abuses such right and beats the other, or wilfully destroys his property, he is liable for the damages, since no plea which he could make would meet such an invasion of another's right. By reference to some of the cases cited in support of the law in trespass *quare clausum fregit*, it will be seen that this difference is recognized." And that trespass *quare clausum fregit* will not lie, see *Sampson v. Henry*, 13 Pick. 36.

The cases above referred to as holding that recovery may be had in an action of trespass *quare clausum fregit* for injuries to the person are clearly erroneous and in fact have been severely criticized and in most cases overruled in effect, at least. Such cases follow. Thus, in *Dustin v. Cowdry*, 23 Vt. 631, which is a much discussed case, the court, after referring with approval to *Newton v. Harland*, *supra*, which was an action for trespass for assault, and not trespass *quare clausum fregit*, sustained an action of trespass *quare clausum fregit* where the tenant had sustained injury to his person through being forcibly ejected from demised premises. (For an extended analysis and criticism of this case as well as an able discussion of the general question of the "Right of a landlord to regain possession by force," see 4 Am. L. Rev. 420.) Other cases which contend that trespass *quare clausum fregit* will lie in such cases are *Page v. DePuy*, 40 Ill. 506, and *Reeder v. Purdy*, 41 Ill. 279. And see *Brock v. Berry*, 31 Me. 293. G. J. C.

Upon the question of damages, the court charged:

If you find that there was an injury to the plaintiff, but if you find that the injury was merely an aggravation of some other condition which existed prior to the time of his exposure to the formaldehyde, and if you find that the exposure merely aggravated a prior condition, then the plaintiff is not entitled to recover for such aggravated condition, because he has not counted for it in this case.

Mr. Miller: There is no evidence of any pre-existing condition whatever. The evidence is that the man was healthy before. I submit that that is not in the case, your Honor, and you should not charge it.

The court: If you conclude from the testimony in this case that such exposure of the plaintiff to the formaldehyde, for the purpose that has been testified to in this case, could not produce any such effect as the plaintiff claims was produced, then you may consider whether or not the condition which he testified to as having occurred from that actually did result from that, or was an aggravation of some other condition which the plaintiff might not have been conscious of. If you determine, as a matter of fact, that the exposure, which appears to have happened in this case, to these fumes, would not cause such a condition as the plaintiff testified to, from what you have heard as to practical demonstration and scientific theories upon the effects of formaldehyde, then, if it is found to be some other cause, which you cannot account for, and if you find it is due to some other cause, which you cannot account for, the plaintiff would not be entitled to recover for that. Or, if you find that such an effect, with such an exposure, could not have possibly been produced, unless some other conditions existed, then you may conclude that such other condition did not exist for that purpose. So I say, gentlemen of the jury, if you find that what the plaintiff has testified to be a fact as to his continued condition was not due to the formaldehyde, but may have been due to some other cause, or may have been merely an aggravation of a prior existing condition, he cannot recover for that in this case, because there is no such damage as that counted upon in the declaration. I think I have covered all provisions of this case.

This instruction was clearly erroneous. There is no testimony tending to show that plaintiff was ailing in any respect prior to the commission of the wrong complained of. On the contrary, the record shows that up to that time he never, during all his life, had had trouble with his eyes or throat. 42 L.R.A.(N.S.)

Campau v. North, 39 Mich. 606, 33 Am. Rep. 433.

Upon the record as presented, but one question should have been submitted to the jury,—that of plaintiff's damage.

The judgment is reversed, and a new trial ordered.

## NEBRASKA SUPREME COURT.

STATE OF NEBRASKA

v.

ADAMS EXPRESS COMPANY.

(85 Neb. 25, 122 N. W. 691.)

Carrier — rate regulation — constitutionality.

1. Statutes fixing maximum rates which corporations, joint-stock companies, or persons whose property is devoted to public use, may charge and receive as compensation for their services, are presumed to be constitutional; and the burden of proof is on one who challenges their validity to show, by a preponderance of the evidence, that the legislation complained of clearly contravenes some provision of the Constitution.

Same — disclosure of expenditures.

2. When an attempt is made to strike down a rate statute, it is incumbent on the attacking party to make full, fair, and complete disclosure of all the revenue derived from the business, and the disbursement of the same for all purposes, including salaries paid to all of its officers, agents, and employees, so that it may be determined whether such salaries and expenditures are necessary as well as reasonable in amount.

Same — knowledge of court.

3. Before the courts are called upon to adjudge an act of the legislature fixing maximum rates for express companies unconstitutional, on the ground that they are unreasonable and confiscatory, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management within the rates prescribed would secure to the company a reasonable compensation for the use of its property and for conducting its business.

Headnotes by BARNES, J.

Note. — Generally, as to legislative power to fix tolls, rates, or prices, see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177. And see also as to the principles to be applied in determining the reasonableness of railroad rates, notes to Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A.(N.S.) 108, and State ex rel. McCue v. Northern P. R. Co. 25 L.R.A.(N.S.) 1001.

**Same — express rates — interference — trial.**

4. A court of equity ought not to interfere with and strike down an act of the legislature fixing maximum express rates, before a fair trial has been made of continuing the business thereunder, and in advance of any actual experience of the practical result of such rates.

**Same — noninterference by court.**

5. Where it reasonably appears from a consideration of all the evidence that the rates complained of are not confiscatory, but afford the express company at least some measure of profit for carrying on its business, the courts will not interfere with the operation of the statute, but will require the party complaining to apply for relief to the rate-making power, or the tribunal provided by the statute with power to increase such rates, if they are alleged to be unreasonable.

**Same — statute — penalties — effect.**

6. A rate statute will not be declared unconstitutional on the ground that it provides drastic penalties for its violation, unless it appears that the penalty clause was the inducement for its passage, and, with that clause eliminated, the remainder of the act is incomplete and incapable of enforcement.

(September 25, 1909.)

**A**CTION by the state to enjoin defendant from making charges or rates in excess of those prescribed by statute. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. W. T. Thompson, Attorney General, for the State:

In an action by the state to prevent an express company from exacting compensation in excess of the rates limited by statute, the existence of the law and defendant's refusal to comply with its terms make a prima facie case in favor of plaintiff, since the statute is presumed to be valid.

Moore v. American Transp. Co. 24 How. 39, 16 L. ed. 681; Ex parte Young, 209 U. S. 126, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Ruggles v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 832; Reagan v. Farmers' Loan & T. Co. 154 U. S. 395, 38 L. ed. 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; State ex rel. Board of Transportation v. Fremont E. & M. Valley R. Co. 22 Neb. 313, 35 N. W. 118; Davis v. State, 51 Neb. 301, 70 N. W. 984.

Testimony that the operating expenses of defendant under the statutory rates would deprive it of its right to proper earnings is insufficient to overturn the statute, where 42 L.R.A.(N.S.)

the nature and necessity of important items of expense are not disclosed.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; State v. Martyn, 82 Neb. 225, 23 L.R.A.(N.S.) 217, 117 N. W. 719, 17 Ann. Cas. 659.

A statute reducing express rates cannot be set aside as confiscatory on testimony which fails to show the effect of the reduced rate on new business.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; State v. Pacific Exp. Co. 80 Neb. 823, 18 L.R.A.(N.S.) 664, 115 N. W. 619.

The penalties provided for are not so drastic as to render the act unconstitutional, and if the penalties were unconstitutional they would not invalidate the remainder of the act.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The amount of taxes paid by defendant company constitutes no correct basis for the measurement of the value of the property devoted to the express business.

Willcox v. Consolidated Gas Co. supra. Messrs. Lawrence Maxwell, Frank H. Platt, J. L. Minnis, T. B. Harrison, Jr., Charles W. Stockton, George W. Field, Ralph W. Breckenridge, and Charles J. Greene for defendant.

Barnes, J., delivered the opinion of the court:

This is an action in equity by which the state of Nebraska, as plaintiff, has invoked the original jurisdiction of this court to enjoin the defendant (the Adams Express Company) from charging or receiving for services between places in Nebraska any sum in excess of 75 per cent of certain charges exacted by defendant under its schedule of rates in force on the 1st day of January, 1907. The reduction of rates in question was sought to be accomplished by an act of the legislative assembly of that year (Laws 1907, p. 339, chap. 91), which reads as follows: "Sec. 1. All persons, associations, or corporations engaged in the transportation of money or merchandise for a money consideration, in cars other than freight cars and on trains other than

freight trains, shall be deemed an express company within the meaning of this act. Sec. 2. Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D. 1907. Sec. 3. Express companies may charge and receive for the transportation of merchandise within the state of Nebraska any sum not exceeding 75 per cent of the rate as shown in the schedule provided for in § 2 of this act, until after the State Railway Commission shall have provided a greater rate. Sec. 4. Provided that nothing in this act shall be construed to change the prepaid rates on merchandise weighing one (1) pound or less; and provided, further, that no provision of this act shall reduce any special contract rate in force for the transportation of cream, milk, or poultry, or any charge, to a sum less than 15 cents; and provided, further, that nothing in this act shall abridge the authority of the railroad commission to make a reduction in any rate provided for in this act. Sec. 5. If any express company should fail to comply with the provisions and conditions of this act, they shall be fined on conviction a sum not less than ten dollars or more than one thousand for each offense. Sec. 6. The Nebraska State Railroad Commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act." The act above quoted was passed by the legislature, in the exercise of the power of the state, to regulate defendant as a common carrier of express matter or articles of commerce between places in Nebraska. Defendant threatened to disobey the law, to prevent the state from controlling its internal commerce on defendant's lines of transportation between places in Nebraska, and to charge and collect for intrastate services compensation in excess of the maximum rates fixed by the legislature. The attorney general thereupon commenced this action, and obtained a restraining order preventing the defendant from carrying out its threat of disobedience. Early in the history of the litigation defendant challenged the jurisdiction of the court, and filed a petition and bond for removal. The record was thereupon lodged in the circuit court of the United States for the Federal district of Nebraska, where the defendant was unable to sustain its contention, and the cause was remanded to this court. On proper pleas, and after a full hearing, the jurisdiction of the court and the right of

the state to maintain the action were sustained. *State v. Adams Exp. Co.* 80 Neb. 840, 115 N. W. 625; *State v. Pacific Exp. Co.* 80 Neb. 823, 18 L.R.A.(N.S.) 664, 115 N. W. 619. Having finally adjudicated those questions, they will not again be referred to in this opinion.

After the settlement of the preliminary questions the defendant filed its answer, alleging, among other things: First, that a horizontal cut of 25 per cent of its rates was impractical and unreasonable; that the rates thus fixed by the statute are confiscatory; that the defendant is thereby deprived of its right to a reasonable profit on its business and its property investment, and therefore the act is unconstitutional; second, that the penalties provided by the act for a violation of its provisions are so unreasonable, excessive, and drastic as to prevent the defendant from securing a judicial inquiry into the validity of the statute without incurring a prohibitive risk, and that they therefore constitute a violation of the equality clause of the 14th Amendment of the Federal Constitution. The allegations of the answer were controverted by a reply, and after the issues were thus joined, the Honorable John J. Sullivan was appointed as a referee to take and report the evidence, together with his conclusions of facts and law, to the court, with all convenient speed. A large amount of testimony was taken, which is now before us, together with the referee's report. His findings of facts were generally for the plaintiff, and his conclusions of law are as follows: "My conclusions of law are: First, that the Sibley act (which is the statute in question), so far as it affects the business of the Adams Express Company, is not confiscatory; second, that judgment on the merits should be rendered in favor of the state and against the defendant company." To this report the defendant has filed exceptions so voluminous that to quote them would extend this opinion to an unreasonable length; but such of them as are necessary to a correct disposition of the case, together with the particular findings of fact to which they refer, will be noticed, considered, and decided under proper subdivisions. The case has been argued and submitted on its merits, and therefore, if the report of the referee is sustained, judgment must be entered for the state; while on the other hand, if the exceptions are allowed, we may make such disposition of the case as we think the evidence requires.

Defendant first excepts to the report as a whole, and particularly to the findings of fact contained therein, "Because the same are not sustained by the evidence." The determination of the question thus raised

requires a careful examination of the testimony taken by the referee. In making the investigation we start with the presumption that the statute in question is a valid and constitutional exercise of legislative power. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362-365, 38 L. ed. 1014-1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Ex parte Young*, 209 U. S. 126, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; the concurring opinion of Field, J., in *Ruggles v. Illinois*, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 832; *State ex rel. Board of Transportation v. Fremont, E. & M. Valley R. Co.* 22 Neb. 313, 35 N. W. 118; *Davis v. State*, 51 Neb. 301, 70 N. W. 984. In the case last cited the rule is well stated as follows: "Every legislative act comes before this court surrounded with the presumption of constitutionality, and this presumption continues until the act under review clearly appears to contravene some provision of the Constitution." This rule places the burden of proof on the defendant; and before we can strike down the statute, it must show by a preponderance of the evidence that the rates fixed thereby are so low as to be clearly confiscatory. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167-173, 44 L. ed. 417-420, 20 Sup. Ct. Rep. 336; *Ex parte Young*, supra.

The facts of this case which are not in dispute are that the defendant is a common carrier; it operates in twenty-eight states, and upon 34,862 miles of railroad and other lines of transportation; it is not incorporated, but is a joint-stock company; it has a capital stock of \$12,000,000, divided into 120,000 shares, which are owned by 2,700 shareholders, whose identity is not disclosed. The territory in which it operates is divided into three departments. The western department, which includes Nebraska, is operated over 18,652 miles of transportation lines. The Nebraska mileage, all of which is upon the Burlington lines, is 2,514 miles. The company has 272 offices in this state and about 450 employees. The value of the property employed in carrying on its entire business is not disclosed, but the estimated value of the portion devoted to the service in Nebraska is between \$50,000 and \$60,000. The gross revenues of the company upon all of its lines for the year ending December 31, 1907, were \$27,822,738.23. Its operating expenses for the same period were \$27,356,345.17, leaving a net profit of \$466,393, or 1.6 per cent of the gross receipts.

Assuming the burden of proof above mentioned as to the remaining facts, the defendant produced as witness Mr. Glenn, the auditor of the western department, and Mr. Wa-

ters, the general author of the company, and as a summary of their evidence, has placed in the record its Exhibit 5. This, after having been revised by counsel to correct errors, shows that the business of the company in this state for the year ending December 31, 1907, resulted in a net income of \$12,689.94. Those witnesses were afterwards recalled, and an attempt was made to show by them that the terminal expenses properly chargeable to Nebraska business would reduce the net earnings of the company for the year 1907 to approximately \$8,216.03. The plaintiff, however, challenges the truth of this evidence, and claims, by its construction of Exhibit 5, that the net earnings of the defendant in this state for the year 1907 were in fact \$14,336.29, or approximately 5½ per cent of its gross earnings. It will be observed by an examination of the original Exhibit 5 that the defendant has built up an estimate of what it conjectures would have been the result on the business of 1907, had the statute in question then been in effect. By assuming that there would have been no increase in the business, that all of the general expenses and office salaries would have remained exactly the same, defendant contends that it would have lost \$14,812.65 on the business of that year. In this calculation, however, no account has been taken of the money-order business, and it has been assumed that only \$15,000 of the total revenue would have been unaffected by the rate reduction. It is further assumed that the new rate would not have added anything whatever to the gross revenue of the company. It is also erroneously claimed that the expenses would not be reduced or affected by reason of the reduction in rates. Again, it appears that the defendant made no deduction from the expenses charged to the Nebraska business for that portion of the general expense which it incurred in conducting its through business, business which neither originated nor terminated in Nebraska, and which is called its overhead business. By these devices the defendant has attempted to show that, if the statutory rates were in force for the year 1908, it would lose on its Nebraska intrastate business \$15,812.65.

It may be conceded that by loading the Nebraska intrastate business with a sufficient amount of so-called terminal expenses, together with a proportionate amount of the expenses of administration, it is possible to show that the Nebraska business for 1907 was conducted at a loss, which loss would be increased for the year 1908; but the evidence introduced for that purpose is not convincing. It must be borne in mind that, prior to the passage of the Sibley act, the defendant had, with a free hand, made

its own rates and charges, and it is not to be believed that it had voluntarily made a rate under which it had been conducting its Nebraska business without profit for more than a generation. The findings of the referee that the defendant's business in Nebraska for the year 1907 was remunerative seems to be warranted by the evidence, accords with sound reason, and is therefore sustained.

Coming now to a consideration of defendant's Nebraska intrastate business for the year 1908, we find that the company has introduced in evidence a statement of its transactions for the month of June of that year, which it has used as a basis of its claim or contention that the rates fixed by the statute are confiscatory. We are of opinion, however, that this evidence does not furnish a satisfactory test of the effect of the act, and is not worthy of serious consideration. At the time defendant closed its testimony and rested its case, the statute had been in force for at least sixteen months, and the result of the rates fixed thereby could have been clearly and accurately shown. Yet the company declined to make such a showing, and rested its case on conjecture, assumption, and insufficient comparison. We are therefore of opinion that this showing does not meet the burden of proof which the law places upon the defendant. On the other hand, the plaintiff has shown, from the monthly reports made by the defendant company to the Nebraska State Railway Commission up to and including the month of October of the year 1908, that the reduction complained of has resulted in a large increase of defendant's intrastate business, without a corresponding increase of expenses, and has produced a net income amounting to more than 4 per cent of its gross receipts, exclusive of its money order business. It also appears that if that item is added to the ordinary earnings of the company, and we agree with the referee that it should be so added, its profits will be increased to about 5.5 per cent. Surely this is not confiscation, and the rate complained of is, at least to a considerable extent, remunerative.

It is claimed, however, that the referee has arrived at the foregoing results by an improper method of apportioning expenses to the intrastate business, and this seems to be the main contention between the parties. It appears that the referee has apportioned the expenses on a revenue basis, while the defendant insists that the only correct method of apportionment is the transaction or package basis. The referee has found from an estimate for the year 1907, based on an actual count for the months of March and September, that there were, for that year,

1,698,752 handlings of domestic, and 1,003,648 handlings of interstate transactions. In other words, that the handlings of domestic transactions were 62.8 per cent of all of the handlings within the state. It is now contended by the defendant that the item of terminal cost ought to have been distributed according to the ratio which the domestic handlings bear to the interstate handlings. The referee has found, and this is not contested, that these items aggregate \$146,231.91, which, distributed on the basis proposed, would result in charging the domestic business, which produced a revenue of \$277,726.76, with \$91,833.36, and the interstate business, which produced a revenue of \$655,027.52, with only \$54,398.28. This would make the terminal cost of the domestic business 33 per cent of the revenue derived from it, and the terminal cost of the interstate business would be only 8.3 per cent of the revenue received therefrom. As was said by the referee: "An apportionment according to this method shows that the defendant carried on its intrastate business in 1907 at a loss of approximately \$12,000." This, to say the least, is incredible. The fact, as we have above stated, that the defendant, before the passage of the act in question, had been unrestrained in fixing its rates, causes us to doubt the correctness of this method of apportionment; and while we do not hold that a fair distribution of expenses cannot be made on the package basis, we are of opinion, for many reasons, that the apportionment of expenses on a revenue basis affords the easiest and most practicable solution of this difficult question.

We also find from the evidence that the defendant has in many ways pursued and offered sanction for this method. Indeed, until this contention arose, it seems to have considered its business throughout the whole country as an entirety, and to have deducted its expenses, and calculated its profits, on the revenue basis. Again, it is a well-known fact that the expense of a particular transaction may not be, and often is not, the same at the point of shipment as at the point of destination. The amount paid by defendant to its agents at its different points for the same handling is not always the same. To illustrate, suppose a shipment originates at an office where the pick-up and delivery system is in operation, and terminates at a point where that method is not pursued, but where the consignee is required to visit the express office in order to obtain the consignment. In such a case to double the charge at either point would not produce the correct amount of terminal expense. For further illustration, suppose a package is shipped from an office where the



agent receives as his compensation a commission of, say, 10 per cent of the amount charged for the shipment, while the receiving office is in charge of an agent who receives a salary. In such a case it would be impracticable and incorrect to double the amount of the agents' commission at the shipping office, to obtain the amount of terminal expenses of that transaction. It further appears that the largest item, to wit, \$66,493.07 commission paid to agents, has no relation at all to the number of pieces handled, but is based entirely upon the revenue derived from the business transacted at their offices. It is also inferable from the evidence that agents' salaries, an item amounting to \$8,582, are based to some extent upon revenue. So we do not see how, upon this record, it can be held as a matter of law that terminal expenses must be distributed upon the package basis, and not otherwise.

For the foregoing reasons we are constrained to sustain the finding of the referee, which adopts the revenue basis for a distribution of terminal charges.

In concluding the discussion of this question, it must be borne in mind that, where an attempt is made to strike down a rate statute, it is incumbent on the party complaining to make full, fair, and complete disclosure. Now, while it appears from a careful reading of the evidence that in many, and perhaps most, things the defendant has made full and fair disclosure, still in some matters it has failed to do so. We find that there is a large sum charged to the intrastate business as expenses of administration. We are told that this includes the salaries of the defendant's general officers. It appears that the company has declined to state the salary of a single one of such officers, and we are wholly without any knowledge as to the amount, much less the reasonableness, of such salaries. Under a showing of this kind the defendant could, without danger of detection or even adverse criticism, load the Nebraska state business with an expense which would render it so unremunerative as to require us to strike down the act in question. Again, it appears that the defendant is a joint-stock company, and it is fair to presume, in the absence of disclosure and proof to the contrary, that a majority of its stock is held and owned by its officers and directors. In such a case salaries could readily be made so exorbitant, unreasonable, and excessive that, by charging to the intrastate business a proportionate amount thereof, that business would appear to be unremunerative.

Finally, the evidence shows that the amount paid to the Burlington railroad for transportation for the year 1907 was \$159,42 L.R.A.(N.S.)

727.76, or 57.5 per cent of the gross receipts from domestic business. This appears to be a larger percentage than is paid to any other railroad for like services. It may be an entirely proper charge, or it may be an unreasonable exaction, and there is no evidence in the record tending to establish either proposition. Counsel for the defendant assert that its contract with the Burlington railroad was the result of competitive bidding. This may be so, but it is not proved, and, if it were proved, would not establish *per se* the reasonableness of the charge. The public is entitled to have its commodities carried at fair rates, and cannot be subjected to excessive charges by any arrangement between the railroad and the express company. If a railroad farms out the express business, it must be on terms that will enable the express carrier to operate at a profit, without imposing excessive charges upon its patrons. Any contract which will not permit this to be done, whether it be the result of competitive bidding or not, is void in so far as it affects the rights of the public.

For the foregoing reasons we are of opinion that the defendant has failed to show by competent evidence a fair and full disclosure that the rates in question are confiscatory, and its exceptions upon this point are therefore overruled.

Having sustained the report of the referee as to the main facts of this controversy, we come now to the consideration of his conclusions of law. It appears that a like question was before the Federal Supreme Court in *Willcox v. Consolidated Gas. Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, where it was held that a court of equity ought not to interfere by injunction with state legislation fixing gas rates before a fair trial has been made of continuing the business under such rates; and the case must be a clear one before the courts should be asked to interfere by injunction with state legislation regulating gas rates in advance of any actual experience of the practical results of such rates. That case is an instructive one, and many of the questions involved in the case at bar were there litigated and determined adversely to the defendant's contention herein. Similar questions were also before that court in the city of *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148, and it was there said: "The courts should not enjoin the enforcement of a municipal ordinance fixing maximum water rates, on the ground that such ordinance is invalid under U. S. Const. 14th Amend., as confiscatory, unless the confiscation is clearly apparent."

The case of *Chicago & G. T. R. Co. v. Well-*

man, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, was one to test the validity of an act of the legislature of the state of Michigan, fixing a maximum rate of passenger fare. It was contended in that case that the rate was confiscatory. Mr. Justice Brewer delivered the opinion of the court, from which we quote as follows: "Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and therefore the earnings? At any rate, must the court assume that it has no such effect, and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law, in its application to a particular company, depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury, and decline to assume that the effect is as claimed? There can be but one answer to these questions. If the contention be that the legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer to the long series of cases in this court in which the contrary has been decided." Concluding the opinion, Judge Brewer said: "Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation, which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.' . . . The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indi- 42 L.R.A.(N.S.)

cate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

In the case at bar counsel have devoted a considerable part of their brief to a eulogy of the ability, probity, and integrity of their witnesses. By this opinion we do not intend to in any manner reflect upon the character of the officers of the express company, but confine ourselves to the belief that full disclosure has not been made.

We think our decision herein should be ruled by the principles announced in the foregoing cases, rather than by the case of *Cotting v. Kansas City Stockyards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, which is cited and relied on by counsel for the defendant. In that case the service was rendered by the owners of property in such a position that the public had simply an interest in its use, while in the present case the defendant has devoted its property to the discharge of a public service. It should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and the public. Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulation, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use. This state of affairs cannot be said to exist in the case at bar, for it not only appears that the rates fixed by the statute are not confiscatory, but afford defendant a much greater percentage of income on its Nebraska intrastate business than that which, by its own testimony, it claims to receive upon its general business considered as an entirety. For the foregoing reasons the referee's conclusions of law upon this point are sustained.

Defendant further contends that the act in question is unconstitutional because of the enormous fines which is imposed for a failure to comply with its terms, and it is thereby denied the equal protection of the law. It is a sufficient answer to this contention to say that the act does not in any manner deny the defendant the right to test its validity in the courts, and the reasonableness of the rates fixed thereby are now

by this proceeding under judicial inquiry. It also seems clear that the penalty clause is not a necessary or inseparable part of the act without which it would not have been passed. In such a case if, when the objectionable part of the statute is eliminated, the balance is valid and capable of being enforced, the valid portion of the act will be upheld. *Willcox v. Consolidated Gas Co. supra*. This is a familiar principle which has been often announced by this court, and we do not hesitate to say that, in order to avoid striking down the act in question, we would, if necessary, eliminate the penalty clause. *Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857; *State ex rel. Wheeler v. Stuhrt*, 52 Neb. 209, 71 N. W. 941, and cases there cited.

It is also urged by counsel for the defendant that what its property is worth for taxation, or what its business produced for that purpose, must be considered or reckoned with when the inquiry is directed to the amount upon which a legitimate return may be claimed. This question was squarely presented and passed upon in the case of *Willcox v. Consolidated Gas Co. supra*, where it was said: "The assessed value for taxation of the franchises of a gas company furnishes no criterion by which to ascertain their value, when testing the reasonableness of gas rates as fixed by statute, where the taxes are treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount applicable to dividends can be ascertained." And further: "The future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the great profits upon which that value was based are largely reduced by legislative action."

Counsel for defendant complain of the failure of the referee to incorporate in his report their theory of the case, which they have designated the ultimate facts, and by motion have asked us to require him to make it a part of his findings. We are of opinion that this request should be denied. The statement so entitled is not in evidence. It is simply a summary of the conclusions of counsel as to what the evidence shows, and is properly made a part of their brief. It was used by them as a part of their oral argument; but, as its conclusions were repudiated by the referee, he properly refused to make it a part of his report.

Finally, upon a careful consideration of the whole case, we are of opinion that defendant's exceptions should be, and they are, overruled; and the report of the referee is sustained. This requires us to enter judgment for the plaintiff, and this we do without hesitation, because we are convinced  
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from the evidence that the rates complained of are not clearly shown to be confiscatory, but are, to some extent at least, remunerative. When this fact appears, the courts should not interfere to strike down the statute, but should require the complainant, if the rates are deemed to be too low, to resort to the rate-making power, or the tribunal charged with rate regulation for relief. The statute in question clearly provides that the express companies, in case the rates fixed thereby are found to be unreasonable, may apply to the Nebraska State Railway Commission for relief, and that tribunal is given full authority to increase such rates.

For the foregoing reasons, judgment will be rendered for the state, and the temporary restraining order now in force herein is made permanent; but our judgment must be so construed as not to in any manner interfere with the right of the defendant company to apply to the State Railway Commission for a revision or an increase of rates, if in any case, it shall deem them unreasonable; and the power of that tribunal to grant any and all proper relief is not to be affected thereby.

Judgment accordingly.

Reese, Ch. J., and Rose, J., not sitting.

#### NORTH CAROLINA SUPREME COURT.

MAUD M. BARRETT et al., Appts.,  
v.

FRANK BREWER, et al.

(153 N. C. 547, 69 S. E. 614.)

**Adverse possession — tacking — ancestor's color of title — necessity of possession.**

Heirs of one having a deed to real estate which constituted color of title, under which neither the ancestor nor anyone on his behalf took possession, cannot, after the lapse of a number of years after the ancestor's death, and the granting of the property to a stranger, enter and gain title by adverse possession, relying on the color of title of the ancestor where, by statute, color of title is necessary to secure title by adverse possession.

(Hoke, J., dissents.)

(December 7, 1910.)

*Note.* — Must ancestor have been in possession to give heirs the benefit of his color of title.

A diligent search discloses a dearth of authority on the question whether a person in whom color of title originated must have been in possession thereunder to entitle per-

**A**PPEAL by plaintiffs from a judgment of the Superior Court for Montgomery County, dismissing an action brought to recover possession of a tract of land. Affirmed.

The facts are stated in the opinion.

Mr. U. L. Spence for appellants.

Messrs. R. T. Poole and J. A. Spence for appellees.

Brown, J., delivered the opinion of the court:

Plaintiffs introduced a grant to defendants from the state, dated October 15, 1891, covering the land in controversy; thereby proving that the legal title was in defendants at that time. Plaintiffs attempted to show that they have acquired title since then by adverse possession under color of title for seven years. For this purpose they introduced a deed from G. R. Bryant to Josephine Barrett, dated February 5, 1870, and recorded May 13, 1890, covering the same land. This deed was good color as to the grantee herself had she entered upon and taken possession of the land under it. The evidence is that Josephine Barrett died in 1872, when she was eight years old; that the deed was made to her about two years before she died, and that neither she nor anyone for her ever entered upon the land and claimed it for her under this deed. The land was woodland entirely, and Josephine resided 14 miles from it. She was born in 1864 and died eight years later. The plaintiffs claim that they have shown seven years' adverse possession since the date of the grant to defendants, and the "color" they offer is the deed to Josephine Barrett, who was their sister, and whose heirs at law they are.

Inasmuch as their ancestor had no legal title to the land, never was in possession of it, and never claimed it, nor did anyone for her, can these plaintiffs be permitted, many years after her death, to enter upon the land without title and offer the deed to their ancestor as good color for their unlawful entry?

As to what constitutes "color of title" and "claim of title" the courts differ in the different states, because it largely de-

pends upon the language of the different statutes. As said by Judge Henderson in *Doe ex dem. Tate v. Southard*, color of title is evidently the production of our own country (10 N. C. [3 Hawks] 120, 14 Am. Dec. 578). The term "color of title" is not synonymous with "claim of title," as used in the statutes of some states. To constitute color of title there must be a paper title to give color to the adverse possession, whereas a claim of title may be constituted wholly by parol. *Hamilton v. Wright*, 30 Iowa, 480.

Our statute does not recognize a mere claim of title. It enacts that "when the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries and under colorable title for seven years, no entry shall be made or action sustained," etc. Revisal 1905, § 382. It has long been settled in this state that the colorable title required by the statute must be "a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or the defective mode of conveyance that is used." *Doe ex dem. Tate v. Southard*, supra; *Williams v. Scott*, 122 N. C. 550, 29 S. E. 877.

In this last case it is said: "The defendants insist further that the possession of the *feme* defendant, the heir at law of the bankrupt, since his death in 1878, is color of title by descent. Counsel cited us some authorities from other states to that effect, but upon examination it is found that that has been made so by statute. Whatever the law may be elsewhere, there can be no such thing in North Carolina as color of title without some paper writing attempting to convey title." It is plain, therefore, that plaintiffs cannot set up a "claim of title" under our statute.

This brings us to the inquiry, Is the deed to the ancestor, under which she made no entry or claim to the land, or no one for her, good color for an entry made more than twenty years after her death, by her heirs at law, and after the state had granted the lands to defendants?

The reason usually given to support the

sons claiming under or through him to avail themselves thereof to sustain their adverse possession.

The cases *Bond v. Beverly*, 152 N. C. 57, 67 S. E. 55, and *Miller v. Davis*, 106 Mich. 300, 64 N. W. 338, are discussed and set out in the court's opinion and dissenting opinion of the reported case, *BARRETT v. BREWER*.

It has been held in *McMullin v. Erwin*, 58 Ga. 429, that, in order for the defendant in ejectment to rely on a deed as color, in establishing title by prescription, it is not 42 L.R.A. (N.S.)

necessary for him to show affirmatively that the person who made the deed had either title or possession; that prescription runs in favor of one who has color of title and possession under it, whether he holds the possession in person or by a tenant.

The necessity of color of title when not expressly made a condition by statute to found title by adverse possession is the subject of a note to *Jasperson v. Scharnikow*, 15 L.R.A. (N.S.) 1176. J. D. C.

doctrine of maturing title by adverse possession, under color of title, is that where one, in the exercise of ordinary care, is induced to enter upon and improve land because he has some written evidence of title that would naturally induce a "layman" to believe that it vested in him what is professed to pass, it would be unjust to enforce the right of another who brings no action till the end of the statutory period. *Wood, Limitations*, § 159; *Avent v. Arrington*, 105 N. C. 387, 10 S. E. 991. In the opinion in that case many cases are cited and quoted from, which seem to indicate that the entry must be made by the person to whom the colorable instrument is made.

In view of the fact that the ancestor to whom the colorable title was made never asserted any claim to the land under it, and these plaintiffs do not take by purchase, they evidently do not come within the reason of the rule, as stated by Mr. Wood, and approved by this court in *Avent v. Arrington*. When they entered they knew and admit their ancestor had never entered upon the land and had never perfected his colorable title. It is different when the ancestor enters and takes possession under colorable title. At his death the possession is cast by descent upon his heir, who may continue the possession in good faith in himself, and tack it to that of his ancestor's so as to complete the necessary statutory period. *Atwell v. Shook*, 133 N. C. 391, 45 S. E. 777; *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757, 24 S. E. 748. It is the continuity of possession which gives to the heir the benefit of the entry under color made by his ancestor.

We fail to find any authority for the position that long after the ancestor's death his heir can avail himself of a colorable title, consisting of a paper writing made to his ancestor, when the latter either refused or failed to claim any rights under it himself. It would seem more consistent with reason and authority that the entry should be made and claim of title first asserted by the person to whom the colorable instrument was made; and that if he did not see fit to do so in his lifetime, no one can do it after his death, under his color.

The grantee in the deed takes by purchase. Her heirs took no interest under the deed. They take by descent from her; therefore, they must show a "descent cast." As their ancestor had no real title to descend, they can only show it by proving her possession and that at her death it was cast upon them, for, as against one showing no title in himself, possession is title. *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551; *Sedgw. & W. Trial of Title to Land*, §§ 717, 718. "A descent cast, where an ancestor is

in possession, gives color of title." 3 Washb. Real Prop. 168.

It must be admitted that an heir cannot inherit a color of title, for that is not a muniment of title. It is a mere shadow, a pretense of a title. Muniments of title follow the real title and descend to the heir as an incident to the estate. If there is no estate to descend, there can be no muniments. It is the descent of the possession which gives vitality to the colorable title, and which, when continued long enough, constitutes it a muniment of a real title. Without the possession the colorable instrument is but worthless paper. It has been said that color of title must purport to convey title to the claimant thereunder, or to those with whom he is in privity. 1 Cyc. 1085.

This term "privity," when used in connection with color of title, does not mean privity in blood, for a privity in blood is defined to be one who derives his title to the property in question by descent. 6 Words & Phrases, 5608. That refers to a real title which can descend, and not to a mere colorable title, for until the ancestor enters and takes possession under his color, he has nothing to descend, neither title nor possession. Therefore it is held in treating of color of title that "the privity spoken of exists between two successive holders when the later takes under the earlier, as by descent (for instance, a widow under her husband, or a child under its parent) or by will or grant, as by a voluntary transfer of possession." *Sherin v. Brackett*, supra; *Hamilton v. Wright*, 30 Iowa, 480; *Jackson ex dem. Colden v. Moore*, 13 Johns. 513, 7 Am. Dec. 398; *Sedgw. & W. Trial of Title to Land*, §§ 747, 748; *Wood, Limitations*, § 271. This term "privity," when used in connection with a colorable, or sham, title, and not a real title, evidently means "privity of possession."

To show privity of possession the later occupant must enter under the prior one; must obtain his possession either by purchase or descent from him. 6 Words & Phrases, 5609; *Shuffleton v. Nelson*, 2 Sawy. 540, Fed. Cas. No. 12,822; *Sedgw. & W. Trial of Title to Land*, § 747. *Warvelle*, in his work on Vendors, vol. 1, § 8, p. 54, states the law very clearly as follows: "Possession under color of title for the period of statutory limitation confers upon the holder a perfect title in law; and where one takes possession under a deed giving color of title, his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period. . . . Titles acquired in this manner, must, however, show

connecting possession and a privity of grant or descent."

The case of *Bond v. Beverly*, 152 N. C. 60, 67 S. E. 55, relied upon by the defendants, supports the position we have taken. In that case the plaintiff claimed the land by virtue of sale in 1870, under an execution against Laurence Askew, the owner of the land. The defendant Beverly claimed under a deed from Harrill, who claimed under a deed from the executors of Laurence Askew. It was claimed that Beverly's deed was void for lack of sufficient description and was not color of title. This court, in a very lucid opinion by Mr. Justice Manning, in which the facts are fully stated, held that the deed to Harrill was good color of title and that Beverly, having been put in possession by Harrill, could take the benefit of such color. In other words, Beverly was privy in possession with Harrill. The learned justice says: "This adverse entry occurred on December 22, 1890, when Harrill put Beverly, the ancestor of the defendants, and one Young, into the possession of the land and they took possession of it;" and he cites a number of cases wherein privity of possession is held to exist between successive holders. It is manifest from the opinion that, if there had been no privity of possession between Harrill and Beverly, the latter could not have availed himself of the former's deed from the executors as color of title.

Another case pressed upon our attention by the learned counsel for plaintiffs is *Miller v. Davis*, 106 Mich. 303, 64 N. W. 338, which appears upon examination to be based upon a construction of the Michigan statutes. Joseph St. Andre was the legal owner of the land by patent from the government. He seems to have abandoned the land, and others took adverse possession of it. Louis St. Andre, an heir of Joseph, afterwards re-entered upon the land, and the judge, writing the opinion, says, "he could not be said to have entered without color of title." This was purely *obiter*, and we think not an apt expression, for when Louis St. Andre re-entered he held the legal title in his person, and his entry was not under color of a spurious title, but under the protection of the original patent, which he had inherited from his ancestor.

We are of opinion that his Honor did not err in sustaining the motion to nonsuit, and his judgment is affirmed.

**Hoke, J., dissenting:**

Impressed as I am with the learned discussion of the subject in the opinion of the court, I cannot bring my mind to the conclusion, made the basis of the decision, that in order to make a deed available as color 42 L.R.A. (N.S.)

of title, it is always necessary that there should be an actual entry thereunder by the original grantee. To constitute color of title in this state, it is required that there should be a paper writing purporting to convey or contract for the title to land, sufficiently defining its boundaries, and an entry thereunder, asserting ownership with a certain degree of good faith. Subject to these requirements the question of color of title is very largely one of intent, and there is no reason occurring to me why an heir should not be allowed to acquire title when he enters under a deed to the ancestor and remains in the exclusive possession for the required length of time, asserting ownership under the deed.

The position chiefly relied upon in the court's opinion that there should be an entry by the ancestor grantee, under the deed, and descent cast, before the heir can avail himself of the deed as color, is a doctrine asserted and applied by the courts to cases where it was necessary to join, or "tack" the possession of the ancestor to that of the heir in order to make out the length of occupation required. The courts were giving a reason for allowing one wrongdoer or disseisor to avail himself of the occupation by another, and this is what the text-books mean when they lay such apparent stress upon possession by the ancestor. As in the citation from *Warvelle*, appearing in the principal opinion, "that possession under a deed, giving color, may be transferred to other parties, but in order to do this they must be purely of grant or descent." In our case, however, there was evidence to the effect that the heirs had entered, and themselves had occupied the property adversely for the required length of time, asserting ownership under the deed to their ancestor, and to my mind there is nothing to prevent the operation of the principles of color of title: a paper writing purporting to convey same, and an entry thereunder, asserting ownership in good faith. Such a claim of ownership would not be allowed to an absolute stranger, but by reason of privity it should be allowed to the heir. The principle contended for seems to have been applied in *Miller v. Davis*, 106 Mich. 300, 64 N. W. 338, and was directly recognized by this court in *Bond v. Beverly*, 152 N. C. 57, 67 S. E. 55.

In that well-considered case, it appeared that the executors of a claimant, under order of court, had sold the land in controversy to one Harrill and made a deed to Harrill, properly and sufficiently defining the boundaries. Harrill conveyed to Beverly, the ancestor of defendant, who entered, and he and those under whom he

claimed occupied for sufficient length of time to mature the title, asserting ownership under these deeds. The deed from the executors to Harrill was a good and sufficient deed. That from Harrill to Beverly was void for lack of sufficient description. There was no entry on the land under this claim until Beverly, the ancestor of defendants, entered. The title of defendants by adverse occupation was established and allowed to prevail. This was not, as insisted, an application of the recognized principle that a lessor may ripen his own title by the occupation of his lessee, or even his licensee. Under and by virtue of the deed to Harrill, the grantee of the executors, although there had never been any entry by Harrill or anyone, under whom he claimed, Beverly, who claimed under Harrill, was allowed to avail himself of his grantor's deed as color, though the grantee himself had not entered. On the facts presented he was not an absolute stranger, but a claimant asserting ownership in good faith.

While we recognize and treat claims of this character as beginning in a disseisin, we know that many of them, as a matter of fact, represent the true title, the evidence of which has been lost, from accident or inattention, under the lax methods that formerly prevailed when land was cheaper and more readily obtained. Many thousands of titles in this state could not now be strictly established by a line of registered deeds. Fifty or sixty years back it would be difficult to show the character or circumstances of an original entry, by oral testimony. One hundred years back it would be impossible; and, to my mind, it is an unsound principle, and one fraught with much danger, that deprives an heir of the privilege of availing himself of his ancestor's deed as color.

I am of opinion that, on the facts in evidence, the cause should have been submitted to the jury.

#### NORTH CAROLINA SUPREME COURT.

ANNIE E. ALEXANDER, by Next Friend,  
v.  
WESTERN UNION TELEGRAPH COMPANY, Appt.

(158 N. C. 473, 74 S. E. 449.).

**Telegraph company — receipt of message for transmission — evidence.**

1. That a message was received by a telegraph company for transmission may be found from evidence that, in response to a telephone request made to the person answering the call for the company's number, a messenger appeared and took the message, which had been written on one of the company's blanks, to carry it to the company's office, although the blank contained a stipulation making the messenger the agent of the sender.

**Same — message from physician to sick person — failure to deliver — substantial damages.**

2. One to whom a message of acquiescence is sent by a surgeon who had been requested by telegraph to operate for appendicitis may recover substantial damages from the telegraph company for nondelivery of the message, because of the mental suffering endured by him, because uncertain whether or not relief would reach him in time to prevent death.

(Brown, J., dissents.)

(April 3, 1912.)

**APPEAL** by defendant from a judgment of the Superior Court for Beaufort County in plaintiff's favor in an action brought to recover damages for defendant's negligent failure to deliver a telegram. Affirmed.

The facts are stated in the opinion.

Messrs. George H. Fearons, Small, MacLean, & McMullan, and A. S. Bernard for appellant.

Messrs. Ward & Grimes, for appellee.

There was evidence of mental or physical suffering proximately and independently produced by failure to transmit the answer from Leigh to Speight.

Cordell v. Western U. Tele. Co. 149 N. C. 402, 22 L.R.A. (N.S.) 540, 63 S. E. 71; Carswell v. Western U. Tele. Co. 154 N. C. 112, 32 L.R.A. (N.S.) 611, 69 S. E. 782; Shaw v. Western U. Tele. Co. 151 N. C. 638, 66 S. E. 668; Pierson v. Western U. Tele. Co. 150 N. C. 559, 64 S. E. 577; Suttle v. Western U. Tele. Co. 148 N. C. 480, 128 Am. St. Rep. 631, 62 S. E. 593; Britt v. Carolina Northern R. Co. 148 N. C. 37, 61 S. E. 601; Kernodle v. Western U. Tele. Co. 141 N. C. 436, 54 S. E. 423, 8 Ann. Cas. 469; Dayvis v. Western U. Tele. Co. 139 N. C. 79, 51 S. E. 898.

The defendant waived the stipulation on the back of the telegram, and the delivery by Leigh to the boy in his office was a delivery to the company.

Jones, Tele. & Teleph. Cos. § 408; Will v. Postal Tele. Cable Co. 3 App. Div. 22, 37

**Note.**—The right of an addressee of a telegram to sue for delay in delivery is treated in the note to Anniston Cordage Co. v. Western U. Tele. Co. 30 L.R.A. (N.S.) 1116. For various phases of the right to recover damages for mental anguish in telegraph cases, see Index to Notes, under the title, "Damages — mental anguish — telegrams."

N. Y. Supp. 933; Ayres v. Western U. Teleg. Co. 65 App. Div. 149, 72 N. Y. Supp. 634; 37 Cyc. p. 1692, note 68; Western U. Teleg. Co. v. Todd, — Ind. App. —, 53 N. E. 194; Carland v. Western U. Teleg. Co. 118 Mich. 369, 43 L.R.A. 280, 74 Am. St. Rep. 394, 70 N. W. 762; Gore v. Western U. Teleg. Co. — Tex. Civ. App. —, 124 S. W. 977.

Hoke, J., delivered the opinion of the court:

It was chiefly urged as against the validity of this recovery: (1) That there was no evidence that the message had ever been received for transmission by defendant company. (2) That there was no sufficient evidence of mental anguish to justify an award of substantial damages on that account; but we are of opinion that neither position can be sustained.

There was testimony on part of plaintiff tending to show that she resided with her mother about 300 or 400 yards from Swain, a local railroad station in a remote country district, and on July 19, 1909, she became imminently ill with an attack of appendicitis. That her attending physician was of opinion that an operation was immediately necessary. That he was unwilling and unable to undertake it there with the facilities afforded, and that she should go to a hospital for that purpose. That the plaintiff and her people were unable to pay ready money for such operation, and the doctor, who lived in 150 yards of the telegraph office, undertook to communicate by telegram with Dr. Leigh, at Norfolk, and ascertain if the patient could be received in the hospital there and given the necessary treatment. This was 2 P. M. Monday afternoon. That at 4 P. M. Dr. Speight sent Dr. Leigh, at Norfolk, a message of inquiry as follows:

Roper, N. C., July 19, 1909.  
Dr. Southgate Leigh, Norfolk, Va.

Young lady appendicitis; can't pay anything till fall. Will you operate? Answer.  
J. H. Speight.

This message was shortly received at Norfolk, and within thirty minutes after receipt of same Dr. Leigh placed with a messenger boy sent from defendant company's office for the purpose of taking the same, a return message, as follows:

July 19, 1909.

Dr. J. W. Speight.

Yes, send patient at once. What train?  
Southgate Leigh.

That this message was never received, and the doctor, not having heard, did not 42 L.R.A. (N.S.)

go to see the patient the following morning by 8:30, as he would have done, nor until 2 or 3 P. M., and then told the parties that no message had been received. That it was then arranged that the patient should go to Dr. Tayloe, at Washington, North Carolina, and she did go there on Wednesday, and was there treated successfully. That Dr. Tayloe was a skilled surgeon, and the patient's case was properly treated at Washington.

As tending to show a degree of mental suffering amounting to mental anguish, the plaintiff, testifying in her own behalf, among other things was allowed to say:

He said I had to go to the hospital right away. He could not operate on me. He said that he would wire Dr. Leigh that afternoon and let us know the next morning, and when my mother asked him why he did not come, he said it was because he had not heard from Dr. Leigh.

Tell us whether you were alarmed or not about your condition, and to what extent, as best you can? (Objection by defendant overruled, and defendant excepts.)

I was alarmed. I was scared. I had never thought of going to the hospital before. My mother was crying and my sister, too, and, of course, they came in the room crying, and that scared me. (Defendant objects to this form of answer, and moves that the same be stricken out. Objection overruled, and defendant excepts. Here the court charged the jury that they should not consider the crying of the mother nor anything except the plaintiff's mental and physical condition directly due to her failure to hear from Dr. Speight as to whether he would operate). I did not know of anywhere I could get relief except from Dr. Leigh during that whole day until Dr. Speight came late in the evening, and said he had not heard from Dr. Leigh, and fixed for me to go to the Washington Hospital.

Q. What impression was made on your mind by Dr. Speight,—that you would die if you did not get operated on?

A. He said that an operation had to be performed, and so I thought it was an operation or death.

Q. Why was it that you had to look to Dr. Leigh?

A. Because that was all Dr. Speight had told me.

Q. Did you have any money to pay cash for your operation?

A. I did not.

And again:

Q. From the time Dr. Speight said he could not hear from Dr. Leigh on through the balance of the afternoon and night and next morning until you heard from Dr.



Speight that Dr. Tayloe would operate on you, what was your mental condition with reference to the question as to whether you could get anybody to operate on you at all?

A. I thought the reason that Dr. Leigh had not answered the telegram was that I did not have the money to pay him with, and I did not know whether I could get anybody else to operate on me or not. I did not know whether Dr. Tayloe would operate on me without the money or not, and my mind was all torn up because I did not know whether I could get anybody to operate on me or not. If I had heard from Dr. Leigh, I would have known whether he would operate on me or not, and would have not been uneasy.

And further:

I was conscious of everything that was happening. I was studying whether I could be operated on or not. I did not want to be operated on, but after Dr. Speight said I had to be operated on, I thought I would have to be operated on right away or die one. My mother and sister were crying because they were afraid of the operation and death, too, I suppose. What was troubling me was that Dr. Speight said I had to be operated on, and we didn't hear from Dr. Leigh, and I didn't know of anywhere else I could get operated on. . . . I did not know why he did not hear from Dr. Speight. I did not know whether he thought I would die before I could get to the hospital or not. I was lying there thinking that he thought I was too low to go to the hospital, and that I would die before I could get there. I thought he was waiting to let me die before he let us know what was the matter. That annoyed my mind.

Q. To what extent?

A. I was in agony. I did not know what to do or what to think. I just thought that he was waiting for me to die.

On the same subject Walker Alexander, a brother of plaintiff, testified as to his sister's suffering as follows: "She would ask me when I would go to the room, 'Bud, have you heard from the doctor yet?' and I said, 'No.' She said, 'Do you think I am going to die?' and I said, 'No; I hope not.' All she talked about was believing she was going to die."

The right of an addressee or a beneficiary whose interest has been made known to the company to recover for a negligent failure to deliver a message of this character is fully established with us, and a perusal of this testimony will clearly bring plaintiff's cause within the principle of our decisions where substantial damages by reason of mental anguish have been allowed.

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Christman v. Postal Telegr. Co. — N. C. —, 74 S. E. 325; Kivett v. Western U. Telegr. Co. 156 N. C. 296, 72 S. E. 388; Suttle v. Western U. Telegr. Co. 148 N. C. 480, 128 Am. St. Rep. 631, 62 S. E. 593; Dayvis v. Western U. Telegr. Co. 139 N. C. 80, 51 S. E. 898; Green v. Western U. Telegr. Co. 136 N. C. 489, 67 L.R.A. 985, 103 Am. St. Rep. 955, 49 S. E. 165, 1 Ann. Cas. 349; Bright v. Western U. Telegr. Co. 132 N. C. 317, 43 S. E. 841; Kennon v. Western U. Telegr. Co. 126 N. C. 232, 35 S. E. 468; Young v. Western U. Telegr. Co. 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044. As to the receipt of the message by the company, the relevant facts appearing in the record as we understand them are that the original message was received by Dr. Leigh in due course, at his office in Norfolk on the afternoon of July 19, and the doctor then dictated a return message, which was written by his secretary on a company blank kept regularly in his office for the purpose. The secretary then called over the telephone for 165, the telegraph company's number, and asked them to send a boy for the telegram. The witness stating that "165 was the defendant company's phone number," as she had called it several hundred times before; that in fifteen or twenty minutes, not over a half hour, a boy came for the return message and it was delivered to him in the office of Dr. Leigh. There was evidence for defendant from the different employees of the office that no such message was received in the office of the company, and the office record, the call sheet on which all entries of the kind were made, was referred to by the witnesses, who stated that it showed no call for a messenger on that date for any purpose, and, on consideration of the testimony and the authorities applicable, we are of opinion, and so hold, that there was a receipt of the return message for transmission on the part of the company, or, rather, testimony from which such receipt could be properly inferred, and this notwithstanding a stipulation appearing on the blank that no responsibility regarding messages should attach to the company, unless accepted at one of its transmission offices, and, if a message is sent to the office by one of the company's messengers, he acts for the purpose as "agent of the sender." It is well understood here and in other jurisdictions that a telegraph company may make reasonable stipulations restrictive of its liability to the extent that it is not relieved thereby from the obligations of diligence superimposed by law in the performance of their duties (Sherrill v. Western U. Telegr. Co. 109 N. C. 527, 14 S. E. 94; Thompson v. Western U. Telegr. Co. 107 N. C. 449, 12 S. E. 427); and there is authority to the effect

that the stipulations in question here appearing on a blank on which the sender writes the message shall bind the sender as a part of the contract (*Stamey v. Western U. Teleg. Co.* 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008).

If this, however, may be allowed to prevail under ordinary conditions, it is qualified, as a general proposition, by decisions which hold that, if a messenger is instructed by the company to procure an answer for this last purpose, the messenger will be considered the company's agent, and the stipulation referred to is not controlling. And this limitation should apply, we think, when, in response to a specific request, the company sends a messenger for the express purpose of taking a message. *Will v. Postal Teleg. Cable Co.* 3 App. Div. 22, 37 N. Y. Supp. 933; *Ayres v. Western U. Teleg. Co.* 65 App. Div. 149, 72 N. Y. Supp. 634; *Jones, Teleg. & Teleph. Cos.* § 408; 37 Cyc. p. 1692, note 68. The case of *Ayres v. Western U. Teleg. Co.* 65 App. Div. cited by defendant, recognizes the limitations on the general principle established in the former case. *Will v. Postal Teleg. Cable Co.*, supra.

In this connection it was further insisted for defendant that there was no evidence that the messenger boy was sent by the company for the purpose of receiving the message, and that the message given over the telephone wire to the telephone number of defendant company was not sufficient as testimony, in the absence of evidence *ultra*, that this message was received by an agent of defendant company authorized for that purpose, citing *Planters' Cotton Oil Co. v. Western U. Teleg. Co.* 126 Ga. 621, 6 L.R.A.(N.S.) 1180, 55 S. E. 495. While there is some difference in the facts of that case, we do not think it can be upheld as authority on the facts presented here, where the number is called, known to be that of the telegraph company, "tried as such several hundred times," as stated by the witness, and responded to by a company messenger. In such case on the better reason and by the weight of authority, we are of opinion that a messenger sent in response to such a request should be considered *prima facie* an agent of the company, and certainly under such circumstance there is evidence from which authority of the company could be inferred. *Reed v. Burlington, C. R. & N. R. Co.* 72 Iowa, 166, 2 Am. St. Rep. 243, 33 N. W. 451; *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590; *Gore v. Western U. Teleg. Co.* — Tex. Civ. App. —, 124 S. W. 977; *Jones, Ev.* 2d ed. p. 262.

There were also several objections to the admission of evidence chiefly as to the physical and nervous condition of the plaintiff at the time in question, but none of the

exceptions can be sustained or held for reversible error. Most of the testimony was directly relevant as tending to show mental suffering that would naturally arise under the conditions indicated, and, where it was otherwise, the trial court in its clear and comprehensive charge was so careful to restrict the recovery and the effect of the evidence to the suffering directly attributable to the failure to deliver the message, and to that alone, that the jury could not have been misled. There is no error, and the judgment below must be affirmed.

Brown, J., dissenting:

The facts upon which this action is based are as follows: Plaintiff, who resided with her mother at Roper, North Carolina, was stricken with appendicitis. Her physician, Dr. Speight, advised an operation, and on Monday, July 19, at 4 P. M., in plaintiff's behalf, wired Dr. Leigh, at Norfolk, Virginia, in regard to performing it. Dr. Speight told his patient that he would see her next morning, and let her know what Dr. Leigh said. Dr. Speight did not visit his patient next morning, as promised, but called to see her at 2 P. M. that day, Tuesday, and informed her that he had not heard from Dr. Leigh, and that he had arranged for her to go to the Washington (North Carolina) Hospital to be treated by Dr. David Tayloe, an acknowledged expert in his profession. Dr. Speight says that plaintiff could not have left her home and arrived at Norfolk until 4 P. M. Wednesday, the 21st, and that she arrived at Washington Hospital in safety at 11 A. M. that day, five hours earlier than she could have reached Norfolk. She would have been compelled to travel 84 miles to Norfolk, and only travel 40 to Washington. Plaintiff admits "that she came to as good hospital as she would have gone to if she had gone to Dr. Leigh's, and got as good surgical attention." Dr. Tayloe kept the plaintiff until July 28, on account of slow development of the disease before operating. The operation was successful, and plaintiff returned home completely recovered.

1. The defendant excepted because the court permitted testimony that the plaintiff traveled from Roper to Washington on a "mixed" freight and passenger train, and the record shows that this evidence was repeated to the jury in several different forms over the objection of the defendant. It is true that his Honor, at the time when the objection was first made, stated to the jury they were not to consider the riding on a freight train as a measure or cause of damage, and, if the evidence had been terminated then and there under such instruction, it might be regarded as a harm-

less error. But the record shows that this testimony was repeated by several witnesses after that admonition to the jury, over the subsequent objection of the defendant, and strongly impressed upon them, and undoubtedly they had a right to suppose that such testimony as was allowed by the court, after the admonition given, was intended to be considered. Such evidence was utterly erroneous and very harmful. The record shows that the plaintiff was brought in the baggage car on a cot. According to the testimony of Dr. Tayloe himself, she need not have come on the "mixed" train, but could have taken the regular passenger train, and arrived at Washington at 4 P. M., the same hour at which she would have arrived at Norfolk. Notwithstanding these facts proven by the plaintiff's own witnesses, and after the admonition of the judge, the plaintiff was permitted to testify that this "mixed" train, which she voluntarily took, without any necessity, was jarring in its motion, had to go in on side tracks and get freight cars, log cars, and switch cars in and out. No one can read the evidence in this case without being impressed with the undeniable fact that this evidence must have had great effect upon the jury in estimating the damages. That such evidence is incompetent, harmful to the defendant, and could not possibly have been in the contemplation of the parties, is shown by overwhelming authority. *Hancock v. Western U. Teleg. Co.* 142 N. C. 163, 55 S. E. 82; *McCoy v. Carolina R. Co.* 142 N. C. 383, 55 S. E. 270. I am of opinion that a new trial should be granted for this flagrant and material error. Other incompetent evidence was received by the court over the objection of the defendant on which it is not necessary now to comment.

2. I am of opinion that there is no evidence in this record upon which a legitimate claim for damages for mental anguish suffered by the plaintiff because she did not hear from Dr. Leigh can be founded. It is admitted by the counsel for the plaintiff that the only period of time when the plaintiff could have suffered any mental anguish on such account covered only a very short time. She was told by Dr. Speight that he could not hear from Dr. Leigh until some time Tuesday morning, when he would come over and inform her of the result. He did not come until 2 P. M. on Tuesday, at which time he informed her that he had not heard from Dr. Leigh, and had made arrangements to take her to Washington. She left for Washington the next morning, and arrived there at 11 A. M., and could not be operated upon until the 28th on account of the condition of her appendix. I fail to find in the testimony of the plaintiff herself any-

thing whatever which tends to prove that from the time that she expected to hear from Dr. Leigh Tuesday morning until 2 P. M., when Dr. Speight came, she could reasonably have suffered any mental anguish because she had not heard from Dr. Leigh. During that time, according to her own testimony, she had grown very weak from the acute and sudden attack of her disease. She was greatly under the influence of drugs given to deaden this pain, which, according to all the evidence, was of such acute character as to render the plaintiff practically oblivious to her surroundings, and to the fact that she had not heard from the telegram sent to Norfolk.

Again, his Honor permitted, over the objection of the defendant, not only the plaintiff herself, but her physicians, to describe to the jury her physical condition, her acute and agonizing suffering, for none of which could this defendant be held responsible, and all of which was well calculated to appeal to the sympathies of any jury, and greatly and grossly aggravated the damages assessed. Upon the facts as set out in this record, I am bound to conclude, with all deference to my brethren who differ with me, that the plaintiff should be permitted to recover \$1,000 for alleged mental anguish in not hearing from Dr. Leigh, when her body and mind were tortured by agonizing disease, which undoubtedly excluded every other thought, is a great miscarriage of justice, which should not be permitted to take place in the courts of this state.

The majority of courts in this country, as well as Great Britain, repudiate this doctrine of "mental anguish," because of the inequalities it produces and the impossibilities of establishing any uniform rule of damage, as well as on account of the frivolous character of many cases where the doctrine is applied.

I am of opinion that the facts of this case disclose no reasonable or just foundation upon which to base a recovery, and that it should be dismissed by the court.

Petition for rehearing denied.

#### NORTH DAKOTA SUPREME COURT.

A. L. SCHAFER, Appt.,  
v.

S. M. JOHNS et al., Respts.

(— N. D. —, 137 N. W. 481.)

School — teacher's contract — absence of certificate — validity.

Under the school laws of this state, as

Headnote by FISK, J.

revised and re-enacted in chapter 266, Laws 1911, a contract, otherwise duly entered into, between a school board and a teacher, is not void or voidable merely because at the date of such contract the teacher did not hold a certificate or permit qualifying him to teach.

(September 23, 1912.)

**A**PPEAL by plaintiff from an order of the District Court for McHenry County quashing a writ of certiorari to review the proceedings of the defendant school board with reference to the hiring of teachers. Reversed.

The facts are stated in the opinion.

Messrs. Palda, Aaker, & Greene for appellant.

**Note.**—*Effect of contract by teacher without license or certificate of qualification.*

As to right of school teachers to pay during absence, see note to District of Columbia v. Dean, 38 L.R.A. (N.S.) 513.

For cases on the right of teachers to salary during temporary interruption of school in term time for causes other than their own act or omission, see note to McKay v. Barnett, 50 L.R.A. 371.

As to interference by courts with revocation of school-teacher's license, see note to Stone v. Fritts, 15 L.R.A. (N.S.) 1147.

Certificate as prerequisite to valid contract.

Under statutes, generally, "no matter what an applicant's qualifications for employment as a teacher may be, it is a necessary prerequisite to his appointment or employment as a teacher that he have in his possession, or file with the proper board or officer, a license or certificate of his qualifications, as prescribed by law; otherwise his contract of employment is void." 35 Cyc. 1070. That the law, as stated, is well founded, is attested by the following authorities: Catlin v. Christie, 15 Colo. App. 291, 63 Pac. 328; School Directors v. Jennings, 10 Ill. App. 643; Casey v. Baldrige, 15 Ill. 65; Botkin v. Osborne, 39 Ill. 101; Wells v. People, 71 Ill. 532; Stevenson v. School Directors, 87 Ill. 255; Board of Education v. Arnold, 112 Ill. 11, 1 N. E. 163; Putnam v. Irvington, 69 Ind. 80; Butler v. Haines, 79 Ind. 575; Rolfe v. Cooper, 20 Me. 154; School Comrs. v. Wagnan, 84 Md. 151, 35 Atl. 85; Com. v. Dedham, 16 Mass. 141; Jenness v. School Dist. No. 31, 12 Minn. 448, Gil. 337; Jay v. School Dist. No. 1, 24 Mont. 219, 61 Pac. 250; Blandon v. Moses, 29 Hun, 606; O'Connor v. Francis, 42 App. Div. 375, 59 N. Y. Supp. 28; Wood v. Board of Education, 59 Misc. 605, 112 N. Y. Supp. 578; Gormley v. Board of Education, 129 N. Y. Supp. 153; Grattan v. Ottawa Separate School, 9 Ont. L. Rep. 433, affirming 8 Ont. L. Rep. 135.

Indeed, it has been held that the em- 42 L.R.A. (N.S.)

Messrs. George A. McGee and John E. Martin, for respondents:

Since the appellant did not have the required certificate at the time the contract was made and reduced to writing, he did not possess the necessary qualification and was incompetent to enter into said contract, and for that reason the contract is void.

Hoamer v. Sheldon School Dist. No. 2, 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035; Butler v. Haines, 79 Ind. 575; Jenness v. School Dist. No. 31, 12 Minn. 448, Gil. 337; Ryan v. School Dist. No. 13, 27 Minn. 433, 8 N. W. 146; Botkin v. Osborne, 39 Ill. 101; Goose River Bank v. Willow Lake School Twp. 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; Hardy v. Purington, 6 S. D. 382, 61 N. W. 158;

ployment of a teacher who has no certificate of qualification, in contravention to a statute so requiring, constitutes an indictable offense. Robinson v. State, 2 Coldw. 181.

The provision requiring a teacher to have a certificate in order to make a valid contract can be neither waived nor dispensed with. Harrison Twp. v. Conrad, 28 Ind. 337; Barr v. Deniston, 19 N. H. 170; Goodrich v. School Dist. No. 1, 26 Vt. 115. Precisely to this point Fraser, J., spoke in Harrison Twp. v. Conrad, supra, when he said: "The officer having authority to employ the teacher cannot nullify this law. It was intended, by the requirement of a certificate of qualifications, to guard against the squandering of a sacred public fund upon persons assuming to teach without being capable of performing a teacher's duties, and to insure the employment of competent persons only as teachers, thereby making the schools useful as instruments for the education of the young. That an officer can, either expressly or by implication, set at defiance an express statute defining and limiting his official authority, and, by doing what he is forbidden to do, waive what the law palpably requires, is a proposition which is best answered by merely stating it."

And a board of school directors has no power to employ a teacher who has not at the time the contract is made a certificate of qualification as provided by the school law, and any contract made with a teacher not having such certificate is void so as not even to be susceptible of ratification. Stevenson v. School Directors, 87 Ill. 255; Wells v. People, 71 Ill. 532.

It has been held that the employment of a teacher without a certificate cannot be accomplished indirectly, as by employing one who has a regular certificate, with the distinct understanding and agreement that she will employ another, without a certificate, to assist her in teaching. Catlin v. Christie, 15 Colo. App. 291, 63 Pac. 328.

So, where school directors employed a teacher who did not have the necessary certificate, to teach school for six months, and after having taught for three months

*Bryan v. Fractional School Dist. No. 1*, 111 Mich. 67, 69 N. W. 74; *Wells v. People*, 71 Ill. 532; *Pearson v. School Dist. No. 8*, 144 Wis. 620, 140 Am. St. Rep. 1043, 129 N. W. 940; *School Directors v. Jennings*, 10 Ill. App. 643; *McKinney v. School Dist. No. 45*, 20 Minn. 72, Gil. 57; *O'Connor v. Francis*, 42 App. Div. 375, 59 N. Y. Supp. 28; *School Directors v. Newman*, 47 Ill. App. 364; *McCloskey v. School Dist. No. 5*, 134 Mich. 235, 96 N. W. 18.

*Fisk, J.*, delivered the opinion of the court:

This is an appeal from an order of the district court of McHenry county, quashing a writ of certiorari issued by such court to review the proceedings of the defendant

he obtained the certificate, and the directors then made a new contract with him whereby he was to teach three months at a salary twice the amount per month he was to receive under the first contract, it was held in *Wells v. People*, supra, that the first contract was void, and that the new contract was an attempt to do indirectly what the directors had no power to do directly, and that, as to the increased amount of salary, the second contract was void and admitted of no recovery.

But the repeal of a statute under which a certificate, good until revoked, is issued after a proper examination, does not affect the validity of a contract based on such certificate. *Snell v. Glasgow*, 90 Minn. 111, 95 N. W. 881.

#### Effect of failure to have certificate.

And it is settled that a teacher who lacks the required certificate or license cannot recover upon his contract for services rendered thereunder. *Botkin v. Osborne*, 39 Ill. 101; *Wells v. People*, 71 Ill. 532; *Board of Education v. Arnold*, 112 Ill. 11, 1 N. E. 163 (bill in chancery to enjoin payment of salary to teacher without license); *Jackson School Twp. v. Farlow*, 75 Ind. 118; *Flanary v. Barrett*, 146 Ky. 712, 143 S. W. 38; *Jackson v. Hampden*, 20 Me. 37; *School Comrs. v. Wagaman*, 84 Md. 151, 35 Atl. 85; *Lee v. School Dist. No. 2*, 71 Mich. 361, 38 N. W. 867; *Devoe v. School Dist. No. 3*, 77 Mich. 610, 43 N. W. 1062; *Bryan v. Fractional School Dist. No. 1*, 111 Mich. 67, 69 N. W. 74; *Barr v. Deniston*, 19 N. H. 170; *Chestnut v. Philadelphia*, 17 Phila. 32; *Dillon v. Myers*, Brightly, 426; *Kimball v. School Dist. No. 122*, 23 Wash. 520, 63 Pac. 213; *Baker v. School Dist. No. 1*, 12 Vt. 192; *Wright v. School Trustees*, 32 U. C. Q. B. 541.

Nor can the teacher recover damages for a breach of such a contract, unless he has been licensed to teach as prescribed by the statute. *School Directors v. Jennings*, 10 Ill. App. 643; *Casey v. Baldrige*, 15 Ill. 65; *School Directors v. Newman*, 47 Ill. 42 L.R.A. (N.S.)

school board with reference to the hiring of teachers. For the purposes of this appeal the facts stated in the petition for the writ must be taken as true; the defendants' motion to quash, which was granted, being in the nature of a demurrer admitting the facts alleged, and merely challenging their legal sufficiency to authorize the issuance of such writ. The petition, omitting formal parts, is as follows:

State of North Dakota, } ss.:  
County of Ward.

A. L. Schafer, being first duly sworn, says: That he is the plaintiff named in the above entitled action. That he is of the age of twenty-nine years. That he is a

App. 364 (even though the person does not begin to teach until after he receives his certificate); *Putnam v. Irvington*, 69 Ind. 80; *Jackson School Twp. v. Farlow*, 75 Ind. 118; *Flanary v. Barrett*, 146 Ky. 712, 143 S. W. 38; *Jose v. Moulton*, 37 Me. 367; *Blandon v. Moses*, 29 Hun, 606; *O'Connor v. Francis*, 42 App. Div. 375, 59 N. Y. Supp. 28; *Hosmer v. Sheldon School Dist. No. 2*, 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035.

And a teacher who is without the required certificate cannot recover his wages from the agent who employed him. *Jose v. Moulton*, 37 Me. 367.

But, it has been held that where a town pays the person who holds the place of agent of the district an amount of money sufficient to pay a teacher, and for his use it is so received by the agent, it becomes the property of the teacher, and he may maintain an action against the agent to recover it although he is without a certificate during the period of his employment. *Dore v. Billings*, 26 Me. 56.

The agent of the selectmen of a town who has paid out his own money to a teacher without the proper certificate cannot recover the amount, either from the town or from the selectmen. *Tolman v. Marlborough*, 3 N. H. 57.

In *Rolfe v. Cooper*, 20 Me. 154, it was held that proof by the master of a school that he was employed by the regular authorized agent of a school district, and actually performed the services contracted for, prima facie entitled him to the stipulated compensation, and that if the town wished to avail itself of the want of the requisite certificate as a defense, it must prove such want.

In Arkansas the statutes (Sandels & H. Dig. §§ 7051, 7071) provide that directors of a school district "shall not draw any order on the county treasurer for the payment of the wages of any teacher not licensed," and that "any person who shall teach in a common school in this state without a certificate of his qualification, and his license to teach, shall not be entitled to receive for such services any compensation from revenue raised by tax or in any wise

regular graduate of the Dakota Wesleyan University, of Mitchell, South Dakota, and during all the times hereinafter mentioned was the possessor of a certificate or diploma of graduation from said institution. That heretofore, and on the 14th day of May, A. D. 1912, the school board of said South Bend School District No. 1, of the county of McHenry, in the state of North Dakota, at a regular meeting of said board, was presented with this affiant's application for the position of superintendent of the schools of said school district for the then ensuing year. That at such meeting said application was considered by the school board of

said district, and upon resolution duly carried this affiant was duly elected as such superintendent of schools for the ensuing year at a salary of \$1,600 for said period. That due and sufficient record of said proceedings were made and kept by the school board of said district; that thereafter, and on the 20th day of May, A. D. 1912, the said school board, pursuant to its action hereinbefore set forth, made and entered into a contract in writing with this affiant in duplicate, one copy of which was delivered to this affiant and one copy was filed with the clerk of said school board. That said contract so made and entered into between

appropriated for the support of common schools."

The requirement that teachers shall obtain a license is not a condition of the contract, but is a command of the law, and must be complied with; a mere introductory recital in the contract that one is a licensed teacher is not sufficient. *Jackson School Twp. v. Farlow*, 75 Ind. 118.

But a county superintendent of schools is not competent to maintain an injunction restraining one from teaching a public school, and a township treasurer from paying for such service, for the reason that such teacher is without the required certificate, in violation of the laws of the state. *Perkins v. Wolf*, 17 Iowa, 228, wherein the court said that it supposed any citizens or residents of the proper district would have a right to resort to a similar proceeding to restrain parties that were thus putting at defiance the plain provisions of the school law.

Warrants issued to pay for the services of a teacher who held no lawful certificate of qualification are void, and no recovery for services rendered is to be had either on the warrants or upon a *quantum meruit*. *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 28, 28 Am. St. Rep. 605, 44 N. W. 1002, wherein Corliss, Ch. J., said: "There is no force in the position that the defendant, having received the benefit of the teacher's services, is liable. Such a doctrine would defeat the policy of the law, which is to give the people of the state the benefit of trained and competent teachers. The law recognizes only one evidence that that policy has been regarded,—the certificate of qualification. If the defendant could be made liable by the mere receipt of the benefit of the services rendered, the law prohibiting the employment of teachers without certificates, and declaring void all contracts made in contravention of that provision, would be, in effect, repealed, and the protection of the people against incompetent and unfit teachers, which such statute was enacted to accomplish, would be destroyed." So, in *Hardy v. Purington*, 6 S. D. 382, 61 N. W. 158, there is *dicta* to the same effect.

In *Harrison Twp. v. Conrad*, 26 Ind. 337, *supra*, it does not appear whether the ac-  
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tion was upon the contract or not, the court merely saying that "the only question in this case is whether a teacher who is employed for service in one of our public schools, having at the time no certificate of qualifications, can recover for such service;" and then answers it in the negative.

But there is *dicta* in *Kimball v. School Dist. No. 122*, 23 Wash. 520, 63 Pac. 213, *supra*, to the effect that a teacher whose contract is void because of the lack of a certificate of qualification may recover for services rendered upon a *quantum meruit*.

In Michigan it has been held that where the employment of an unqualified teacher is a necessity, the school district is authorized to employ one who has not the proper certificate if the school board are satisfied that the teacher is otherwise qualified, and to pay such teacher out of moneys belonging to the district. But the primary-school moneys and mill tax cannot be applied to that purpose. *Hale v. Risley*, 69 Mich. 596, 37 N. W. 570.

And the Illinois law requiring a teacher to have a certain certificate before he can receive pay for his services is applicable only to schools under the general school law, and has no application to a district containing more than 2,000 inhabitants,—such district being controlled by special act,—so that a teacher in such district needs no certificate and may recover compensation upon his contract, notwithstanding he may have no certificate of qualification. *Kuenster v. Board of Education*, 134 Ill. 165, 24 N. E. 609, affirming 31 Ill. App. 386.

The want of an examination before giving the teacher a certificate of qualification cannot be pleaded as a defense in a suit by him for wages under his contract. *Doyle v. School Directors*, 36 Ill. App. 653; *Union School Dist. No. 6 v. Sterricker*, 86 Ill. 596; *School Dist. No. 25 v. Stone*, 14 Colo. App. 211, 59 Pac. 885; *State v. Grosvenor*, 19 Neb. 495. The reason assigned is that the certificate is in the nature of a commission, and is subject to the same rules of law in that respect, and therefore cannot be attacked collaterally. *Union School Dist. No. 6 v. Sterricker*, *supra*. But it seems that the certificate may be attacked collaterally if fraud or collusion in obtaining it

the plaintiff and the said school board was in the words and figures following, to wit:

"Teachers' Contract (Original).

"State of North Dakota,  
County of McHenry, } ss.:  
South Bend School District No. 1. }

"This agreement, made and entered into this 20th day of May, A. D. 1912, between A. L. Schafer, a duly qualified teacher, of McHenry county, state of North Dakota, and the school board of South Bend School District No. 1, county of McHenry, state

of North Dakota, witnesseth: That the said A. L. Schafer is to teach school No. 1 in said school district for a term of twelve months, beginning on the 1st day of August, A. D. 1912, for which services truly rendered the school board of said school district agrees to pay the said A. L. Schafer, at the expiration of each month of service, the sum of \$133.33: Provided; that the salary of the last month in the term shall not be paid until the term report shall be made, filed with, and be approved by the county superintendent of schools, as provided by § 881, Revised Codes 1905: Provided, further, that the school may be dis-

is alleged. *Kimball v. School Dist. No. 122*, 23 Wash. 520, 63 Pac. 213; *Union School Dist. No. 6 v. Sterricker*, supra. .

in good faith herself, and the superintendent acting equally in good faith.

Excuse for failure to obtain certificate.

A failure to procure the requisite certificate is not excused by the fact that there was no committee to examine teachers that particular year. *Jose v. Moulton*, 37 Me. 367.

Nor does the fact that there was ill feeling between the town superintendent and the teacher, and no communication between them, excuse the teacher for not having obtained a certificate. *Welch v. Brown*, 30 Vt. 586.

Nor does the sickness of the superintendent of schools whose business it was to award the certificate excuse the teacher's failure to obtain it, nor does the fact that after the superintendent's death no successor was appointed, constitute an excuse. *Goodrich v. School Dist. No. 1*, 26 Vt. 115.

So, it has even been held that if all three members of the school board should neglect or even wantonly refuse to examine a person, he would not be authorized to teach and recover his wages without the required certificate, since the production of it is an indispensable prerequisite to a legal employment. *Jackson v. Hampden*, 20 Me. 37; *Dillon v. Myers*, *Brightly* (Pa.) 426.

A teacher without a proper certificate who performs the required services is entitled to compensation when, as a matter of fact, she is entitled to the required certificate, and without it solely through some casualty,—no fault of her own. *School Dist. No. 9 v. Brown*, 55 Vt. 61. To the same effect is *Blanchard v. School Dist. No. 11*, 29 Vt. 433.

So, in *Wells v. School Dist. No. 2*, 41 Vt. 353, it was held that a teacher's claim for wages cannot be defeated by showing that she did not in fact obtain her certificate and was not examined until some time after she began to teach, when her certificate shows on its face that it was seasonable, and the evidence *aliunde* shows that she seasonably applied and did all she could to get a seasonable examination; that she in fact subjected herself to the direction and convenience of the superintendent, acting

Effect of subsequent issuance of certificate.

It has been held in some cases that a teacher, in order to make a valid contract, must have a certificate to teach at the time he enters into the contract of employment. *School Directors v. Newman*, 47 Ill. App. 364; *Wells v. People*, 71 Ill. 532; *Putnam v. Irvington*, 69 Ind. 80; *Butler v. Haines*, 79 Ind. 575; *Sly v. Fosdick*, *Howell*, N. P. 267, cited in 5 Mich. Dig. p. 29; *Bryan v. Fractional School Dist. No. 1*, 111 Mich. 67, 69 N. W. 74; *McCloskey v. School Dist. No. 5*, 134 Mich. 235, 96 N. W. 18 (nor does it make any difference that he procures a certificate before the time for the commencement of teaching); *Jenness v. School Dist. No. 31*, 12 Minn. 448, Gil. 337; *McKinney v. School Dist. No. 45*, 20 Minn. 72, Gil. 57; *Ryan v. School Dist. No. 13*, 27 Minn. 433, 8 N. W. 146; *O'Connor v. Francis*, 42 App. Div. 375, 59 N. Y. Supp. 28.

And that a contract by a teacher without the requisite certificate may not be ratified by the subsequent issuance of the certificate. *Putnam v. Irvington*, 69 Ind. 80; *Butler v. Haines*, 79 Ind. 575; *Hosmer v. Sheldon School Dist. No. 2*, 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035.

Other cases take a different position; thus, under the Ohio statute (*Swan & S. 707*, § 7) it is held that the provision reciting that no person shall be "employed" as a teacher unless he has first obtained the certificate required by law does not render invalid a contract of employment made with the teacher before he obtains the requisite certificate, provided he obtains it before entering upon the duties of his employment. *Youmans v. Board of Education*, 13 Ohio C. C. 207, 7 Ohio C. D. 269. And see *SCHAFER v. JOHNS*.

In *Gillis v. Space*, 63 Barb. 177, it is said that the trustee of a school district has no power to contract for the services of an unlicensed teacher and bind the district, but that if he should make it a condition of hiring that the teacher should procure a certificate before entering upon the duties of teaching, such a contract would doubtless

continued at any time as provided by § 832, Revised Codes 1905, and that no compensation shall be received by said teacher from the date of such discontinuance.

"A. L. Schafer, Teacher.

"Scintilla S. Ritchie, President.

"A. E. Welo, Clerk."

That at the time of making such contract, and of the proceedings prior thereto, this affiant was entitled to receive from the state board of examiners a first-grade professional certificate as a teacher in the public schools of the state of North Dakota, upon presentation of his certificate and diploma from the said Dakota Wesleyan University, of Mitchell, South Dakota, all of which facts were well known to the school board of said school district at the time of its said meeting on May 14, 1912, and at the time of the execution of the contract hereinbefore set forth. That in and by the terms of said contract the term of employment of this affiant as such teacher and superintendent of said school district began on the 1st day of August, 1912. That prior thereto this affiant duly presented to the board of examiners of the state of

North Dakota his said certificate and diploma from said Dakota Wesleyan University, of Mitchell, South Dakota, and thereupon there was duly and legally issued to him by the board of examiners provided for by the laws of this state in relation to schools and school officers, a professional first-grade certificate, which qualified this affiant to teach in all the common and graded and high schools of the state of North Dakota for the period of two years, such certificate bearing the 28th day of July, A. D. 1912; and that thereafter, and on the 30th day of July, 1912, and prior to the commencement of this affiant's term of service as teacher and superintendent of said school district, the said first-grade professional certificate so issued to and held by him was duly recorded by the county superintendent of schools of the county of McHenry and state of North Dakota; and that thereupon this affiant became fully qualified and authorized to enter upon the employment set forth in said contract, and has ever since been and now is so qualified and entitled to perform the duties incident to such employment, and to receive from said school district the compensation

be valid, for then the services of a licensed teacher are bargained for.

But where a certificate is required as a condition precedent to the right to enter upon the employment, it was held in *Kester v. School Dist. No. 34*, 48 Wash. 486, 93 Pac. 907, that an action for wages is not maintainable by showing a mere letter from a county school superintendent stating the applicant's papers are sufficient to entitle him to a temporary certificate, and that such certificate will be granted on application, as provided by statute, the letter not being the equivalent of the required certificate.

Under other statutes it is not necessary that the teacher have a certificate at the time of making the contract of employment to teach in future, but it will be sufficient if he has the certificate during the term of his employment. *Crabb v. School Dist. No. 1*, 93 Mo. App. 254.

Revised Statutes of Missouri (1889, §§ 7995, 8021), which make it necessary to the validity of a teacher's contract that he shall have a certificate to teach, and that the certificate must be in force for the full time for which the contract is made, do not require that the teacher shall, at the time of employment, have a certificate which reaches to the end of the term of such employment, provided that during the term of such employment he has a proper certificate. *School Dist. No. 1 v. Edmonston*, 50 Mo. App. 65; *Hibbard v. Smith*, 135 Mo. App. 721, 116 S. W. 487; *Abler v. School Dist. 141* Mo. App. 189, 124 S. W. 564.

Where a statute inhibits a school board from employing any teacher without a 42 L.R.A. (N.S.)

proper license at the date of employment, and another provision provides that any teacher who shall commence teaching without such license shall forfeit all claims to compensation, it was held in *Holtz v. School Dist. No. 9*, 1 Colo. App. 40, 27 Pac. 15, that a school board after the employment of a teacher without the required license is competent to issue a temporary certificate to her to teach until the regular certificate is obtainable, and that such an arrangement constitutes an implied contract of hiring upon the terms of the express contract, so that the commencement of school afterwards with the knowledge and consent of the board is equivalent to the making of a new contract upon the terms of the original contract, and sufficient to enable the teacher to maintain an action for compensation. *Scott v. School Dist. No. 2*, 46 Vt. 452, is to the same effect.

Where a person employed to teach school, before the opening of school, met the school committee and was examined, and they authorized their chairman to sign the certificate required by the statute to be obtained in duplicate, one of which was to be deposited with the selectmen before any payment was made to the teacher, and the chairman then promised to give the certificate to the teacher before school should open, the facts that he did not obtain the certificate in duplicate, and that the certificate which he did get was not obtained and filed with the selectmen until two days after the school opened, will not prevent him from recovering compensation in an action against the town for services rendered after so obtaining and depositing the



provided therefor by the terms of said contract. That subsequent to the making and execution of the contract of such employment the defendants herein as such school board, at a meeting of such board held in said school district on July 13, 1912, made and adopted a certain preamble and resolutions, which were then and there entered upon and recorded in the records of said school district, and which preamble and resolutions are in the words and figures following, to wit:

"Whereas, the board of directors of South Bend School District No. 1, of Velva, McHenry county, North Dakota, at a regular meeting held on the 14th day of May, 1912, elected A. L. Schafer as superintendent of schools of said district for the ensuing year, and, in conformity with said action of the school board, a contract was made between said school board and A. L. Schafer, employing him as superintendent of schools of said district, services to begin August 1, 1912; and whereas, it has become the knowledge of said board of directors that said A. L. Schafer has no legal qualifications to teach in the public schools of the state of North Dakota, he is therefore in-

competent to contract with said board of directors to teach, and by reason thereof said action of the board becomes illegal.

"Be it therefore resolved, that the said contract made between said board of directors and A. L. Schafer be hereby declared null and void, and that said contract be canceled. Be it further resolved, that the position of superintendent of schools of said district be declared vacant, and that said board of directors proceed to elect a lawfully qualified teacher to fill the position made vacant by this resolution."

That thereupon at that said meeting the said defendants, as such school board, voted to and did enter an order declaring the contract of this affiant hereinbefore set forth to be void on account of his not having as yet qualified in the state of North Dakota, and that the position of superintendent of said schools was made vacant thereby. That thereupon said defendants, as such school board, proceeded to and did, in form, elect and employ one O. J. Lokken as superintendent of the schools of said school district for the ensuing year. That this affiant is informed and believes that the said defendants as such school board, and pretend-

certificate. *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808, wherein it was said: "As to the time of obtaining the certificate, and as to the requirement that it shall be in duplicate, the provisions of the statute are merely directory. The committee having authorized the chairman to sign the certificate for the committee, his signature in accordance with their action made the certificate a proper one under the statute."

Prior to July 1, 1893, the statute provided that no teacher should be entitled to any portion of the school fund, or be employed to teach, who had not at the time of employment a certificate of qualification. *Wells v. People*, 71 Ill. 532; *School Directors v. Newman*, 47 Ill. App. 364. But by the amendment in force on the day mentioned it is sufficient that the teacher shall have the certificate at the time he enters upon his duties as such teacher. *Pollard v. School Dist. No. 9*, 65 Ill. App. 104; *School Directors v. Orr*, 88 Ill. App. 648.

Although a statute declares that a certificate from the state normal school shall serve as a certificate of legal qualification to teach when filed in the county, township, city, or district, a failure to file it until after making the contract to teach is no defense to an action for salary earned after it is filed. *Smith v. School Dist. No. 2*, 69 Mich. 589, 37 N. W. 567.

So, one may recover on a contract notwithstanding she had no certificate at the time she made application for the position; so long as she had the certificate at the time she signed the contract. *School Dist. No. 4 v. Stillely*, 36 Ill. App. 133. 42 L.R.A.(N.S.)

Where certificate expires during term of service.

Where a teacher's certificate expires while he is teaching, and a new one is not procured, the teacher does not remain eligible to teach. *People ex rel. Christie v. Board of Education*, 56 App. Div. 368, 67 N. Y. Supp. 836, affirmed in 167 N. Y. 626, 60 N. E. 1118.

And if a teacher's certificate expires while he is teaching, and a new one is not procured, he can recover no compensation for services rendered thereafter. *Devoe v. School Dist. No. 3*, 77 Mich. 610, 43 N. W. 1062.

Nor can he recover any damages for breach of his contract to teach. *O'Leary v. School Dist. No. 4*, 118 Mich. 469, 76 N. W. 1038.

But in *Holman v. School Dist. No. 4*, 34 Vt. 270, where the teacher at the time she made the contract and opened the school had obtained the legal certificate of qualification, but it expired during the term, it was held that she might recover for the services rendered both before and after the expiration of the certificate.

And where during a part of a term the teacher was without a certificate, but payment for the time was made, it was held in an action to recover wages due for the last month of the term, during all of which the teacher had a certificate, that the amount paid beforehand could not be set off against what was due for the last month. *School Dist. No. 8 v. Estes*, 13 Neb. 52, 13 N. W. 16.

E. M. S.

ing to act for and on behalf of said school district, signed and executed an instrument purporting to be a contract with the said O. J. Lokken as said superintendent of the schools of said district. That this affiant had not, at the time of the action of said defendants as such school board in attempting to cancel and rescind his said contract, been guilty of any violation of his contract, gross immorality, or flagrant or other neglect of duty; and this affiant avers and is so advised that the action of said defendants in so attempting to cancel and annul said contract and dismiss this affiant from the employ of said district was illegal in all respects and wholly beyond the power and authority of said defendants as such school board, and that the action of said school board in attempting to employ and to contract with the said O. J. Lokken as superintendent of the schools of said district was also wholly illegal and void, as will appear on the face of said proceedings. That the said defendants, as such school board, have refused and still refuse to recognize this affiant as the employee as such superintendent and teacher in said school district, and to permit him to assume and perform the duties which were imposed upon him by his said contract with said school district; and by reason of the matters and things aforesaid this affiant has been greatly injured, by being so refused the right to perform his said contract and otherwise. That the public schools within said school district will begin their sessions on or about the 9th day of September, A. D. 1912, and that in the interval between the date of this petition and the commencement of the sessions of said school there is a large amount of necessary preliminary work to be performed by this affiant as such superintendent and teacher, and that unless affiant be permitted to enter upon such duties, and unless the said board be restrained and enjoined from suffering the said O. J. Lokken to enter upon the performance of said duties this affiant will be greatly delayed and annoyed in the conducting of the schools of said district in the manner in which they should be conducted.

A. L. Schafer.

Subscribed and sworn to before me this 10th day of August, A. D. 1912.

[Seal] John E. Greene,  
Notary Public, Ward Co., N. Dak.

No question is raised as to certiorari being a proper remedy under the facts; the respondents' contention being that because on May 20th, the date the contract of hiring was entered into between plaintiff and the school board, the former was not the holder of a lawful certificate of qualification or permit to teach in the public schools 42 L.R.A. (N.S.)

of the state, said contract is and at all times has been void and of no force or effect. Concededly the whole controversy grows out of a disagreement regarding the proper construction to be given to certain provisions of our school law hereafter noticed. Respondents' counsel rely upon the decision of this court in *Hosmer v. Sheldon* School Dist. No. 2, 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035, and the trial judge no doubt considered that case controlling. It was there held that a contract to teach school is void, if at the time such contract was entered into the teacher did not hold a certificate entitling him to teach. Such decision was, however, based upon the provisions of two sections of the old school law, which in express language, among other things, provided: "No person shall be employed or permitted to teach in any of the public schools of the state, except those in cities organized for school purposes under special laws, who is not the holder of a lawful certificate of qualification or permit to teach. . . . Any contract made in violation of this section shall be void." Section 122, chap. 62, Laws 1890, as amended in 1891 (Laws 1891, chap. 56, § 24). And the other section reads: "It [the school board] shall employ the teachers of the district, . . .; provided, that no person shall be employed as teacher or permitted to teach in any public school who is not, when so employed or permitted to teach, the holder of a teacher's certificate valid in the county or district in which such school is situated. . . ." Laws 1890, chap. 62, § 75.

The court evidently construed such statute as prohibiting the entering into of such a contract when the teacher at such time does not hold a certificate or permit entitling him to teach, and the language which the court deemed controlling and decisive was that above quoted. In that case it should be noticed, also, that "neither at the time of entering into the contract, nor at the time of commencing to teach, did respondent hold a certificate valid in Ransom county." This fact, no doubt, was considered of some weight in that case; but, however this may be, certain language found in the opinion is very significant, and unmistakably discloses that the court recognized what it deemed a vital distinction between the Colorado statute, construed in *Hotz v. School Dist. No. 9*, 1 Colo. App. 40, 27 Pac. 15, and the North Dakota statute, which it was there construing, and, as we shall presently see, this same distinction exists between such old law and chapter 266, Laws 1911, which governs the case at bar. The language in the *Hosmer* opinion, to which we refer, is as follows: "The

learned counsel for respondent is correct in stating that the evil against which the statute was directed consisted in having the public schools taught by unqualified persons. And there are cases supporting the contention that, when the teacher held the proper certificate at the time the services were rendered, or offered to be rendered, the statute was sufficiently met, and the teacher entitled to recover under the contract. *Hotz v. School Dist. No. 9*, supra, is of that class. A recovery of damages for breach of the contract was allowed there, in a case very similar to this. But the difference in the statutes clearly distinguishes the cases. The Colorado statute prohibited the school district officers from employing a teacher who did not hold a proper certificate. There was no penalty fixed for the violation of the provision on the part of the officers, nor was the contract declared void."

In revising and codifying our school laws in 1911, the legislature re-enacted the old sections construed in the *Hosmer Case*, but in a materially changed form. The portions of the old statute which we have italicized were entirely omitted. In doing so, we think it was the plain intent to change the rule announced in the *Hosmer Case*. The section dealing with the powers and duties of school boards (§ 75, chap. 62, Laws 1890) reads: "No person shall be employed as teacher or permitted to teach . . . who is not when so employed, or permitted to teach, the holder of a teacher's certificate," etc. And as revised and re-enacted in 1911 it reads: "No person shall be permitted to teach who is not the holder of a teacher's certificate. . . ." etc. Why this change in the statute, if no change in its meaning and operation was contemplated? Is it not reasonable to presume that something more than a mere change in the phraseology of the statute was intended, especially in view of the *Hosmer* decision, which had been the settled law in this state for so many years?

Furthermore, and with no intention of questioning the correctness of the *Hosmer* decision, we think a wise public policy demanded such change. There appears to us no good reason for such a drastic statute. The enforcement thereof operated, no doubt, to hamper and greatly interfere with school boards in the employment of teachers. It no doubt frequently happened that a teacher could not obtain from the board of examiners the necessary certificate or permit until a regular meeting of such board, and still it may have been desirable and to the best interests of the schools that definite arrangements by contract be made with such teacher in advance of such meetings. This 42 L.R.A. (N.S.)

fact, no doubt, led to the change in the law. In any event, we see no reason, in the light of our present statute, why valid contracts may not be entered into for the employment of teachers at any time. Of course, in the absence of an express stipulation in such contracts to that effect, the law would raise an implied stipulation that the person thus employed should, before entering upon the performance of the contract, obtain the necessary credentials qualifying him to perform the same.

It would serve no useful purpose to review decisions from other states having statutes differing from ours. The cases cited in respondents' brief involved quite different statutes from those in this case.

Our conclusion leads to a reversal, and the District Court is accordingly directed to reverse its decision, and to enter judgment in accordance herewith.

#### OKLAHOMA SUPREME COURT. (Division No. 1.)

WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,

v.

A. P. SIGHTS et al.

(— Okla. —, 126 Pac. 234.)

Appeal — motion to dismiss — laches — date.

1. On a motion to dismiss for the reason that the case-made was not served within the time prescribed by the order of the court, where it appears from an examination of the record that the only date referred to in the journal entry is not the date on which the motion for new trial was overruled and the time given, the words "from this date," in the journal entry, will be construed as applying to the date on which it is filed, and not the date on which the trial was commenced.

Evidence — nondelivery of telegram — loss of contract.

2. In an action against a telegram com-

Headnotes by AMES, C.

*Note. — Telegraphs: liability for failure properly to transmit or deliver a message pertaining to the negotiation for, or offer of, a contract.*

For the general question of contingencies in the possible action of the sendee, or of some third person, as affecting liability for failure properly to transmit and deliver a telegram, see *Western U. Teleg. Co. v. Caldwell*, 12 L.R.A. (N.S.) 748, and note.

For cases involving loss of opportunity to respond to a call for professional services, see *Barker v. Western U. Teleg. Co.* 14 L.R.A. (N.S.) 533, and the note thereto.

And the loss of profits as an element of

pany to recover for the negligent nondelivery of a message containing an offer to make a contract, evidence that if the message had been delivered the offer would have been accepted is competent.

#### Damages — nondelivery of telegram.

3. Compensatory damages may be recovered from a telegraph company for failure to deliver a message containing an offer to enter into a contract, where there is competent evidence establishing the proper measure of damages.

#### Telegram — presentation of claim — constitutionality.

4. Under § 9 of article 23 of the Constitution, which provides that "any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided

damages for breach of contract to transmit a telegram is discussed in a note to *Hall v. Western U. Tele. Co.* 27 L.R.A. (N.S.) 639.

As is apparent from the title, this note does not cover the cases where the telegram in question was a final acceptance of an offer, so that, if properly and correctly transmitted, it would, of itself, have concluded a contract. Some cases, however, are included where the telegram, though purporting to be an acceptance, was in reality a counter proposition.

Of the cases which discuss particularly the liability of a telegraph company for compensatory damages for failure properly to transmit or deliver a message which is merely a step in the negotiation of a contract, short of its final consummation, the greater number hold that the company is liable in such cases for nominal damages only. Thus, it has been held that the telegraph company was not liable for compensatory damages for failure properly to transmit the following telegrams:

—one by a brokerage firm to a canning company, requesting lowest prices on a prospective order, as it did not necessarily follow that the sale would have been consummated. *Postal Tele. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252;

—an offer to sell merchandise, its acceptance depending upon the will of the addressee. *Hall v. Western U. Tele. Co.* 59 Fla. 275, 27 L.R.A. (N.S.) 639, 51 So. 819;

—an offer of employment to one already under contract to work elsewhere. *Freeman v. Western U. Tele. Co.* 93 Ga. 230, 18 S. E. 647;

—an offer to sell merchandise, which was erroneously transmitted, resulting in sender's refusal to accept. *Richmond Hosiery Mills v. Western U. Tele. Co.* 123 Ga. 216, 51 S. E. 290;

—an inquiry if plaintiff could accept employment at once, the sender not being obliged to employ the sendee, even if he accepted. *Wilson v. Western U. Tele. Co.* 124 Ga. 131, 52 S. E. 153;

—an offer of a contract, which was erroneously transmitted, resulting in cancellation of the contract after its acceptance as 42 L.R.A. (N.S.)

by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void," a condition printed on the back of a telegraph message, which provides that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," is not binding.

(August 20, 1912.)

**E**RROR to the District Court for Custer County to review a judgment in plaintiffs' favor in an action brought to recover damages for defendant's negligent failure to deliver a telegram. Affirmed.

The facts are stated in the opinion.

transmitted, there being nothing to indicate that it would have been accepted had it been properly transmitted. *Bass v. Postal Tele. Cable Co.* 127 Ga. 423, 12 L.R.A. (N. S.) 489, 56 S. E. 465;

—an offer to buy cotton. *Bashinsky v. Western U. Tele. Co.* 1 Ga. App. 761, 58 S. E. 91;

—one containing merely an inquiry concerning the price of land. *Bennett v. Western U. Tele. Co.* 129 Iowa, 607, 106 N. W. 13;

—an inquiry whether plaintiff would accept a government position, there being a period of probation before final employment, and the employment being for no certain period. *Larsen v. Postal Tele. Cable Co.* 150 Iowa, 748, 130 N. W. 813;

—an answer to independent brokers, in response to an inquiry, which merely authorized the brokers to sell oil at the price named. *Postal Tele. Cable Co. v. Louisville Cotton Seed Oil Co.* 140 Ky. 506, 131 S. W. 277;

—an order for goods which might have been either accepted or rejected. *Beaupre v. Pacific & A. Tele. Co.* 21 Minn. 155. But in this case the court pointed out that it was not found that the offer would have been accepted.

—one offering a railroad construction contract to plaintiff, a contractor. *Johnson v. Western U. Tele. Co.* 79 Miss. 58, 89 Am. St. Rep. 584, 29 So. 787;

—an inquiry by plaintiff's agent, who had secured an order on condition that delivery within a certain time be guaranteed, as to whether such guaranty would be given failure to deliver which resulted in loss of the order. *Western U. Tele. Co. v. Adams Mach. Co.* 92 Miss. 849, 47 So. 412;

—one inquiring how soon plaintiff, a contractor, could complete a job if awarded to him, erroneously transmitted, so that the contract was awarded to another at a higher bid. *Western U. Tele. Co. v. Webb*, — Miss. —, 48 So. 408;

—one in response to a letter offering a building for sale, stating that plaintiffs wanted it, and to hold the offer as a letter followed by mail, where the letter did not

Messrs. Snodgrass & Darnell, George H. Fearons, and Shartel, Keaton, & Wells for plaintiff in error.

Mr. Andrew J. Welch, for defendants in error:

Evidence that, if the message had been delivered, the offer would have been accepted, is competent.

Western U. Teleg. Co. v. Blackwell Mill. & Elevator Co. 24 Okla. 535, 138 Am. St. Rep. 893, 103 Pac. 717; Postal Teleg. Cable Co. v. Nichols, 16 L.R.A.(N.S.) 870, 89 C. C. A. 585, 14 Ann. Cas. 369; Western U. Teleg. Co. v. Love Banks Co. 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; Western U. Teleg. Co. v. Collins, 45 Kan. 88, 10 L.R.A. 515, 25 Pac. 187.

An offer or bid on property by telegram

complete the contract. Western U. Teleg. Co. v. Patty Dry Goods Co. 96 Miss. 781, 51 So. 913;

—one ordering oil, which order might or might not have been accepted. Kiley v. Western U. Teleg. Co. 39 Hun, 158, affirmed in 109 N. Y. 231, 16 N. E. 75;

—one in the form of an inquiry, "Onions offered are crates 20 kilos net?" in response to an offer to sell onions, it not appearing what the sendee's answer would have been, or what plaintiff would have done upon receipt of such answer. White v. Western U. Teleg. Co. 153 App. Div. 684, 138 N. Y. Supp. 598;

—one asking plaintiff if he would accept a receivership, there being no obligation upon the sender to appoint him had he answered affirmatively. Walser v. Western U. Teleg. Co. 114 N. C. 440, 19 S. E. 306;

—an acceptance of an offer, not made in the terms of the offer. Cherokee Tanning Extract Co. v. Western U. Teleg. Co. 143 N. C. 376, 118 Am. St. Rep. 806, 55 S. E. 777;

—an inquiry if plaintiff could come and build houses on contract. Harmon v. Western U. Teleg. Co. 65 S. C. 490, 43 S. E. 959;

—"If you want a place, come, first train," as the sender was not bound to employ plaintiff had he responded. Western U. Teleg. Co. v. Connelly, 2 Tex. App. Civ. Cas. (Willson) 99;

—one merely giving a quotation of prices in response to a request for such. Beatty Lumber Co. v. Western U. Teleg. Co. 52 W. Va. 410, 44 S. E. 309;

—one rejecting plaintiff's offer to buy goods, so that he lost an opportunity to make other terms. Fisher v. Western U. Teleg. Co. 119 Wis. 146, 96 N. W. 545;

—"Do accept your offer; ship to-morrow fifteen to twenty hundred," in answer to one, "Will give you 80 cents for rye," as they were insufficient to form a perfect contract. Kinghorne v. Montreal Teleg. Co. 18 U. C. Q. B. 60.

Some cases, however, in which the contention was made that the company was not liable for actual damages because the telegram in question was not the final step in 42 L.R.A.(N.S.)

is an important and material part of the negotiations, and the company cannot excuse itself from damages on the grounds that the negotiations were not completed.

Choctaw, O. & G. R. Co. v. Alexander, 7 Okla. 590, 52 Pac. 944; Western U. Teleg. Co. v. Love Banks Co. 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; Western U. Teleg. Co. v. Collins, 45 Kan. 88, 10 L.R.A. 515, 25 Pac. 187.

Ames, C., filed the following opinion:

The first question to determine is the motion to dismiss the appeal, which was passed for consideration until the case was taken upon its merits. The motion is based upon the contention that the case-made was not served within the time fixed by the order

the completion of the contract, hold that compensatory damages were recoverable. It was so held where the telegram was as follows:

—an offer of employment for a definite time at certain wages. Western U. Teleg. Co. v. Bowman, 141 Ala. 175, 37 So. 493;

—one containing the higher price of two offers to purchase merchandise. Western U. Teleg. Co. v. Love Banks Co. 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712;

—a quotation of prices on apples in response to an inquiry, when, because of its being incorrectly transmitted, the sale was lost. Thorp v. Western U. Teleg. Co. 118 Mo. App. 398, 94 S. W. 554;

—an offer to sell merchandise, there being testimony tending to show that the offer would have been accepted had the telegram been delivered. Lathan v. Western U. Teleg. Co. 75 S. C. 129, 55 S. E. 134;

—a bid on a contract, the testimony showing it would have been accepted had it been delivered in time. Texas & W. Teleg. & Teleph. Co. v. Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581.

In Western U. Teleg. Co. v. Williams, — Tex. Civ. App. —, 137 S. W. 148, the telegraph company contended that the telegram it delayed in delivering was an acceptance of an offer, so that plaintiff's right of action was against the sendee for breach of contract; but it was held that inasmuch as the telegram made a counter proposition instead of being an acceptance in the terms of the offer, the contract was not completed, and plaintiff's right of action was against the telegraph company.

There are numerous cases, however, which, while not discussing the question from the standpoint of the message involved being merely a preliminary step in the negotiation of a contract, hold the company liable for compensatory damages when the message was clearly one of that nature. Some of such cases will be found in a note appended to Western U. Teleg. Co. v. True, 41 L.R.A.(N.S.) 1188, on the question as to the sufficiency of notice to the company of the importance of the message.

R. L. S.

of the court. The record shows that the trial was commenced on January 11, 1910; that the instructions were filed on January 12th; that the verdict of the jury was filed on January 12th; that on January 14th a motion for new trial was filed; that on February 7th a journal entry was filed, which commences with the recital: "This case came on to be heard before the court on the 11th day of January, 1910." It then contains a recital of the proceedings in the case, showing the introduction of the evidence, the giving of the instructions, the submission to the jury, the return of the verdict, the motion for new trial, the judgment, and the concluding paragraph contains this: "Upon application of the defendant, good cause being shown, the defendant is allowed ninety days from this date to make and serve a case-made."

... The motion to dismiss is based upon the contention that the words "from this date" mean from the date first recited, to wit, January 11th, while the defendant argues that the words mean from February 7th, the day on which the journal entry was filed. The journal entry should have recited the dates on which these various proceedings were taken; and it is manifest from its recital that they were not all taken on the 11th, because the remainder of the record proves the contrary. It must follow, therefore, that the words "from this date" cannot refer to January 11th. There being no other date referred to in the journal entry, and it being apparent that January 11th is not the date intended, we resolve the doubt in favor of the hearing of the case upon its merits, and hold that the motion to dismiss should be overruled.

The action was brought to recover damages from the telegraph company for failure to deliver a message reading as follows:

Feb. 17, 1908.

Mr. Jordan Sights,  
Bucklyn, Mo.

Ans. to your of 14th. 130 yearlings, past weight 700, 30 calves, weight 500, short horn, bought around Clinton, price 4 cts. weighed at Keosauqua and delivered to Santa Fe, one car each, \$27; two cars each, \$26.50. If you can take two, answer by wire. I will come on next train.

[Signed] A. P. Sights.

They allege that if the telegram had been delivered to the addressee, that he would have purchased the cattle therein described, and that by reason of the failure to sell to him the plaintiff was damaged. They further allege that the letter referred to in the telegram offered to take a portion of said cattle at the price of 4 cents. The 42 L.R.A. (N.S.)

testimony tended to show that the plaintiff was engaged in the live stock business; that he owned these cattle, located at Keosauqua, Iowa; that he delivered the telegram set out to the company at Clinton, Oklahoma; that he inquired of the agent about its delivery on the next morning; that the agent said he would send a tracer; that the message was never delivered; that the sendee of the message had written the sender with reference to purchasing some of these cattle; and that if he had received the message he would have purchased them, and was ready, able, and willing to pay for them. The case was submitted to the jury, and judgment rendered for the plaintiffs.

It is first argued that the court erred in permitting the sendee of the message to testify that if he had received the message he would have purchased the cattle. In the brief the defendant suggests the following points as admitted: First. That it received the message, as set out in the petition; that it was reduced to writing by defendant's agent in the presence and with the consent of the sender, on a regular blank, with the usual conditions on its back. Second. That the company failed to deliver the message in time for it to fulfil its purpose; that the sendee lived about 4 miles from Bucklyn, Missouri, but was well known in Bucklyn. Third. That the message related to a business transaction, and that the defendant would be liable for such damages as would naturally and reasonably arise from such delay. Fourth. That the plaintiff was the owner of the cattle described; that they were for sale; that they were subsequently sold for \$3.70 per cwt. in Kansas City; that they were thirty-seven hours en route to Kansas City, and showed a shrinkage during transit.

If the telegraph company negligently failed to deliver the telegram, the plaintiffs' measure of damages would be the loss which would naturally and probably result from the breach of its duty. It is manifest that if the sendee would have refused to purchase the cattle, had he received the message, that the plaintiffs would not have been injured by its nondelivery; and it seems equally manifest that if the sendee would have purchased the cattle at the price stated, that this would be material evidence as tending to show that the plaintiff was damaged; and we can imagine no better way of proving this fact than by the testimony of the sendee. *Hasbrouck v. Western U. Teleg. Co.* 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034; *Wallingford v. Western U. Teleg. Co.* 60 S. C. 201, 38 S. E. 443, 629; *Elam v. Western U. Teleg. Co.* 113 Mo. App. 538, 88 S. W. 115; *Nellis v. Western U. Teleg. Co.* 69 S. C.

531, 104 Am. St. Rep. 828, 48 S. E. 538, 2 Ann. Cas. 52; *Carter v. Western U. Teleg. Co.* 141 N. C. 374, 54 S. E. 274; *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841.

It is next argued that the testimony is "inconclusive and insufficient;" that a mere offer is not a sufficient basis of damages, and there is no certainty that a legal contract would have been consummated; and that the proposed acceptance of the sendee did not correspond with the terms of the offer.

There being competent evidence tending to show that the defendant failed to deliver the telegram, that if it had been delivered the sendee would have purchased the cattle, and that the damages were sustained by reason of its nondelivery, the conclusiveness of this evidence was properly submitted to the jury.

The defendant cites the following cases in support of the proposition that nondelivery of a telegram containing a mere offer to make a contract will not support an action for compensatory damages, because there is no certainty that a legal contract would have been consummated: *Beatty Lumber Co. v. Western U. Teleg. Co.* 52 W. Va. 410, 44 S. E. 309; *Cherokee Tanning Extract Co. v. Western U. Teleg. Co.* 143 N. C. 376, 118 Am. St. Rep. 806, 55 S. E. 777; *Hall v. Western U. Teleg. Co.* 59 Fla. 275, 27 L.R.A.(N.S.) 639, 51 So. 819; *Western U. Teleg. Co. v. Adams Mach. Co.* 92 Miss. 849, 47 So. 412; *Beatty Lumber Co. v. Western U. Teleg. Co. and Cherokee Tanning Extract Co. v. Western U. Teleg. Co.* supra, seem to support this proposition. *Hall v. Western U. Teleg. Co. and Western U. Teleg. Co. v. Adams Mach. Co.* supra, are distinguishable. It is well settled that when a message which is delayed in transmission, or not delivered at all, is a definite acceptance of an offer, that the telegraph company is liable for compensatory damages if it is negligent. *Alexander v. Western U. Teleg. Co.* 66 Miss. 161, 3 L.R.A. 71, 14 Am. St. Rep. 556, 5 So. 397; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263, 4 Am. Rep. 673; *United States Teleg. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Western U. Teleg. Co. v. Hyer Bros.* 22 Fla. 637, 1 Am. St. Rep. 222, 1 So. 129; *Daughtery v. American U. Teleg. Co.* 75 Ala. 168, 51 Am. Rep. 435; *True v. International Teleg. Co.* 60 Me. 9, 11 Am. Rep. 156.

In *Western U. Teleg. Co. v. Allen*, 30 Okla. 229, 233, 38 L.R.A.(N.S.) 348, 119 Pac. 981, 982, we said: "It is a well-settled principle of law, both in this country and in England, that where a party making an offer of a contract has

stipulated the method of acceptance, he is bound by an acceptance in that method, whether he receives it or not. If, for instance, an offer is made by mail, with directions to accept by mail, the posting of the letter of acceptance completes the contract. *Tayloe v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *McClintock v. South Penn. Oil Co.* 146 Pa. 144, 28 Am. St. Rep. 785, 23 Atl. 211; *Northampton Mut. Live Stock Ins. Co. v. Tuttle*, 40 N. J. L. 476. The rule is the same with reference to the telegraph. *Minnesota Linseed Oil Co. v. Collier White-Lead Co.* 4 Dill. 431, Fed. Cas. No. 9,635; *Brauer v. Shaw*, 168 Mass. 198, 60 Am. St. Rep. 387, 46 N. E. 617; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634."

It being true that a contract thus made by telegraph furnishes a basis of recovery, if the message of acceptance is not delivered, and we having already held in this opinion that it is competent to offer evidence tending to show that the sendee would have accepted if he had received the offer, we do not see any good reason for refusing a recovery where the negligence of the telegraph company is in failing to deliver the telegram containing the offer, instead of the telegram containing the acceptance. The action for damages against the telegraph company is not on the contract, but for its negligence in preventing the making of the contract; and it seems to us that those courts which hold that compensatory damages cannot be recovered for negligent failure to deliver a telegram containing an offer overlook this distinction. The telegraph company is liable for the damages proximately caused by its negligent nondelivery of a telegram. If the proximate result of the nondelivery of the offer is to prevent the making of a contract, it seems to us that the telegraph company ought to be liable for the damages caused by the loss of the contract. This principle is supported by the following authorities: *Thorp v. Western U. Teleg. Co.* 118 Mo. App. 398, 94 S. W. 554; *Propeller Tow-Boat Co. v. Western U. Teleg. Co.* 124 Ga. 478, 52 S. E. 766; *Wallingford v. Western U. Teleg. Co.* 60 S. C. 201, 38 S. E. 443, 629; *Larsen v. Postal Teleg. Cable Co.* 150 Iowa, 748, 130 N. W. 813; *Texas & W. Teleg. & Teleph. Co. v. Mackenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *Postal Teleg. Cable Co. v. Louisville Cotton Oil Co.* 136 Ky. 843, 122 S. W. 852, 125 S. W. 266; *Western U. Teleg. Co. v. Williams*, 57 Tex. Civ. App. 267, 122 S. W. 280.

As previously stated, the authorities are in substantial agreement that, where the

message which is not delivered is an acceptance of an offer, the telegraph company is liable for compensatory damages (*Western U. Teleg. Co. v. Blackwell Mill. & Elevator Co.* 24 Okla. 535, 138 Am. St. Rep. 893, 103 Pac. 717); while there is a conflict of authority in cases where the message is not delivered, and is an offer, instead of an acceptance of an offer. Of course, the general rule prevails that the company is liable only for those damages which might reasonably be anticipated, and which are the direct and proximate consequence of the breach of duty. In the case of the acceptance of an offer, the telegraph company knows that the contract has been completed, and the general rule at once applies. In a case where the telegram merely makes an offer, the company knows that an offer has been made, which may result in an acceptance if it does its duty. It is its duty to exercise the highest care to deliver the message; and if it fails to do so it must know that the contract will not be made, and, therefore, that loss may follow. It does not know that loss will surely follow; but it does know that loss may follow, and that its negligence may prevent the opportunity of making a contract. If, therefore, on the trial it is established that a contract would have been made had the telegraph company discharged its duty, it does not seem to us that the company is in position to say that it did not discharge its duty, and therefore no contract was made, and therefore no damages proximately resulted, because this defense is based upon the assertion of its own negligence, and it takes advantage of its own wrong to defend against the consequences of its wrong. We therefore hold that when the message which is not delivered is a mere offer of a contract, that the telegraph company, for its negligence, is liable in damages if its negligence prevented the making of the contract. What we have said disposes of the remaining subdivisions of the argument under the first heading of the plaintiff in error, including the instructions referred to in its brief.

The telegraph blank on which the message was written contained a number of printed conditions on its back, amongst which is the following: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." And it is argued that this clause prevents recovery. Section 9 of article 23 of the Constitution (Williams's Constitution and enabling act, § 358), provides that "any provision of any contract or agreement, express or implied, stipulating 42 L.R.A. (N.S.)

for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void." Under this provision of the Constitution (this case having arisen since statehood), the sixty-day limitation on the telegraph blank is not binding in this case. *Western U. Teleg. Co. v. Crawford*, 29 Okla. 143, 35 L.R.A. (N.S.) 930, 116 Pac. 925; *Gray v. Reliable Ins. Co.* 26 Okla. 592, 110 Pac. 728.

In *Chicago, R. I. & P. R. Co. v. Conway*, — Okla. —, 125 Pac. 1110, and a number of earlier cases therein cited, it has been held that certain provisions for notice in railroad bills of lading are valid; but those cases arose prior to statehood, and this provision of the Constitution was not then considered.

Various other errors are assigned relating to the introduction of evidence and the giving of instructions; but it is unnecessary to examine them seriatim. It is sufficient to say that we think there is no reversible error, and that the judgment of the trial court should be affirmed.

**Per Curiam:**

Adopted in whole.

## SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA

v.

JOHN HENRY SANDERS, Appt.

(— S. C. —, 75 S. E. 702.)

**Rape — assault with intent — solicitation.**

Solicitation of sexual intercourse, with intent to enforce the demand, if necessary, by violence, does not render one guilty of assault with intent to rape if no effort is

**Note.**—A diligent search discloses no other case like *STATE v. SANDERS*, wherein the court passes on the question whether a bare solicitation for sexual intercourse, with an intent to force compliance, but without any demonstration or menace, of any kind, constitutes an assault with intent to rape or ravish.

Of course, there are many cases holding that mere solicitation, persuasion, or inducement to have sexual intercourse falls short of an assault with the intent to commit rape; but these cases do not embrace the hypothesis conceded in *STATE v. SANDERS*, of the existence of the intent essential to rape.



made to carry out the intent, but the solicitor flees upon prospect of resistance.

(Gary, Ch. J., and Fraser, J., dissent.)

(September 17, 1912.)

**A** PPEAL by defendant from a judgment of the General Sessions Circuit Court for Hampton County, convicting him of assault with intent to ravish. Reversed.

The facts are stated in the opinion.

Mr. J. W. Vincent for appellant.

Messrs. R. L. Gunter and W. D. Connor for the State.

Woods, J., delivered the opinion of the court:

The defendant appeals from a conviction and sentence under an indictment charging that the defendant, on the 30th day of May, 1911, "in and upon one Mrs. A. James, in the peace of God and of the said state then and there being, did make an assault, and her, the said Mrs. A. James, then and there did beat, bruise, wound, and ill-treat, with intent her, the said Mrs. A. James, violently and against her will, then and there feloniously to ravish and carnally know, and other wrongs the said Mrs. A. James then and there did, to the great damage of the said Mrs. A. James, against the form of the statute in such case made and provided, and against the peace and dignity of the state." The statute of 1909, under which the indictment was found, provides: "Section 1. Be it enacted by the general assembly of the state of South Carolina, that any person convicted of rape or assault with intent to ravish shall suffer death by hanging, unless the jury shall recommend to the mercy of the court, in which event the defendant shall be confined at hard labor in the state penitentiary for a term not exceeding forty years or less than five years, at the discretion of the presiding judge." 26 Stat. 206.

The question made by the appeal is whether the circuit judge should have directed a verdict of acquittal on the ground that there was no evidence of an assault by the defendant on Mrs. James. It seems important to set out the entire evidence bearing on the question. The prosecutrix, Mrs. James, is a white woman living in the town of Brunson. The defendant is a negro.

Mrs. James's testimony as to defendant's acts is as follows:

Q. State the circumstances under which you saw him, and what occurred at that time.

A. I was sitting out on my porch at good dark, and someone came up and says, "Good evening, Mrs. James," and I said "Good evening." He said, "Minnie Fields sent me 42 L.R.A. (N.S.)

down here for 50 cents," and I got it and gave him the money, and after taking the money he backed himself out in the shade of the house and propped himself on the balustrade, and asked me if my husband was at home. I asked him, "Who are you?" and he told me his name was Son Best, and he said, "No; not Son Best, Reverend Best."

Q. Was there a Reverend Best around there, if you know?

A. Yes, sir. I said: "No; my husband is not here; what do you want with him?" He said nothing, and he said, "I want to ask a favor of you," and I said, "What is it?" He said, "Nothing much, but I am kind of afraid to tell you," and I said, "I cannot accommodate you unless I know." He said, "I would like to see you in the room a minute," and I said, "Wait a minute." I stepped in the hall, and got the pistol, and fired out at him three times.

Q. Do you know whether you hit him?

A. No, sir; I don't think I did, very much to my regret.

Q. You said he was in the shadow of the house?

A. The door was open, you know, and the light from the hall shone out in front of the house.

Q. Did you see anyone else with him?

A. No one at all.

Q. When he came up and said something about the money, where was he standing?

A. Standing at the gate.

Q. How far from the steps or piazza?

A. I suppose 8 or 10 yards.

Q. How far?

A. About as far as from me to him (indicating man sitting near clerk's desk).

Q. After you gave him the money, where did he go?

A. He came up the steps, and I handed him the money.

Q. How near were you sitting to the steps?

A. He could have put his hand over the balustrade and touched me if he had tried.

Q. How near was he to you?

A. In 2 feet.

Q. When he took the money, did he come around there in front of the steps?

A. No, sir; when I handed him the money, he backed right in the shade of the steps.

Q. How near was he to you then?

A. In about 2 feet of me. He could have very easily put his hand over the balustrade. He made no attempt to put his hand on me, though he did not have any good intention.

J. M. Sullivan, the town marshal, who arrested the defendant, testified as to defendant's statements:

Q. Did you make any threats before he made that statement?

A. No, sir; I assured him that he would not be hurt. We told him we were there to protect him, and he came out and told us his intention was to go there and have intercourse with Mrs. James. He said afterwards that another fellow was with him that same afternoon or night.

Q. Did he say who that was?

A. Yes, sir; he said his name was Ham Sanders. We found out afterwards that that was false.

Magistrate Dowing testified as follows on the same subject:

Q. Did he make any statement in your presence?

A. Yes, sir.

Q. What was that?

A. He stated to myself and Sullivan together that he and another negro had had some talk that afternoon before the occurrence, and they had agreed together to do what he did. At first he said he made up his mind to go around there, and did go there, and told Mrs. James he wanted her to do a favor for him, and she asked him what kind of a favor, and he told us that he told her to go to bed with him.

Q. Did he say what was his intention?

A. His intentions were to go to bed with her.

The evidence of an intent to commit a rape was the approach to Mrs. James under false pretense, the inquiry whether her husband was at home, and the improbability that even the madness of lust could have led the defendant, a negro, to expect to accomplish his purpose without violence. On the issue of intent, therefore, defendant's counsel very properly conceded that there was evidence for the consideration of the jury.

The demand or solicitation by a man that a woman should submit to sexual intercourse with him, with the intention to enforce his demand by violence, is a heinous moral offense against society. But the general assembly has not seen fit to make such a demand with such an intent a crime, unless accompanied by an assault. If there be a deficiency in the law in this respect, it calls for the exercise of the legislative, not the judicial, power of the state.

The term "assault" is a very ancient one in our law, and its meaning has been long settled. The holding that the acts of the defendant constituted an assault was not in accord with the common understanding of the meaning of assault, nor with the law as established by the courts. Not only do the facts fall short of the definition of assault, but we do not think a single case can be found where a court of last resort has decided that similar evidence would support

a verdict of assault with intent to ravish. The essence of judicial authority on what is necessary to constitute an assault is thus given in 3 Cyc. 1020: "An assault is any attempt to offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect. . . . Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not constitute an assault; but there must be an attempt or offer, though interrupted,—the commencement of an act which, if not prevented, would produce a battery. . . . The force or violence attempted or offered must be physical, and no words of themselves, can constitute an assault." In *State v. Davis*, 1 Hill L. 46, assault is thus defined: "The general rule is that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist, within striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration."

The case of *State v. Sims*, 3 Strobb. L. 137, is relied on to sustain this conviction; but it strikingly illustrates the difference between the attempt or offer to do violence to another necessary to constitute an assault, and the absence of such attempt or offer in this case. In that case the defendant and the prosecutor had a violent quarrel in the morning. Later in the day the defendant "turned his horse across the path before the prosecutor, and then shook his hickory over his head, in striking distance. He rode his horse twice very near to the prosecutor. The third time he rode nearly upon him. The prosecutor said, 'Don't ride upon me,' and, thereupon struck the horse with his jacob-staff on the neck. The horse fell on his haunches. The defendant jumped down and picked up a junk, but dropped it without attempting to throw." On these facts the following instruction was sustained: "The jury were told, if the defendant rode his horse so near to the prosecutor as to endanger his person and create a belief in his mind that it was his intention to ride upon him, it would be an assault; so, too, if he shook his hickory over his head, indicating an intention to strike, and within striking distance, it would also be an assault." In *State v. Johnson*, 84 S. C. 45, 65 S. E. 1023, the conviction was for assault and battery with intent to ravish. The proof was that the defendant actually laid his hands on a young white woman, who was a teacher, and the sole question de-

cided was that the circumstances warranted the inference that the touching of the white woman's person by the negro was an overt act done in the prosecution of an intention to commit rape. The case is no authority for the proposition that a solicitation with an intent to force compliance, but without any demonstration or menace of any kind, constitutes an assault.

The case of *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25, 18 S. E. 132, also relied on to support this conviction, was entirely different in facts. There the defendant, a negro, made the most violent demonstration and assumed the most threatening attitude possible for a man to assume towards a woman, when he went at night into the room of a white girl and got into the bed with her. Likewise in *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344, 16 S. W. 286, the defendant had not only got into the bed of the sleeping woman, but, when detected, was in the act of moving upon her to commit the rape. In *Gaskin v. State*, 105 Ga. 631, 31 S. E. 740, the court held there was no evidence of assault, although the facts were far stronger against the defendant than they are in this case. Among other authorities showing that the evidence does not sustain the charge, we cite *Hairstone v. Com.* 97 Va. 754, 32 S. E. 797, 11 Am. Crim. Rep. 657; *Carter v. State*, 44 Tex. Crim. Rep. 312, 70 S. W. 971, and *Clark v. State*, 56 Fla. 46, 47 So. 481. We are not bound by these decisions, but a perusal of them will show how far outside of established law is the holding that the acts of the defendant in this case in any view constitute an assault with intent to ravish.

If A goes to the house of B with the intention to beat him, and on arrival expresses that intention to B, but makes no effort to execute his purpose, but, on the contrary, runs away when B makes a hostile demonstration, it would not be contended for a moment that A was guilty of an assault. So, in this case, whatever may have been the purpose of the defendant, he made no effort to carry it out, but took to his heels at the prospect of resistance. To hold that the acts of the accused in this case constituted an assault with intent to ravish would be to give a new meaning to the crime of assault, and thus by judicial legislation create a new crime,—and that, too, when the punishment may be death. If there be need for such a change in the law, it is the concern of the general assembly.

For these reasons, I think the judgment of the Circuit Court should be reversed.

Hydrick and Watts, JJ., concur.  
42 L.R.A. (N.S.)

Fraser, J., dissenting:

This appeal is from a conviction for assault with intent to ravish. The appeal here is on the ground that there is no evidence of an assault. The facts are undisputed, and are as follows: The "prosecutrix" was sitting alone on her piazza after dark, when a man (the appellant) approached the house, and, upon being asked his mission, said that he had been sent by the washerwoman of the "prosecutrix" to ask for a loan of 50 cents. The man gave the wrong name. By reason of the false statement he was allowed to approach to within 2 feet of the prosecutrix, and near enough to take the money from her. He made no attempt to take hold of her, but approached near enough to do so. The appellant asked her if her husband was at home, and, being informed that he was not, asked her to go to her room with him, thereby soliciting carnal intercourse. The prosecutrix said, "Wait a minute." She then slipped into the hall, got the pistol, and fired out at him three times. The defendant then ran away.

The appellant claims that, inasmuch as he had not reached the stage at which he was to lay hands upon her, there was no assault. There was evidence (introduced without objection) that the prisoner confessed that he went to the house of the prosecutrix with intent to have carnal intercourse with her. The jury saw the appellant. They saw the prosecutrix. It was their province to say whether the appellant had any reasonable expectation that he could obtain the consent of the prosecutrix. If the appellant intended to have intercourse, and had no reasonable expectation that he could secure her consent, then the jury had the evidence from which they could infer that the appellant was there in pursuance of his purpose to use force; *i. e.*, to commit rape. The intent is not a crime, and unless there was an assault there was no crime.

Appellant relies upon the following authority: 2 Bishop on Criminal Law, § 23, says: "Assault is any unlawful, physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being, as raising a cane to strike him, pointing in a threatening manner a loaded gun at him, and the like." The coming within reach of the prosecutrix with intent to carry out his purpose, together with his words, showing his intent, is the unlawful physical force, partly put in motion, which created a reasonable apprehension of immediate physical

injury, and is evidence sufficient to sustain a verdict of guilty. This case is a very much stronger case than *State v. Johnson*, 84 S. C. 45, 65 S. E. 1023. In that case the placing of the hands upon the shoulders of the victim was no part of the final struggle, and the intent was only an inference from that fact. Here the intent is not an issue, and the appellant had proceeded as far by overt act as the prompt and effective resistance of the prosecutrix allowed. *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25, 18 S. E. 132. "When a man, under the incitement of lust, and with the intention of gratifying it by force, enters the bedroom of a virtuous woman at a late hour in the night, and gets upon the bed in which she is sleeping, within reach of her person, for the purpose of ravishing her, he commits an assault upon her, although he may not actually touch her, being prevented from so doing by her outcry and by the interposition of an occupant of the adjoining room." *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344, 16 S. W. 286. "It was not necessary, in order to constitute an assault, that actual violence should have been used. To sustain such an indictment [assault with intent to commit rape] it is not even necessary that the person of the one upon whom the attempt is intended should be touched. If the intent, with the present means of carrying it into effect, exists, and preparations therefor have been made, the assault is complete." *State v. Sims*, 3 Strobb. L. 137. "To ride a horse so near to one as to endanger his person and create a belief in his mind that it was the intention of the rider to ride over him would be an assault." "His Honor said to the jury that he did not think the defendant intended either to ride upon the prosecutor or to strike him, yet he thought, if his action and conduct was such as to create the belief in the mind of the prosecutor that he intended to ride upon or strike him, he would be guilty of an assault." This conviction was sustained. *Wharton*, *Crim. Law*, 1155. When the prisoner decoyed a female child into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, it was held that, although there was no evidence of his having actually touched her, he was properly convicted of an assault with intent to ravish.

The judgment of this court is that the judgment of the circuit court be affirmed.

Gary, Ch. J., concurs.  
42 L.R.A. (N.S.)

## TEXAS COURT OF CRIMINAL APPEALS.

SAM GRANT, Appt.,  
v.  
STATE OF TEXAS.

(—Tex. Crim. Rep. —, 148 S. W. 760.)

### Evidence — acts before and after killing — admissibility.

1. An accomplice of one on trial for murder may testify as to their trailing the victim before any suggestion was made to kill him, and also as to what the parties did and agreed to do after the money taken from the victim was divided.

### Same — corroboration of accomplice — location of movements.

2. To corroborate an accomplice testifying against his companion in a murder case, evidence is admissible that persons were seen at the time and place when and where the witness locates himself and his companion in detailing their movements in connection with the crime, as well as that accused was recognized or identified as one of the persons then present.

### Trial — admonition of witness — correction by instructors.

3. One on trial for murder cannot be prejudiced by an admonition to an accomplice who takes the stand on behalf of the people that any statement he may make may be used against him, if the jury are afterwards told that he is testifying under an agreement that, if he lives up to his agreement made with the state as to giving testimony, he will not be prosecuted.

### Witness — impeachment — offenses not tried.

4. A witness cannot be impeached by showing that he had committed felonies for which no legal accusation had been made against him.

### Attorney — consent — fine — right to complain.

5. An attorney cannot complain of the

### *Note. — Rebuking or fining attorney during trial as prejudicing rights of party.*

Remarks to counsel because of improper argument have been excluded.

It is within the province of the court to rebuke or censure counsel in the presence of the jury for irregularity of practice or misconduct in the case. To warrant a reversal because of the conduct of the trial judge in rebuking or punishing an attorney during the trial, it must appear that the conduct measured by the facts of the case presented, together with the result of the trial, was clearly prejudicial to the rights of the party.

Punishing counsel for contempt of court.

In *Pinkerton v. Sydnor*, 87 Ill. App. 76, it was said that it is a salutary rule that

imposition of a fine upon him for ignoring rulings of the court that he cannot put a certain kind of questions to witnesses.

**Evidence — testimony at former trial — absence of witness.**

6. The properly proved testimony of witnesses who have left the state after a first trial may be given in evidence on a second one.

**Same — difference in tracks.**

7. Witnesses in a murder trial who had experience in trailing men, and who followed the tracks of two men from the scene of the murder, may testify as to the difference in the characteristics of the tracks of men walking and running.

**Same — number of shot in shell.**

8. In a murder trial, a witness may testify as to the number of shot of the size

found in the body of the victim, contained in a shell of the kind found at the point where accused is said to have been standing at the time the fatal shot was fired.

**Jury — competence — refusal to impose death penalty.**

9. Jurors may be excluded who state that they would not impose the death penalty on circumstantial evidence.

**Same — exclusion of juror — absence of prejudice.**

10. An accused cannot complain of the sustaining of challenges by the state where he has unexhausted challenges when the jury is complete, so that it does not appear that any objectionable juror was forced upon him.

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the trial judge should, during the trial, refrain from any unnecessary comments which might tend to a result in this regard prejudicial to any litigant, but that, when it becomes unavoidable in the procedure of a trial to impose a fine upon any person connected therewith, it cannot be held that this should of itself cause a mistrial, merely because the occurrence might have some influence upon the minds of the jury.

Accordingly, it was held that the action of the trial court in punishing counsel for contempt in the presence of the jury was not ground for complaint on the part of the client:

—where the attorney, whose conduct was very aggravating, persisted in a forbidden line of cross-examination, and the sheriff was instructed to collect the fine during the recess of the court, where the verdict did not show prejudice. *Stewart v. Beggs*, 56 Fla. 565, 47 So. 932;

—where counsel made an improper remark upon the ruling of the court. *Miller v. State*, 32 Tex. Crim. Rep. 266, 22 S. W. 880;

—where counsel failed to obey the admonitions of the court as to the use of objectionable argument to the jury, since it was the duty of the court to preserve and maintain its own dignity. *Spears v. People*, 20 Ill. 72, 4 L.R.A.(N.S.) 402, 77 N. E. 112;

—where counsel pursued objectionable line of cross-examination against repeated admonitions and rulings of the court. **GRANT v. STATE.**

So the action of the court during the trial of a criminal prosecution, in directing counsel for accused to show cause before the court the next day why he should not be punished for contempt in persisting in continuing a line of examination of witnesses against the ruling of the court, is not ground for reversal, where the court, at the conclusion of the trial, directed the jury in emphatic language absolutely to banish from their minds the incident; that it was not to have the slightest weight with them in determining what verdict they 42 L.R.A.(N.S.)

should render in the case. *People v. Moore*, 142 App. Div. 402, 127 N. Y. Supp. 98, affirmed without opinion in 201 N. Y. 570, 95 N. E. 1136.

Likewise punishing defendants' attorney for contempt in the absence of the jury, on account of his repeatedly refusing to abide by the ruling of the court, was not error. *Shaffer v. State*, — Tex. Crim. Rep. —, 151 S. W. 1061.

The error in fining defendant's counsel for contempt in presenting an affidavit for change of venue is no ground for complaint, where the trial took place a year afterwards in another county. *Hargis v. Com.* 125 Ky. 578, 123 S. W. 239.

In *Charles v. State*, 58 Fla. 17, 50 So. 419, it was held that it was improper for the court to suspend defendant's counsel during the trial for contempt of court, and thus deprive defendant of the services of his counsel; that the proper practice in such a case is to defer the application of a penalty upon the offending counsel until after the close of the trial.

It was held, however, in the above case, that such conduct on the part of the trial court was not ground for reversal where it did not appear that defendant was prejudiced thereby; it appearing that the court afterward revoked the order of suspension; that, during the few hours that the order was in force, the suspended attorney continued present in court freely assisting his law partner and associate counsel for the defense with consultations and suggestions, and again himself took active part in the further trial and argument of the cause.

But in *Redman v. State*, 28 Ind. 205, the action of the trial judge in refusing to permit defendants' counsel to continue the cross-examination of witnesses, and directing defendants' other counsel to examine the witnesses, because of the use of offensive language by counsel in replying to the ruling of the court that a certain question propounded was improper, was approved by the appellate court.

And in *Daudel v. Wolf*, — S. D. —, 138 N. W. 814, the action of the trial judge in directing the removal of defendant's

**A** PPEAL by defendant from a judgment of the District Court for Eastland County convicting him of murder in the first degree. Affirmed.

The facts are stated in the opinion.

Mr. J. R. Stubblefield, for appellant:

The defendant could not be legally convicted upon the testimony of Bert Carter, though said testimony was corroborated, unless his testimony upon the material issues in the case were true.

Beeson v. State, 60 Tex. Crim. Rep. 39, 130 S. W. 1007; Nash v. State, — Tex. Crim. Rep. —, 134 S. W. 713; Close v. State, 55 Tex. Crim. Rep. 380, 117 S. W. 138; Hanks v. State, 55 Tex. Crim. Rep. 405, 117 S. W. 149; Lemmons v. State, 58 Tex. Crim. Rep. 269, 125 S. W. 401.

counsel from the court room until he should express a willingness to abide by the rulings of the court, where he persisted in pursuing a line of cross-examination which the court held immaterial upon objection by opposing counsel, and after the court had directed him to stop and be seated, was not ground for reversal, where the court notified the client that he could have ample time to procure other counsel and proceed with the trial.

On the other hand, it has been held that the action of the trial court in holding up counsel to ridicule for making proper objections, and unjustly threatening punishment by fine and imprisonment for contempt, is prejudicial error. *Bennett v. Harris*, 68 Misc. 503, 124 N. Y. Supp. 797.

Likewise, the action of the trial judge in exhibiting strong feeling against counsel for the accused in the presence of the jury during the trial of an indictment for murder, and imposing a fine on counsel with an order that he stand committed to jail until the fine was paid, merely because he insisted on being heard on an objection to the relevancy of certain evidence, is prejudicial error. The court said: "But the appellant's interest in the matter is not that his attorneys were summarily dealt with, and one of them fined excessively, considering the facts, and ordered into the instant custody of the sheriff. His cause of complaint is that all this took place in the presence of the jury, and with such an exhibition of feeling on the part of the court that the jury, which is an instrument most sensitive to every impression coming from the court, must have reasoned that appellant's counsel had been guilty of some very grave offense in the conduct of his case, to their material depreciation as fair and reputable attorneys. In cases of so great gravity as this, such conduct on the part of the trial court will not do, and when it occurs, the least that an accused person can demand is that he be given an opportunity for a hearing of his case before a jury not subjected to such influence." *State v. White*, 10 Wash. 611, 39 Pac. 160, dissenting opinion 10 Wash. 619, 41 Pac. 442, 42 L.R.A. (N.S.)

The evidence raised the issue as to whether the testimony of Bert Carter was true or false, and therefore it was the duty of the trial court affirmatively to submit this issue in its charge to the jury.

*Bond v. State*, 23 Tex. App. 181, 4 S. W. 580; *Smith v. State*, 24 Tex. App. 299, 6 S. W. 40; *Nalley v. State*, 30 Tex. App. 458, 17 S. W. 1084.

The acts of Bert Carter subsequent to the commission of the crime were not admissible in evidence against the defendant.

*Couch v. State*, 58 Tex. Crim. Rep. 505, 126 S. W. 866; *McKenzie v. State*, 32 Tex. Crim. Rep. 578, 40 Am. St. Rep. 795, 25 S. W. 428; *Pryor v. State*, 40 Tex. Crim. Rep. 645, 51 S. W. 375; *Dawson v. State*,

wherein it was said that the facts disclosed by the record (which is set out in the prevailing opinion of the court) did not sufficiently show prejudice to defendant to warrant a reversal; that in the opinion of the dissenting judges such action on the part of the trial judge, instead of injuring the cause of the defendant with the jury, would have a tendency to excite their sympathy in his behalf.

In *Robertson v. State*, 38 Tex. 187, it was held that the action of the court in ordering counsel for accused to be imprisoned the day after filing a motion for a new trial, for an alleged contempt previously committed, and in requiring counsel to be subsequently brought before the court in charge of an officer and to argue the motion for the new trial over their protest that they were not in condition or prepared to do so because of the imprisonment, was such a wanton trifling with the rights of the accused charged with a capital felony, and with the dignity of the courts, as to require a new trial.

#### Remarks to counsel.

It has been said that it is within the province of the court to admonish and rebuke counsel as the occasion may require, and that the degree of severity of the reprimand must be left to its discretion, so long as the same does not prevent a party from having a fair trial of his case. *Laporte v. Cook*, 22 R. I. 554, 48 Atl. 798; *Friemark v. Rosenkrans*, 81 Wis. 359, 51 N. W. 557; *People v. Modina*, 146 Cal. 142, 79 Pac. 842; *Williams v. West Bay City*, 119 Mich. 395, 78 N. W. 328.

In *McDuff v. Detroit Evening Journal Co.* 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671, it was said that the appellate court has nothing to do with the propriety of the conduct and language of the trial court, but only to determine whether they amount to a legal error; that whenever the trial judge compliments one attorney at the expense of the other, or uses language which tends to bring an attorney into contempt before the jury, or uses language which

38 Tex. Crim. Rep. 13, 40 S. W. 731; Dawson v. State, 38 Tex. Crim. Rep. 57, 41 S. W. 601.

The fact that the defendant was in the presence of, and went to the town of Carbon with, Bert Carter subsequent to the homicide, was not a criminative fact, and therefore was not admissible against the defendant.

Low v. State, 108 Tenn. 127, 65 S. W. 401, 15 Am. Crim. Rep. 21; State v. Richardson, 194 Mo. 326, 92 S. W. 653, 12 Cyc. 423.

The fact that Bert Carter was present with the defendant on Friday or Saturday night subsequent to the killing of the deceased, Oats, on the Wednesday previous,

tends to prejudice them, he commits an error of law for which the verdict and judgment must be set aside.

In Hine v. Bay Cities Consol. R. Co. 115 Mich. 204, 73 N. W. 116, it was held error arbitrarily to refuse to hear counsel as to their position on a request for instructions when presented in a courteous manner, though not ground for disturbing the judgment where the case was not prejudiced thereby.

And in State v. Sharp, 233 Mo. 269, 135 S. W. 488, the court said that it cannot be said that a manifestation by the court of its good opinion of one attorney and of hostility toward another is without influence on the minds of the jury, and that it should be avoided, though it was not considered as ground for a new trial in the present case.

The action of the trial judge in rebuking counsel during the trial has been examined in the following cases, and held not to present prejudicial error under the circumstances:

—directing counsel for defendant not to step within the railing where a timid child was being examined as a witness, and to take his seat, where it appeared that the counsel for the prosecution and the judge were endeavoring to get the witness to narrate in her own way what occurred, and that defendant's counsel had made numerous interruptions with needless objections devoid of merit, and the court had permitted an extended cross-examination. People v. Collins, 5 Cal. App. 654, 91 Pac. 158;

—impatiently remarking to defendants' counsel upon his objection to the argument of the prosecuting attorney, "Don't interrupt counsel's argument," where the record shows that numerous objections of a trivial character had been made, and that accused was given a careful trial. People v. Ecarius, 124 Mich. 616, 83 N. W. 628. To the same effect are Tuttle v. State, 83 Ark. 379, 104 S. W. 135, which held the uncalled-for manifestation of impatience and reflection on conduct of counsel not ground for reversal, where the verdict was responsive to the evidence; and Anglo-American Pack-42 L.R.A. (N.S.)

at the home of Bert Carter, was not admissible against the defendant.

Couch v. State, 58 Tex. Crim. Rep. 505, 126 S. W. 866; McKenzie v. State, 32 Tex. Crim. Rep. 578, 40 Am. St. Rep. 795, 25 S. W. 428; Pryor v. State, 40 Tex. Crim. Rep. 645, 51 S. W. 375; Dawson v. State, 38 Tex. Crim. Rep. 13, 40 S. W. 731; Dawson v. State, 38 Tex. Crim. Rep. 57, 41 S. W. 601.

The court should have instructed the jury that there must be other testimony in the case than that of Bert Carter tending to connect the defendant with the taking the life of the deceased, Oats, and this should have been affirmatively submitted to the jury.

Hoyle v. State, 4 Tex. App. 245; Frank-

ing Co. v. Baier, 31 Ill. App. 653, which held manifestation of impatience not error, where the examination of a witness was largely calling for a repetition of former answers;

—remarking to counsel to "take as much time as possible," and "I think you are reading for your own amusement," by way of rebuke for the unnecessary consumption of time in an exceedingly prolix and extended cross-examination of an expert witness. State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266;

—abruptly calling attention of counsel for defendant, during his cross-examination of the prosecuting witness, that he was making many unnecessary repetitions of questions and irrelevant inquiries, where the record shows that the court was warranted in warning counsel not to waste the time of the court, and it did not appear from a consideration of the entire case that defendant was prejudiced by the remarks of the court; the court saying: "Attention might have been called to this impropriety of counsel in wasting time of the court in a more urbane manner and in more courteous language. But the proper courtesy which shall be exercised between court and counsel must, of course, be left to the judge's own sense of propriety, and we are only concerned with its exercise in any given case, to the extent of considering how far the want of it affected the jury, if at all, to the prejudice of the defendant." People v. Modina, 146 Cal. 142, 79 Pac. 842;

—directing counsel to desist from going over what has already been covered, since it is the duty of the court to prevent needless repetitions in a fair and effective way, and if such remarks place counsel in a ridiculous position before the jury, to the prejudice of his client, it is the fault of counsel. State v. Brown, 100 Iowa, 50, 69 N. W. 277. To the same effect is Benson v. State, 51 Tex. Crim. Rep. 367, 103 S. W. 911;

—remarking that "counsel seem to make a good many objections that I do not think necessary," where, during the progress of the trial, counsel on both sides had made

lin v. State, 53 Tex. Crim. Rep. 388, 110 S. W. 65; Adams v. State, — Tex. Crim. Rep. —, 102 S. W. 1129; Roach v. State, 8 Tex. App. 492; Hall v. State, 52 Tex. Crim. Rep. 250, 106 S. W. 380; Smith v. State, — Tex. Crim. Rep. —, 38 S. W. 201; Smith v. State, 27 Tex. App. 197, 11 S. W. 113; Crowell v. State, 24 Tex. App. 410, 6 S. W. 318; 12 Cyc. 456; 1 Am. & Eng. Enc. Law, 2d ed. 403.

Without the testimony of Bert Carter, there is not enough evidence in the record to raise a serious question as to the defendant's guilt, and in view of the character of Bert Carter, and the extreme penalty which was fixed by the jury, the verdict of the jury should not be permitted to stand.

frequent objections to the admission of testimony, which were frivolous, although the particular objection then under consideration was sustained. Butler v. State, 91 Ga. 161, 16 S. E. 984;

—remarking to defendants' counsel in a prosecution for keeping intoxicating liquors with intent to sell them unlawfully, that the cross-examination of the prosecuting witness had been "unusually protracted," where it appeared it had continued for about thirty minutes. Com. v. Coughlin, 182 Mass. 558, 66 N. E. 207;

—remark to defendant's counsel, after he had protracted the cross-examination of the prosecuting witness to great length for the purpose of showing ill-will of the witness toward defendant, that he had carried the examination in that direction far enough, and that it was the duty of a good citizen to report crime to the prosecuting officer when inquired of by him. State v. Robertson, 86 N. C. 628;

—directing counsel for accused to be seated, the court adding, "You will not let us prove anything," where counsel for accused persisted in interposing an objection after the court had overruled a previous objection and directed the prosecuting attorney to proceed, it appearing that the progress of the trial had been interfered with by the numerous objections and wrangling over the testimony, since the remark, though improper, was not a comment upon the testimony, and was not calculated to influence the jury against accused. Dailey v. State, — Tex. Crim. Rep. —, 55 S. W. 821;

—admonishing counsel that after the court had ruled twice with reference to a certain question, it was unprofessional and uncourteous for him to persist in putting the question for the purpose of securing an answer considered improper by the court; that counsel had the record covering the point completely, and that he must not offend in that way again. Hein v. Mildebrandt, 134 Wis. 582, 115 N. W. 121. To the same effect is Finan v. New York C. & H. R. R. Co. 111 App. Div. 383, 97 N. Y. Supp. 859. where counsel persisted in read-

Hill v. State, 55 Tex. Crim. Rep. 435, 117 S. W. 823; Lynch v. Snead Architectural Iron Works, 132 Ky. 241, 21 L.R.A. (N.S.) 858, 116 S. W. 693; Mann v. State, 44 Tex. 643.

The evidence in this case is not sufficient to show the defendant's connection with the crime apart from the testimony of Bert Carter, and therefore the verdict of the jury should be set aside.

Crowell v. State, 24 Tex. App. 410, 6 S. W. 318; Franklin v. State, 53 Tex. Crim. Rep. 388, 110 S. W. 65; Adams v. State, — Tex. Crim. Rep. —, 102 S. W. 1129; Hoyle v. State, 4 Tex. App. 245.

Mr. Charles E. Lane, Assistant Attorney General, for the State.

ing certain evidence after the court had ruled adversely;

—remark by the court, in overruling defendant's objection to certain questions propounded to a witness, that he could not put that kind of a bridle on the prosecuting attorney; that the witness could answer the question. Watson v. State, 52 Tex. Crim. Rep. 85, 105 S. W. 509;

—remarking to counsel, in reply to an objection to a question that could not have injuriously affected the case, "Very well, object and object; the supreme court will get its fill of your objections." State v. Musick, 101 Mo. 260, 14 S. W. 212;

—remark to counsel that the testimony objected to was material; that he should not be so quick about taking an exception. People v. Burkhart, 165 Mich. 240, 130 N. W. 597;

—a sarcastic reply by the court to a premature interruption and objection by counsel, where nothing was said or done that in any manner pertained to the merits of the cause. Vasser v. State, 75 Ark. 373, 87 S. W. 635;

—remark characterizing as frivolous an exception to the court's action on objection to an improper argument of the district attorney, where the court held such argument to be improper, and attorney withdrew it and apologized for it. Sawyer v. United States, 202 U. S. 150, 50 L. ed. 972, 26 Sup. Ct. Rep. 575, 6 Ann. Cas. 269;

—warning the prosecuting attorney to examine the witnesses so as to avoid the taking of bills of exceptions, pointing out that the case had been tried before. State v. Johnson, 31 La. Ann. 368;

—remarking to counsel in a low voice that the court was trying to give them a fair trial, but they did not seem to appreciate it, upon discovering that the trial had proceeded for a few minutes in the absence of the accused and upon ascertaining that the defendant's counsel knew that he was absent before the court discovered the fact, especially where, in the judgment of the court, the remark could not have been heard by the jury, it appearing that the court stenographer, who was sitting be-



Harper, J., delivered the opinion of the court:

This is the second appeal in this case; the opinion in the former appeal being found in 60 Tex. Crim. Rep. 358, 132 S. W. 350. When tried again, the jury again returned a verdict of murder in the first degree, assessing his punishment this time at imprisonment in the penitentiary for life.

Bert Carter testified that deceased, Oats, spent the night with appellant, and the next day appellants says deceased was at a tank on Jim Williams's place making coffee. That appellant was there with deceased when he went to where they were. That shortly after noon deceased got in his buggy and drove off, when appellant

tween the court and the jury, did not hear it. *Vanderford v. State*, 126 Ga. 753, 55 S. E. 1025;

—remark, when requested to charge the jury in writing, that requests of that kind "were never made except when counsel were angry with the court," and "that there was no excuse for such request when there was a stenographer to report the case," where it is the duty of the judge to comply with such request, though improper, will not be treated as cause for a new trial, unless it appears that the case was thereby prejudiced. *McLeod Bros. v. Wilson Bros.* 108 Ga. 790, 33 S. E. 851;

—statement by the court to counsel on presenting a motion for adjournment on the ground of absent witnesses, that counsel was simply trying to fool and hoodwink the jury, though improper, was cured by instructing the jury to disregard the remark. *Klinker v. Third Ave. R. Co.* 20 App. Div. 322, 49 N. Y. Supp. 793;

—addressing counsel in such language as to indicate that the judge considered them only competent to practise before justices of the peace, where the remarks did not indicate how the judge thought the case out to be decided. *State v. Teeter*, 239 Mo. 475, 144 S. W. 445;

—warning counsel, who had persisted in asking leading questions in spite of the repeated adverse rulings of the court, that, upon further provocation of that nature, he would not be permitted to proceed with the examination of the witness. *State v. Drake*, 128 Iowa, 539, 105 N. W. 54;

—marking to counsel, during the examination of prospective jurors, that a proposed question contained an erroneous assumption as to the law. *State v. Heft*, — Iowa, —, 134 N. W. 950;

—marking to counsel that "you are trying Mr. Smyth (the defendant) as though he was a common, ordinary thief trying to get away with somebody's property," though improper, was not prejudicial, where the verdict must have been the same had the remark not been made. *Cone v. Smyth*, 3 Kan. App. 607, 45 Pac. 247;

—remark to defendant's counsel upon 42 L.R.A. (N.S.)

stated to witness Carter he thought deceased was a detective, and suggested that they follow him. That both of them did trail him all that evening, detailing the way they traveled. About sundown deceased went in the home of Mr. Cozort, when appellant stated deceased would doubtless spend the night there, and proposed to witness that they go home and return next morning and kill deceased. That deceased had told him (appellant) he was going to buy a restaurant at Strawn, and he knew he had money. Witness says he objected, when appellant insisted, saying he would do the work and divide the money. That next morning they did return, trailed deceased, telling the way they traveled. That finally they stopped,

his objection to certain cross-examination of his witnesses, that "you seem to want no testimony except what suits your side of the case;" and "Are you afraid of your own witnesses?" *State v. Barnes*, 48 La. Ann. 460, 19 So. 251;

—admonishing counsel, during cross-examination of the prosecuting witness, to treat the witness with respect, though the record shows that the language used by counsel was not improper, since the appellate court cannot judge from the record that the manner of counsel toward the witness was not disrespectful, or that the language used by the court was not uttered in such a tone of voice as to have been unobjectionable. *State v. Hatfield*, 75 Iowa, 592, 39 N. W. 910;

—admonishing defendants' counsel that his questions were an evasion of a former ruling of the court, though no objection was made by the prosecuting attorney, since it is the duty of a judge to see that a trial is conducted in accordance with the rules of evidence and law as these appear to him, whether counsel objects or not. *People v. Bartley*, 12 Cal. App. 773, 108 Pac. 868;

—remark of court to a witness, "You need not answer that question," and saying to counsel, "I don't like to hear as intelligent counsel as represent the defendant ask such question. They knew, or should know, the mere fact that a witness had been indicted for assault with intent to murder in no way impeaches said witness, and such evidence is not relevant," especially where the court immediately instructed the jury to disregard the remark made to counsel. *Watson v. State*, 155 Ala. 9, 46 So. 232;

—where the prosecuting attorney objected to a certain question propounded by counsel for accused, stating that the sole purpose of defendants' counsel in asking said question was to get the effect of said question and the evidence it implied before the jury, when counsel knew the court would rule the question out, a remark by the court, "I presume so, but I cannot prevent defendants' counsel from asking questions," where it appeared that counsel had

and appellant got in a tree top and told him to look and see if deceased was coming. He informed appellant that deceased was coming down the road, and, as deceased got about even with an opening in the tree top, appellant fired, then jumped the fence and took his money off of him. Witness says he and appellant then returned to their homes, detailing the way they went, saying, when they parted, that he would come, and they would go to Carbon together; and they did go there that afternoon.

1. Appellant objected to the witness being permitted to detail what took place between appellant and the witness the evening before up to the time witness says appellant suggested to him to return next

morning and kill deceased, and objected to witness being permitted to state what he and appellant did and agreed to do after the money was divided. He also objected to witnesses being permitted to state that they saw two men the evening before at the times and places detailed by Carter, and one witness stating that he recognized one of them as appellant, Grant, and objected to witness Everett being permitted to state that he looked well at the men when he saw them passing, and, while he had never seen Grant before, yet he subsequently had appellant pointed out to him, and from his build, complexion, etc., he thought appellant was one of the men who passed him and others on the road that Carter said they went. All this testimony, we think,

persisted in asking the question after it had been ruled out. *Burns v. State*, — Tex. Crim. Rep. —, 66 S. W. 303;

—reprimanding counsel in the presence of the jury for talking with the witnesses placed under the rule, without the permission of the court. *Magee v. State*, — Tex. Crim. Rep. —, 43 S. W. 98;

—admonishing counsel to adhere to the rules of evidence in the examination of witnesses. *Stripling v. State*, 47 Tex. Crim. Rep. 117, 80 S. W. 376;

—reprimanding counsel for persisting in improper cross-examination, in violation of the former ruling of the court. *Scott v. Dow*, 162 Mich. 636, 127 N. W. 712;

—where the court thought counsel was hurrying the witness for his answers, and said, "Give him time to answer," and stated to counsel, who said he had given the witness plenty of time, "Sometimes you don't." *Birmingham R. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276;

—remark to counsel during cross-examination, "I do not think that is a proper examination," where the question was trivial and could elicit nothing of any possible consequence touching the case. *Lewis v. State*, 90 Ga. 95, 15 S. E. 697;

—remark made by the judge during the selection of the jury, which had a tendency to cast some discredit upon the action of counsel in saving an exception, though improper, is not ground for reversal, where it is not clear that it would probably tend to the prejudice of the client. *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171;

—remark to counsel during cross-examination that the court did not think the point material, and directing counsel to desist from that line of questions, where no claim is made that the matter was important, or that the court erred in refusing to allow further questions along that particular line. *People v. Rogers*, — Cal. —, 126 Pac. 143.

On the other hand, the use of offensive language towards counsel, such as to imply that he is an intruder in the court, is such "irregularity in the proceedings of the court" as to warrant the granting of a 42 L.R.A. (N.S.)

new trial, where the verdict is against the client and the record shows that the jury may have been influenced unfavorably by the conduct of the trial judge and his prejudice against counsel. *Walker v. Coleman*, 55 Kan. 381, 49 Am. St. Rep. 254, 40 Pac. 640.

In *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047, it was said that the aid of counsel is guaranteed by the Constitution to every person accused of crime, and that any conduct or statement on the part of the court that tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error. Accordingly, it was held that a remark which tended to question the good faith of counsel in making an offer, implying that counsel was attempting to get improper testimony before the jury under a promise he did not hope or expect to fulfil, was prejudicial error.

So, in the following cases the remarks of the trial judge were held to be so prejudicial as to warrant a reversal of the judgment:

—remark intimating that defendant's counsel was pursuing an unfair course. *McIntosh v. McIntosh*, 79 Mich. 198, 44 N. W. 592;

—remark tending to insinuate that counsel was not fair in his examination. *People v. Fiori*, 123 App. Div. 174, 108 N. Y. Supp. 416;

—remark of the judge while counsel, in his closing argument to the jury, was commenting on certain papers which he had fairly and openly offered in evidence, and which had been duly received, that if the papers were put in evidence, it was done surreptitiously. *State v. English*, 62 Minn. 402, 64 N. W. 1136;

—remarks of the judge addressed to counsel in a loud tone of voice, which implied that counsel had violated an agreement made by him in open court, and that such act made it necessary to place the witness back on the stand. *Dallas Consol. Electric Street R. Co. v. McAllister*, 41 Tex. Civ. App. 131, 90 S. W. 933;

—excessive criticism of counsel for failure to produce a witness, characterizing the

was clearly admissible. It does not come within the rule prohibiting acts and declarations of conspirators from being admitted, when said or done in the absence of the other. The court permitted the witness to tell nothing but what he and appellant jointly did. If both men had been on trial, a third person, if he had seen these men making these maneuvers, would have been permitted to testify to all these facts to show they were acting together; and that one of the actors is detailing the matter does not alter the rule. And as the witness Carter, under his testimony, was an accomplice, his testimony had to be corroborated, and it was not error to permit witnesses to state that they saw two men traveling along the road and across the

fields that Carter said they traveled; nor to permit a portion of them to say they recognized appellant Grant; nor for others, who did not know Grant, to testify that when they had Grant pointed out to them that from his build, height, complexion, etc., they were of the opinion that he was one of the men passing along with a gun.

Mr. Chamberlain, in his *Modern Law of Evidence*, (§§ 48 and 49), treats of the character of testimony given by Carter at length, and holds it admissible and necessary to throw light upon the entire transaction and enable the jury to give to it its due weight. And if the testimony of Carter is admissible, then there can be no question that testimony corroborative of the facts stated by him would also be

omission as a scheme to fabricate a defense and to sustain it by perjury. *People v. O'Hare*, 124 Mich. 515, 83 N. W. 279, 12 Am. Crim. Rep. 576;

—remark by the trial judge in the presence of the jury, upon an objection by the prosecuting attorney that the question about to be propounded to the witness by the defendant's counsel should be in writing and submitted to the court, that the court was getting tired of being humbugged and bamboozled by the counsel for the defendant, and that he had stood this as long as he intended to. *Massie v. Com.* 15 Ky. L. Rep. 562, 24 S. W. 611;

—the action of the court in directing questions to a witness for defendant which were calculated to impress the jury with the conviction that the court charged defendant and counsel with tampering with the witness and advising him to refuse to answer, where there was nothing to warrant such suspicion. *State v. Allen*, 100 Iowa, 7, 69 N. W. 274;

—remark by the trial judge that the objection of counsel to the examination of a witness by the court was made because the facts would be prejudicial to his client, since such remark had a tendency to convey to the jury the idea that, if the facts were drawn out as the court proposed to draw them out, such facts would be injurious to the client's case. *People v. Hull*, 86 Mich. 449, 49 N. W. 288;

—remarks that tend to give to the jury the impression that counsel is asking foolish questions, where they are on a material issue. *Nave v. McGrane*, 19 Idaho, 111, 113 Pac. 82; *Poole v. State*, 45 Tex. Crim. Rep. 348, 76 S. W. 565;

—uncalled-for criticism of attorney during the cross-examination of a witness, that was well calculated to disparage an attorney in the eyes of the jury. *Williams v. West Bay City*, 119 Mich. 395, 78 N. W. 328;

—reflections upon counsel in passing upon evidence. *House v. State*, 42 Tex. Crim. Rep. 125, 57 S. W. 825;

—where counsel asked questions which the court deemed leading, it was error to 42 L.R.A. (N.S.)

remark to counsel, "Don't lead the witness. These ignorant witnesses can be led to say anything in the world you want them to say," since such remark was in effect an instruction to the jury that the witnesses were unworthy of belief or credit. *Jefferson v. State*, 80 Ga. 16, 5 S. E. 293;

—remarking to attorney, when ruling upon a question asked him, "What is the use of your asking this question? Your brain seems to be out of order." *Williams v. West Bay City*, supra;

—reprimanding counsel for objecting to the argument of opposing counsel in informing the jury the result of a former trial, although the court subsequently instructed the jury not to consider the objectionable remarks of counsel. *Adams v. Fisher*, 83 Neb. 686, 120 N. W. 194;

—numerous manifestations of impatience when taken together indicate an attitude of the court toward counsel and the manner in which they were conducting the case, which was calculated to prejudice their client with the jury, although evidently not so intended. *State v. Coss*, 53 Or. 402, 101 Pac. 193; *State v. Clements*, 15 Or. 237, 14 Pac. 410;

—where accused relied largely in his defense upon proof of his previous good character, and called to the stand, for the purpose of establishing the same, quite a number of witnesses, a remark by the judge in denying certain questions to be propounded to the witnesses, as to how long and how intimately they were acquainted with accused, wherein he alluded to the efforts of counsel to introduce the testimony as unnecessary, because they consumed time "in taking wild-goose chases all over the country in these things." *Peoples v. State*, 103 Ga. 629, 20 S. E. 691.

—remarking to counsel that he has not prepared his case, wasting the time of the court and jury, and is seeking to deceive. *Kleinert v. Federal Brewing Co.* 107 App. Div. 485, 95 N. Y. Supp. 406;

—manifesting a hostile attitude toward counsel during the trial. *People v. Mayer*, 132 App. Div. 646, 117 N. Y. Supp. 520; *Tuchfeld v. Plattner*, 116 N. Y. Supp. 693;

—remarks in the presence of the jurors

admissible, as he, in law, under his evidence, was an accomplice or coprincipal, and his testimony had, of necessity, to be corroborated in a way tending to connect the defendant with the offense committed; and for this reason, it is admissible, when Mrs. Cozort testifies that at the time deceased came into their house she saw two men standing where Carter says he and defendant were when he says the agreement to kill deceased was formed; and the testimony of the witness, Bob Jennings, is admissible, when he says he saw appellant and another pass through his farm, and that they had guns and fired them at the time and place Carter says he and appellant passed along with guns and fired them; and the testimony of the witness Everett was admissible, when he says he saw two men near to and going in the direction of where deceased was killed, armed with a gun, and that, while he did not at that time know appellant, yet he had met him shortly thereafter, and one of the men he saw passing was of similar height, their make-up the same, and their complexion was alike, and that he thought he was the same man. Other testimony similar to this, all corroborative of the testimony of the witness Carter, was admissible, and these bills present no error.

2. On the question of accomplice, the court charged the jury in terms exactly in accord with the opinion of this court in the case of *Campbell v. State*, 57 Tex. Crim. Rep. 302, 123 S. W. 583, and approved in *Brown v. State*, 57 Tex. Crim. Rep. 570, 124 S. W. 101; *King v. State*, 57 Tex. Crim. Rep. 363, 123 S. W. 135, and other cases handed down since those opinions were rendered. And the court having thus charged the jury, there was no error in refusing the special charges relating to accomplice testimony. When the accomplice, Carter, took the witness stand, the court told him, in the presence of the jury: "I want to state to you, Mr. Carter, that, under the law, if you give evidence that will in any manner incriminate yourself,—you don't have to make any statement at all, unless you want to,—if you make any

statement at all on this stand, it must be voluntary on your part; and I also want to warn you that any statement you make might hereafter be used against you, and not for you." Appellant objected to these remarks being made to the witness, because it was calculated to lend additional weight to the testimony, and the state had made a contract with the witness not to prosecute him, but to dismiss his case, in consideration of his testifying in this case. On cross-examination, the appellant proved that the witness had a written contract signed by the district attorney and approved by the court, and introduced the contract in evidence. The court then instructed the jury: "At the request of defendant, I instruct you that, where the state makes an agreement with a party to testify, or what is known as to turn state's evidence, if that party carries out the agreement faithfully and states the truth of the transaction, why, the state would be bound by that agreement, and could not prosecute a party thereafter. The defendant asked me to so instruct you, and I do it at his request. If Carter lives up to his agreement with the state to testify in this case, he will not be prosecuted." The court states he gave the witness the warning, so that if he did not live up to his agreement with the state, and the state decided to prosecute him, the testimony given could be used against the witness. When the court gave the instructions requested by appellant, certainly the remarks to the witness could not have resulted in any harm to appellant. The jury were made fully aware under what conditions he was testifying, and it all could but go to impair, instead of strengthen, his testimony with the jury.

3. It also appears by bills of exception that, while this witness was testifying, the appellant was permitted to prove that he had been indicted of offenses of the grade of felony, when the appellant's attorney asked the witness, "Bert, what other offenses have you been charged with?" which was objected to and the objection sustained, the court instructing appellant's counsel

upon the presentation of a motion for change of venue on the ground of prejudice of the judge, which amounted to a severe criticism of defendant and his attorneys and an accusation that they had laid a false and perjured charge of prejudice against the judge for the mere purpose of delay. *State v. Wright*, 161 Mo. App. 597, 144 S. W. 175;

—remark in presence of those from whom the jury was to be selected upon the presentation of a motion for a continuance by accused, because of an absent witness, after having sworn that the witness was

not absent with the knowledge, or by the procurement or consent, of accused, that the case would be called at a later hour that day, and that accused could get the witness there if he wanted him. *Peoples v. State*, supra;

—remark to counsel upon denying the latter's request for time to prepare an affidavit for accused for a continuance upon the ground of the absence of important witnesses, that the court did not propose to have the court blocked. *Strange v. Com.* 23 Ky. L. Rep. 1234, 64 S. W. 980.

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that he could inquire as to any offense of the grade of felony or involving moral turpitude, but no others. At once appellant's counsel asked the witness, "With what offenses have you been indicted?" which was objected to and sustained, when the court instructed the attorney that he knew the rule of the court and the rule of law, and he must not again ask such questions, when appellant's counsel asked the witness: "Is it not a fact that you took some money off of Fieldon Brown when he was drunk?" It developed that the witness had never been charged in any court with such an offense, and the court again instructed appellant's counsel not to ask questions in regard to offenses, except in those instances where he had been charged with an offense in the courts involving moral turpitude or of the grade of felony. Counsel ignored the instructions of the court and repeated similar questions to witnesses a number of times, when he was fined by the court and required to pay the fine. It appears from the record that the witness Carter had not been indicted in regard to any of the matters inquired about, and no complaint filed against him. In the case of *Ware v. State*, 36 Tex. Crim. Rep. 599, 38 S. W. 198, and *Barkman v. State*, 41 Tex. Crim. Rep. 105, 52 S. W. 73, it was held: The witness never having been indicted or under legal accusation for said offenses, it was not competent evidence to impeach him. For a full discussion of this question and a citation of authorities, see *Wright v. State*, — Tex. Crim. Rep. —; 140 S. W. 1105. The testimony was not admissible, and the court did not err in excluding it, and counsel for appellant, after the question had been ruled on by the court, should have shown some respect for the ruling of the court. If the court had been in error, he could have reserved his bills of exception; but under no conditions was he authorized to ignore the ruling of the trial court. Having, by contemptuously ignoring the ruling of the court, brought about conditions which resulted in fines being imposed, he will not be heard to complain.

4. Levy Cozort and his wife were in attendance on court at the former trial in this case and testified. Since then they have moved to Oklahoma. The state introduced their testimony at the former trial, after properly proving it up. In this there was no error. *Robertson v. State*, — Tex. Crim. Rep. —, 142 S. W. 533.

5. While the witnesses Deans and Johnson were on the witness stand, they testified that they trailed the tracks of two men from a point near where the homicide was committed to a given point, and testi-

fied that they could tell the difference between tracks made by a person walking and one running, in that the tracks of the one running would be farther apart, and when running the toe of the shoe cuts deeper, etc. These witnesses testified they had had experience in trailing men, and knew this fact by observation and experience. The testimony was properly admitted.

6. A Winchester Nublack No. 12 shell was picked up in the tree top near the scene of the homicide, and at the point where Carter says appellant was standing when the fatal shot was fired. A witness testified as to the number of shot in a No. 12 shell of the size found in deceased's body. This testimony was admissible in connection with other circumstances in this case.

7. Nine bills of exception are reserved to the action of the court in sustaining challenges to jurors. The jurors answered they had conscientious scruples, and would not impose the death penalty on circumstantial evidence. The court did not err in sustaining the challenge for cause to these jurors. But if he had, it is shown by the record that when the jury was obtained, appellant still had seven unexhausted challenges; and it is not claimed any objectionable juror was forced on him. *Rice v. State*, 54 Tex. Crim. Rep. 149, 112 S. W. 209, and cases there cited.

8. The charge of the court is framed in accordance with the opinion of this court in the former appeal in this case, and aptly presents the law as applicable to the evidence. The other matters complained of present no error.

The judgment is affirmed.

Petition for rehearing denied June 19, 1912.

## VERMONT SUPREME COURT.

STATE OF VERMONT

v.

JAMES KELLEY.

(— Vt. —, 84 Atl. 861.)

**Animals — evidence — dog without collar — fine of owner.**

The loss of its collar without the owner's knowledge, by a dog, while absent from

*Note.* — *Loss of collar as defense to prosecution for keeping dog without collar.*

*STATE v. KELLEY* is apparently a case of first impression upon the point. In *Heisrodt v. Hackett*, 34 Mich. 283, 22 Am. Rep. 529 (where it was held that statutory

home, does not subject the owner to fine, under a statute imposing a fine for "keeping" a dog which does not wear a collar.

(Munson, J., dissents.)

(October 23, 1912.)

**E**XCEPTIONS by defendant to a ruling of the City Court of Barre convicting him of permitting a dog to run at large without a collar. Sustained.

The facts are stated in the opinion.

Mr. M. M. Gordon, for defendant:

The owner or keeper of a dog cannot be held criminally responsible under the statute, where the dog loses his collar without the knowledge of the owner and without the owner having an opportunity to replace the collar on the dog.

State v. Valwell, 66 Vt. 558, 29 Atl. 1018; State v. Kelley, 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203, 9 Am. Crim. Rep. 354; Com. v. Presby, 14 Gray, 65; Com. v. Stebbins, 8 Gray, 492; Marsh v. Jones, 21 Vt. 378, 52 Am. Dec. 67; Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; State v. Davis, 14 R. I. 281; Worthen v. Love, 60 Vt. 285, 14 Atl. 461; State v. Zonetti, 80 Vt. 348, 67 Atl. 817.

Mr. J. Ward Carver, for the State.

Munson, J., delivered the opinion of the court:

The licensing of dogs is required and regulated by §§ 5623 to 5628 of the Public Statutes. One of these sections provides that the owner or keeper of a licensed dog "shall cause it to wear a collar distinctly marked with the name of the owner or keeper." Section 5629 provides that "a person keeping a dog contrary to the foregoing provisions" shall be fined as therein stated. The respondent has been adjudged guilty upon a complaint which charges that he did not cause his dog to wear a collar, but that said dog ran at large without a collar. The case was heard upon an agreed statement, from which the following facts appear: The respondent held an unexpired license for the dog, which he obtained by a full compliance with all the requirements of the statute. He placed upon the dog a collar, which was properly marked, and which he never al-

lowed to be removed. During the respondent's absence from home the dog followed a member of his family to the city of Barre, a distance of about  $\frac{1}{2}$  mile, where it was killed by the constable because it was without a collar. It afterwards appeared that the dog lost its collar on its way to the city. The respondent had no knowledge of the loss of the collar, and no opportunity to replace it before the dog was killed. The collar had been lost off once before this, but without the knowledge of the respondent.

The want of a collar justified the officer in killing the dog. P. S. 5635. *McDerment v. Taft*, 83 Vt. 249, 138 Am. St. Rep. 1083, 75 Atl. 276. But the condition which justified the killing of the dog did not necessarily subject its owner to the fine. The state relies upon the general doctrine that, when a statute makes an act penal without reference to knowledge or intent, ignorance of the fact and freedom from criminal intent are no protection. *State v. Tomasi*, 67 Vt. 312, 31 Atl. 780; *State v. Ward*, 75 Vt. 438, 56 Atl. 85. The respondent's brief ignores these cases, and stands solely upon the claim that there can be no criminal liability without a criminal intent. But the case invites further consideration; for the language of the statute may suggest some inquiry not disposed of by the cases cited.

The requirement is that the owner cause the dog to wear a collar. The offense lies in keeping a dog contrary to this provision; that is, in keeping a dog without a collar. The question is whether the failure to have the dog wear a collar on this occasion, under the circumstances presented by the statement of facts, was a keeping of the dog without a collar within the meaning of the statute. If the respondent is relieved from liability on the case presented, it must be by force of the word "keeping." But in determining the effect of this word regard must be had to the nature of the subject-matter, and the intention of the legislature as evidenced by the whole provision. If we look mainly to the word "keeping," it may fairly be argued that the respondent is not within the prohibition. "Keeping," as applied to an existing relation or condition, implies some degree

provision that any person might kill any dog going at large, not licensed and collared according to law, would not make plaintiff's failure to license and collar his dog a defense to an action for damages for the killing of such dog by defendant's dog), the court, after so holding, added: "The court also erred in refusing to charge as requested by plaintiff's counsel. If the plaintiff had complied with the provisions

of the act by having his dog properly licensed and collared, and by accident the collar was lost, a reasonable time must have been allowed the plaintiff to discover that fact and replace it. There is so much justice and common sense in thus allowing the owner to discover and replace the lost collar that no argument is required to demonstrate it."

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of permanence. "Keep" is often used as synonymous with "maintain," and one cannot be said to maintain a condition which comes upon him by accident, and is remedied at the earliest possible moment. In this view the ownership of the dog from the time its collar was lost until it was killed, without a possibility of the collar being replaced, would not constitute a keeping of the dog without a collar. A majority of the court take this view of the statute, and consider that the conviction was erroneous.

Exceptions sustained, judgment and sentence vacated, and respondent discharged.

Munson, J., dissenting:

The statute requires the owner of a dog to cause it to wear a collar. The owner fails to meet this requirement if he provides a collar that can be and is "lost off." The respondent's lack of knowledge that this collar could be and had been lost off is no excuse. Legislation of this class requires an owner to know, and treats him as if he did know. The collarless condition of this dog was not cast on the respondent by accident. His failure to provide a suitable collar lay back of the accident.

## WEST VIRGINIA SUPREME COURT OF APPEALS.

ELLA M. BOAL, Appt.,

v.

STUART WOOD et al.

(70 W. Va. 383, 73 S. E. 978.)

**Parties — unborn children — representative.**

1. When an intestate leaves living heirs and an unborn heir of the same class, and

Headnotes by ROBINSON, J.

**Note. — Divestiture of estates of persons not in being.**

This note includes only cases decided since the preparation of the former note on the same subject to Downey v. Seib, 8 L.R.A. (N.S.) 49.

As in that note, cases are excluded which determine simply the effect of deeds and other conveyances to pass title where there were outstanding contingent remainders, but where no question of the interests of persons not in being arose. Only cases are included herein in which the question of the effect of a decree or conveyance upon the rights of persons subsequently born was actually in controversy, or those in which it was expressly declared that such interests were or were not affected by representation through persons in being.

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the estate is thereby vested in the living heirs subject to the contingency that the unborn heir will come into life and inherit with them, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of courts to deal with the same, represent the whole estate and stand not only for themselves but also for the person unborn.

**Same — birth — effect on jurisdiction.**

2. Where the court once legally acquires jurisdiction of an unborn heir by representation through living heirs of the same class, its subsequent birth without thereafter being made a direct party to the cause does not divest the court of jurisdiction to decree against it, though to do so is error.

**Unborn child — sale of property — decree — want of service.**

3. Decrees supporting a judicial sale, in a suit brought by an administrator to subject the decedent's lands to the payment of his debts, to which suit the widow and living heirs were parties, are not void for want of jurisdiction as to one who, when the administrator's suit was instituted, was an unborn heir of the decedent, of the same class as the living heirs who were parties to the suit, notwithstanding he was never made a direct party to the suit after coming into life.

(February 20, 1912.)

**A** PPEAL by plaintiff from an order of the Circuit Court for Logan County dismissing a petition filed to partition certain real estate which had been the property of Levi Vance, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Lilly & Shrewsbury, Chaffin & Bland, and Cox & Baker for appellants.

Messrs. Campbell, Brown, & Davis for appellees.

Robinson, J., delivered the opinion of the court:

The suit is one for partition. Plaintiff claims a one-tenth interest in the lands of

**Doctrine of representation — in general.**

Persons not *in esse* are, of course, not represented by those whose interests are hostile, and are not bound by a judgment obtained by fraud and collusion. Los Angeles County v. Winans, 13 Cal. App. 234, 109 Pac. 640. The court said: "If the sole purpose of the appearance of a living remainderman in an action were to secure some advantage to himself, or merely to serve the convenience of the party whose title was being quieted against the unborn remaindermen, virtual representation could not be presumed to exist, and any judgment obtained by virtue of such pretended representation could be set aside on the ground of fraud or collusion when the unborn remainderman became capable of suing in his own right." "The doctrine is said by some

which her father, Levi Vance, died seised and possessed. These lands were sold in a suit brought by the administrator of Vance to subject them to the payment of his debts. Defendants hold under purchasers at judicial sales made in that cause.

Vance died intestate in the year 1887. He left a widow, nine living children, and an unborn child. That unborn child is now the plaintiff here. She was born within ten months after her father's death. Prior to her birth, the suit to sell the lands had been instituted by the administrator. It had proceeded to a decree of sale as to a part of the lands. As is usual in such cases, that suit had been instituted within six months after the qualification of the administrator. The widow and the nine living children were parties defendant there-

to. But plaintiff not being yet in life, was not named as a party. Nor was she ever brought in by process after she was born. The suit, after her birth, proceeded to a sale under the decree which had theretofore been entered and to a confirmation of that sale. A subsequent decree of sale, as to the lands not embraced in the former one, was entered, and a sale made under that subsequent decree was confirmed.

Plaintiff contends that the judicial sales are void as to her,—that the suit in which they were made did not divest her of title to the lands. She says the court had no jurisdiction in the premises, since she was never made a formal party to the suit. Her bill asserting this claim was dismissed on demurrer, and she has appealed.

If, as plaintiff submits, the court had no

of the cases to be applied only where the law regards the interest of the representative so identical with that of the person represented that motives of self-interest will induce the person acting as the representative to defend the property as his own." "The interests of representative and represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each." It is also stated that the better reasoned of the later cases hold that the rule of representation can be relied upon in support of the judgment only as a matter of necessity, and never merely as a matter of convenience; and that all the cases hold that all persons in being capable of appearing, who are interested, must be brought into court.

In accordance with these general principles, the court in *Los Angeles County v. Winans*, supra, although recognizing the application of the doctrine to the sale of property for street assessment liens and proceedings thereunder, held that where there was a declaration of trust by the purchaser for the benefit of one for life, remainder to the heirs of her body, and the life tenant and one of her daughters conveyed their interest, they could not thereafter represent unborn grandchildren in an action by their grantee against the life tenant and her children to quiet title, and that because of this hostile interest the doctrine of representation did not apply. No point is made in the opinion as to whether the children of the life tenant who had not parted with their interest might not represent unborn remaindermen.

It was also held in the *Winans* Case that an action to foreclose a mechanics' lien was not such an action *in rem* as to bind subsequently born remaindermen, unless they were represented by those who were parties to the proceeding; and that where, in an action to foreclose a mechanic's lien on a building erected by a lessee of the life tenant, remainder to the heirs of her body, the life tenant and her children were made parties, the children could not, by consent-

ing to the decree against them, bind unborn remaindermen.

In *Whallen v. Kellner*, 31 Ky. L. Rep. 1285, 104 S. W. 1018, in a suit by the administrator for the appointment of a trustee, the trustee nominated in the will having refused to qualify, holding that it was sufficient to make the life tenant a party to the suit, although there were contingent remaindermen living, the court said:

"Such contingent interests must, in such state of case, be represented by the life tenant, or tenant of the estate in possession, who is deemed the representative in estate of those contingently entitled, whether born or not, as otherwise it would be impossible to ever bring them all before the court during the existence of the life estates. . . .

If, therefore, no valid appointment of a trustee could be made unless every contingent remainderman were before the court, the trust might fail for lack of a trustee, which equity will not permit."

In *Murphy v. Coale*, 107 Md. 198, 68 Atl. 615, it was said that a decree granted at the instance of the life beneficiary of a fund, so construing the will as to give the surviving executrix power to sell securities in which such fund had been invested, would not be binding upon unborn children of the life tenant, as contingent remaindermen.

Under the rule that the rights of contingent remaindermen not *in esse* may be finally adjudged when the remaindermen *in esse* are made parties as representatives of the class, it was held in *Hunt v. Gower*, 80 S. C. 80, 128 Am. St. Rep. 862, 61 S. E. 218, that unborn children would be concluded by a decree granted at the instance of the father in a suit against a living child represented by a guardian, to the effect that the father after the birth of a child could convey a fee title under a will providing that if at the time of his death he left children, his right in the real estate should descend to them and their children.

A construction of a bequest to testator's daughter for life, remainder to her "legal issue," that only children of the life bene-



jurisdiction as to her in the administrator's suit, then it is true that she did not lose title by the proceedings therein. Her suit is a collateral attack. She does not come within six months after reaching twenty-one years of age to show error in the proceedings. She comes, after that opportunity has passed, alleging absolute want of jurisdiction.

There is no allegation in the bill that plaintiff's rights were not fairly defended by those present as parties,—her mother, brother and sisters,—having interests identical with hers. Indeed, it appears there was full opportunity for defense against the subjection of the lands to the decedent's debts by those who had motives of interest for themselves and affection for the plaintiff to make that defense. The adminis-

trator prosecuting the suit was plaintiff's brother, himself an owner of the lands and a defendant in his own right. It is not to be assumed, nor is anything alleged to make it appear, that the lands were needlessly or injudiciously subjected to sale. Though plaintiff had an interest in the lands, she took that interest subject to the debts of the ancestor from whom she inherited. Those debts were a paramount charge on the lands. It must be presumed that those interested with plaintiff were careful to preserve the joint estate as far as could be done under the circumstances surrounding that estate. The case presents merely the question whether plaintiff's interest was illegally sold,—whether it was sold without jurisdiction in the court to order a sale and to consummate one when made.

ficiary living at her death shall take, rendered in a judgment to which the life tenant was a party, but before any of the grandchildren were born, and in which no provision was made for protecting the possible interests of persons not in being, is not binding upon grandchildren subsequently born who would take directly under the will had the term "legal issue" been properly construed to mean descendants. *Schmidt v. Jewett*, 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110. It was held that privity of blood was not enough to bind subsequently born remaindermen, that there must be privity of right, title, or interest.

In *Tonnele v. Wetmore*, 195 N. Y. 436, 88 N. E. 1008, where there was a devise in trust for life to testator's children, remainder to the issue of each child, with remainders over, it was held that a judgment declaring the trust provisions void, and that the children living at the death of the testator became seised of his lands as tenants in common, was binding upon a subsequently born grandchild, he being represented in the former action by grandchildren then in being whose interests were identical and who appeared through a guardian *ad litem*. The court says in effect that even if the former determination was contrary to the generally accepted rules of equity jurisprudence, since the court had jurisdiction of the unborn grandchildren through representation of those in being whose interests were identical, the judgment would not be subject to collateral attack.

In *Newton v. Hunt*, 134 App. Div. 325, 119 N. Y. Supp. 3, affirmed in 201 N. Y. 599, 95 N. E. 1134, it was held that a child of a settlor born after a judgment construing the powers of the settlor under a deed of trust whereby she settled her property in trust to pay the income to herself for life, and on her death to pay the principal to her children, was bound by the judgment, being represented by the other children of the settlor, who were parties thereto and whose interests were the same. This is stated in the opinion as a matter of course, 42 L.R.A. (N.S.)

the principal question discussed being the rights of a mortgagee of the settlor and certain of the children.

#### Judgment holding will invalid.

Where the question involved is not whether a will has been properly construed, but whether the will itself is valid, a judgment rendered in an action in which all the persons in being who had any interest were made parties, adjudging that the will is invalid, is binding upon subsequently born persons who would have taken under the will had it been valid. *Campbell v. Hughes*, 69 Misc. 433, 126 N. Y. Supp. 147. The court said: "It is true that in any judgment providing for a sale of real property in which unborn issue might possibly be interested a provision should be made for the protection of their rights. . . . It is well settled that a judgment in any case will bind unborn persons if their rights were protected; but where, as in this case, the judgment itself sweeps away the instrument which creates their possible rights, the rule that these rights should be protected is not applicable. . . . If this were not the rule, it would be impossible to successfully maintain an action to set aside a will under . . . the Code, so long as by any possibility, under the terms of that will, persons not *in case* could take."

#### Decrees beyond court's jurisdiction.

A decree which is void because beyond the jurisdiction of the court, under the relief prayed, will not divest the estate of unborn remaindermen. *Charles v. White*, 214 Mo. 187, 21 L.R.A. (N.S.) 481, 127 Am. St. Rep. 674, 112 S. W. 545, a case where a creditor of a grantor sued his grantees for life, with remainder to the heirs of their bodies, and made parties all the remaindermen in being; and it was held that subsequently born remaindermen were not divested of estate by a decree that the defendants should be and were divested of title, but under which the land was not sold.

We have noticed that plaintiff, though legally in being as an unborn child, was not in life at the time the suit was instituted. It was impossible to make her a formal party thereto. It was not then known that plaintiff would be born alive and take the inheritance which she should have in the event that she came into life. Conditions of the estate demanded that the suit proceed. The necessity of the case demanded that it proceed without her as a formal party. The law provided a way for the court to take jurisdiction notwithstanding the situation. The law provided a way for the court to take hold of the interest of this unborn child and to deal therewith in judicial proceedings affecting it. Though that child might thereafter come into life, and an interest in the lands devolve on it as of the time of the death of its father, still the court could take jurisdiction in relation to it even before its birth. The court's power to do so arose out of the very necessity of things. "The rule in regard to parties is a rule of convenience, and the court will never allow it to be so applied as to do an injury, to obstruct the administration of justice." *Faulkner v. Davis*, 18 Gratt. 693, 98 Am. Dec. 698. The living owners

of the estate were the only ones that could be made actual parties to the suit. But this unborn child was so virtually made a party through them that jurisdiction attached as to it also. It was a party by representation. "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost of necessity." *Kent v. Church of St. Michael*, 136 N. Y. 10, 18 L.R.A. 331, 32 Am. St. Rep. 693, 32 N. E. 704. "Where the legal title to an estate is vested in a class, subject merely to open and let in after-born children, the members of the class in being at any given time represent not only themselves, but also the persons not born, in any litigation with reference to the estate." 15 Enc. Pl. & Pr. 650. "Whenever the court of chancery has power to decree the conversion of real estate into personal, it may do so notwithstanding the contingent interests of some of

#### Contracts and conveyances *inter vivos*.

Under a corresponding heading in the note in 8 L.R.A.(N.S.) 74, is set out the case of *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. 195, where the court, after holding that the living children of the life tenant took a vested remainder subject to open and let in afterborn children, held that the contingent interest of the afterborn children was extinguished by merger of the life estate and any possible reversion in the vested remainder, and the conveyance of the united interests to a third person.

The later cases in the same state, *Birdsall v. Birdsall*, — Iowa, —, 36 L.R.A.(N.S.) 1121, 132 N. W. 809, and *Westcott v. Meeker*, 144 Iowa, 311, 29 L.R.A.(N.S.) 947, 122 N. W. 964, holding that the interests of the unborn remaindermen were not divested by the union of the life estate and the interests of living remaindermen in the same person, were distinguished upon the ground that interests of the living remaindermen in these cases were contingent, and not vested,—a point that is not within the scope of the present note. But see note in 25 L.R.A.(N.S.) 888.

Generally, as to the effect of union of life estate and remote remainder or reversion in the same person upon intermediate contingent remainder, see note to *McCreary v. Coggeshall*, 7 L.R.A.(N.S.) 433.

#### Partition.

It was held in *Kenyon v. Davis*, 219 Pa. 585, 69 Atl. 62, where an interest in prop-42 L.R.A.(N.S.)

erty was devised in trust, the income to be paid to one for life and his children to receive the principal at his death, that it was sufficient in partition proceedings to make the trustee a party, and was not necessary either to join the life beneficiary, or to appoint a trustee for his unborn children, in order to bind them by the decree.

A voluntary partition among five grantees for life, with remainder to their heirs or assigns, was held in *Acord v. Beaty*, — Mo. —, 41 L.R.A.(N.S.) 400, 148 S. W. 901, to bind a subsequently born heir. The court approves and follows what it states is the English doctrine, that a voluntary partition, if fair and equal when made, is binding upon persons not *in esse*, and that the only difference between a voluntary partition and one by a suit in court is that, in order to bind persons not *in esse*, the voluntary petition must have been equal at the time it was made. As to partition by action in court it is said: "We may then accept it as a settled doctrine that, in a partition by procedure in court, the parties not *in esse* are represented by those who hold subject to their interest and are bound by the decree."

It was also held in the *Acord Case* that, although the voluntary partition might not have been fair and equal when made as against plaintiff's ancestor, because of a possible defect of title, yet where, before the birth of plaintiff, adverse possession had continued for such a time as to give title thereby, which was as good under the statute as a title running back to the government, the plaintiff was bound by the partition.

the parties who are not yet in being, or not ascertained, provided all the parties are brought before the court that can be brought before it, and especially where the rights of the nonexistent, or as yet unascertained, parties will be represented and sufficiently defended by the persons who are made parties, and who have motives of self-interest and affection to make such defense. And this is styled the doctrine of representation of parties." 2 Minor's Inst. 4th ed. 238. "Under the laws of Virginia parties in being, possessing an estate of inheritance in property, are regarded as so far representing all persons who, being afterwards born, may have interests therein, that a decree for the sale thereof binding them will also bind the latter persons." *Knotts v. Stearns*, 91 U. S. 638, 23 L. ed. 252.

The court acquired jurisdiction to hear and to determine the rights of this unborn infant. It acquired that jurisdiction by making the living owners of the same class with the unborn owner parties to the suit. Having thus acquired jurisdiction of the party, the court possessed the power to proceed to the final disposition of the suit. *Black, Judgm. § 243*. True, when the infant

came into life, it should have been made a party in person. Not to do so was error, just as it is error, not to revive a suit against the heirs or legal representatives when a party dies. But the failure to do so could not divest the court of the jurisdiction it had lawfully acquired. "The test of jurisdiction . . . is whether the tribunal has power to *enter upon the inquiry*, and not whether its conclusions in the course of it were right or wrong." *Van Fleet, Collateral Attack, § 61*. "When once the jurisdiction of the court has attached, no subsequent error or irregularity in the exercise of that jurisdiction can make its judgment void." 1 *Black, Judgm. § 204*. The jurisdiction by representation continued for a longer time than necessity demanded, but it continued nevertheless. To allow it so to continue was error which would call for a reversal. But mere error cannot avail plaintiff in this suit. The court legally acquired jurisdiction over her which it later erroneously employed; but it never lost the jurisdiction which it lawfully acquired before she was born. It had the power to proceed to final judgment though it proceeded thereto erroneously by a failure to make her a personal party to

#### Judicial sales.

In *McClure v. Crume*, 141 Ky. 361, 132 S. W. 433, where under a statute an equitable action was brought for the sale and reinvestment of the proceeds of property in which there were contingent remainders, it was held that the estates of unborn remaindermen would thereby be divested. The court said: "The person in being who has a contingent interest in the property is required to be joined as the defendant in the proceeding, in order that not only his own interest may be protected by his own watchfulness and judgment, but by their exercise the interest of the unborn contingent remaindermen, identical in its character, may also be protected. Thus is representation provided for the unborn remainderman. The chancellor, too, represents him."

Where property devised to a son and daughter for life, and then to the heirs of their bodies, was sold in a proceeding by a creditor of the testator, in which the son and daughter and all the children of the latter in being were parties, the son then having no children, the judgment binds subsequently born children of the son,—especially where the property was sold for a fair price and the interests of unborn children were not prejudiced. *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763.

A court of equity does not have inherent power, in a suit by the life tenant against her children represented by a guardian *ad litem*, to appoint a commissioner and clothe him with power to sell property devised to one for life, with remainder to the heirs of her body, where it appears that the sale

was for speculation to reinvest the proceeds; and although the court made a finding that such would be for the best interests of the children, subsequently born grandchildren whose parents died before the life tenant, and who therefore took under the will, can recover their interest from the purchaser. *Heady v. Crouse*, 203 Mo. 100, 120 Am. St. Rep. 643, 100 S. W. 1052.

In *Bernard v. Bernard*, 79 S. C. 364, 128 Am. St. Rep. 852, 60 S. E. 700, where property was devised to testator's children for life, remainder to the children of each child living at the latter's death, and all persons in being who had any interest were made parties to proceedings to sell the property, it was held that remaindermen born during the proceedings were bound by them, being represented by those who were parties. Part of the property was sold after the birth of such remaindermen, under an order of the court made previous to their birth, and part under an order subsequent to the birth. The court said that, conceding that the subsequently born remaindermen have the right to intervene, they nevertheless would be bound by all orders in the action before they were made parties.

Where statutory provisions for the sale of property in which there are contingent remainders are complied with, the purchase money being held for the remaindermen, a decree rendered in a suit by a life tenant, with contingent remainders to her children, in which two of the children are represented by their guardian, binds subsequently born children of the life tenant. *Swift v. Harbison-Walker Refractories Co.* 228 Pa. 584, 77 Atl. 916.

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the suit when she came into life. This principle is well illustrated in a Virginia case, from which we quote: "The authority to decide being once shown, it can never be divested by being improperly or erroneously employed. Freeman, Judgm. § 135; Cox v. Thomas, 9 Gratt. 312. If, for example, a suit be commenced against a *feme sole*, it does not abate by her subsequent marriage, but it may proceed against husband and wife jointly. If the plaintiffs, however, without noticing the marriage, take judgment against the *feme*, the judgment is not thereby rendered void, but is regarded as valid and binding until and unless reversed by some direct proceeding in that court. In a number of cases this doctrine has been carried to the extent of holding that when process is served in the lifetime of the defendant and he afterwards dies, a judgment against him subsequent to his death is not absolutely void, but simply voidable. The court, having obtained jurisdiction over the defendant whilst living, is thereby empowered to proceed with the case to judgment; and although the court ought to cease to exercise jurisdiction over the party when he dies, its failure to do so is an error to be corrected on appeal, or writ of error *coram nobis*, as the case may be." Neale v. Utz, 75 Va. 480. See also King v. Burdett, 28 W. Va. 601, 57 Am. Rep. 687; Watt v. Brookover, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007; Black, Judgm. § 200.

In the case under consideration, necessity made the court to take jurisdiction of the unborn infant by representation; the court then had power to go on by representation to the end, though to do so was erroneous. Just as the court may erroneously go on after the death of a party as to whom jurisdiction has attached while living, so it may proceed after the birth of a party as to whom jurisdiction theretofore attached while unborn. The court having legally acquired jurisdiction over the infant whilst unborn, that court was empowered to proceed to judgment. The change from an unborn child to one in the arms of the mother could not divest the court of jurisdiction over it. It was the same person. It had already been constructively brought before the court by the bringing in of those of the same class who in law represented it. A change in the status of a party does not call for a new summons to enable a court to keep the jurisdiction it has once acquired. If it were so, jurisdiction would readily be lost; a party, could voluntarily divest the court of jurisdiction. Surely constructive service by publication as to a nonresident continues to give the court jurisdiction notwithstanding the party 42 L.R.A. (N.S.)

afterwards becomes a resident of the state, and is not personally served. So constructive service by representation as to one, an unborn infant, continues to give the court jurisdiction though the infant is afterwards born alive. "The jurisdiction of a court depends upon the state of affairs existing at the time it is invoked, and if the jurisdiction once attaches to the person and subject-matter of the litigation, the subsequent happening of events, though they are of such a character as would have prevented jurisdiction from attaching in the first instance, will not operate to oust the jurisdiction already attached. This is the statement of the rule that subsequent events will never defeat jurisdiction already acquired." 12 Enc. Pl. & Pr. 171.

Plaintiff was before the court in the suit of which she complains. She was there by representation which the law deems sufficient to give the court jurisdiction as to her. She cannot collaterally attack the decrees. If the suit had been brought after her birth, the case would be entirely different. The demurrer was rightly sustained. We must affirm the order.

#### NEBRASKA SUPREME COURT.

J. A. ROSSBACK, Appt.,  
v.

GRAHAM MICKS.

(89 Neb. 821, 132 N. W. 526.)

#### Mortgage — duplicate — double filing — effect.

1. Where parties to a recorded mortgage execute a second one on the same realty for the same amount, to secure the same debt, for the sole purpose of correcting a mistake in the first, and so express themselves in the body of the second instrument, its effect, when recorded, is to supersede the first, and the two constitute one mortgage, nothing having intervened to impair the mortgagee's security.

#### Specific performance — plaintiff's default — effect.

2. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price, according to the terms of his agreement, he is not en-

Headnotes by ROSE, J.

Note. — The correction by a new instrument of a mistake in the name of a party in a conveyance of real property, as affecting the question of marketable title, is considered at pages 21 et seq. of the note to Justice v. Button, 38 L.R.A. (N.S.) 1, covering the general subject of marketable title.

titled to specific performance or to damages for breach of contract.

(September 25, 1911.)

**A**PPEAL by plaintiff from a judgment of the District Court for Greeley County, dismissing his action to compel specific performance of a contract to convey land, or the recovery of damages for failure to do so. Affirmed.

The facts are stated in the opinion.

Messrs. J. J. Sullivan, I. L. Albert, J. B. Barry, and Willis E. Reed for appellant.

Messrs. J. R. Swain, T. P. Lanigan, and J. M. Lanigan, for appellee:

Under the contract in this case, all that the plaintiff could ask or demand from the defendant was a marketable title to his land; and the title which he presented to him was a title that would be accepted by an ordinarily prudent person, and which was accepted by Goodrich, the subsequent purchaser, later on, without question.

Todd v. Union Dime Sav. Inst. 128 N. Y. 636, 28 N. E. 504; Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981; Harrass v. Edwards, 94 Wis. 459, 69 N. W. 69; Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99; Mathews v. Lightner, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992.

Plaintiff is not entitled to the loss of his bargain as damages, for the reason that it nowhere appears from the evidence that the defendant had notice or knowledge of a resale of said premises at an advanced price, or that plaintiff was buying for that purpose.

Violet v. Rose, 39 Neb. 660, 58 N. W. 216.

Plaintiff has not brought himself within the law governing actions for specific performance.

Cummings v. Rogers, 36 Minn. 317, 30 N. W. 892; Foster v. Ley, 32 Neb. 404, 15 L.R.A. 737, 49 N. W. 450; David Bradley & Co. v. Union P. R. Co. 76 Neb. 172, 107 N. W. 238; Mason v. Strickland, 73 Neb. 783, 103 N. W. 458; Gilbert v. Union P. R. Co. 79 Neb. 160, 112 N. W. 359.

Ross, J., delivered the opinion of the court:

Specific performance of a contract obligating defendant to convey to plaintiff a half section of land in Greeley county, or the recovery of damages for failure to do so, is the relief sought in the petition. The contract was dated October 20, 1906, and may be summarized thus: Defendant agreed to convey by warranty deed title in

fee simple, clear of all encumbrances. The purchase price was \$12,000, plaintiff paying \$250 down and agreeing to pay the remainder, subject to a mortgage of \$6,000, March 1, 1907. These payments were conditions precedent to the conveyance, and the failure of plaintiff to make either was defendant's authority to declare a forfeiture of the contract, and to retain as liquidated damages all payments made. Plaintiff did not pay or tender as purchase money any sum except the cash payment, and defendant did not execute the deed required by the contract. Under issues raised by the pleadings, the trial court, upon consideration of the evidence of both parties, found that plaintiff did not perform his part of the contract, and that by reason of such default defendant declared a forfeiture thereof. A decree dismissing plaintiff's action followed, and defendant was allowed to retain as liquidated damages the amount received by him on the purchase price. Plaintiff has appealed.

Before the time for performance had expired, defendant submitted to plaintiff an abstract of title. It contained a reference to a mortgage executed by defendant in favor of John M. Hardy, for \$3,000, in addition to the encumbrance of \$6,000 mentioned in the contract of purchase pleaded in the petition. In this connection plaintiff argues: March 1, 1907, and afterwards, the record of the additional mortgage was a defect which prevented defendant from conveying the title purchased. Plaintiff was ready and willing to pay the purchase price, but was not required to do so or to make a tender thereof, since defendant refused to perfect his title, and allowed it to remain in the condition described. The additional mortgage should have been released of record or canceled by a decree of court. By refusing to convey the title purchased, defendant was in default, and could not require payment or a tender. Unless plaintiff is right in the position thus taken, there is no merit in his appeal.

The abstract of title submitted to plaintiff is in the record. Entry 26 relates to the \$3,000 mortgage in controversy. Defendant and wife are grantors, and John M. Hardy is grantee. In the column under remarks this note is inserted: "Substituted by 27." Entry 27 is a duplicate of 26, with these exceptions: "James Hardy," instead of "John M. Hardy," is grantee, and the date of acknowledgment and the name of the notary are different. The remarks in entry 27 are: "Made to take the place of 26. See note 1 on back." The note last cited reads thus: "Clause contained in 27—mortgage from Graham Micks

& wife to James Hardy: 'This mortgage is made in lieu of and to take the place of another certain mortgage of the same date, on the same land, for the same amount, by the same parties, to John M. Hardy, whose real and correct name is James Hardy, and the real and true mortgagee in both instruments.'" Both mortgages were made by the same parties to secure the same debt, and the second was executed to correct a mistake in the first. It was the purpose of the parties to substitute the second mortgage for the first, and the effect was to release the erroneous lien. The mortgage records so show. Plaintiff, however, argues: The parties to the corrected mortgage could only bind themselves by their contract, and there is nothing on the public records except their agreement to show that a John M. Hardy is not in fact the original mortgagee, instead of James Hardy. If he is, he cannot be deprived of his lien by the contract of the parties to the later mortgage. This argument is refuted by evidence adduced at the trial. Defendant testified without objection that he was ready, able, and willing to convey a good title March 1, 1907; that he would have done so had the purchase price been paid; that he had a conversation with plaintiff's attorney in relation to the mortgages, and told him that the man who drew the first mortgage made a mistake, there being in fact only one mortgage; that defendant told him he had the mortgages and notes in his possession to show there was really only one mortgage. When asked what the attorney said, defendant replied: "He said that was all right; and, of course, he expected, when we made the deal, I would turn these notes and mortgages over to him." Defendant also testified that he notified plaintiff March 2, 1907, to put up at least \$1,000, giving him until March 5 to do so. There is no reason to disbelieve this testimony, and it is accepted as the truth. It is sufficient to show, when considered with both mortgages, that the first would not prevent defendant from conveying a good title. By refusing to make the stipulated payments or a deposit on a tender, plaintiff was in default, and is not entitled to specific performance or to damages.

Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. Under this elementary principle, plaintiff's suit was properly dismissed.

The trial court also ruled correctly in 42 L.R.A. (N.S.)

allowing defendant to retain as liquidated damages the \$250 payment on the purchase price. Defendant believed in the good faith of plaintiff, procured an abstract of title, and prepared to vacate his farm. He sought a new home, sold part of his stock in contemplation of the change, and was otherwise damaged.

Affirmed.

Sedgwick, J., not sitting.

Petition for rehearing denied December 4, 1911.

## ARKANSAS SUPREME COURT.

ROBERT L. HILL, Appt.,

v.

MARY C. HEARD.

(— Ark. —, 148 S. W. 254.)

### Descent — bond for title — completion of contract — ancestral estate.

The completion, after the death of one who had contracted for real estate, paid a small portion of the purchase money, and taken a bond for title, of the contract, by payment of the balance of the purchase money out of profits from the property, which became the homestead of the widow and child, and money furnished by the widow, and conveyance to the child by the vendor, renders the property a new acquisition by the child, and not an ancestral estate, and therefore, upon the death of the child without issue, the descent will be to his heirs, uncontrolled by the fact that the equitable title was acquired through his father.

(May 20, 1912.)

### *Note. — Devolution of vendee's interest under contract for the purchase of real property.*

- I. In general, 446.
- II. From the deceased vendee, 447.
- III. From the heir, 450.

The question whether a right of dower or curtesy will attach to the vendee's interest is not within the scope of the note.

#### *I. In general.*

The equity of the vendee holding real estate under a contract of purchase is included within the general class of equities in real estate, existing in a person or persons while the legal title is in another, yet differs sufficiently from the other equities of the general class to require separate treatment.

The principles governing the general class do not come within the scope of this note. They are, so far as they are applicable to this special class of cases, simply stated under their appropriate headings.

**A** PPEAL by defendant from a judgment of the Circuit Court for Conway County in plaintiff's favor in an action brought to recover possession of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Sellers & Sellers, for appellant:

The land was a new acquisition in James Montgomery Heard.

Walker, Am. Law, 11th ed. 409; Nicholson v. Halsey, 1 Johns. Ch. 417; 14 Cyc. 28; Brower v. Hunt, 18 Ohio St. 312; Brown v. Whaley, 58 Ohio St. 654, 65 Am. St. 793, 49 N. E. 479; Bowman v. People, 82 Ill. 246, 25 Am. Rep. 317; Guier v. Bridges, 114 Ky. 148, 70 S. W. 288; Hagan v. Clemons, 25 Ky. L. Rep. 1776, 78 S. W. 899; Gardner v. Astor, 3 Johns. Ch. 53,

8 Am. Dec. 465; Cooper v. Cooper, 5 N. J. Eq. 9; Holme v. Shinn, 62 N. J. Eq. 1, 49 Atl. 151; Latrobe v. Carter, 83 Md. 279, 34 Atl. 472; McCammon v. Cooper, 69 Ohio St. 366, 69 N. E. 658; Armington v. Armington, 28 Ind. 74; Shepard v. Taylor, 15 R. I. 204, 3 Atl. 382; Bristol v. Austin, 40 Conn. 449; Re Donahue, 36 Cal. 329; Spencer v. McGonagle, 107 Ind. 410, 8 N. E. 266; Wells v. Head, 12 B. Mon. 109; Gould v. Tucker, 20 S. D. 226, 105 N. W. 625; Patterson v. Lamson, 45 Ohio St. 80, 12 N. E. 531; Goodright ex dem. Alston v. Wells, 2 Dougl. K. B. 771; Selby v. Alston, 3 Ves. Jr. 338, 4 Revised Rep. 10; Stembel v. Martin, 50 Ohio St. 525, 35 N. E. 208; Higgins v. Higgins, 57 Ohio St. 244, 48 N. E. 943; Russell v. Bruer, 64 Ohio St. 1, 50

To sustain them by authorities, it would be necessary to cite very many cases outside of the special class here considered.

This note does not include cases involving government lands held under homestead or other claims. The inheritance of such claims is controlled by the acts of Congress. The same is true of mining claims. For the latter, see note to O'Connell v. Pinnacle Gold Mines Co. 4 L.R.A. (N.S.) 919.

## II. From the deceased vendee.

Since the common law and practically all the statutes governing descent and distribution provide, as between real estate and personalty, a different method of administration as well as a different line of devolution, it is necessary to decide the character of the estate passing from the deceased vendee.

Applying the doctrine of "equitable conversion," which is based upon the maxim that "equity regards that as done which ought to be done," both the English and the American courts have uniformly treated as real estate the equity of the vendee in real estate held under contract of purchase. Entering into the contract, it is held, converts the interest of the vendor unto personalty, and the money of the vendee into real estate. From the date of the contract the vendor is held to be a trustee of the legal title for the vendee, with a lien for purchase money, and the vendee holds any balance of purchase money in trust for the vendor. The character of the estate of each is held to have been converted. This general doctrine, of course, cannot be covered in this note of limited scope. Only the cases showing the fact that the interest of the vendee passes at his death as real estate are here cited.

That the interest of the vendee, at his death, passes as real estate, is a rule so well established that in many cases it has apparently been assumed. Several such cases are here cited, because a rule so vital to the decision would not likely escape the notice of both court and counsel. 42 L.R.A. (N.S.)

Passing upon a case involving such a contract, without reference, however, to the inheritance laws, the court, in Seton v. Slade, 7 Ves. Jr. 274, said: "The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate, from the sealing of the contract, is the real property of the vendee. It descends to his heirs. It is devisable by his will."

A leasehold estate merges into an estate of inheritance upon the lessee's purchasing and holding the fee under a contract of sale; consequently, a will, made while the testator held under the lease, before his acquisition by contract, passes nothing, and the heir at law takes the property as against the devisee. Capel v. Girdler, 9 Ves. Jr. 510, 7 Revised Rep. 289. The court said: "If he had by his will afterward disposed of all his lands, this estate would have passed by that will."

And Langford v. Pitt, 2 P. Wms. 629, was another case of testator's securing land by contract after he had made his will. Here the eldest son took the land in the capacity of heir at law, and not in that of devisee; hence he took a fee-simple title under the law, rather than a life estate, as provided in the will generally. The result would have been the opposite had the will been made after the acquisition under the contract.

In Greenhill v. Greenhill, Prec. in Ch. 320, 2 Vern. 679, Gilb. Eq. Rep. 77, it was held that land held under a contract would pass under clauses in the will disposing of the testator's "freehold estate" and all of his "lands of inheritance," where it appeared that he had no other freehold estate or lands of inheritance.

A purchaser holding land under a contract, the purchase money partly paid, devised it for specified uses, and directed his executors to pay the balance of the purchase money out of his estate. It was held, in Whittaker v. Whittaker, 4 Bro. Ch. 31, that if, from the state of his affairs, the contract is dissolved, the pur-

N. E. 740; *Groves v. Groves*, 65 Ohio St. 448, 62 N. E. 1044; *Smith v. Croom*, 7 Fla. 172; 1 *Dembitz*, Land Titles, § 36; 2 Washb. Real Prop. 6th ed. 476; *Martin v. Martin*, 98 Ark. 93, 135 S. W. 348.

Messrs. Douglass Heard and William L. Moose, for appellee:

The estate in Montgomery Heard was ancestral, and not a new acquisition on his part.

*Kelly v. McGuire*, 15 Ark. 555; *Galloway v. Robinson*, 19 Ark. 396; *Magness v. Arnold*, 31 Ark. 103; *Pate v. Johnson*, 15 Ark. 275.

**Frauenthal, J.**, delivered the opinion of the court:

This is an action of ejectment, instituted

chase money does not sink back into the estate, but must be laid out in other lands, for the same uses to which he had devised the land under contract.

In case of the death of the vendee, holding property by purchase under an executory contract only, his interest in the land should be considered as real estate and descends to his heir, or he may devise the same by will. *Flomerfelt v. Siglin*, 155 Ala. 633, 130 Am. St. Rep. 67, 47 So. 106.

And the same principle had been previously stated in *Masterson v. Pullen*, 62 Ala. 145.

But where the contract to purchase is accompanied by a title bond which shows upon its face that the title is not in the vendor, but is to be procured by him, which condition is never fulfilled, the heir, upon the death of the vendee intestate, takes nothing, either in law or in equity; and the administrator is the proper party to sue for breach. *Allen v. Greene*, 19 Ala. 34.

In Arkansas it has been held in several cases that a contract to purchase land, the vendor furnishing a title bond, and the vendee giving his notes for the unpaid purchase money, creates the same relation as if the vendee had taken a deed and given a mortgage for the purchase money (*Smith v. Robinson*, 13 Ark. 533; *Lewis v. Boskins*, 27 Ark. 61; *Holman v. Patterson*, 29 Ark. 357; *McConnell v. Beattie*, 34 Ark. 113; *Harris v. King*, 16 Ark. 126; *Moore v. Anders*, 14 Ark. 633, 60 Am. Dec. 551); therefore, such an interest is said to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law (*Hardy v. Heard*, 15 Ark. 188; *Strauss v. White*, 66 Ark. 167, 51 S. W. 64).

In *Stubbs v. Pitts*, 84 Ark. 160, 104 S. W. 1110, it was held that the equitable interest of the vendee in land held by him under a contract of purchase, upon his death intestate, passes as land to his heirs, and that the surety on his notes, for the balance of the purchase money, having paid the notes and taken title in her own name, held the title thus acquired in trust for 42 L.R.A. (N.S.)

by appellee for the recovery of a tract of land situated in Conway county. It is conceded by both parties to this suit that the land was owned by one James Montgomery Heard (who, for brevity, will be hereafter referred to as Montgomery Heard), who died intestate and without issue, leaving his mother as his only surviving parent, who also died prior to the institution of this suit. The appellee claims that the land was an ancestral estate coming to said Montgomery Heard on the part of the father, and that she inherited it from him by reason of the fact that she is his sole surviving paternal grandparent. The appellant claims that the land was obtained by Montgomery Heard as a new acquisition, and that the title passed to his half-

the heirs, subject to the lien of the amount so paid; and where the rents and profits went to the holder of the legal title, for some years, the heirs could claim an accounting and offset them against the lien.

Land held under a contract to purchase descends in equity to the heir, and not to the administrator. *Smith v. Smith*, 55 Ill. 204.

Or, if the vendee had assigned his contract to purchase to other parties, having no interest therein, nothing passes to his heirs. *Kellogg v. Logan*, 38 Iowa, 688.

Under the probate system in Michigan, Comp. Laws, §§ 2516, 2517, 3065, an executory contract for the purchase of land is regarded in the light of real estate, so far as to give the administrator no right to dispose of such a contract, which he would not have to dispose of the land itself, had it been conveyed to his intestate during life. It belongs to the heirs. *Baxter v. Robinson*, 11 Mich. 520.

A statute in Nebraska, borrowed from the one in Michigan, is construed in the same way as in *Baxter v. Robinson*, supra, and the court, in *Hovorka v. Havlik*, 68 Neb. 14, 110 Am. St. Rep. 387, 93 N. W. 990, adds that even in the absence of statute, the administrator would not be allowed to take lands held by the decedent under an executory contract, in the same manner as he does personalty.

In *Dorsey v. Hall*, 7 Neb. 460, it is held that the vendor under an executory contract for the sale of land is considered in equity, a trustee for the vendee for the estate sold; but it is not decided how the estate descends.

The equitable estate of a vendee in land held by him under contract of purchase is alienable, descendible, and devisable, in like manner as real estate held by a legal title. *Cutler v. Meeker*, 71 Neb. 732, 99 N. W. 514, 8 Ann. Cas. 951.

Land held under contract of purchase, upon which part has been paid, descends as real estate, and not as personalty, and this is true where the vendor is the state. *Grandjean v. Beyl*, 78 Neb. 349, 110 N. W. 1108, 15 Ann. Cas. 577, affirmed on re-



brothers and half-sisters, who are appellant's children.

The land was purchased by James B. Heard in January, 1894, from one Richard Brooke, at the price of \$1,550, for which he executed four notes for the sum of \$387.50 each, due, respectively, on the 1st of January 1895, 1896, 1897, and 1898. At the same time Brooke executed to him a bond for title, by which he agreed to convey said land to him by deed upon the payment of said notes. Under said purchase, Heard went into possession of and occupied said land as his homestead until his death, which occurred on May 28, 1895. He died intestate, leaving surviving him his widow, Edna, and one child, the said Montgomery, who was then from three to

four months old. In April, 1897, the widow, Edna, married the appellant, Robert L. Hill, by whom she had six children. Montgomery Heard died intestate and without issue in September, 1908, and his mother died in September, 1911. There is a conflict in the testimony relative to the question as to who paid the various notes executed by James B. Heard for the purchase money of the land. The testimony upon the part of the appellee tended to prove that the first maturing note was paid by the maker in his lifetime at or about its maturity, and that the other three notes were paid after his death by his widow, Edna, out of moneys derived partly from some personal property left by the said James B. Heard, and from a tract of land

hearing in 78 Neb. 354, 114 N. W. 414, 15 Ann. Cas. 579.

Lands held under contract of purchase from the state, part of the purchase price having been paid, descend to the heirs as realty, and the administrator cannot sell the equity of the heirs therein, except in the manner prescribed by statute for the sale of real estate. *Mauzy v. Hinrichs*, 89 Neb. 280, 131 N. W. 218.

In *Livingston v. Newkirk*, 3 Johns. Ch. 312, it was held, citing *Greenhill v. Greenhill* and *Langford v. Pitt*, supra, that "an equitable interest [in land] founded upon articles for a purchase, and which a court of equity will specifically enforce, is real estate, which will pass by a devise made subsequently; and if there be no such devise, will descend to the heir, and the executor must pay the purchase money for the benefit of the heir."

And the same principle has been followed in *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343; *Williams v. Kinney*, 43 Hun, 1, 6 N. Y. S. R. 560, affirmed in 118 N. Y. 679, 23 N. E. 1147; *Re McMonagle*, 139 App. Div. 398, 124 N. Y. Supp. 258; *Johnson v. Corbett*, 11 Paige, 273.

And in *Swartwout v. Burr*, 1 Barb. 499, which was a bill by the vendee against the heir of the vendor for specific performance of a contract to purchase land, it was said: "The vendee is treated as the owner of the land, and it is devisable and descendible as her real estate." And the same statement is made in *Terrett v. Cowenhoven*, 11 Hun, 322.

And it was held in *Griffith v. Beecher*, 10 Barb. 432, that an administrator has no power to dispose of his decedent's contract for the purchase of land, except by complying with the same laws that govern real estate, for such an equitable estate is real estate.

In *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825, the court, in speaking of the respective interests of the vendor and vendee in land under contract of sale between them, says: "And the latter [the vendee], even before the conveyance to him, can devise the same . . . and the land

which was agreed to be sold has been turned into money belonging to the vendor. Courts of equity regard that as done which ought to be done."

The vendee's equitable interest in land held by him under contract of purchase descends, at his death, to his heirs, and his widow cannot sell it or give it away. *Alldrich v. Bailey*, 71 Pa. 246.

In *Stephenson v. Yandle*, 3 Hayw. (Tenn.) 109, it was held that the vendee's equity in land held by him under contract of purchase descends as land, on his death, to his heir, and that his administrators have no right to sue for a breach of covenant that occurs after his death.

And it was further held in *Myrick v. Boyd*, 3 Hayw. (Tenn.) 179, that the administrator has nothing to do with such an interest except to pay the residue of the purchase money as far as assets come into his hands for that purpose. He cannot cancel the agreement or any part thereof.

In *Irvine v. Muse*, 10 Heisk. 477, although the question was not directly before the court, it is said that the interest of the vendee in land held by him under contract of purchase is devisable and descendible as his lands.

It was held in *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007, that an equitable interest in real estate, held by the vendee under contract of purchase, descends just as a legal estate in the land.

The interest of the vendee in land held by him under contract of purchase descends as real estate to his heirs, subject to the unpaid balance of purchase money; and where a deed is made to the widow of the vendee in pursuance of the contract, she will hold the property in trust for the heirs, charged with the money she borrowed to complete the payment of the purchase money. *Braxton v. Braxton*, 9 Mackey, 355.

Where a covenant in a perpetual lease made to a trustee of a *feme covert* provides that at any time upon the payment of a definite sum by the trustee of the *feme covert*, or their or either of their heirs or assigns, over and above the rent stipulated, to the lessor or his heirs or assigns,

also left by the said intestate, which brought \$150, and principally from the rents and proceeds of the crops made upon the land in controversy by the widow and those working for her. The testimony on the part of the appellant tended to prove that the last note was paid by the appellant out of his own money. But this testimony also tended to prove that he collected rents and profits of the land during the year in which he made the payment, which amounted to as much as said note. Upon the payment of the last note, the vendor, Brooke, in November, 1897, executed a deed by which he conveyed the land to said Montgomery Heard.

The case was tried by the court sitting as a jury, who found that the land was

an ancestral estate coming on the part of the father to said Montgomery Heard, and that, upon his death without issue and the death of his mother, the land ascended to his paternal grandmother, and judgment was entered accordingly.

The sole question involved in this case for determination is, What was the character of the estate acquired by Montgomery Heard in this land? that is, was it ancestral or a new acquisition? If it was an ancestral estate, coming by the father, then upon the death of the said Montgomery intestate and without issue, and the termination of the homestead interest of the mother by her death, the land ascended to his grandmother in the line of his father, in exclusion of his brothers and sisters of

a deed of release of the leasehold premises shall be given, it was held in *Prout v. Roby*, 15 Wall. 471, 21 L. ed. 58, that, while the leasehold would descend as personal property to the personal representative of the lessee, if there were one, yet the right to purchase, contained in the covenant, descends to the heir who would have a right to demand that the purchase money be paid out of the estate. But where there is no personal representative, and the heir proposed to make the payment *aliunde* he could enforce performance of the contract to convey.

But in *Bean v. Reynolds*, 15 App. D. C. 132, it is said: "It is evident that the decision in the case of *Prout v. Roby*, supra, applies only where, at least in equity, if not in law, the leasehold interest and the right to purchase the fee are vested in one and the same person." And it is here held that a covenant in a lease for years, giving the lessee, his executors, administrators, or assigns, the right to purchase the fee-simple title for a definite sum at any time during the term of the lease, descends as personalty to the personal representative, and not to the heir. A point is also made of the facts that the word "heirs" is left out of the covenant, and that a destruction of the leasehold would destroy the covenant; but in *Prout v. Roby*, supra, it would not, since in that case the option to purchase was not limited to the term of the lease.

In *Lewis v. Hawkins*, 23 Wall. 119, 23 L. ed. 113, it is said that the equity of the vendee in land held by him under contract of purchase is alienable, descendible, and devisable in like manner as real estate held by a legal title.

In *Boone v. Chiles*, 10 Pet. 225, 9 L. ed. 405, the vendor is said to be trustee of the legal title to the land, for the vendee, who owns the land, where the latter holds under a contract of purchase from the former.

### III. From the heir.

On the death of the owner, without issue, one set of heirs will, under the common law as well as under most statutes, inherit the 42 L.R.A. (N.S.)

land he has acquired by purchase, while another set will inherit his ancestral land. This makes it necessary to consider the subject under these two heads.

It is evident that in all cases of the class here under consideration, the equitable interest and the legal title vest in the heir of the vendee at different times. The former, according to the foregoing cases, vests as land immediately at the death of the vendee, while the latter must be subsequently acquired. In *HILL v. HEARD*, above reported, the court applies the ancient and well-established rule of merger; i. e., that where the equitable interest and the legal title both become vested in the same person, the former merges into the latter, and the further devolution of the estate will be cast according to the source of the legal title alone. This is a general rule and applies to cases not included in this note. It cannot be considered here further than to state that the courts have uniformly applied it to the class of cases here considered. But there are very few cases clearly in point as to all of the facts.

Land on which part of the purchase money had been paid by the vendee, and the balance paid after his death, with money arising from a sale of part of the land itself, the legal title passing directly to the heir from the vendor by virtue of an order of court, is a new acquisition on the part of the heir; hence, at his death, it ascends to his mother in preference to his paternal grandmother. *Higgins v. Higgins*, 57 Ohio St. 239, 48 N. E. 943. The father of the heir held the land under a verbal contract of purchase, the vendor having executed a deed, but holding it undelivered, to secure the balance of the purchase money. The decision is based upon the principle of merger; the source of the legal title alone controlled.

Real estate, the legal title to which was acquired by a deed in fulfillment of a trust, is a new acquisition notwithstanding the trust estate itself was inherited. *Nicholson v. Halsey*, 1 Johns. Ch. 417. Here the father and another person had made a joint location on a tract, but the father died before patent was issued, which was later is-

the half blood. On the other hand, if the land was a new acquisition, then, upon the death of said Montgomery and his mother, the land passed by descent to his brothers and sisters of the half blood. Kirby's Dig. §§ 2645-2647; Kelly v. McGuire, 15 Ark. 555.

With the father, James B. Heard, purchased the land from Brooke and obtained from him a bond for title, he acquired an equitable estate in the land. The legal title to the land, however, was still in the vendor. The equitable estate thus obtained by a vendee is such an interest in land as will, upon his death, descend to his heir. As is said in 1 Pomeroy, Eq. Jur. § 363, in speaking of the interest which a vendee under a bond for title obtains in land:

sued to the other, one half in trust for the heirs. In fulfillment of the trust, a deed was made, conveying to the heir one half of the acreage. This decision is based upon the doctrine of merger.

Land acquired by the widow of one who had at one time held it under contract of purchase is a new purchase, where it appears that the decedent had forfeited the contract during his life, and that after his death she made a new contract, whereby she purchased the land from the same vendor, for the amount of the unpaid notes the decedent had given for it, the vendor voluntarily thus giving her the benefit of the amount the decedent had paid, and destroying the notes. Joslin v. Joslin, — Iowa, —, 75 N. W. 487.

#### As an ancestral estate.

In the case of HILL v. HEARD, above reported, the court says: "If the entire purchase money had been paid by the father, or had been paid by his administrator out of his property, then, under the principle of the above cases, the land would have come to the son by or on the part of the father."

This expression by the court is entitled to more weight than mere *dictum*. While, under the facts, it was not essential to the decision, yet it is announced as a rule which the court was ready to apply in case the facts should bring the case within it. The court then immediately proceeds to determine whether or not the facts make the rule applicable.

Such a rule would seem to be inconsistent with the principle of merger, *supra*, which is the basic principle of the decision itself, unless it can be held that the son inherits the legal title from the father. Can a legal title be inherited in one from whom it never vested,—by one in whom it does not vest for some time after the death of the ancestor?

A vendee holding land under contract of purchase, after paying the full purchase price, died without having received the legal title. He devised all his property to his 42 L.R.A.(N.S.)

"He may convey or encumber it, may devise it by will. On his death intestate, it descends to his heirs, and not to his administrators." Stubbs v. Pitts, 84 Ark. 160, 104 S. W. 1110. It follows that upon the death of said James B. Heard the equitable estate in this land passed by descent to his sole child and heir, the said Montgomery, subject to the homestead rights of the widow and of himself as minor. Thereafter Montgomery obtained the legal estate and title to the land by virtue of the conveyance executed to him by the vendor, Brooke. The question then arises as to how Montgomery obtained this legal title,—whether by or on the part of his father, or by purchase,—and, if by purchase, then the question recurs, What was the character of the estate

widow, in trust for their son, until he arrived at the age of twenty-one years, and until he should make a specified settlement upon the widow. A conveyance in harmony with the terms of the will was made to the widow after the testator's death. It was held in Goodright ex dem. Alston v. Wells, 2 Dougl. K. B. 771 (Selby v. Alston, 3 Ves. Jr. 339, 4 Revised Rep. 10, the same case in equity), that, upon the death of the widow before the son arrived at the age of twenty-one years, he inherited from her (not from the father) the legal title. And it was further held that, at his death, after he was twenty-one years old, and without issue, the equitable estate (coming from the father) had merged in the legal estate (coming from the mother); hence the estate devolved upon the heir *ex parte materna*, as against the heir *ex parte paterna*.

In Nicholson v. Halsey, *supra*, it was contended that the purchase money was paid by the mother of the heir out of her separate estate. But the court makes no inquiry as to the truth of that contention, evidently regarding it as immaterial. After a thorough review of the early English decisions on the doctrine of merger, the court applies that doctrine to the case. The whole import of the decision is, that the further devolution of the estate will be cast according to the source of the legal title, no matter who paid the purchase money, or from what source the equitable estate was derived.

In the case of Higgins v. Higgins, *supra*, the two thirds of the purchase price was paid by the father, and the balance paid by selling part of the land, and title was made from the vendor to the guardian of the heir by operation of an order of court; yet the court held that the legal title was not inherited from the father, but was acquired by purchase; hence, under the principle of merger, the whole estate was a new acquisition, and not an ancestral estate.

Frick Coke Co. v. Laughead, 203 Pa. 168, 52 Atl. 172, cited by the court in favor of the rule, was not a case of contract among the living. The purchaser at an orphans' court sale made the cash payment

which he then acquired when the equitable title and legal title to the land were thus united in him, the one by inheritance and the other by purchase? Was the land thus acquired ancestral or a new acquisition?

In the case of *Kelly v. McGuire*, supra, the entire subject of the descent of real estate as fixed by our statute was fully discussed and considered. The construction placed upon our statute of descent by that decision has been uniformly followed by this court, and the decision has become a rule of property. In considering the provision of the statute relating to ancestral estates, it was there said that its manifest intention was to preserve ancestral estates in the line of the blood from whence they came. In speaking of this provision, the court said: "It was a partial adoption or recognition of the common-law principle which invariably followed the line of the blood." It has been the policy of our law, as evidenced by statutory enactments, to get away from the rules and canons of the common law relative to the descent of property. But the provision in our statute of descent relative to ancestral estates seems to have preserved to some extent a portion of such rules. At common law, after a failure of lineal descendants of the last owner, the land, on account of feudal reasons, passed to his collateral relations, provided they were of the blood of the first purchaser by whom the land came to the intestate. 2 Bl. Com. 220; 2 Tiffany, Real Prop. § 432. So, by this provision of our statute, if the land came to the intestate by gift, devise, or descent from an ancestor, it shall pass to such kindred only as are of the blood of the ancestor by or on the part of whom it was derived by him. In speaking again of this provision of the statute of descent relating to ancestral

estates, this court, in the case of *West v. Williams*, 15 Ark. 682, said that, in order to carry out the intention of the legislature to preserve such estates in the line of the blood, "the same means must be resorted to that were used at common law to make it effectual as to descended estates." It will thus be seen that, in the interpretation of this section of the statute of descent, the court recognized it as a partial adoption of common-law principles, and considered it according to the rules of the common law relating to such succession. In order, therefore, to determine what is the rule of succession when the legal and the equitable estate in land come from different channels and unite in the same person, we should resort to the same source for the interpretation of this phase of the statute. According to this, the descent of land is controlled by the legal title. The character of the estate in the holder, therefore, is determined by the course of the legal title coming to him. The leading case on this doctrine is *Goodright ex dem. Alston v. Wells*, 2 Dougl. K. B. 771, which was tried before Lord Mansfield, and in which it was held that, "if the legal interest in land descend in fee simple *ex parte materna*, and the equitable interest in fee simple *ex parte paterna*, or *vice versa*, the equitable estate shall merge in the legal, and both follow the line through which the legal estate descended." The doctrine thus announced has been followed in this country. In the case of *Nicholson v. Halsey*, 1 Johns. Ch. 417, Chancellor Kent held that "where the legal and equitable estates in land, being coextensive, unite in the same person, the equitable is merged in the legal estate, which descends according to the rules of law." In that case A, having paid money for the purchase

required by the order of sale, the sale was confirmed by the court, and he held possession for some three years, and died without paying the balance of the purchase money or getting the deed. His administrators paid the balance out of his estate, and took a deed to themselves "for the use of the heirs." It was held that under the laws of Pennsylvania the legal title was good in the purchaser before his death, but imperfect, being open to an attack on the part of the heirs of the party formerly owning; that paying the balance of the purchase money and taking the deed only perfected the title, and related back to the confirmation; therefore the heirs inherited the legal title from their father, as well as the equitable estate.

*Galloway v. Robinson*, 19 Ark. 396, and similar cases, referred to by the court, can be clearly distinguished. There it was held that land purchased and paid for by the father, with deed made directly from the

vendor to the son, is a gift within the meaning of the statute making "all gifts from the father to son" ancestral estates. Here was no executory contract, no question of merger, for the title, legal and equitable, vested in the son at the same time; and no question of inheritance was involved, so far as the son's title was concerned.

In *Kelly v. McGuire*, 15 Ark. 555, the court was considering legal estates alone, without regard to the equitable, and no question of merger was involved; but it might well be said, as it was aptly remarked in *Goodright ex dem. Alston v. Wells*, supra (where the vendee had paid the full purchase price), that there is no inherent equity in one set of heirs over another set, so that the rule of law ought to prevail.

The three cases first above cited, it will be seen, are more or less opposed to the rule for which the court in *HILL v. HEARD* contends. None have been found supporting it, or even considering it. J. W. M.

of land, died before any conveyance was made, and B afterwards took a conveyance of the land in trust for the infant daughter of A, to whom he afterwards executed a deed in fee, and it was there held that she acquired the legal estate by purchase, and, on her death without issue, the estate descended to her brothers and sisters of the half blood, to the exclusion of her paternal uncle. In Walker's American Law, 11th ed. 409, the author says: "In determining what is ancestral property, the legal title controls. It is paramount to the equitable title. . . . Thus, if the legal and equitable titles come by separate channels to unite in the same person, the latter is merged in the former, and follows the course of descent that an exclusively legal derivation would have dictated." In 27 Am. & Eng. Enc. Law, 2d ed. 303, the rule is thus stated by the writer of the article therein, and this rule appears to be well sustained by the authorities there cited: "Where the legal and the equitable estate in the land come through different channels and in different modes, it has been held that it is the course of the legal rather than the equitable estate which determines whether it be an ancestral estate in the holder." Selby v. Alston, 3 Ves. Jr. 339, 4 Revised Rep. 10; Wells v. Head, 12 B. Mon. 166; Shepard v. Taylor, 15 R. I. 204, 3 Atl. 382; Holme v. Shinn, 62 N. J. Eq. 1, 49 Atl. 151; Stembel v. Martin, 50 Ohio St. 495, 35 N. E. 208; Russell v. Bruer, 64 Ohio St. 1, 59 N. E. 740. In the case of Higgins v. Higgins, 57 Ohio St. 239, 48 N. E. 943, the principle as to the determination of the succession of land wherein the legal and equitable titles have come to an intestate from different sources is thus stated: "In determining questions as to the descent of real property, regard is had to the legal title only; and, where the legal title is acquired by purchase and an equity in the property by inheritance, the legal title and equitable interest at once unite, and, upon the death of the owner, the descent of the property will be cast as an estate which came by purchase." In that case John Higgins agreed to sell to James Higgins 200 acres for \$6,000, to be paid in instalments, and deed to be made on payment thereof. Possession was delivered to the vendee, who afterwards died, leaving a widow and infant child named Darlton, and also brothers and sisters. Afterwards the court required John Higgins to execute a deed to the said Darlton on payment of the balance of the purchase money, amounting to \$2,000. Darlton thereafter died intestate and without issue, and it was there held that the land which he had thus obtained was a new acquisition

and descended accordingly. See Hogan v. Finley, 52 Ark. 55, 11 S. W. 1035; Wheelock v. Simons, 75 Ark. 19, 86 S. W. 830. In the case of Kelly v. McGuire, supra, it was definitely determined when land was ancestral and when a new acquisition, but the consideration there was only of legal estates. It was there said that when land comes by gift, devise, or descent, either mediately or immediately, from the father or mother or from any person in their respective lines, it is an ancestral estate; and where the land is acquired by the intestate by his own exertions and industry, or is derived from any source other than descent, devise, or gift from father or mother, or any relative in the paternal or maternal line, then it is a new acquisition. It has, however, been held by this court, that, in order to constitute land an ancestral estate, it is not necessary that it come directly from the ancestor by deed or gift. It is sufficient to make the land ancestral if the ancestor advances the entire purchase money, and takes the deed in the name of his son. In the case of Galloway v. Robinson, 19 Ark. 396, it was held that "where the father advances the money for the purchase of lands, and takes the deed in the name of the son, upon the death of the son without issue, the lands vest in the father in fee. In such case, the lands came to the son 'on the part of the father' by gift, and were not a new acquisition by the son within the contemplation and meaning of the act of descents and distributions of this state;" and this ruling was recognized and followed in the case of Cotton v. Citizens' Bank, 97 Ark. 568, 135 S. W. 340. See also Magness v. Arnold, 31 Ark. 103. But in all these cases the legal title came from or on the part of the father, and with no consideration other than that coming from him. In the case at bar only the equitable title came from the father, and the entire consideration for the land did not come from him. If the entire purchase money had been paid by the father, or had been paid by his administrator, out of his property, then, under the principle of the above cases, the land would have come to the son by or on the part of the father. Frick Coke Co. v. Loughhead, 203 Pa. 168, 52 Atl. 172. However, in this case the legal title came to the intestate, Montgomery, from Brooke; and, if any substantial portion of the purchase money of the land came from any source other than from the father, the land did not come by or on the part of the father to him. In such event, the equitable and legal title came to the son, Montgomery, by different modes and through different channels. The land came partly by a title and considera-

tion derived from a source other than by descent to the son from the father. The land was the homestead of the father, and, upon his death, the rents and profits arising therefrom became the property of his widow and minor child. Kirby's Dig. § 3882; *Gainus v. Cannon*, 42 Ark. 503; *Smith v. Scott*, 92 Ark. 143, 122 S. W. 501. If it should be held that the rents of the land coming to the minor son were derived from the father, still the rents acquired by the widow became her separate property. The widow also became the owner of a portion, if not all, of the personal property left by the father. These rents and this personal property which came to the widow from the estate of James B. Heard became her absolute and separate property, and when this property of the widow, or the proceeds thereof, was paid on the land for the benefit of the son, it came to the son, not from the father, but from the mother. According to the undisputed evidence, the rents and personal property which were thus owned by the mother were used in paying a great portion of the purchase money of this land. This portion of the consideration of the land came from a source other than from the father to the son. It follows, therefore, that the legal title to the land came to the son from a source other than from the father, and also that a substantial part of the consideration for the land, according to the undisputed evidence, came from a different source. In the case of *Martin v. Martin*, 98 Ark. 93, 135 S. W. 348, we said: "In order to constitute a gift from a parent to a child an ancestral estate within the meaning of our statute, the conveyance must be made entirely in consideration of blood, and without any consideration deemed valuable in law; and, if such deed is executed partly for a valuable consideration, the estate acquired is a new acquisition." In like manner, in order for the land to be ancestral in coming by descent from the father, it must come wholly from the father, and without any pecuniary equivalent from any other source. If it comes in any other way, whether by purchase or gift, from a source other than from the father, then it is not an ancestral estate, but a new acquisition.

In the case at bar one fourth of the consideration for the land was paid by the father. After his death, three fourths of the purchase money was paid, and a great portion thereof was paid by the mother, and out of her separate property. This portion of the consideration did not come to the son by descent on the part of the father, or through his estate, but came to him from the mother, and out of her separate property. The legal title obtained by the 42 L.R.A. (N.S.)

son from the vendor was acquired by a consideration obtained from a source other than from the father, and therefore by purchase, and not by descent. The two estates which thus united in the son came by different rights,—the equitable estate by inheritance and the legal estate by purchase. The equitable estate, therefore, merged into the legal estate, and the rule of succession to the land must be determined solely by the course of the legal estate. The legal estate was not obtained by descent, but by purchase, and the land acquired by the said Montgomery was therefore not ancestral, but a new acquisition. It follows that, upon the death of said Montgomery intestate and without issue, and the termination of the homestead right by the death of his mother, the land descended to his brothers and sisters of the half blood. The court erred in the judgment which it rendered.

The judgment is accordingly reversed, and this cause is remanded for a new trial.

#### ALABAMA SUPREME COURT.

BLACKSHER COMPANY et al., Appts.,  
v.

MARY S. NORTHROP.

(— Ala. —, 57 So. 743.)

#### Will — probate — disposal of property.

1. An instrument must dispose of property to be entitled to probate as a will.

#### Same — executors and guardians — necessity of will.

2. A statutory authorization of testamentary executors and guardians applies only to such as are named in a will disposing of property.

#### Judgment — collateral attack — admission to probate of void will.

3. A decree showing on its face that the will which it admits to probate was not attested as required by statute is subject

*Note. — Collateral attack on probate where the decree or the will affirmatively shows that the will is invalid.*

For the general subject of the conclusiveness of probate as *res judicata* in the same jurisdiction, see the note to *Sly v. Hunt*, 21 L.R.A. 680.

It is usual to say that where the probate court had jurisdiction, its decree of probate is not subject to collateral attack (though in some jurisdictions this rule is modified by statute, particularly where a distinction is made between the effect of probate as to real, as distinguished from personal, property).

Thus in the early case of *Noell v. Wells*, 1 Lev. 235, where a woman as executrix of her husband's will sued his debtor who

to collateral attack, since there was an absence of jurisdiction to admit such an instrument to probate.

(McClellan, J., dissents.)

(December 29, 1911.)

**A**PPEAL by defendants from a decree of the Law and Equity Court for Monroe County overruling a demurrer to a bill filed to secure the sale of the property for division among the joint owners thereof. Reversed.

Complainant claimed title under a probated will having only one attesting witness.

The case sufficiently appears in the opinion.

pleaded that she was never executrix, and she brought in the probate and he said that the will was not a true but a forged will, it was held at the trial that he could not give evidence directly contrary to the seal of the ordinary as to a matter in his jurisdiction; and upon motion the whole court held that such evidence "could not be given. But evidence may be given, that the seal was forged or repealed, or that there were *bona notabilia*; for those confess and avoid the seal. But he cannot give in evidence that another was executor, or that the testator was *non compos mentis*; for those falsify the proceedings of the ordinary in cases of which he is judge. But those are to be remedied by appeal."

The application of the rule where there may have been defects not appearing on the face of the record is not, in general, attended with difficulty. And where it appears from the record that a usual element of validity is not present, and the statute permits probate without it under certain circumstances, the presence of these circumstances in general will be presumed. But where, on the face of the decree or on the face of the will, a vital defect in the will appears, the question of the effect of the decree when collaterally attacked is unsettled, the few cases where it has arisen showing marked differences of opinion in the courts on the subject.

Inasmuch as the cases usually do not show the form of the decree, they are arranged here according to the nature of the defect, and not according to the instrument in which it appears.

#### Defects as to witnesses—attesting witnesses.

In **BLACKSHER CO. v. NORTHPROP**, it was held that a decree admitting a will to probate is subject to collateral attack where the decree shows on its face that the will was attested by only one witness when the statute required two. It will be noticed that the court lays stress on the fact that the invalidity of the probated instrument appeared on the face of the decree, so that

Messrs. Stevens & Lyons, for appellants:

The will in question, appointing executors, as it did, was valid for that purpose, although attested by but one witness, and therefore was properly probated, but such probate did not make it effective "to pass real or personal property."

Powell v. Powell, 30 Ala. 705; Shields v. Alston, 4 Ala. 255; McGrew v. McGrew, 1 Stew. & P. (Ala.) 31; Ex parte Henry, 24 Ala. 646; 23 Am. & Eng. Enc. Law, 120; Morey v. Sohler, 63 N. H. 507, 56 Am. Rep. 541, 3 Atl. 636; 1 Jarman, Wills, 6th ed. 33; Beard v. Beard, 3 Atk. 72; Brownrigg v. Pike, L. R. 7 Prob. Div. 61, 51 L. J. Prob. N. S. 29, 46 L. T. N. S. 821, 30 Week. Rep. 561, 46 J. P. 360.

it was not necessary to look to the probated instrument itself to discover such invalidity.

In Cureton v. Taylor, 80 Ga. 400, 15 S. E. 643, an ejectment suit, where it appeared from the instruments probated, that there were only two attesting witnesses to each, it was held that "a will attested by only two witnesses is void, and can derive no aid from probate and being admitted to record. The judgment of probate is not merely erroneous, but an absolute nullity on its face. No motion to set it aside is requisite, nor is it ever too late to urge its invalidity." This case was followed in Gay v. Sanders, 101 Ga. 601, 28 S. E. 1019, where the form of the decree does not appear, but the instrument admitted had but one attesting witness. It was also followed in Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694, the form of decree not appearing.

But, on the contrary, in Vanderpoel v. Van Valkenburgh, 6 N. Y. 190, where the form of decree does not appear, and where the will had been attested by a single witness only, while the statute required two, it was held that its probate as to personalty could not be collaterally attacked. (The court does not refer to the fact that the will was admitted upon the consent of all the heirs and next of kin of the testatrix.)

In Leatherwood v. Sullivan, 81 Ala. 458, 1 So. 718, where a will executed in Florida, having one witness, was filed in Alabama under the certificate of the Florida court, that said will was regularly proved and established according to the laws of Florida, the Alabama court declined to take judicial notice that the laws of Florida required three witnesses. The court did say, however: "The record fails to show what is the law of Florida on this subject, and we can take notice of the statutes of other states only when they are introduced in evidence. Moreover, even were this true, the probate of the will, and the grant of letters by a court of competent jurisdiction in Alabama, would not for this reason be rendered void. Such judgment of probate would be valid until set aside, and would

Even though a will which is not attested by two witnesses cannot operate as a valid appointment of an executor or testamentary guardian, yet a decree probating such a will, but finding and reciting that it is attested by but one witness, cannot, and does not, make such will "effective to pass real or personal property."

Thornton v. Chisholm, 20 Ga. 338; Hooks v. Stamper, 18 Ga. 471; Cureton v. Taylor, 89 Ga. 490, 15 S. E. 643; Gay v. Sanders, 101 Ga. 601, 28 S. E. 1019; Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694; Torrey v. Bruner, 60 Fla. 365, 53 So. 339; Wall v. Wall, 123 Pa. 545, 10 Am. St. Rep. 549, 16 Atl. 589.

Mr. C. J. Torrey, also for appellants.

Messrs. Barnett & Bugg, for appellee:

not be subject to collateral attack, as is here attempted by objecting to the introduction of the letters testamentary in evidence." But see Sullivan v. Rabb, 86 Ala. 433, 5 So. 746, reviewed in the opinion in BLACKSHER CO. v. NORTHROP.

#### —holographic will.

In Stevenson v. Huddleson, 13 B. Mon. 299, the court said: "Here the will in question does not purport to be attested by any subscribing witness; but it is a good will if it was not so attested, provided it be wholly written and signed by the testator himself; it does not appear upon its face that it was written by any other person than the testator himself; it does not appear, from the face of the will or the certificate of probate, that the testator did not write the whole of the will and sign it himself. If he did, though there be no attesting witnesses, the will was properly established. It was established by the proper court, and no other tribunal has a right collaterally to pronounce their judgment to be void, or even erroneous, when it does not appear from the will itself, or the certificate of probate, that it was unauthorized by law; or, in other words, when it does not so appear that the will was written by any other person than the testator himself."

—insufficient number of witnesses examined.

In Telford v. Barney, 1 G. Greene, 575, where it appeared by "the record" that the will was proved by one witness, the court said: "This record is of the probate of a will,—a matter clearly within its jurisdiction,—and stands on the same footing, jurisdiction appearing, as the records of this or any other court. It must therefore be presumed that the heirs assented, or that one witness was dead or absent, so that a single witness filled the statute. But if these facts were expressly negatived by the record, it would only prove that the court ought to have decided the other way, not that it lacked the power of deciding."

In Dilworth v. Rice, 48 Mo. 124, where it seems probable that the defect did not 42 L.R.A.(N.S.)

A judgment admitting the instrument to probate as the last will and testament of the decedent, until it is avoided in some mode prescribed by law, establishes, as against the whole world, the instrument as the law of descent and distributions governing the particular estate; and the judgment giving this operation to the instrument cannot be collaterally impeached.

Deslonde v. Darrington, 29 Ala. 92; Hall v. Hall, 47 Ala. 290; Dickey v. Vann, 81 Ala. 432, 8 So. 195; Knox v. Paull, 95 Ala. 505, 11 So. 156; Woodruff v. Stewart, 63 Ala. 211; Sims v. Waters, 65 Ala. 442; Steele v. Tutwiler, 68 Ala. 107; Brock v. Frank, 51 Ala. 89; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Wyman v. Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Schultz v. Schultz, 10 Gratt. 358, 60 Am.

appear in the judgment or certificate of probate, the court in sustaining the probate against collateral attack said: "The record shows that in the probate of the will only one witness was examined, although it was attested by two, and the requirement of the statute is that every will must be attested and proved by two subscribing witnesses. It is thence argued that as there was a defect in the proof, and the law was not complied with, the probate was a nullity, and that all proceedings thereafter were void. On the other hand, it is insisted that the probate of a will under our law is a judicial act, and that a judgment of probate cannot thus be collaterally impeached, and that it is entitled to full force and effect until set aside or annulled in the manner prescribed by statute."

In Thompson v. Thompson, 9 Pa. 234, where the statute required proof by two witnesses, but did not, it seems, require any attesting witnesses, and a certificate of probate of a codicil stated that it was duly proved "by Robert Craig, the subscribing witness," it was held that the probate could not be collaterally attacked after thirty years. The court said: "In the present case, the register makes what is substantially a decree that the codicil was duly proved before him on the 30th December, 1815, by the subscribing witness. He does not say that any other person was examined; and the presumption is at least in equilibrium between another person being sworn and no other person making probate. Every fair intentment ought to be made in favor of the correctness of the proceeding, after this lapse of time. The will and the codicil have been acted upon for more than thirty years by the devisees; and as the codicil operates on the personal estate, which alone is in contest in this suit, the probate must be considered not only prima facie, but conclusive."

#### —statute of limitations.

In Calias v. Semeré, 10 La. Ann. 684, it was held that a will which was null in that it did not bear on its face the evidence that



Dec. 360; *Bowen v. Johnson*, 5 R. I. 312, 73 Am. Dec. 54; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 127; *Hine v. Hussey*, 45 Ala. 515; *Leatherwood v. Sullivan*, 81 Ala. 462, 1 So. 718; *McCann v. Ellis*, 172 Ala. 60, 55 So. 305; *Waring v. Lewis*, 53 Ala. 623; *Penny v. British & A. Mortg. Co.* 132 Ala. 357, 31 So. 96; *Burke v. Mutch*, 66 Ala. 368; *Matthews v. McDade*, 72 Ala. 386; *Acklen v. Goodman*, 77 Ala. 521; *Broderick's Will (Kieley v. McGlynn)* 21 Wall. 503, 22 L. ed. 599; *Fouvergne v. Municipality No. 2*, 20 How. 471-473, 15 L. ed. 399-401; *Tarver v. Tarver*, 9 Pet. 174-180, 9 L. ed. 91-93; 1 *Woerner, Am. Law of Administration*, 328; *Dublin v. Chadbourne*, 16 Mass. 433; *Schultz v. San-*

*ders*, 38 N. J. Eq. 154; *Herman, Estoppel*, p. 112.

*Anderson, J.*, delivered the opinion of the court:

While impressed with the logic and reasoning of the argument of appellants' counsel, to the effect that the formalities as to the execution of wills as contained in § 6172 of the Code of 1907 apply only to wills which devise real or personal property, and are not essential as to wills appointing an executor or guardian; that a will devising property, though not executed according to the statute, may be invalid as a devise or bequest of property, and yet may be a valid will for other purposes, under the common law, and entitled to probate and proof, and

the subscribing witnesses thereto were residents of the parish where it appears it was written and received, was unassailable after five years, under the statute which provided "that the action of nullity or rescission of contracts, testaments, or other acts, etc., are prescribed by five years, when the person entitled to exercise them is in the state." The court said: "The defect of which the appellants complain is one of form. It is true, defects of form in a will are absolute nullities, but we think it is well settled that such nullities may be cured by the lapse of time." This case was followed in *Justus's Succession*, 45 La. Ann. 190, 12 So. 130.

#### Posthumous instrument.

In *Wall v. Wall*, 123 Pa. 545, 10 Am. St. Rep. 549, 16 Atl. 598, where there seems to have been no decree except one stating that letters testamentary were issued, and the invalidity of the instrument offered appeared in the record of the evidence of the "subscribing witnesses," the court said: "Isaac Wall, realizing the dangerous character of his sickness, desired to make a will, and gave directions to a scrivener for its preparation. Before the writing was ready for his examination he died. He never saw the will which had been prepared for him, nor knew its contents. It was presented to the register for probate in the same condition in which it left the hands of the scrivener, an unexecuted writing. This was enough to prevent its probate until the want of execution was accounted for in accordance with the act of 1833. The proofs produced, instead of showing that the paper was approved by the testator, but its execution prevented by the extremity of his last sickness, showed very clearly that he had not examined it, and could not have intended its execution, because he was dead when it was finished. The register was therefore without jurisdiction. The writing produced was not signed nor was the failure to sign accounted for, as the act of 1833 required in order to entitle the writing to probate."  
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#### Capacity of maker of will.

The probate determines the question of the capacity of the maker of the will as to which in general no defect would necessarily appear upon the face of the will; but collateral attacks have been made upon the probate of wills of married women, which the court usually meet by the statement that it will be taken for granted that one of the circumstances which permitted a married woman to make a will was in existence. But in *Robinson v. Allen*, 11 Gratt. 785, where the matter was not essential to the result, the court did not consider it necessary to give this reason for considering that the probate of a will of real and personal property was not subject to collateral attack, where it said: "It was suggested, however, by the appellee's counsel, in the argument here, that inasmuch as it appears on the face of the paper that Catharine Bradford was a married woman at the time of executing it, it cannot have the effect of a will; and that she must be regarded as dead intestate. This objection could have had no force in this suit, even if made in the court below; for it is well settled by the decisions of this court that the sentence of a court of probate, of competent jurisdiction, admitting a will, or writing in nature of a will, to probate, is conclusive evidence of the due making thereof, and that it cannot be denied in any collateral proceeding touching the will: that its validity can be tested only by resorting to the means provided by law for that specific purpose." (The form of the probate decree does not appear.)

#### Revocation by marriage, etc.

It would seem that the subsequent marriage of a woman would be suggested on the face of the proceedings by the difference in her name.

In *Bowen v. Allen*, 113 Ill. 53, 55 Am. Rep. 398, it was held that probate of a will could not be attacked collaterally on the ground that marriage of the testatrix after its execution revoked the will.

It may be here noted that where the pro-

is operative to the extent to which it may be valid as a testamentary document. We do not think the question, however, now open or debatable in this jurisdiction, since the adoption of a complete system of statutes, as far back as the Code of 1852, covering the subject of wills, and providing how they must be executed and proven. *Barker v. Bell*, 46 Ala. 216.

A will has been defined to be "an instrument by which a person makes a disposition of his property, to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." 1 Jarman, Wills, § 1. This definition has been approved and adopted in the cases of *Rice v. Rice*, 68 Ala. 216, and *Daniel v. Hill*, 52 Ala. 436.

In other words, there must be some disposition of property by the testator in order for the paper to amount to a will, and it

must be executed as required by the statute. Therefore § 6172, in requiring that wills to be effective to pass real or personal property, except nuncupative ones, must be in writing, signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator, covers all wills, as there is no such thing as a will under our laws which does not dispose of property. As was said by this court through Tyson, J., in the case of *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 So. 98: "One of the essential requisites to the validity of the instrument as a will is that it must be attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.—Code 1896, § 4263. Unless this requisite of the statute was

bate was only prima facie evidence of the validity of a will so far as real property was concerned, the probate as to such property was collaterally overcome by proof of the testator's subsequent marriage and birth of a child, there being nothing to indicate that the will was made in contemplation of marriage. *Belton v. Summer*, 31 Fla. 139, 21 L.R.A. 146, 12 So. 371.

#### Matter below testator's signature.

In *Wells v. Stearns*, 35 Hun, 323, where the form of decree does not appear, after the signature of the testator and the attestation clause, and after the signatures of the witnesses, there was written a clause changing a certain absolute gift in the will to one in trust for the benefit of the person to whom the property had been given in the will, and such person, though notified of the probate, did not appear, and this clause was admitted to probate as part of the will,—it was held he could not, after thirty years, attack it. The court said of the will or of the trust, "It cannot now be assailed collaterally upon the ground that the decision was wrong in respect to the portion of the paper now disputed."

#### Testamentary character of instrument.

In *Wall v. Wall*, 28 Miss. 409, where the court included with the probate another paper, and the probate court had power to declare whether this paper was or was not part of the will, it was held that the decision could not be attacked collaterally.

But in *Pennsylvania* it was held in *Bowly v. Thunder*, 105 Pa. 173, that "the fact that all the writings were probated at the same time cannot change the character previously stamped upon them. Probating does not create a will. It cannot make a will out of a writing which was not a will before."

42 L.R.A. (N.S.)

#### Translation of will as part of probate.

In *L'Fit v. L'Batt*, 1 P. Wms. 526, it was held that "nothing but the original is part of the probate, neither hath the spiritual court power to make any translation; and supposing the original will was in Latin (as was formerly very usual) and there should happen to be a plain mistake in the translation of the Latin into English, surely the court might determine according to what the translation ought to be."

In *Caulfield v. Sullivan*, 85 N. Y. 153, it is stated in the headnote that the translation of a will written in French "was to be treated as part of the surrogate's decree, unassailable collaterally, like the rest of it, *L'Fit v. L'Batt*, 1 P. Wms. 527, disapproved." While the court did state that the translation "must be treated as part of his [the surrogate's] decree, unassailable collaterally, like the rest of it," it went on to discuss the *L'Fit* Case and said: "That case is meagerly reported, and it does not appear by what rules or usages the spiritual courts were governed in admitting to probate wills written in a foreign tongue; but so far as that case holds that a will written in a foreign language must be admitted to probate and recorded in the foreign language only, it is without reason, certainly as applied to the state of things existing in this country. But the authority of that case would seem to authorize any court before which the question was raised to determine whether the translation was correct or not. We have examined this translation, and have no reason to doubt that it is correct; and that it was correct was not even disputed on the trial before the referee."

#### Miscellaneous.

While without the scope of this note, reference should here be made to *Waggener v. Lyles*, 29 Ark. 47, where the probate

complied with, the instrument was ineffectual to pass real or personal property. It was not a will at all within the purview of the statute, and cannot be admitted to probate. Proof of this essential requisite is just as necessary in order to probate the paper as a will as was a compliance with the statute necessary to give validity to it."

True, our statute authorizes testamentary executors and guardians, but that means that they should be named by a will, such a will as is defined by our court and which has been executed in compliance with the statute, and authorizes the issue of letters only after the will has been admitted to probate. Section 2507 of the Code of 1907. There are cases to the effect that there can be a will appointing an executor, but making no general disposition of the property, and that it can be proved as such. *Mulholland v. Gillan*, 25 R. I. 87,

54 Atl. 928, 1 Ann. Cas. 366, and cases there cited. Whether such a rule can prevail in our state we need not determine, but it could be doubtless upheld as a will for the reason that it is a special disposition of the property to the executor for administration purposes. It gives him the legal title to the personalty and the right to control or sue for the realty, and, to be operative and valid, should be executed and proven as required by our statute. The paper in question was attested by but one witness, and was not therefore a will, and should not have been admitted to probate.

So the remaining question is, Was the decree of the probate court so admitting same conclusive as against a collateral attack? While the decree of the probate court declares the instrument in question to be proven, and admitted it to probate, it shows upon its face that it was not a

court admitted a lost will to probate by an order that a copy be declared probated in the place and stead of and as though it was the original, and such court had no jurisdiction to admit to probate a lost will, the supreme court said: "It is contended for the defense that this is a collateral proceeding in which the validity of the proceedings in the probate court cannot be considered or assailed. We do not so consider it. The objection to the validity of the proceedings of the probate court are not that the court has acted in excess of its powers, or that some act necessary to perfect its jurisdiction has not been complied with, but that the subject-matter submitted to it was one of which it could take no jurisdiction whatever; and when such is the case, whether in collateral or direct proceedings, the fact being apparent upon the record, such orders and proceedings are treated as nullities. This question may be considered as definitely settled by our own and most of the American courts."

In *Thomas v. Williamson*, 51 Fla. 332, 40 So. 831, where the particular defect does not appear, the court said: "The second ground of objection, 'that the will, shows upon its face that it was not signed and executed in the manner required by law,' is also untenable, for the reason that § 1810 of the Revised Statutes of 1892 makes the probate of wills conclusive as to the personalty and *prima facie* evidence of the validity of wills as to real property. The manner of execution and of attestation of the will cannot be attacked in a collateral proceeding."

In *Slick v. Brooks*, 253 Ill. 58, 97 N. E. 250, where it appeared from the records that one of the attesting witnesses was David D. Malone, and that the will was proved by the testimony of the other witness and "D. M. Malone," the court said: "The probate of a will cannot be attacked in a collateral proceeding; . . . and if it could be so attacked, it does not appear

from the county court record that the will was not properly admitted to probate by the county court of DeWitt county, as the middle letter of a name is no part of the name, and after the elapse of thirty-five years, in the absence of proof to the contrary, the presumption would obtain that the David Malone who attested the will was the same person who made proof of its execution as D. Malone at the time it was admitted to probate in the county court."

In *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289, where it appeared that a will purporting to be signed by a mark had not been signed by a mark, the court said: "In other words, before the ordinary could probate the will, he must have been satisfied by satisfactory proof that the will had been executed by the testatrix in one of the forms prescribed by law. After the lapse of seven years, a judgment of probate becomes conclusive as to the *factum* of due execution of the will (Civil Code, § 3283), unless the fact appears on its face that it was not executed pursuant to law. *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019. The instrument relied on as a will in the present case did not conclusively show on its face that it was never signed, in a legal sense, by Charlotte Young. As already suggested, the placing of the words 'her mark' in the position they occupied relatively to the signature affixed by the person who drew the will was open to explanation, and the fact may have been that it was never contemplated that she should sign the will by filling in the blank space with her cross-mark, but she requested the scrivener to subscribe her name to the will in her presence, and he adopted the form of signature which it bears. We accordingly hold that the certified copy was not one of an instrument which was on its face a nullity; and this being so, it follows that the judgment of probate was not open to collateral attack."

B. B. B.

will under the laws of this state. The decree affirmatively shows upon its face, and in fact recites, that it was attested by but one witness, W. A. Shomo, "the only witness." If this was true, and we must consider all of the recitals of the decree, then the instrument offered was a nullity as a will. It did not purport to be a will, and gave the probate court no jurisdiction. The probate court may be a court of general jurisdiction in matters pertaining to the estates of decedents, but its general jurisdiction in probating wills must be confined to instruments which purport to be wills. It cannot be resorted to for the purpose of making something out of nothing. It has jurisdiction to probate wills, but not to convert something that the law says is not a will into a will, and thus nullify, or, in effect, amend or repeal, our statutes. The proceeding to probate a will is *in rem*, and, in order for the court to acquire jurisdiction and to proceed to a final decree, there must be a *res*, not a blank piece of paper or a paper which makes no attempt to, and does not in fact, purport to be a will. Of course, if a paper which purports to be a will is presented and is declared proven, and the decree does not show upon its face that it contravenes the law or public policy, the decree will be binding on the world upon collateral attack, and the paper thus probated becomes the last will and testament of the decedent, and governs the descent and distribution of his property. On the other hand, a decree which upon its face contravenes the law or public policy is *coram non judice*. The decree in question bespeaks its own impotency. It is void upon its face, and is subject to collateral attack. Black, Judgm. § 246. Our court, like most others, has often quoted the general rule as to the effect and conclusiveness of a decree of competent jurisdiction admitting a will to probate. The general rule is that "the probate of a will cannot be collaterally impeached on any ground." "The probate of a will establishes its status; and the status thus established adheres to the will as a fixture, and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world." As we say, this broad and general rule has often been quoted and approved by our courts, often without exception or qualification, but it has never been enforced or applied in dealing with judgments and decrees, disclosing upon their face that there was no will, and that said decrees thereby contravened the law on the subject of wills. On the other hand, we find our court in the cases of *Jordan v. Thompson*, 67 Ala. 471, and *Knox v. Paull*, 95 Ala. 505, 11 So. 156, while reiterating 42 L.R.A. (N.S.)

the general rule, sounding a warning signal by expressly stating that the rule did not prevail if the decree "contravened some rule of law or public policy." While courts have the right to construe laws, they have no authority to amend or repeal a statute; and to sanction a decree which shows upon its face that a paper is not a will under the law, but which at the same time declares that it is a will, would, in effect, ignore § 43 of the Constitution by permitting the judicial department of our state to exercise legislative powers, and this would be abhorrent to our system of government. We think our conclusion is not only founded upon sound reason and judgment, but it is supported by several well-considered authorities. In the case of *Wall v. Wall*, 123 Pa. 545, 10 Am. St. Rep. 549, 16 Atl. 598, the supreme court of Pennsylvania, in discussing the decree admitting a will to probate, which was involved in a collateral suit, speaking through Williams, J., said: "The general rule on which the court below rested its ruling in this case is well settled. A decree of probate made by the register of wills is a judicial decree, and, after the lapse of five years without appeal, it is conclusive as to the real estate disposed of by it. This rule has been recognized and applied in many cases, among which are *Holliday v. Ward*, 10 Pa. 485, 57 Am. Dec. 671; *Cochran v. Young*, 104 Pa. 333; *McCay v. Clayton*, 119 Pa. 133, 12 Atl. 860. But the general proposition thus affirmed must be understood as qualified by the same considerations that qualify the conclusiveness of judgments at law. Of these the most obvious is that which relates to the jurisdiction of the court over the subject-matter and the persons affected by the judgment. If the court has no jurisdiction, it is of no consequence that the proceedings have been formally conducted, for they are *coram non judice*. A judgment rendered by a justice of the peace in a cause over which he has no jurisdiction is void, notwithstanding service may have been regularly made on the defendant, and he may have failed to appeal or take a certiorari within the time prescribed by law. A judgment rendered in the court of quarter sessions in a proceeding exclusively within the jurisdiction of the common pleas, and *vice versa*, is void for want of jurisdiction in the court rendering the judgment. So, although the court may have jurisdiction of the subject-matter, yet, if there be no service, actual or constructive, on the defendant, the judgment is void for want of jurisdiction over the person to be affected. If such want of jurisdiction appear upon the record, it can be taken advantage of at any time and in

any court where the conclusiveness of the judgment is the subject of judicial inquiry. The reasons for this are found in the fact that the record of the judgment bears on its face the proof of its illegality, and shows the want of power in the tribunal to render it. When it is offered as a conclusive adjudication between the parties, an inspection shows that it is not, because the court had no power to make an adjudication. In the case now under consideration the jurisdiction of the register is conferred by statute, and the limitations within which it is to be exercised are very plainly prescribed. Within these limits his decrees are conclusive. Outside of them he is without any authority to make a decree, and his decree, if made, is a nullity. The act of 1833 provides that 'every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise said will shall be of no effect.'"

The supreme court of Georgia in the case of *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019, in passing upon the validity of a decree admitting a will to probate, speaking through Simmons, Ch. J., said: "The paper upon which the defendant relied, as giving authority for his becoming executor, purported to be a last will and testament, but was attested by only one witness. As a will it was void. 'All wills (except nuncupative wills) disposing of realty or personalty . . . shall be attested and subscribed in the presence of the testator by three or more competent witnesses.' Civil Code, § 3272. And in the case of *Thornton v. Chisholm*, 20 Ga. 338, this court held that an instrument attested by two witnesses only was void as a will. A judgment of the court of ordinary ordering the probate of such a paper attested by one witness only gives that paper no effect as a will in any proceeding in which its validity may be called in question. The court of ordinary is without jurisdiction to render such judgment, which is therefore void. 'The will

. . . had been proven and admitted to record; and yet it had no attesting witnesses, as appears from the probate itself. . . . It is conceded that it had no subscribing witnesses. The will was therefore utterly void, and of no effect. It was competent, therefore, to move, at any time, to set aside the judgment of the ordinary admitting this paper to probate. It was a nullity upon its face; and in favor of such a judgment nothing can be presumed.' 42 L.R.A. (N.S.)

*Hooks v. Stamper*, 18 Ga. 471. 'A will attested by only two witnesses is void, and can derive no aid from probate and being admitted to record. The judgment of probate is not merely erroneous, but an absolute nullity on its face. No motion to set it aside is requisite, nor is it ever too late to urge its invalidity.' *Cureton v. Taylor*, 89 Ga. 490, 15 S. E. 643." This case is in point, except as to the number of witnesses required, which are three in Georgia and two in Alabama.

The Alabama cases cited and relied upon by appellee's counsel, while quoting or expressing the general rule without exception or qualification, do not conflict in conclusion with the present holding. Many of them deal with foreign wills, and the probate thereof in the testator's home state entitled them to probate as wills, and they become valid bequests of personalty, and which said probate was conclusive, unless, perhaps, it appeared upon the face of the decree that they were valid under the laws of the sister state, in which event we would not be bound by said decree. *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. St. Rep. 773. As to real estate, however, they could not be binding on our courts, as a devise of same, unless executed in conformity with the statutes of this state.

The law of the domicile prevails as to bequests of personal property, but "*the lex rei sitæ* prevails in regard to the devise, descent, or heirship of real estate, because it does not comport with the dignity, the independence, or the security of any independent state or nation that these incidents should be affected in any manner by the legislation or the decisions of the courts of any nation or state beside itself. *Redf. Wills*, § 398." *Brock v. Frank*, 51 Ala. 85. A discussion in detail of the numerous Alabama cases cited by counsel for appellee can serve no purpose other than to prolong this opinion, and we will discuss those two which appear to be in conflict. The others, while approving the general rule as to the conclusiveness of decrees admitting wills to probate, did not decide the abstract question that a decree void upon its face could not be collaterally impeached, and, if they did, we would not hesitate to overrule them as being unsound. We cannot sanction any ruling upholding and giving life to a decree or judgment which is void upon its face. The case of *Matthews v. McDade*, 72 Ala. 377, did not involve a void decree. The point there involved was whether or not a certain instrument, executed contemporaneously with the will of James McDade, and which was attested by the requisite number of witnesses, and referred to in the will, was in fact a part of the will. In other

words, whether or not it was a deed or will. The court held that the probate of same was conclusive on collateral proceedings that it was a testamentary document, or, rather, that it was a will. The opinion does contain the expressions that "the power to probate a will necessarily involves the power to decide whether the paper presented for probate is in fact a will or not a will. Hence it has been held that the probate of a forged paper as a will is binding and valid until revoked, and is conclusive on collateral assaignment." There the paper referred to contained statutory requirements as to execution, and the decree was not void, and did not show on its face that the instrument admitted to probate was not a will under the law. We do not think that the court held, or would have held, that the probate of any kind of paper null and void as a will was made a valid will by the probate of same, especially when the decree also disclosed the invalidity of said paper as a will. Of course, the expression as to the conclusiveness of a decree admitting a forged will to probate can have no bearing upon the present case. The paper, if forged, evidently purported to be a will in legal form and possessing the legal requisites of a will, and was therefore such a paper, as upon its face, gave the probate court jurisdiction. We do not think for a moment that a decree admitting a paper to probate would be upheld as conclusive by any court if the said decree recited that the paper was forged, or that it had never been executed. Here we have a decree which recites and shows upon its face that the paper admitted to probate was not a will. The case of *Leatherwood v. Sullivan*, 81 Ala. 458, 1 So. 718, was dealing with the probate of a foreign will upon the certificate of the judge of the Florida court. It was assailed because attested by only one witness, when the Florida statute required three witnesses. The court declined to condemn the will because of the verity of the certificate from the Florida court, and because the statute of said state was not in evidence, and properly declined to take judicial notice of same. The "moreover clause" in paragraph 3 of the opinion was not decisive of the point, as it had already been decided. Moreover, this identical will and decree was assailed in the subsequent case of *Sullivan v. Rabb*, 86 Ala. 433, 5 So. 746, wherein the Florida statute was introduced; and the court would not or did not invoke the *dictum* in the case of *Leatherwood v. Sullivan*, *supra*, to the effect that the probate decree was conclusive, but pretermitted passing upon the validity of the instrument as a will as well as the validity of the decree, but proceeded upon the theory that

the personal representative could maintain the suit whether the will was effectual to convey lands or not; that in the instant case the power of an administrator was coextensive with the executor named in the instrument; that, when the title to the land is not vested in the executor, the powers are practically the same, and either could maintain the suit. Whether the decree admitting the will to probate was or was not valid, the probate court had jurisdiction to appoint a personal representative, and, if he was named or designated as executor when it should have been administrator, the issuance of letters was irregular, but not void or open to collateral attack. Just as we would, no doubt, hold in the present case, if it was necessary to pass upon the question, as the decree admitting the will to probate could be declared void, yet the issuance of letters to the persons named as executors would be irregular, but would operate to clothe them with the right to administer upon the estate until their said appointment was revoked upon direct attack.

The case of *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190, is not in conflict with this opinion. It was not dealing with a decree void on its face. This will involved personalty only, and was decided upon a statute not set out. The two Virginia cases, *Vaughan v. Doe*, 1 Leigh, 287, and *Parker v. Brown*, 6 Gratt. 554, did not deal with decrees void on their face. In each case the wills were valid as bequests of personalty, and as such were entitled to probate, but they were not sufficiently attested to operate as a devise of realty. The court, however, held them conclusive for all purposes upon collateral attack after the expiration of seven years. We are not much impressed with this holding, unless it can be justified, and as the opinion seems to indicate that it was, by a Virginia statute much broader than our own, which not only limited the right to contest to seven years, but further providing that, if not contested within that time, "the probate shall be forever binding." The case of *Dublin v. Chadbourn*, 16 Mass. 433, is not in point. It merely involved the competency of the attesting witnesses, and to all intent and purpose the instrument and decree purported validity upon the face thereof.

Mr. Van Fleet in his work on *Collateral Attack*, p. 224, states that "although a will which lacks the statutory number of witnesses, when presented for probate, affirmatively shows that it is a void piece of paper, yet the cases all agree that its probate is simply erroneous, and not void." He cites in support of the assertion the cases

above discussed, and none of them hold that the probate of a paper absolutely void as a will is conclusive that it is a valid will. It is true the Virginia cases held that, though the wills considered were not executed so as to devise real estate, they became operative as such after seven years from the probate thereof, if not contested within that period; but it does not appear that the paper probated was a void document as a will. It may have been good, under the law then existing, as a will of personal property; nor does it appear anywhere in the report of the cases that it was even contended that the documents were void as wills. The only point made against them was that they were not so executed as to operate as valid devises of real estate.

In the case at bar the probate court did not attempt to declare the instrument a valid devise or bequest of property, but found that it was not executed as such under the statute, and evidently proceeded upon the erroneous theory that the instrument was a will and entitled to probate, notwithstanding it was not valid as a devise or bequest of property. This theory, however, while sustained in some jurisdictions, is not in harmony with our complete statutory system as to the execution and probate of wills, as demonstrated in the first part of this opinion; but, if such could be the case, in this jurisdiction, it would avail the appellee nothing, for, if the courts could uphold the will as a testamentary document, it would be for limited purposes, and could not be construed by the probate court, or any other court, as a valid disposition of property when attested by but one witness, and which is in the teeth of the statute which requires two.

As the appellee bases her sole claim to or interest in the land sought to be partitioned, under the will in question, she shows that she has nothing to be partitioned, and her bill is therefore wanting in equity. The law and equity court erred in overruling the demurrer to the bill, and one will be here rendered, sustaining the general demurrer for want of equity.

The decree of the law and equity court is reversed. One is here rendered, sustaining the demurrer, and the cause is remanded.

**Simpson, Mayfield, Sayre, and Somerville, JJ., concur. Dowdell, Ch. J., not sitting.**

**McClellan, J., dissenting:**

The jurisdiction of the probate courts of this state of proceedings to probate wills being *in rem* and original, general, and final, and hence immune from collateral

assailment (save for fraud), it seems clear to me upon all well-considered authority that the decree of probate of the paper propounded as the last will and testament of J. W. Shomo, deceased, cannot now in this collateral way be brought into question and thereupon pronounced void, though, of course, upon direct attack the conclusion must have been fatal to this decree of probate.

The following decisions and texts, among others, demonstrate, as I view it, the soundness of the opinion just stated: Brock v. Frank, 51 Ala. 85, 89; Matthews v. McDade, 72 Ala. 386; Leatherwood v. Sullivan, 81 Ala. 458, 462, 1 So. 718; Goodman v. Winter, 64 Ala. 410, 426, 38 Am. Rep. 13; Dickey v. Vann, 81 Ala. 425, 429-431, 8 So. 195; Hunt v. Acre, 28 Ala. 580, 593, 594; McCann v. Ellis, 172 Ala. 60, 55 So. 303; and also Van Fleet, Collateral Attack, pp. 224, 609; Herman, Estoppel, p. 112; Dublin v. Chadbourn, 16 Mass. 433, approvingly cited in Goodman v. Winter, 64 Ala. at page 426, 38 Am. Rep. 13; Shultz v. Sanders, 38 N. J. Eq. 156, 157; 1 Woerner, Am. Law of Administration, p. 328; Tarver v. Tarver, 9 Pet. 174, 180, 9 L. ed. 91, 93.

In my opinion the sole effect of the recital that one witness only attested the instrument, whereas the statute requires two, was and is to show that the probate court egregiously erred in allowing the probate of the thus imperfectly executed testamentary instrument. That fact did not, could not, defeat the jurisdiction of the court,—the only condition wherefrom the utter invalidity of its decree could result. The idea that a decree in a proceeding *in rem* pronounced by a court competently jurisdictioned to so pronounce is absolutely void because it plainly disobeys the law is, it seems to me, a startling proposition, the consequences of which will be, if applied, profound, widespread, and recurrently surprising. *Res judicata*, as referred to collateral assaillment, becomes a shadow merely, instead of a wholesome and imperatively necessary doctrine, if such an idea finally and fully prevails. Brock v. Frank, *supra*; other authorities, *supra*. The idea was soundly refuted in Schultz v. Sanders, 38 N. J. Eq. 156, where it was said: "A court of general jurisdiction may misconstrue, misapply, or plainly disobey the law in pronouncing judgment, yet, so long as its judgment remains unreversed, it unalterably binds the parties, and pronounces the law which defines and determines their rights in the particular case. . . . The decision of a domestic court . . . acting within the scope of its powers has inherent in it such conclusive force that it cannot be challenged collaterally, and such decision defi-

nately binds all parties embraced in it, unless on objection made to such court itself, or in a direct course of appellate procedure. . . . Such judicial act may be voidable, but it is not void. Even if admitted erroneous, such error cannot be set up against the decree in a collateral proceeding founded upon the decree." (Italics supplied.)

It is not rationally possible to avert the consequence, in conclusion, of an applicable general principle, by the mere fact that in the case or cases it was theretofore announced the particular circumstances thereof do not accord with the case under judgment. The doctrine of *res judicata* may be incorrectly applied in a concrete case, thereby leading to an incorrect result; but this cannot reflect upon the doctrine. So it may be said with every assurance of soundness that, whether the question of probate of a paper as a will by a court of competent jurisdiction arises over the validity (against collateral attack) of a decree of a nondomestic court of probating power, or over that of a decree of such a court in this state, the applicable doctrine *res judicata* is fundamentally the same. Jurisdiction of the subject-matter to so pronounce is and must be the controlling factor. So the doctrine, as respects testamentary papers, inspired this expression in Brock v. Frank: "In the absence of statutory provisions in regulation of the subject, the sentence of probate in the proper tribunal of the domicile of the testator is conclusive everywhere, as to the capacity of the testator, the due execution, and validity of the will." (Italics supplied.) In the language of the lord chancellor: "No other court could go back upon the *factum*, and raise any question upon the validity of the will." The assumption that public policy is violated by the probate of a testamentary instrument which is not attested by the requisite number of witnesses is, as I view it, manifestly untenable. Will or no will is the inquiry submitted to the court of general and exclusive jurisdiction in the premises. Comprehended within the inquiry is, as appears from the foregoing statement taken from Brock v. Frank (and others might be added), whether the paper was duly executed. In deciding the issue so submitted, the probate court's decree may be obviously erroneous, but it cannot be opposed to public policy, for the simple reason that, under the charter of its existence, such a decree, when the probate court's jurisdiction is invoked to determine the inquiry of "will or no will," only expresses the judicial prerogative. The allusion to public policy in Knox v. Paull, 95 Ala. 507, 11 So. 156, and in Jordan v. Thompson, 67 Ala. page 471, has 42 L.R.A. (N.S.)

reference patently to the instrument, to its provisions, and not to the decree of the court invoked to probate it.

Leatherwood v. Sullivan, 81 Ala. 458, 462, 1 So. 718, is, in my opinion, decisive of the question now under consideration. The suggestion that the pertinent language of the pronouncement was *dicta* in that case is refuted by reference to the issues in the litigation. D. F. Sullivan, resident of Florida, died leaving a testamentary instrument. He owned lands in Escambia county, Alabama. The testamentary instrument was attested "by only one witness," a certified copy thereof being introduced in evidence, as was also a certificate of the judge of probate in Escambia county, Florida, stating that the instrument had been "regularly proved and established." M. S. and Emily S. Sullivan were named as executors in the instrument, and letters testamentary were issued by the Florida court to them. The probate court of Escambia county, Alabama, upon certificate of the Florida judge of probate as indicated, issued letters testamentary to the Sullivans. The action was detinue, brought by the executors, "for the recovery of thirty-five pieces of timber, more or less, alleged to have been cut from section 13, township 2, and range 6, in the county of Escambia, State of Alabama" (Italics supplied.) The right of the plaintiffs to maintain the action was questioned; and one ground thereof went to the sufficiency of the certificate of the judge of the Florida court in granting letters testamentary, and so upon the theory that the issuance of the letters testamentary by our probate court to nonresident executors was conditioned upon the statute-defined (Code 1876, §§ 2379, 2380; Code 1907, §§ 2556, 2557) facts, *viz.*, that such persons were named as executors in wills regularly probated, and that a copy of the will probated in another state, under which will such nonresident executor has been appointed, "together with a certificate of the judge of the court in which the will was probated, that such will was regularly proved and established, and that letters testamentary were issued to him thereon, in accordance with the laws of the state or territory in which such original letters were granted. . . ." From this status of fact and law it readily appears that this court in Leatherwood v. Sullivan was specifically invited to determine the questions it did decide in these words: "There is no merit in the other objection urged to the sufficiency of the certificate made by the judge of the court in Florida, which granted the original letters to the plaintiffs. The will, it is said, has but one witness, and the laws of Florida require, three witnesses to such a paper. The record fails to show what is



the law of Florida on this subject, and we can take notice of the statutes of other states only when they are introduced in evidence. Moreover, even were this true, the probate of the will and the grant of letters by a court of competent jurisdiction in Alabama would not for this reason be rendered void. Such judgment of probate would be valid until set aside, and would not be subject to collateral attack, as is here attempted by objecting to the introduction of the letters testamentary in evidence. *Dickey v. Vann*, 81 Ala. 425, 8 So. 195; *Brock v. Frank*, 51 Ala. 85; *Ward v. Oates*, 43 Ala. 515; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

This pronouncement in the *Leatherwood-Sullivan* appeal has long since become a rule of property in this state; and considerations of the highest moment forbid in this late day a departure from its ruling, whatever may have been held elsewhere. To avoid its effect as a wholesome precedent in this regard on an untenable assumption that its pertinent announcement is *dicta* is, as I view it, unfortunate.

I therefore dissent.

Petition for rehearing denied February 15, 1912.

#### KANSAS SUPREME COURT.

THOMAS A. POLLOCK

v.

KANSAS CITY et al., Appts.

(87 Kan. 205, 123 Pac. 985.)

#### Injunction — against paving highway — parties.

1. Under § 265 of the Civil Code (Gen. Stat. 1909, § 5859), a property owner not

Headnotes by WEST, J.

#### Note. — Curative act as special legislation.

The earlier cases on this subject are collected in notes to *State ex rel. Board of Education v. Brown*, 5 L.R.A. (N.S.) 327, and *Cole v. Dorr*, 22 L.R.A. (N.S.) 534.

In *State ex rel. Jackson v. Pauley*, 83 Kan. 456, 112 Pac. 141, cited in *POLLOCK v. KANSAS CITY*, the question arose whether a constitutional provision requiring uniform operation of general laws, and forbidding enactment of a special law where a general law could be made applicable, was violated by a statute legalizing high schools established under a misinterpretation of a former act, that a majority of those voting on the proposition. Instead of a majority voting at the election, could authorize the establishment of the schools. It was held, following 42 L.R.A. (N.S.)

affected by the special assessments for street paving, but whose burdens as a taxpayer will be increased by reason of paving the intersections, may maintain a suit to enjoin the city from proceeding to let an unauthorized contract for pavement.

#### Highway — paving — designation of material.

2. Under § 1009, of the General Statutes of 1909, a paving petition which used words designating one specific kind of material, patented and controlled by only one company, and furnished to bidders at only one price, in effect named the brand of material to be used, and was void.

#### Same — validation of petition.

3. The legislature had the power to validate petitions of this kind already on file, and by chapter 91 of the Laws of 1911, did validate the one in question.

(West, Smith, and Benson, JJ., dissent.)

(May 11, 1912.)

**A**PPEAL by defendants from a judgment of the District Court for Wyandotte County overruling demurrers to the petition in a suit to enjoin the defendant city from entering into a contract for a street pavement. Reversed.

The facts are stated in the opinion.

Messrs. James M. Head and W. C. Culbertson, with Messrs. R. J. Higgins and Nathan Cree, for appellant Kansas City.

Messrs. George R. Allen and J. W. Dana for appellant Kansas Bitulithic Company.

Messrs. Edward C. Little and Thomas A. Pollock for appellee.

West, J., delivered the opinion of the court:

The voluminous record in this case presents one question: Were the demurrers to the amended petition rightfully overruled? The suit was brought by a tax-

*Cole v. Dorr*, supra, that curative legislation forms an exception to the rule that classification cannot be based solely on existing conditions, and that, since the acts validated were such as the legislature might have originally authorized, and the classification natural, and not arbitrary, the statute was constitutional. The question as to whether the validating act violated the constitutional provision prohibiting the enactment of special laws conferring corporate powers was not, as stated in the dissenting opinion to the principal case, involved.

In *Carlstadt Nat. Bank v. Hashrouck Heights*, — N. J. L. —, 84 Atl. 1069, it was held that an act validating notes or other evidences of indebtedness issued by commissioners to pay the expenses of draining ponds, swamps, etc., under an invalid act

payer of Kansas City, Kansas, to enjoin the city from entering into a contract for the paving of certain streets, who amended his petition so as to cover the pavement on one street only. The controlling questions involved in the ruling are whether the plaintiff can maintain the suit under § 265 of the Code (Gen. Stat. 1909, § 5859) and if so, whether the proviso of § 1009 of the General Statutes of 1909, that the petition shall state the kind of material to be used, but not the brand of material nor the name of the manufacturer thereof, was violated by the paving petition in this case, and if so whether the defect was cured by chapter 91, of the Laws of 1911.

Section 265 of the Code provides that an injunction in such case may be brought by "any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened, unauthorized contract or act." The plaintiff owned no property subject to special assessment for the contemplated paving; but, being a taxpayer in the city, and such paving, when laid, necessitating the paving of intersections, his right to sue depends upon whether his burden as such general taxpayer would be increased by the paving in question. Such increase was alleged.

of the legislature, was general in its nature, and therefore not unconstitutional as special legislation, the court saying that it was applicable to all municipalities similarly situated, imposing upon those having lands of the character described a liability to pay for their drainage.

In *Carroll v. Bosworth*, 151 Ky. 337, 151 S. W. 916, it was held that a constitutional provision that the legislature should not pass local or special acts to legalize, except as against the commonwealth, the invalid act of any officer of the commonwealth, was not violated by an act of the legislature legalizing an invalid contract for legal services of an attorney employed by the attorney general in a prosecution in the name of the state, the court saying that the exception in the Constitution by inference gave the legislature authority to legalize, as against the commonwealth, the unauthorized acts of its officer.

A constitutional provision prohibiting the amendment of a city charter by special or private law is not violated by an act of the legislature redistricting the state for legislative purposes, which, in dividing a particular city into legislative districts, bounded the same by new ward lines, thereby recognizing the validity of a redistricting of the wards in the city and legalizing it, even if the new adjustment was previously invalid. *State ex rel. Neacy v. Milwaukee*, 150 Wis. 616, 138 N. W. 76. The court says it is well established that the legis-

The paving of a street implies the pavement of the intersections; and it is impossible to see how the contemplated work could fail to add to the plaintiff's burden as a taxpayer. The former statute (§ 4700, Gen. Stat. 1901; Old Civil Code § 253) provided that such suit could be brought by "any number of persons whose property is affected by a tax or assessment so levied;" the change by the amendment in this respect being that now such action may be brought by those whose property is thus affected, or those whose burdens as taxpayers may be increased. Civil Code, § 265. This amendment was discussed in *Water, Light, & Gas Co. v. Hutchinson Interurban R. Co.* 74 Kan. 661, 87 Pac. 883; in *Bunker v. Hutchinson*, 74 Kan. 651, 87 Pac. 884; and in *Meistrell v. Ellis County*, 76 Kan. 319, 91 Pac. 65, 66. In the latter case, it was said: "The act named expanded the remedy of injunction, and gives the taxpayer a right of action against a public officer or board, to enjoin them from entering into any contract, or doing any unauthorized act, that might result ultimately in the creation of a burden or the levying of a tax against his property." p. 323. The foregoing decisions were referred to with approval in *Makins v. Dickinson County*, 77 Kan. 861, 95 Pac. 394. If, as

lature may by implication, as well as by direct legislative act, ratify or cure defects or illegalities in municipal proceedings which it might have dispensed with or made immaterial by prior law.

In *Calderwood v. Jos. Schlitz Brewing Co.* 107 Minn. 465, 121 N. W. 221, it was held that a curative act validating the refunding in good faith of part of the license fee in cities of over 50,000, where the license to sell intoxicating liquors had been revoked, did not violate a provision of the Constitution prohibiting local or special statutes where a general law could be made applicable. Classification of cities according to population was, however, authorized by the Constitution in applying general laws.

In *San Pedro, L. A. & S. L. R. Co. v. Hamilton*, 161 Cal. 610, 37 L.R.A.(N.S.) 686, 119 Pac. 1073, it was held that a statute validating leases of a certain class, among which was the one in controversy, which was a lease from a city to a railroad company of tide lands, was not special legislation prohibited by the Constitution. The court says: "The principle of decision is that such curative acts do not come within the constitutional inhibition against special legislation."

The authority of the *Hamilton Case* was held to govern in *San Pedro, L. A. & S. L. R. Co. v. Nelson*, 161 Cal. 720, 119 Pac. 1077, where the facts were similar.

R. E. H.

argued by the defendants, the right is restricted to one whose property is affected by the special assessments, then the work of the legislature in making the amendment appears to have been one of supererogation. We think there is no doubt, and we therefore hold, that the plaintiff, being a general taxpayer in the city, has the right to maintain the suit.

The petition for the improvement named bitulithic pavement. The amended petition alleges that this is a particular brand and kind; that the word "bitulithic," as used in the expression "bitulithic pavement," is a trademark for one particular kind of patented bituminous concrete pavement, duly registered as a trademark under the copyright and trademark laws of the United States; that bitulithic pavement is now, and has been for many years, well known to civil engineers, to persons engaged in the business of street paving, and to the public generally, as controlled and produced only by Warren Brothers Company, and held in monopoly and control by such company exclusively; that such pavement could be obtained only from the one source by the payment of a royalty, and that other bituminous concrete pavements, equal in all respects to this, and as to which there could be full and free competition as to price, could have been procured and constructed for a less sum per square yard, and that better pavement of bituminous concrete, as to which there could be full and free competition, could have been procured and constructed for \$2 or less per yard; that in response to the advertisements for bids only one bid was received, and that for \$2 a square yard,—there being no competition and no bidder, except one company. In short, the amended petition alleged, in substance, that bitulithic pavement, as petitioned for and submitted for bids, was one specific and distinct kind of pavement, controlled by and procured from only one company; and that competition was therefore rendered impossible. Of course, the demurrers, for the purpose of this case, admit the truth of these allegations. It remains, therefore, to consider and determine whether, in view of these allegations, the petition for the pavement named the brand of the material to be used, or the manufacturer thereof, within the meaning of the statute.

It is contended by the defendants that, as the petition may state the kind of material, and not the brand, the one used in this case was proper. In a former statute (§ 730, Gen. Stat. 1901), it was required that the petition state the width of the paving and the specific description of the material to be used; and it is argued that

when the change was made in the statute, the legislature intended that the petition should be so worded as to promote competition, and not confine the pavement to one particular brand. If there were various kinds of bitulithic pavement which could be procured at different prices, it is quite true that the words "bitulithic pavement" would not contravene the requirements of the statute and the intention of the legislature; but under the allegations of the amended petition, the words had a well-defined and well-known meaning, confined to only one kind of paving material, absolutely controlled by one company, so that the matter of competition was entirely eliminated. It is impossible to conceive, in the face of the assumed truth of these allegations, how the language and intent of the legislature could be more positively avoided and defeated. The fact that the contract was to be let to the Kansas Bitulithic Company makes no difference; for, under the allegations, it could procure its material from the one source only, and at the one price only. The requirement to name the kind of material, and the prohibition upon naming the brand, indicate plainly an intention that the petition shall indicate whether the pavements shall be of brick, asphalt, or other kind of material, but that it shall not be confined to one particular brand, for the reason that such brand is presumed to be controlled by only one concern, and thereby competition could not be possible.

The word "brand" derivatively has reference to burning, and in many cases signifies a distinctive mark placed on objects by use of a hot iron. The verb has been judicially defined as meaning to stamp or to mark, as by a stencil, plat, or chisel. Also the noun as indicating some figure or device burned on an animal by a hot iron. 1 Words & Phrases Judicially Defined, 858. Of course, it can make no difference what sort of brand or identification may be used; and if the words describe and distinguish one particular kind of material only, which can be procured from one party and at one price only, this is to all intents and purposes as effective as if branded into the material or stenciled thereon. It is insisted that the Warren Brothers Company filed with the city an agreement under which it offered to all bidders the use of its patents, together with an offer to furnish the material and necessary skilled supervision, for \$1.35 a square yard, thereby placing all bidders on an equal footing. The offer, set out as part of an exhibit to the amended petition, was dated June 29, 1907, about three years before the petition was acted upon, and recited that, as it was

deemed advisable by the proper authorities that bids be received to pave certain streets with "Warren's bitulithic pavement," the company proposed and agreed to furnish any bidder to whom a contract might be awarded certain material, with the free license to use the same, necessary to lay such pavement. The amount per square yard was left blank; likewise the name of the city and the location of the plant. But as it appears to be conceded that the price per yard to be charged by the company was \$1.35, and that the total price of the paving was \$2, the margin of possible competition, had there been competitive bidders, is so small as to be negligible, even if the proposal in the form claimed by the company had been on file.

The pleading alleges that the specifications were approved by the commissioners September 15, 1910, and not filed in the office of the city clerk until March 30, 1911; that on the ——— day of March, 1911, the city received, in response to an advertisement, a bid from the Kansas Bitulithic Company for certain paving, in accordance with certain plans and specifications therefor on file in the office of the city clerk, and that on March 21, 1911, the board of commissioners considered and accepted such bid, on condition that the bidder would enter into a written contract, the execution of which contract is sought to be enjoined. It is insisted that the amended petition nowhere alleges nor admits that the paving petition was ever spread upon the journal of the council or commission; therefore the curative act cannot apply. The provision of the statute (Gen. Stat. 1909, § 1009) is that "in cities of the first class having a population of over 25,000, no resolution to pave . . . any street . . . shall be valid unless a petition asking such improvement has been ordered spread upon the journal." From the facts alleged, that the petition was circulated and signed, that bids were advertised for, that a contract was about to be let, that bonds were about to be issued to pay for the pavement, and that the board of commissioners "did adopt, and in July, 1910, caused to be published, a certain resolution providing for the paving," and "did, on September 15, 1910, enact an ordinance ordering and providing" for the paving, it must be presumed that the officers did their duty, and that the resolution was spread upon the journal. *Kindley v. Rogers*, 85 Kan. 645, 118 Pac. 1037.

The language of the curative act (chapter 91, § 1, Laws 1911) is as follows: "But nothing herein contained shall be held to invalidate any petition heretofore ordered spread upon the journal of the council or

commissioners in the manner provided by law, and all such petitions shall be held valid." The defendants insist that this completely cures the paving petition in this case, even if it did name the brand of material; while the plaintiff urges that the words, "in the manner provided by law," have reference to the legality of the petition itself, and not to the manner of its being spread upon the journal. Grammatically the words appear to qualify the act of spreading upon the journal, and not the character of the petition. It may be that when this curative act was framed, its author had no desire to announce from the housetops the real purpose of the closing language of the proviso. But we are not relieved from the duty of giving to the words used their ordinary and natural interpretation.

On the assumption, however, that this was the intention of the act, the plaintiff contends that the real object was to enable the city to increase the expense of street improvements from \$200,000 to \$300,000, on condition that all paving petitions thereafter should state the kind of paving in generic terms, and not specify the particular character of the material, or name of the manufacturer; that this proviso in turn was limited so that it could not have retroactive effect, or invalidate any valid petition ordered spread upon the journal in the manner provided by law; that it was not intended to make good any void petitions or proceedings, or proceedings which were void because based upon void petitions. We are unable so to interpret the wording of the act. The object appears to have been to provide that in the future petitions should describe the kind of pavement in general, and not in specific terms, but that nothing in the amendment should invalidate any petition already properly ordered spread upon the journal; and that all petitions should thereby be validated, if they had been spread upon the journal in the manner provided by law. It is true the law does not provide the manner of spreading upon the journal, but doubtless the usual and proper manner would be by motion or resolution, acted upon by the council or commission, and not the mere unauthorized act of the clerk or some employee or outsider. "Any petition heretofore ordered spread upon the journal" (chap. 91, § 1, Laws 1911) would include any petition actually, but not properly or rightfully, ordered spread; while spread "in the manner provided by law" restricts the proviso to such petitions as have been, by proper action of the council or commission, ordered spread upon the journal.

It is insisted that with this construction

the act violates the Constitution, in that the title does not indicate curative intention; and that the power to validate a particular paving petition is inherently judicial, and not legislative. Also that it is bad as special legislation; and that it is not within the power of the legislature to make good that which it could not have originally provided for. On the last proposition, *Carey Salt Co. v. Hutchinson*, 72 Kan. 99, 82 Pac. 721, is cited. It was there held that the mayor and council, and not the petitioners, must determine the matter of street improvements, and it was suggested in the opinion that a statute delegating legislative powers to the petitioners would be unconstitutional; but we know of no reason why the legislature might not authorize the council to order a pavement upon a petition designating the specific kind of material to be used. This would not give the petitioners legislative power to make street improvements, but would simply give them a right to say what material should be used to pave streets in front of their property, the major portion of expense of which they must bear. Under the rule that what can be originally authorized can be validated by a curative act, we think this proviso was within the legislative power, and constitutional. *Haggart v. Kansas City*, 77 Kan. 798, 94 Pac. 789.

It is forcibly suggested that, if the paving petition in this case was originally void, the legislature could not, by a subsequent enactment, breathe the legal life into it; and decisions are cited to the effect that only irregularity, and not invalidity, can be cured. But, as said in *Haggart v. Kansas City*, supra, on rehearing: "It is true that the statute gives property owners in cities of the first class the privilege of designating the kind of material to be used. The legislature might, however, have refused this privilege in the beginning; and since it could have done this, it could cure a proceeding that was defective because one kind of material was used instead of another." p. 799.

In a reply brief, plaintiff raises the question that the proviso is a special act conferring corporate power, and therefore void under § 1 of article 12 of the Constitution. The section amended applied only to cities having a population of over 65,000. While the section and amended section were so drawn that other cities reaching the required population might come within the provision of the act, still, at the time of the amendment, Kansas City was the only city in the state having 65,000 inhabitants. The argument that this conflicts with the provision that "the legislature shall pass no special act conferring corporate powers"

(Const. art. 12, § 1) is met by the fact that this court has adopted the holding that curative acts are not within the general rule regarding special legislation. In *Leavenworth v. Leavenworth City & Ft. L. Water Co* 69 Kan. 82, 76 Pac. 451, an act validating certain ordinances, general in terms and including all cities of the first class, was attacked as special legislation conferring corporate powers; but it was upheld, although applicable only to existing conditions, with no possibility of future operation. In *Cole v. Dorr*, 80 Kan. 251, 22 L.R.A.(N.S.) 534, 101 Pac. 1016, the statute in question, which could apply only to certain cities in which irregular elections had already been held, was upheld. In discussing the claim that it was special legislation, it was said: "But a curative act is necessarily of that character. It operates only on conditions already existing. . . . Therefore, whenever it relates to a subject concerning which special legislation is forbidden, it is void if subjected to the ordinary test, as some courts have held that it must be. Other courts, however, recognize an exception arising from the nature of the case." p. 259. The decision then quotes from *State ex rel. Board of Education v. Brown*, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477: "Necessarily this class forms an exception to the general rule that classification cannot be based upon existing conditions alone. The very object of the statute is to remedy a present condition, and, if possible, avoid its repetition." p. 259.

This was followed by *State ex rel. Jackson v. Pauley*, 83 Kan. 456, 112 Pac. 141, the case involving the Barnes high school law, affecting only certain counties; it being there said: "Curative legislation necessarily forms an exception to the general rule that classifications cannot be based solely on conditions already existing; for the object of such a statute is to effect a remedy for present conditions." p. 462.

Section 1009 of the General Statutes of 1909 directed what should be contained in paving petitions circulated in cities of over 25,000. The act of 1911 (chapter 91, Laws 1911) amends § 1180 of the General Statutes of 1909, fixing the limit of paving expenditures in cities of over 65,000, prescribes the limit of expenditure in cities of over 75,000, and prescribes what paving petitions in such cities shall and shall not set forth. The act provides that nothing therein contained shall be held to invalidate any petition theretofore ordered spread upon the journal in the manner provided by law, and expressly provides that "all such petitions shall be held valid." This clause is entirely curative in character, and the

court is disposed to apply the rule thus repeatedly announced, and hold that it does not contravene the constitutional prohibition.

The defect in the paving petition having been thus cured, the amended petition failed to state a cause of action, and the judgment overruling the demurrers is reversed.

West, J., dissenting:

I cannot agree that a curative act is outside the purview of the Constitution, or that it forms an exception to the general rule. It is not a question of classification. It is the merest and plainest question of obedience to the supreme law, commanding that "the legislature shall pass no special act conferring corporate powers." Const. art. 12, § 1. That the proviso is special, and authorizes the city to proceed with improvements otherwise impossible, cannot be questioned. When the convention framed this section and the people ratified it, if they meant that the legislature should pass no special act conferring corporate powers except curative acts, there was no reason or excuse for not saying so. That it was not said is sufficient ground for our refusing to add such an exception.

Beginning with *Atchison v. Bartholow*, 4 Kan. 125, a most thorough and convincing decision, it has been uniformly held that the provision in question is binding upon the legislature, abundant reasons being given in this and other decisions for its adoption and enforcement. *Commercial Nat. Bank v. Iola*, 9 Kan. 689; *Gilmore v. Norton*, 10 Kan. 491; *Re Council Grove*, 20 Kan. 619; *State ex rel. Green v. Lawrence Bridge Co.* 22 Kan. 438; *Gray v. Crockett*, 30 Kan. 138, 1 Pac. 50; *Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *State ex rel. Godard v. Downs*, 60 Kan. 788, 57 Pac. 962; *Davenport v. Ham*, 72 Kan. 179, 83 Pac. 398. Never until the decision in *Leavenworth v. Leavenworth City & Ft. L. Water Co.* was any attempt made to distinguish between curative and other acts; and the only subsequent instances are those found in *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, and *State ex rel. Jackson v. Pauley*, 83 Kan. 456, 112 Pac. 141. In the *Leavenworth* Case, the present question did not arise, because the act was general in form and in terms. In the *Pauley* Case, no such question was involved; the act there referring only to counties, which, as repeatedly held by this court, are not corporations, but only quasi corporations, and therefore not within article 12 of the Constitution. In *Cole v. Dorr*, the act in terms covered all cities of the first class which had theretofore adopted a commission form of government by a majority vote of the 42 L.R.A. (N.S.);

electors voting. It does not appear in the opinion whether more than one city was in fact affected or not; but, assuming that only one was affected, it is plain to be seen that the decision turned on the question of classification, based not on the condition in one city, but on present, as distinguished from future, conditions, regardless of the number of municipalities involved. The opinion on which the decision is based (*State ex rel. Board of Education v. Brown*, 97 Minn. 402, 106 N. W. 477,) was founded entirely on the question of classification; the opinion expressly stating that "the only serious question is whether the basis of classification is proper and reasonable." p. 405.

It is familiar doctrine that the legislature may cure that which it could have originally done; but it is equally familiar that it cannot, by a curative act, do that which it had no power to do in the first instance. "That the legislature can do indirectly what it cannot do directly seems too preposterous for argument." *Heacock v. Sullivan*, 70 Kan. 754, 79 Pac. 659. "And it is not competent for the legislature, by a curative act, to validate proceedings which were originally void for want of jurisdiction." *State v. Cipra*, 71 Kan. 715, 81 Pac. 488.

In *Enterprise v. State*, 29 Fla. 128, 10 So. 740, it was held that the legislature could not, by a curative act, validate the incorporation of a town, for the reason that the Constitution forbade the creation of a municipal corporation by special act, quoting (p. 148), and following *Stange v. Dubuque*, 62 Iowa, 303, 17 N. W. 518, where it was said: "As the legislature could not by special act have authorized the city of Dubuque to pass the ordinance in question, it follows that it cannot, after the passage of the ordinance, legalize it by special act. The legislature cannot do indirectly what it is inhibited from doing directly." p. 305.

In *Rutten v. Paterson*, 73 N. J. L. 407, 64 Atl. 573, a New Jersey statute passed to validate the proceedings of the commissioners previously appointed to divide cities into wards, and to confirm their actions, was held violative of the constitutional provision forbidding special and local acts regulating the internal affairs of cities. The decision was by Pitney, J., who said: "It is therefore but reasonable to consider the act of 1906 as applying to Paterson alone, as counsel admits to be the case. This being so, it seems to me to necessarily result that the act is a special and local law, within the constitutional interdict. I do not at all question the constitutional power of the legislature to pass validating acts in this class of cases. I have no doubt they might validate anything that they

might authorize, and have no doubt of their power to oblige the mayor to appoint commissioners for the purpose of dividing the city into wards, even without any petition. But the legislative power to validate defective proceedings does not extend to authorize them to employ a validating act as a means of regulating the internal affairs of cities, if such act be special and local." p. 476.

In *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184, an act to validate an illegal and unauthorized resolution of a board of supervisors, locating or changing a county seat, was held to be a local act, in violation of a constitutional provision prohibiting the passing of a local law in cases of locating or changing the county seat, and as an attempt to do indirectly what could not be done directly by the legislature. The supreme court of Wisconsin, in *Cawker v. Central Bitulithic Paving Co.* 140 Wis. 25, 121 N. W. 888, in accordance with a long line of prior decisions, struck down an act purporting to validate certain classes of paving contracts theretofore made by "any municipal corporation of the first class" (p. 28), which in fact applied only to Milwaukee, as a special law amending its charter, in violation of the Constitution, forbidding the enactment of any special law to amend the charter of a city.

One of the decisions relied upon by the Minnesota court in the *Brown Case*, 97 Minn. 402, 422, 106 N. W. 477, is *Read v. Plattsmouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208. A very slight examination of the latter discloses that a very different question from the one now under consideration was involved. A city, without authority, issued bonds for a high school building. The bonds were sold and the proceeds applied. The legislature legalized the proceedings of the city by a special act, and by another validated the tax levy and the bonds. The constitutional provision was exactly the same as ours. In an action on overdue coupons, the plaintiff proved that he bought them for full value, without notice of any informality in their issue. There was no evidence offered in their defense, and the court instructed a verdict for the defendant. The plaintiff excepted and assigned error upon the ruling. The real question was whether a bona fide purchaser, for value, could be defeated in an action without any evidence, simply because of the validating acts. It was said in the opinion: "It is not a special act conferring corporate power; it is merely a special act taking away from the corporation the power to interpose an unconscionable defense against a just claim; and to avoid an obligation to pay an equivalent

for public benefits which it has continued to enjoy." p. 577. This decision, therefore, affords no support for the rule under consideration.

*Cole v. Dorr*, 80 Kan. 251, 259, 101 Pac. 1016, refers to *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402, as having settled the question. The question settled by the *Mason Case* was this: An act provided that in any case when sewers had been theretofore constructed in any cities of the first class by order of the mayor and council, and not fully paid for, the mayor and council should from time to time have authority to levy taxes to pay for them. Among the other complaints was one that the act conferred corporate powers upon certain cities only, in violation of § 1 of art. 12 of the Constitution; but the court said: "In the present case, however, the act is not only general in its form and general in its terms, but it is made to apply to an entire class of cities, and a class as broad and general as any class for which any of the general laws for cities of the first class are enacted. It applies to all cities of the first class, and the time given for its operation is not limited; and any city of the first class coming within its terms may act under it, or not, as it chooses." p. 519.

A careful examination of the three cases in which the rule has been applied will demonstrate that neither involved the exact question now presented. Such examination will also disclose that the basis for the rule thus announced and applied was in each case one of classification, and not one of exception, by reason of curative nature, from the ban upon special acts conferring corporate power. No one will pretend that the legislature could, by a special act, have empowered this one city to proceed with the pavement upon a void petition; and no one can deny that, by giving effect to the proviso in question, the legislature is, by judicial construction, enabled to do indirectly precisely what it could not do directly. Curative acts are often necessary; and upon a mere question of classification I would be reluctant to regard them unfavorably. But here is a statute whose title and purport do not indicate the place or purpose of this provision, slipped in at the close, a provision which is the clearest possible conferment of corporate power upon one city, and one only. It probably escaped notice except by the draftsman of the bill; but it flies squarely into the teeth of § 1 of article 12 of the Constitution, and is as void as if of more pretentious length and of unconcealed location.

Dangerously loose notions regarding constitutional obligations seem to be entertained by many; some even manifesting im-

patience with the Constitution itself, and asserting that it is out of fashion and insufficient for modern needs. This makes it more than usually important that the courts yield and require willing and ready obedience to the supreme will of the people as expressed in that instrument.

Smith, J., concurs in this dissent.

Benson, J., dissenting:

In my opinion, chapter 91 of the Laws of 1911 is not curative. It consists solely of an amendment of § 2 of chapter 78 of the Laws of 1909 (Gen. Stat. 1909, § 1180), which prohibited cities affected by its provisions from entering into contracts for paving requiring aggregate expenditures of over \$200,000. The amendment of 1911 increases the authorized expenditures to \$300,000, and declares that petitions for paving shall not specify the particular character of the material or name of the manufacturer, and provides that "nothing herein contained shall be held to invalidate any petition heretofore ordered spread upon the journal, . . . and all such petitions shall be held valid."

In the absence of anything in the title or body of the act indicating a different purpose, it should be presumed that all of the sentence quoted above relates to the same subject; the last clause being added by way of emphasis, and meaning only that all such petitions shall be held valid, as though the act had not passed.

Petition for rehearing denied.

#### OKLAHOMA SUPREME COURT.

CEDRIC DUFF, by Next Friend, et al.,  
Plffs. in Err.,  
v.

HARWOOD KEATON, Guardian, etc., of  
Cedric Duff et al.

(33 Okla. 92, 124 Pac. 291.)

**Mine — oil and gas lease — sale of realty.**

1. A lease granting oil and gas mining privileges for a term of years is not a "sale

Headnotes by WILLIAMS, J.

**Note. — Oil and gas lease as real estate or personalty.**

For "Nature of property in mineral oil or gas," see note appended to Williamson v. Jones, 25 L.R.A. 222.

See note to Wolfe County v. Beckett, 17 L.R.A. (N.S.) 688, on "Interest of one other than the owner of the soil in mineral in 42 L.R.A. (N.S.)

of realty" as contemplated by § 5314, Comp. Laws, Oklahoma, 1909.

**Same — character of property.**

2. A lease granting oil and gas mining privileges for a term of years is a "chattel real."

(a) A chattel real is "personalty."

(b) A lease for such purposes, made by the guardian of a minor, permission of the court having first been obtained thereto, and such lease having been approved and confirmed by the court, though without the preliminary notices essential for the order of sale and confirmation of the same in case of the sale of real estate of minors by guardians, is valid against a collateral attack.

(May 14, 1912.)

**ERROR** to the District Court for Okmulgee County to review a judgment in defendants' favor in an action to enjoin a waste of the estate of defendant's ward and to have declared null and void and set aside a pretended oil and gas lease upon said estate and for an accounting and recovery for waste already committed. Affirmed.

The facts are stated in the opinion.

Messrs. Eaton & Carter, Scothorn, Caldwell, & McRill, for plaintiffs in error:

An oil and gas lease which demises, grants, and lets, for a term of years, all of the oil deposits and natural gas in and under a particular tract of land, conveys a portion of the corpus of the estate, and is a sale of real estate within the meaning of the Probate Code of Oklahoma.

Edwards v. Perkins, 7 Or. 149; Eadie v. Chambers, 24 L.R.A. (N.S.) 879, 96 C. C. A. 561, 172 Fed. 73, 18 Ann. Cas. 1096; Tuohy's Estate, 23 Mont. 305, 58 Pac. 722; Milliken v. Faulk, 111 Ala. 658, 20 So. 594; Faxon v. Ridge, 87 Mo. App. 299; Acklin v. Waltermier, 19 Ohio C. C. 372, 10 Ohio C. D. 629; Johnson v. Stagg, 2 Johns. 510; Paine v. Mason, 7 Ohio St. 198; Spielmann v. Kliest, 36 N. J. Eq. 199; Jones v. Marks, 47 Cal. 242; Crouse v. Mitchell, 130 Mich. 347, 97 Am. St. Rep. 479, 90 N. W. 32; Koeber v. Somers, 108 Wis. 497, 52 L.R.A. 512, 84 N. W. 991; Hyatt v. Vincennes Nat. Bank, 113 U. S. 408, 28 L. ed. 1009, 5 Sup. Ct. Rep. 573; Sharp v. Lancaster, 23 Okla. 349, 100 Pac. 578; Barnes v. Stonebraker, 28 Okla. 75, 113 Pac. 903; Marshall v. Mellon, 179 Pa. 371, 35 L.R.A. 816, 57

situ as independent subject of taxation."

Cases like those considered in the last note, and cases involving statutes expressly determining the nature of property in oil and gas leases for purposes of taxation, are not included in this note.

Personal property includes chattels real as well as chattels personal. Chattels real are such as concern or savor of the realty,



Am. St. Rep. 601, 36 Atl. 201, 18 Mor. Min. Rep. 548; Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292; 28 S. E. 781; Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564, 18 Mor. Min. Rep. 350.

The record shows on its face that compliance with the law was not even attempted, and thereby said record affirmatively discloses its invalidity; therefore, to challenge the same is to accept the verity of the record, and rely upon the same as absolutely excluding every presumption as to the validity of the judgment based thereon.

Eaves v. Mullen, 25 Okla. 679, 107 Pac.

and include all estates and interests in real property less than estates of freehold, a freehold being an estate of inheritance or for life. 32 Cyc. 668.

Although there is much authority to the effect that leaseholds generally are personal property, a careful search has revealed but few cases in which the courts have answered the precise question which constitutes the subject of this note. Notwithstanding the fact, however, that oil and gas leases are in many respects dissimilar to ordinary leases, it seems very well established, irrespective of any statute on the subject, that they, too, are to be considered as chattels real, and personalty. Thus, in Chamberlain v. Dow, 16 W. N. C. 532, an oil lease for ninety-nine years, or so long as oil can be produced in paying quantities, is held to be a chattel interest which may constitute partnership assets as to third parties, though the title is not recorded in the partnership name, and therefore a levy or sale thereof for partnership debt gives a title superior to that of an assignee of the interest of one of the partners.

So, leases of lands for a term of years, with the use and exclusive right and privilege, during that period, of digging or boring for oils and other minerals at a fixed rent or royalty reserved out of the production, are personalty, and not real estate. Brown v. Beecher, 120 Pa. 590, 15 Atl. 608. The court at the conclusion of its opinion used this language: "As we have already said, the leases from Cornen conveyed an interest in land, but a chattel interest only. A lease for years is personal, not real estate; at the decease of the lessee it passes not to the heir, but to the administrator, as personal assets for the payment of debts."

And it was again held in this case that an oil lease was partnership assets, such that the sale thereof to satisfy a judgment against the partnership would transfer title as against the sale of his interest by one partner.

In Ohio a chattel mortgage on an oil and gas lease, which gives the lessee the exclusive right to drill for oil and gas, etc., for a term of five years, and so long as oil and gas, etc., are found in paying quantities, a share of the oil produced to be rendered to the landlord, is binding as against the mortgagor; but for a mortgage of such 42 L.R.A. (N.S.)

433; Frazier v. Steenrod, 7 Iowa, 339, 71 Am. Dec. 447; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Hendrick v. Cleaveland, 2 Vt. 329; Campbell v. McCahan, 41 Ill. 45; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Strouse v. Drennan, 41 Mo. 289; Haynes v. Meeks, 20 Cal. 288; Furgeson v. Jones, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842; Wells v. Steckleberg, 50 Neb. 670, 70 N. W. 242; Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295; Beachy v. Shomber, 73 Kan. 62, 84 Pac. 547; Hancock v. Yourree, 25 Okla. 460, 106 Pac. 841; New-

interest to be valid and effective as against third persons, it must be filed and recorded as required by the statute on the subject of conveyances and encumbrances of real estate. Acklin v. Waltermier, 19 Ohio C. C. 372, 10 Ohio C. D. 629.

And the lessee's interest under such a lease is subject to levy and execution as a chattel, but to make the levy valid the officer is not required to go into possession of the premises, or to put any one in possession thereof. Ibid. His levy can only be by description of the realty out of which the leasehold issues. Titusville Novelty Iron Works's Appeal, 77 Pa. 103, 9 Mor. Min. Rep. 17. Apparently this was an oil leasehold of which the court was speaking.

Of course, there is little difficulty in determining the nature of property in oil and gas leases, where such is fixed by statute. Thus, in Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584, 22 Mor. Min. Rep. 42, a statutory provision that "all oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation," was the partial basis of a decision to the effect that the exclusive right to produce oil under a lease for a term of years is personal property. This holding, it will be observed, is in strict accord with DUFF v. KEATON, save for the fact that in the DUFF CASE the statute provides generally that "estates for years are chattels real."

In Pennsylvania an oil leasehold is regarded as real estate under the act of April 27, 1855, making it lawful for the lessee of a term of years to mortgage the same, and giving such mortgage, executed and recorded according to its provisions, the same force and effect as a mortgage of real estate. Gill v. Weston, 110 Pa. 312, 1 Atl. 921.

In the following cases, although not expressly so holding, the court apparently regarded oil and gas leases as chattels real: Aderhold v. Oil Well Supply Co. 158 Pa. 401, 28 Atl. 22; Devine v. Taylor, 12 Ohio C. C. 723, 4 Ohio C. D. 248; Beardsley v. Kansas Natural Gas Co. 78 Kan. 571, 96 Pac. 859. And see other cases cited in the note in 17 L.R.A. (N.S.) 688, above referred to.

W. W. A.

hall v. Sadler, 16 Mass. 122; People's Sav. Bank v. Wilcox, 15 R. I. 258, 2 Am. St. Rep. 894, 3 Atl. 211; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Royston's Appeal, 53 Wis. 612, 11 N. W. 36.

Messrs. W. S. Fitzpatrick, J. B. F. Cates, C. L. Thomas, and George S. Ramsey, for defendants in error:

Under no construction can the contract in question, made by the guardian to the defendant the Prairie Oil & Gas Company, be considered a sale or deed.

Tennessee Oil, Gas & Mineral Co. v. Brown, 65 C. C. A. 524, 131 Fed. 696; Raynolds v. Hanna, 55 Fed. 783; State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520.

An oil and gas lease for a term of years is not a sale of real estate.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 730, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Broadwell v. Banks, 134 Fed. 470; Backer v. Penn Lubricating Co. 89 C. C. A. 419, 162 Fed. 627; Shenk v. Stahl, 35 Ind. App. 493, 74 N. E. 538; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Watford Oil & Gas Co. v. Shipman, 23 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Richlands Oil Co. v. Morris, 108 Va. 288, 61 S. E. 762; Thornton, Oil & Gas, p. 73; Donahue, Petroleum & Gas, § 24, p. 176; Stahl v. Illinois Oil Co. 45 Ind. App. 211, 90 N. E. 632; Gillespie v. Fulton Oil & Gas Co. 239 Ill. 326, 88 N. E. 192; Dickey v. Coffeyville Vitriified Brick & Tile Co. 69 Kan. 106, 76 Pac. 398; Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335, 89 Pac. 750; Eastern Ohio Oil Co. v. McEvoy, 75 Kan. 515, 89 Pac. 1048; Phillips v. Springfield Crude Oil Co. 76 Kan. 783, 92 Pac. 1119; Beardsley v. Kansas Natural Gas Co. 78 Kan. 571, 96 Pac. 859.

A private sale of the ward's land, made by the guardian, upon petition to the court and order thereon, when confirmed by the court, cures all defects and irregularities, and is not subject to attack.

Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124; Eliason v. Bronnenberg, 147 Ind. 248, 46 N. E. 582; Apel v. Kelsey, 52 Ark. 341, 20 Am. St. Rep. 183, 12 S. W. 703; Fleming v. Johnson, 26 Ark. 421; Alexander v. Hardin, 54 Ark. 480, 16 S. W. 264; Greer v. Ford, 31 Tex. Civ. App. 389, 72 S. W. 73; Ex parte Kirkman, 3 Head. 517; Kretzinger v. Brown, 91 C. C. A. 450, 165 Fed. 612; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 71; United States ex rel. Hine v. Morse, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37, 21 Ann. Cas. 782; Grignon v. Astor, 2 How. 319, 11 L. ed. 42 L.R.A. (N.S.)

283; Mohr v. Manierre, 101 U. S. 417, 426, 25 L. ed. 1053, 1055; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 317; Stuckey v. Watkins, 112 Ga. 268, 81 Am. St. Rep. 47, 37 S. E. 401; Bush v. Lindsey, 24 Ga. 245, 71 Am. Dec. 117; J. B. Watkins Land Mortg. Co. v. Mullen, 62 Kan. 1, 84 Am. St. Rep. 372, 61 Pac. 385; Neville v. Kenney, 125 Ala. 149, 82 Am. St. Rep. 230, 28 So. 452; Satcher v. Satcher, 41 Ala. 26, 91 Am. Dec. 498; Wyman v. Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; M'Pherson v. Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 643; Roach v. Martin, 1 Harr. (Del.) 548, 27 Am. Dec. 746; Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; Bell v. Green, 38 Ark. 78; Apel v. Kelsey, 47 Ark. 419, 2 S. W. 102; Hendrickson v. Canter, 20 Ky. L. Rep. 1258, 49 S. W. 188; Neligh v. Keene, 16 Neb. 407, 20 N. W. 277; Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572, 26 S. W. 692.

Messrs. James B. Diggs and Henry McGraw, amici curiæ:

The oil and gas mining lease set out in plaintiffs' amended petition is not a conveyance of an interest in real estate, and does not require to be advertised and sold as real estate, unless such advertisement and sale are required by statute.

Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584, 22 Mor. Min. Rep. 42; Lowther Oil Co. v. Miller Sibley Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; Kelly v. Keys, 213 Pa. 295, 110 Am. St. Rep. 547, 62 Atl. 911; Phillips v. Springfield Crude Oil Co. 76 Kan. 783, 92 Pac. 1119; Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335, 89 Pac. 750; Beardsley v. Kansas Natural Gas Co. 78 Kan. 571, 96 Pac. 859; Rawling v. Armel, 70 Kan. 778, 79 Pac. 683; O'Neil v. Sun Co. — Tex. Civ. App. —, 123 S. W. 172; Gartside v. Outley, 58 Ill. 210, 11 Am. Rep. 59, 10 Mor. Min. Rep. 566; Austin v. Huntsville Coal & Min. Co. 72 Mo. 535, 37 Am. Rep. 446, 9 Mor. Min. Rep. 115; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429; Brown v. Spilman, 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Denriston v. Haddock, 200 Pa. 426, 50 Atl. 197, 21 Mor. Min. Rep. 513; Raynolds v. Hanna, 55 Fed. 783; United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573; State v. South Penn Oil Co. 42 W. Va. 80, 24 S. E. 688; Heal v. Niagara Oil Co. 150 Ind. 483, 50 N. E. 482; Tone v. Brace, 11 Paige, 566; Perkins v. Morse, 78 Me. 17, 57 Am. Rep. 780, 2 Atl. 130; State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520; Providence Min. & Mill Co. v. Nicholson, 101

C. C. A. 157, 178 Fed. 29; Stahl v. Illinois Oil Co. 45 Ind. App. 211, 90 N. E. 632; Test Oil Co. v. LaTourette, 19 Okla. 214, 91 Pac. 1025; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902.

The lease, having been confirmed by the proper county court, cannot be attacked collaterally, and is good save as against a direct attack.

Fleming v. Johnson, 26 Ark. 421; Guynn v. McCauley, 32 Ark. 97; Beidler v. Friedell, 44 Ark. 411; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; Thaw v. Ritchie (Thaw v. Falls) 136 U. S. 519, 34 L. ed. 531, 10 Sup. Ct. Rep. 1037; Holmes v. Oregon & C. R. Co. 7 Sawy. 380, 9 Fed. 229; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522; Apel v. Kelsey, 47 Ark. 413, 2 S. W. 102; Fisher v. Bassett, 9 Leigh, 119, 33 Am. Dec. 227; Gibson v. Roll, 27 Ill. 88, 81 Am. Dec. 219; Scarf v. Aldrich, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324; Daughtry v. Thweatt, 105 Ala. 615, 53 Am. St. Rep. 146, 16 So. 920; Salter v. Hilgen, 40 Wis. 363; Young v. Lorain, 11 Ill. 624, 52 Am. Dec. 463; Iverson v. Loberg, 26 Ill. 179, 79 Am. Dec. 364; Mortgage Trust Co. v. Redd, 38 Colo. 458, 8 L.R.A.(N.S.) 1215, 120 Am. St. Rep. 132, 88 Pac. 473; Berrian v. Rogers, 43 Fed. 467; Eaves v. Mullen, 25 Okla. 679, 107 Pac. 433.

Messrs. A. L. Beaty, John H. Kane, M. E. Michaelson, and Hayes McCoy also *amici curiæ*.

Williams, J., delivered the opinion of the court:

This proceeding in error is to review the judgment in an action brought by Cedric Duff, a minor, by his mother, Evaline Duff, as next friend, and the said Evaline Duff in her own right, as next of kin to the said Cedric Duff, against Harwood Keaton, as guardian of the said Cedric Duff's estate, and the Prairie Oil & Gas Company, a corporation, to enjoin a waste of said ward's estate, to have declared null and void and set aside a pretended oil and gas lease upon said ward's estate, and for an accounting and recovery for waste already committed. A demurrer was sustained to the plaintiffs' amended petition, and plaintiffs having elected to stand on same, a judgment dismissing the action and for costs was entered against them.

It is the contention of the plaintiffs in error that certain proceedings had in the county court of Okmulgee county, authorizing said oil and gas lease, are not merely irregular and erroneous, but absolutely void; that such invalidity is not made to

appear by facts outside the record, but is shown and established upon the face of the record itself, being a sale of real estate by the guardian, in violation of the requirements of § 5314, Comp. Laws 1909; and that such sale can be approved by the county court only after certain preliminary requirements.

The petition for leave to lease the land of said ward for oil and gas mining purposes is, in part, as follows: "Comes now Harwood Keaton and shows to the court: That he is the duly appointed, legally qualified, and acting guardian of the person and estate of Cedric Duff, a minor. That said minor is the owner of certain real estate located in Okmulgee county, Oklahoma, and more particularly described as follows:

. . . That said land was allotted to said minor by the Creek Nation, and Cedric Duff is duly enrolled upon the Creek freedmen roll. That said premises are situated in what is known as the oil and gas belt in the state of Oklahoma, and your petitioner believes that the same are valuable for oil and gas mining purposes. Your petitioner further shows to the court that neither he nor his said ward are able to develop said property for oil and gas because of lack of means necessary to drill and equip oil and gas wells; that wells have been drilled for oil and gas in the neighborhood of this land, and oil and gas have been discovered and are being produced in paying quantities, and unless your petitioner is authorized by this court to lease the lands of his ward to some person or company able to properly develop the premises for oil and gas and protect the interest of his ward, the estate will suffer waste and loss by drainage to wells which may be and are being drilled adjacent to the property herein described. Your petitioner further shows that, if oil and gas are found in paying quantities on the above-described land, it will greatly enhance the value of his ward's estate, and the money which may be derived from the production of oil and gas from said premises is necessary for the proper education, maintenance, and support of his said ward. Wherefore, petitioner prays the court to make and enter an order herein directing him, as the guardian of said minor, to enter into an oil and gas mining lease with some responsible person or company in order that said premises may be developed for oil and gas, and the estate of said Cedric Duff protected." On the same day that said petition was filed in said county court, the following order was made: "This cause coming on to be heard upon this 24th day of December, 1908, on the duly verified petition of Harwood Keaton, who is the guardian of the person and estate of Cedric Duff,

a minor, praying for permission and an order of court permitting and directing him, the guardian, to execute an oil and gas mining lease upon the following described premises of his ward, to wit; . . . and it being shown to the court that such action will be to the best interest of said ward, and that it is necessary to execute an oil and gas mining lease to some person or company which is able to properly develop said premises in order that the interest of said minor may be protected; and it being fully shown to the court that neither the guardian nor his ward have means sufficient to develop said premises for oil and gas,—it is by the court ordered that said Harwood Keaton, guardian of the person and estate of Cedric Duff, a minor, be and is hereby directed and authorized to execute an oil and gas mining lease to some company or person responsible and able to develop said premises for oil and gas."

It is insisted by plaintiffs in error that said order is void for the reason that no compliance was made with §§ 5503, 5504, and 5505, Comp. Laws 1909, by making an order directing the next of kin of said minor, or persons interested in said estate, to appear before said court at any time or place in such order specified, to show cause why an order should not be granted for the making of such oil and gas lease upon said estate, and without personal service or service by publication, and without any attempt at personal service or service by publication, of notice upon said plaintiff Evaline Duff, as the next of kin of said ward, Cedric Duff, or upon any person interested in said ward's estate, etc.; and, further, for the reason that said order did not set forth and specify the terms upon which the said guardian should lease said premises for oil and gas mining purposes pursuant to §§ 5316, and 5508, Comp. Laws 1909.

On December 24, 1908, the said guardian, pursuant to said order, but without any appraisalment of said estate for oil and gas mining purposes ever having been made pursuant to § 5318, Comp. Laws 1909, and without any notice of the time and place of a public sale of said oil and gas mining lease on said ward's estate, pursuant to the provisions of § 5320, Comp. Laws 1909, made the following report as to his action in the premises to said court, to wit: "Comes now Harwood Keaton and respectfully shows to the court that he, as guardian of the person and estate of Cedric Duff, a minor, acting under the direction of this court in an order made and entered on the 24th day of December, 1908, directing him, as such guardian, to execute an oil and gas mining lease on the premises of his ward to some person or company responsible and

able to properly develop said premises for oil and gas and protect the interest of his ward, has on this day entered into an oil and gas mining lease with the Prairie Oil & Gas Company, a Kansas corporation; said lease continuing from this date to a period ending December 1, 1926, and not extending beyond the minority of his ward. The conditions of said lease are that the lessee is to pay to the estate of the said minor a royalty of one eighth of all oil produced and the sum of two hundred fifty (\$250) dollars for each and every gas well drilled thereon, the product of which is marketed off the premises. The lessee pays, as a bonus for the execution of said lease, the sum of eighty (\$80) dollars in cash, and if a well is not drilled within one year from the date of said lease the lease is to be null and void unless the lessee pays to the estate of said minor the sum of 25 cents per acre, semi-annually. Your petitioner further shows to the court that this is the best offer he has been able to secure for an oil and gas mining lease on these premises; that he has made diligent inquiry and knows that the Prairie Oil & Gas Company is financially able to develop said premises for oil and gas, and is able to fully protect the interest of said minor in said premises, and believes it for the best interest of said minor that the court approve the lease executed by his guardian to the Prairie Oil & Gas Company, and prays the court that his action in so doing be in all things approved and confirmed by this court."

It is contended by counsel for plaintiffs in error that §§ 5323 and 5324, Comp. Laws 1909, require the setting of a day for hearing such report and notice, etc., and that such was not done in this case.

On said report the court rendered the following order: "Now on this 24th day of December, 1908, this cause coming on to be heard upon the report of the guardian filed herein, showing that in pursuance of an order heretofore made and entered in this cause, directing him, as such guardian, to execute an oil and gas mining lease on the premises of his ward, to wit, . . . and said report showing that the orders of this court have been complied with, the court upon investigation finds: First, that the premises above described are in the oil and gas belt of the state of Oklahoma, and should be developed for oil and gas. Second, that neither the guardian nor his ward have means sufficient to develop said premises for oil and gas. Third, that the estate would suffer waste and loss if said premises are not developed for oil and gas. Fourth, that the bonus paid by the Prairie Oil & Gas Company is a reasonable bonus. Fifth, that the royalty agreed to be paid by said

lessee is the royalty usually paid by responsible oil and gas operators in that territory. Sixth, that it is to the best interest of said minor that said lease be approved and confirmed by this court. The court further finds that the Prairie Oil & Gas Company, a Kansas corporation, the lessee, is responsible and financially able to develop said premises for oil and gas, and is able to properly protect the interest of said minor in said premises. It is therefore by the court considered, ordered, and adjudged that the lease this day executed by Harwood Keaton, as guardian of the person and estate of Cedric Duff, a minor, to the Prairie Oil & Gas Company, a Kansas corporation, covering the above-described premises, be and the same is hereby approved and confirmed by this court."

Plaintiffs in error further contend that said order of confirmation is void for not complying with § 5323, (Comp. Laws 1909, relative to confirming the sale of lands of minors. It is insisted by the plaintiffs in error that "an oil and gas lease which demises, grants, and lets, for a term of years, all of the oil deposits and natural gas in and under a particular tract of land, conveys a portion of the corpus of the estate, and is a sale of real estate within the meaning of the Probate Code of Oklahoma."

1. Is such a lease a sale as contemplated by § 5314, Comp. Laws 1909? When §§ 1187, 1194, and 1195, Comp. Laws 1909, are considered together, it is obvious that a lease for a period of over one year, within the terms of said statutes, is not a conveyance of real estate. A lease for one year or for six months is an instrument relating to real property; § 1195, *supra*, indicating that the legislature did not understand a lease as conveying real estate or an interest therein, for that section expressly declares that no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as therein provided.

Under the theory of the plaintiffs in error, the guardian cannot lease the lands of his ward for any term of years in excess of one year for agricultural, grazing, or commercial purposes, unless the guardian files a petition in court alleging that the income of the ward is insufficient to maintain or educate said ward, and such lease must be made or sold for the purpose of deriving funds with which to educate or maintain the ward, or alleging that such lease for any term over one year, for agricultural, grazing, or any other commercial purpose

should be made for the benefit of the estate, for reinvestment, etc.

The statutes of this state are entirely lacking as to any specific provision for the procedure to be followed by the guardian in leasing the lands of his ward for agricultural or grazing or commercial purposes or for exploring for oil or gas.

By sections 12 and 13 of article 7 of the Constitution, jurisdiction of all probate matters is conferred upon the county court.

By § 5478, Comp. Laws 1909, it is provided that "every guardian appointed shall have the custody and care of the education of the minor; and the care and management of his estate, until such minor arrives at the age of majority, or marries, or until the guardian is legally discharged." In the following section the guardian is required, before his appointment becomes effective, to give a bond to the minor, conditioned that he will faithfully execute the duties of his trust according to law; it being specially provided that the following conditions shall constitute a part of every such bond without being expressed therein: First, to make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order. Second, to dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward. Third, to render an account on oath of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the probate judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto.

Section 5491, Comp. Laws 1909, is as follows: "Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward, and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate upon obtaining an order of the county court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for

the maintenance and support of the ward and his family, if there be any."

On account of § 5513, Comp. Laws 1909, which provides: "The county court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and *the county court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require*" (italics ours),—a guardian has no authority to lease the lands of his ward, or enter into a license or contract covering the same, for oil and gas mining purposes, without the direction and approval of the probate court. For said section stipulates that the probate court may "make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require." The rule obtaining at common law for the guardian to lease the lands of his ward without the approval of the court is thereby changed.

We reach the conclusion that a lease for oil and gas or mining purposes is not a "conveyance of real estate" within the purview of § 5314, supra, and in this we are supported by many authorities dealing with and construing statutes of similar import.

In *Tone v. Brace*, 11 Paige, 566, in holding that a lease for a term of years was not within the statute excluding implied covenants in conveyances of land, the chancellor said: "Such lease is not, in common parlance, called a conveyance of lands, tenements, or hereditaments, though an instrument by which the lessee might afterwards transfer his interest in the leasehold premises to another might very properly be denominated a conveyance of his chattel interest as lessee."

In *Perkins v. Morse*, 78 Me. 17, 57 Am. Rep. 780, 2 Atl. 130, the court, reaching the conclusion that a lease for years by a married woman was not a conveyance of the land, said: "A lease may be, in a sense, a conveyance; but such is not the commonly accepted nor the accurate meaning of the term. When we say premises are leased, we generally mean that the use of them is transferred, and by the term 'conveyed' that the title is deeded."

In *State v. Evans*, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520, upholding an act of the legislature providing for the issuance of mineral leases on school lands, without 42 L.R.A. (N.S.)

offering them at public sale, in the face of a constitutional provision that no such lands should be sold otherwise than at public sale, the court said: "The term 'sale,' as ordinarily used, and as it is used in the Constitution in reference to the disposition of school lands, means the transfer of the absolute or general property in the thing sold. In determining whether a mineral lease of the kind here in question is a sale, neither the name nor form given to it by the statute is controlling. The legal effect of the transaction determines its classification, not its form. . . . The conclusion to be drawn from the English cases, as clearly and correctly stated by the learned trial judge, is this: 'That from the very beginning the rights of the man who owned the land, and of the man who took the minerals from it, were worked out through the law of tenancy, without the aid of the law of sales. That it was never a conception of the law that the man who took away the mineral got his title through a sale by the owner of the land; but the theory was that the mineral was the product of the use for which rent was paid, and that the tenant got his title to his mineral by an appropriate use of the demised premises. That it never was a circumstance of significance that the use of the demised premises, in accordance with the intent of the parties, and in accordance with the nature of the use to which they could be put, resulted in the gradual consumption or even exhaustion of the portion of the land of chief worth.' A consideration of the cases in this country leads to a like conclusion."

2. Is a lease for oil and gas mining purposes for a term of years realty or personalty? Under our statute, "estates for years are chattels real." Comp. Laws 1909, § 7216.

In 1 *Woerner's American Law of Administration*, at page 231, it is said: "Leasehold estates and estates for years are treated at common law as personal property, and the widow of a lessee dying is not entitled to dower therein, although it be for a period of a thousand years, or renewable forever, or although the lease contain a covenant to convey the estate in fee on the demand of the lessee."

In *Despard v. Churchill*, 53 N. Y. 192, it is said: "The property in this state affected by this will is leasehold estates, held by leases for a short term of years. This is, at common law, personal property. 3 Kent, Com. 401, 2 Kent, Com. 342; *Merry v. Hallet*, 2 Cow. 497; *Brewster v. Hill*, 1 N. H. 350."

In *Cunningham v. Baxley*, 96 Ind. 367, where a lease for life was under consideration, it was said: "Such a lease is not real

estate; it is a chattel interest; it does not descend to heirs, but goes to the executor or administrator; and he is the party to maintain a suit for possession against one who has wrongfully taken possession of the leased premises."

In *McCormick v. Stephany*, 57 N. J. Eq. 264, 41 Atl. 843, it is said that the unexpired term of a lease "is an asset in the hands of the executor and administrator.

... By the express terms of the will all the real and personal estate are given to the complainant," lessee's widow. "But, however absolute may be the gift to her, if the thing be an asset to be administered, the executor primarily takes it; and all rights touching it must, during the period of administration, be asserted by the executor as such, or it must appear that the executor assents to the possession of the legatee."

In *Thornton v. Mehrling*, 117 Ill. 55, 25 N. E. 958, a lease for eighty-nine years being under consideration, the court said: "There would seem to be no doubt that the lease in this case was personalty, and the legal title and power of disposal passed to the administratrix on the grant of letters of administration."

In *Faler v. McRae*, 56 Miss. 227, it was held that a lease of land for ninety-nine years is a chattel real, and upon the death of the lessee descends to the administrator of his estate; and that so long as there is a valid debt against the estate the heirs and distributees cannot acquire any title as against the creditor, and any conveyance thereof by them is ineffectual as against such creditor. To the same effect, see *Webster v. Parker*, 42 Miss. 465; *Becker v. Walworth*, 45 Ohio St. 169, 12 N. E. 1; *Rickard v. Dana*, 74 Vt. 74, 52 Atl. 113.

In *Sutter v. Lackmann*, 39 Mo. 97, it is said: "Being a lease for ten years, we think it should be treated as a mere chattel interest, which, of course, goes to the administrator upon the death of his intestate, and not to the heirs, and therefore the suit was properly revived in the name of the personal representative." See also *Dillingham v. Jenkins*, 15 Miss. 479; 3 Kent, Com. p. 401; *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *Goodwin v. Goodwin*, 33 Conn. 317; *Whitmire v. Wright*, 22 S. C. 446, 53 Am. Rep. 725; *Holzman v. Wager*, 114 Md. 322, 79 Atl. 205, Ann. Cas. 1912A, 619.

In *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902, it was held that "oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find,

and passes nothing that can be the subject of an ejectment or other real action."

In *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 119 Pac. 260, this court followed the rule announced in *Kolachny v. Galbreath et al.*, and said: "This lease, under these decisions, does not have the effect of placing the title of the oil and gas that is under the surface of the land in controversy in the lessee, but to grant to the lessee the privilege of exploiting for the oil and gas."

The rule seems to be settled in this jurisdiction that the grant of an exclusive privilege to go upon land for the purpose of exploring for oil or gas, the grantor to receive part of the oil or gas mined, does not vest in the grantee any estate in the land or oil or gas, but is merely a license or grant; such a lease creating an incorporeal hereditament only, and the lessee having no right or title to the oil or gas lying under the surface of the land. This, under our statute, is simply a chattel real.

In *Wagner v. Mallory*, 169 N. Y. 501, 62 N. E. 584, 22 Mor. Min. Rep. 42, a deed was under consideration, wherein "all the lands and premises" owned by the grantor, located in a certain place and specifically described, were conveyed to a certain grantee. There was an oil and gas lease outstanding in favor of a certain lessee, made by the grantor. The grantee in the deed afterwards insisted that said conveyance vested in him also the lease interest. The court held that the interest under the lease was not transferred, saying: "In other words, the intent was to convey an interest in real estate, and not in personal property. We think the provision does not cover the interest in the lease." This case specifically holds that an oil and gas lease is personal property. An oil and gas lease is neither a conveyance, within the purview of § 5314, supra, nor a sale of the minor's real estate, within the terms of said section; such lease being personalty.

But it is insisted that these conclusions are contrary to § 5530, Comp. Laws 1909, which authorizes guardians of infants and insane persons to lease and grant oil and gas mining rights in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the county court, as now provided by law, where such consideration is money. But we have heretofore reached the conclusion that the rule existing at common law, by which the guardian was authorized to lease the lands of the ward for a number of years without the approval of the probate court, has been changed by § 5513, supra; and that by said section said leases in order to be valid must be first approved by the

probate court; it being specially provided by said section that the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require.

Having also reached the conclusion that such a lease was personalty, and not realty, it is under the procedure by virtue of said § 5513 that oil and gas leases were authorized to be approved by the probate court, and § 5530 obviously referred to such procedure by virtue of said section. This construction harmonizes all the provisions of said statutes.

This conclusion does not militate against the rule announced in *Eldred v. Okmulgee Loan & T. Co.* 22 Okla. 742, 98 Pac. 929. There it was held that a lease was an alienation within the terms of an act of Congress approved April 21, 1904 (33 Stat. at L. 204, chap. 1402), which reads: "And all restrictions upon the alienation of lands of all allottees of either of the five civilized tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed." Wherein this court said: "Hence we conclude that a lease conveys a leasehold estate; is an 'alienation by deed;' is an alienation within the intent and meaning of the Act of April 21, 1904, supra, upon which species of alienation restrictions by that act were removed."

But we have heretofore reached the conclusion that leasehold estates and "estates for a term of years" were chattels real, and that such were included within that class of property known as personal property, and the procedure followed in this record harmonizes with that in force in the state for the sale of personalty by order and approval of the probate court.

In the argument of this case before this court the statement is made without denial that hundreds of acres of land belonging to minors in eastern Oklahoma have been explored under contracts similar to this, approved by the county courts under a similar procedure; that the county courts of said section of the state where oil and gas have been found have uniformly construed § 5314, Comp. Laws 1909, as not applying to an oil and gas lease; that the district courts where the question has been raised, have also put a like construction thereon; and that the Secretary of the Interior has uniformly recognized as legal and valid leases of minors approved under the procedure in this case, in the conduct of his office relative to the guardianship of the Federal government over the Indians.

No charge of fraud is made in this case against the defendant in error; no charge of actual fraud is made against the guard-

ian. The only allegation kindred to such a charge is that the guardian's conduct in making the lease was a fraud because it has resulted in the wasting of the oil and gas in the lands of the defendant; but just how the exploration and development of property for oil and gas, and the accounting for the same by legitimate production, can be waste, is not pointed out.

Wherever there is fraud participated in by the lessee, as a rule the conveyances may and ought to be set aside. That is not the question here involved. The rule here sought to be invoked would strike down every lease, it matters not how much investment had been honestly made under it, and probably bring about chaotic conditions in the development of one of the great industries of this state.

These investments have been made under constructions placed by the county judges and the district judges on these statutes. *MaHarry v. Eatman*, 29 Okla. 46, 116 Pac. 935. A reasonable consideration of these statutes sustains the conclusion reached by such courts.

It follows that the judgment of the lower court must be affirmed.

All the Justices concur.

#### KENTUCKY COURT OF APPEALS.

CITY OF LAWRENCEBURG, Appt.,

v.

ALICE LAY.

(149 Ky. 490, 149 S. W. 862.)

**Municipal corporations — unsafe street — rope to close alley — injury — liability.**

Stretching a rope across an entrance to an alley between the street and sidewalk to prevent use of the alley is not an obstruction to the street which will render the municipality liable in case it is broken by a runaway horse and an end flies against a person passing on the walk to his injury.

(September 26, 1912.)

**Note. — Liability for injury by obstruction placed in street or highway to stop travel.**

Generally, as to liability of municipal corporation for defects or obstructions in street, see note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513.

Here are a few cases presenting the specific point indicated in the title.

Thus, it was held in *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542, that a city was liable for damages for injury to one who ran into a rope stretched across



**A**PPEAL by defendant from a judgment of the Circuit Court for Anderson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. F. R. Feland and E. H. Gaither for appellant.

Messrs. Edwards, Ogden, & Peak, L. W. McKee, and W. H. Morgan for appellee.

Carroll, J., delivered the opinion of the court:

In this suit by the appellee to recover damages for personal injuries sustained by reason of the alleged negligence of the ap-

pellant city in placing and permitting to remain in one of the streets an obstruction, the jury assessed for damages at \$500, and from the judgment entered accordingly the city prosecutes this appeal.

The following facts appear from the uncontradicted evidence: That leading off from the main street in the city was an alley, about 25 feet wide and some 220 feet deep. This alley was what is called a "blind alley," and was used as an entrance to the back yards and stables of the property owners abutting on it; the rear or back end of the alley being closed. That on public days when large crowds were in the city noisy, drunken, and disorderly persons were in the habit of congregating in this alley, to the great annoyance and disturb-

a street by a policeman, by order of the mayor, for the purpose of stopping travel, even if the act were *ultra vires*, since the mayor of the city had notice of the obstruction, which constituted a nuisance.

Generally, as to liability of municipality in tort for acts beyond scope of its powers, see note to Scott v. Tampa, post, 908.

And as to liability of municipality for torts of police officers, see note to Sehy v. Salt Lake City, post, 915, and earlier notes there referred to.

And in Anderson v. Wilmington, 2 Penn. (Del.) 28, 43 Atl. 841, an action for damages for personal injuries sustained by the complainant by riding on his bicycle into a small wire stretched across a street for the purpose of closing it, the court instructed the jury, which found a verdict for the complainant, as follows: "The city had a right to block off that street for the comfort and well-being of sick residents thereon, in its discretion, and to use for that purpose such instrumentalities as it deemed proper; but inasmuch as the street was a public highway of the city, to the proper use of which all the citizens were entitled, it was the duty of the city, in placing such obstruction there, to so place and mark the same as to properly guard the public safety, and to give such warning and notice of the existence of the obstruction as would reasonably notify all persons having occasion to use the street, that the danger was there; and just in such proportion as the character of the obstruction was not manifest to the ordinary observer, the duty on the part of the city to plainly make known its existence, by such signals as could reasonably be observed, was the more imperative. It has been well said by the courts that the traveler is not bound to hunt for obstructions or pitfalls in the public streets. It is the duty of the city to keep such streets in a reasonably good condition and repair at all times. The traveler has a right to presume that this duty has been performed, and that the streets are so fit for use. While this is the duty of the city, there is also a clear duty imposed upon the traveler, that he shall proceed on

the said street at a lawful rate of speed, and in the reasonable use and exercise of all his faculties, taking all reasonable care and precaution to avoid all injuries to himself as well as to others. If he shall disregard this duty and proceed recklessly or carelessly, he must take the consequences of injuries resulting therefrom."

It was held in Bills v. Kaukauna, 94 Wis. 310, 68 N. W. 992, that it was the duty of the town to give such warning as would prevent the use of a discontinued, but well-beaten road, by night as well as by day, and that the town was liable for damages to one who drove at night into a barbed-wire fence erected across the road, and the court said: "In the absence of anything to the contrary, travelers have a right to assume that a highway that appears to be open and used for public travel has not been discontinued, or travel on it obstructed by any device or means, especially such as a barbed-wire fence, practically imperceptible in the nighttime, and especially dangerous to persons or horses coming into sudden contact with it."

And it was held in Glasgow v. Gillenwaters, 113 Ky. 140, 67 S. W. 381, that the municipality was liable for damages for injuries sustained by one who encountered at night a barbed-wire fence drawn across a street by an independent contractor who was doing repairing beyond the fence, as to the existence of which there was no warning. The court remarked that the city was required by statute to keep its streets in a reasonably safe condition for travel, and free from obstruction, but that it would seem that such would be its duty independent of such statute.

So, in Baltimore v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395, a city was held liable to one who at night drove into a rope of which there was no warning, that had been stretched across the street for the purpose of arresting travel, by an independent contractor engaged in repaving the street. Generally, as to the liability of municipality for negligence of street contractor, see note in 66 L.R.A. 126.

But in Holliday v. Athens, 10 Ga. App.

ance of the property owners, and their presence endangered the safety of persons passing on the street on which the alley opened. That to prevent the assembling of this class of people in the alley, the city directed, or at least permitted, the police officers to stretch a rope across the mouth of the alley by tying it to two telephone posts that stood on each side of the alley. That these poles were on a line between the sidewalk and the street, and, as the rope was stretched parallel with the sidewalk, it did not, of course, interfere in any way with the customary use of the sidewalk or the street; but it served to warn people that the alley was closed, and to prevent the taking of horses in it from the street. That the rope was large and heavy, and was suspended about 5 feet from the ground, and that it had been the custom of the city to close the alley in this manner on public days for eight or ten years previous to the injury complained of. That on the day appellee was injured there was a large crowd in town to see a circus, and the rope was placed in the usual manner, and as above described, to prevent the use of the alley. That during the day, and while appellee was walking on the sidewalk in front of the mouth of the alley, a horse that had been left standing alone in the street, and that was kept in one of the stables in the alley, ran into the alley, and in passing under the rope it was caught in some way by the saddle on the horse and pulled loose from its fastening, or broke, and when so broken or detached it struck with considerable force the person of appellee, inflicting the injury of which she complains.

709, 74 S. E. 67, upholding a verdict in favor of the municipality in an action by one injured when his automobile ran into a rope placed across a street by the city authorities to stop travel, the court said: "The city, of course, had a right to close the street for travel while the repairs were under way. It was its duty to take such precautionary measures for the protection of the plaintiff and others having a right to use the street as ordinary prudence would dictate. Just what these precautions should have been, and just what warnings should have been given, and what character of obstruction should have been adopted to close the street, were all questions of fact for the jury. The plaintiff was under a corresponding duty to exercise ordinary care for his own protection. Generally speaking, the questions as to what acts he should have performed to avoid injury to himself were also questions of fact for the jury. But it was certainly incumbent on the plaintiff, as a matter of law, to use his eyesight for the purpose of discovering any obstruction which might have been placed in the street." It appeared in the evidence (though contradicted) that the rope was large in diameter

It is not claimed by the appellee that the manner of attaching the rope to the posts was negligent, or that the rope was not of sufficient size and strength for the purpose intended, or that it could not be plainly seen by any person using the sidewalk or the street, or that, if it was allowable to close the alley in this manner, the rope and the manner of its suspension were not in every respect suitable. But it is contended for the appellee that maintaining the rope in the manner described constituted an obstruction of the street, and the city was therefore guilty of negligence in failing to keep its streets and public ways in reasonably safe condition for public travel, and that this negligence was the proximate cause of the injury received by the appellee, and so the city should be made to respond in damages. This was the view of the matter taken by the trial judge, who instructed the jury, in substance, that they should find for appellee if they believed from the evidence that stretching the rope in the place and manner it was rendered the street or sidewalk at said place in an unsafe or dangerous condition, and that, while appellee was walking along the sidewalk exercising ordinary care for her safety, a horse ran under the rope, causing it to become unfastened and to strike and injure her. On the other hand, it is argued for the city that it was not guilty of actionable negligence in closing the alley by means of the rope, and that, even if its acts in this respect should be treated as negligence, this negligence was not the proximate cause of the injury, and so there should be no recovery.

and could be seen from a long distance, and that the complainant's speed was excessive.

And it was held in *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739, that the city was not liable for damages for the injury of one by a rope stretched across a street to close it for the protection of a parade of the fire department, since "it was but a temporary and reasonable obstruction under the evidence, erected for the convenience and safety of the public, for the promotion of a system in which the public interest was vitally concerned."

So, in *Belvin v. Richmond*, 85 Va. 574, 1 L.R.A. 807, 8 S. E. 378, where it appeared that a city had no part in stretching a rope across a street, but that the act was done by order of a judge of a state court, by whose orders the city was bound, at least until a reversal by the ruling of a competent tribunal, it was held that no right of action against the city accrued to one injured by the obstruction.

As to duty to provide barriers against abandoned highway, see note to *Daniels v. County Court*, 37 L.R.A. (N.S.) 1158.

R. S. N.

There is much force in the argument of counsel for appellant that the act of the city in maintaining the rope was not the proximate cause of the injury, as the rope did not in any manner obstruct the use of the street or sidewalk in the customary manner of their use, although, if an attempt had been made to go from the street to the sidewalk, or from the sidewalk to the street, at the place where the rope was suspended, it would offer in some measure an obstruction. The rule is that to constitute negligence in cases like this, where concurring, independent causes produce accident, the injury complained of must be one that, under the circumstances, might have been reasonably foreseen or anticipated by a person of ordinary prudence, to flow from or be the natural or probable consequence of the first negligent act. *Sydnor v. Arnold*, 122 Ky. 557, 92 S. W. 289; *Louisville Home Teleph. Co. v. Gasper*, 123 Ky. 128, 9 L.R.A. (N.S.) 548, 93 S. W. 1057. And so it is argued that, as the rope was so placed as not to obstruct the customary travel, the city, in the exercise of reasonable prudence, could not have anticipated that anything would come in contact with this rope in so violent a manner as to cause it to become unfastened or break, and hence should not be held liable for the act of the runaway horse that caused the rope to break or become unfastened.

But, passing this question as not necessary to a decision of the case, we are of the opinion that the city is not liable for another reason. Keeping in mind that the city is sought to be held responsible on the sole ground that in maintaining the rope it failed in its duty to keep the streets in safe condition for travel, let us see how the case stands.

While it is the general rule that a city is under a duty to keep the streets and public ways accessible for travel and free from obstructions that might cause injury, this general rule is not without exceptions. In the safe, convenient, and orderly conduct of its affairs, every city frequently finds it necessary to obstruct, or to permit others to obstruct, its streets and public ways, and to make them unfit and dangerous for use, and to partially or completely close parts of them to public travel. Frequent and daily illustrations of this are seen when streets and other public improvements are being constructed or reconstructed, and when buildings abutting on streets are being erected or repaired. But no one would contend that the city was liable for thus temporarily closing or obstructing, or permitting others to temporarily obstruct or close, its streets, if reasonable barriers or lights were placed to give notice of the ob-

struction or the unsafe condition of the streets. It has also been held permissible for a city to erect barriers across the streets during fires, or when a parade is in progress, or when it is necessary to prevent the noise of passing vehicles from endangering the life of a sick person in a house adjacent to the street, or to protect grass plots. *Anderson v. Wilmington*, 2 Penn. (Del.) 28, 43 Atl. 841; *Paducah v. Simmons*, 144 Ky. 640, 139 S. W. 851; *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739. In this last-mentioned case, the court said: "The right temporarily to obstruct a street springs from reasonable necessity, and is limited by it, and those who exercise the right must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the necessities and circumstances of the case; and when they have done this the law holds them harmless. . . . It is, however, a safe and reasonable rule to declare that so long as the alleged obstruction is temporary and reasonable in its character, and is intended for the public safety and convenience, it is no cause of complaint."

As there can be no doubt of the right of a city to obstruct temporarily the use of its streets under certain circumstances, if it employs such means of obstruction as are reasonably suitable and sufficient to warn travelers of the fact that the obstruction exists, we think the principle allowing the temporary obstruction of streets for the safety, convenience, and comfort of the inhabitants of the city and the public generally may well be extended to embrace the right to temporarily close by suitable barriers a street or other public way when it is deemed advisable by the city authorities so to do to preserve peace and quiet and prevent disorder. And this power the city may exercise independent of ordinance, whenever, in the judgment of the authorized city officials, the peace, quiet, and order of the city demands that it should be done. Of course, when the city undertakes to obstruct or permit the obstruction of a street by barriers, the barriers so erected must be reasonably sufficient to give notice that the way has been closed, or else, as held in *Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381, it will be liable in damages to any traveler who, in the exercise of due care, comes in contact with a barrier of such character as not to give sufficient warning of its presence. Here the barrier erected was sufficient in size and form to give notice of its presence, and if appellee, in the daytime, in attempting to go from the sidewalk to the street at the place where this rope was suspended, had come in

contact with it and suffered injuries, we think it clear the city would not be liable; and, this being so, it should not be made liable because a runaway horse came in contact with the rope, and as a consequence appellee was injured.

We think the city, in the exercise of its police power, had the undoubted right to prevent the assembling in the alley of the disorderly crowd who made it a habit on public days to congregate there, to the annoyance and disturbance of adjacent property owners, as well as persons passing on the street. Having, then, the right to close the alley on these occasions to the class who frequented it, the only question is, Did it have the authority to do it in the manner described?

Of course, the city might have closed the alley by the use of a gate, or it might have stationed a policeman there to prevent the assembling of disorderly crowds, or, possibly, it might, by proper procedure, have closed the alley entirely as a public way; but the fact that it might have prevented the use of the alley by disorderly persons in any one of these ways did not prohibit it from adopting the means it did. The method adopted was effective, as well as reasonably safe. The rope did not interfere with the ordinary and usual use of the sidewalk or street, and, under the circumstances, cannot be considered such an obstruction as would make the street unsafe for public travel.

The motion for a peremptory instruction should have been sustained, and if there is another trial, and the evidence is the same as in this record, the trial judge should take the case from the jury and enter a judgment dismissing the petition.

Wherefore, the whole court sitting, the judgment is reversed, with directions for a new trial in conformity with this opinion.

#### PENNSYLVANIA SUPREME COURT.

##### COMMONWEALTH OF PENNSYLVANIA FOR USE OF CHARLES A. GETTMAN

v.  
A. B. BAXTER & COMPANY et al., Appts.

(235 Pa. 179, 84 Atl. 136.)

**Attachment — bond — damages — increase by amendment.**

1. Under a statute providing bail abso-

**Note. — Amendment of claim or pleading as discharge of sureties on bonds given to dissolve attachments or on bail bonds in civil actions.**

This note does not include cases involving appeal or replevin bonds. And it does not cover the question of the discharge of 42 L.R.A. (N.S.)

lute to discharge a foreign attachment conditioned to pay the debt or damages, the liability of the sureties depends upon the sum demanded in the cause of action upon which attachment issued, and cannot be increased by an amendment substituting a different measure of damages after the bond is filed.

**Same — attempted amendment — effect on liability.**

2. Sureties on a bond to discharge an attachment are not released from liability by an attempt to amend the cause of action on which the attachment issued so as to increase the damages claimed.

(February 26, 1912.)

**A**PPEAL by defendant sureties from an order of the Court of Common Pleas, No. 4, for Allegheny County, making absolute the rule for judgment for want of a sufficient affidavit of defense in an action on a bond given to dissolve a foreign attachment. Reversed.

The facts are stated in the opinion.

Messrs. John S. Ferguson, John G. Johnson, William Hunter, and Eugene Mackey for appellants.

Messrs. Langfitt & McIntosh and William Kaufman, for appellee:

The liability of the appellants for the full amount of the recognizance in suit has certainly become fixed and absolute. The plaintiff is not seeking to recover from appellants any more than the amount of the recognizance in suit, to wit: \$65,000, with interest from date of bringing suit, and costs, as allowed by law; and that is precisely and exactly what the appellants obligated themselves to pay.

Fetterman v. Hopkins, 5 Watts, 539; William W. Bierce v. Waterhouse, 219 U. S. 320-334, 55 L. ed. 237-242, 31 Sup. Ct. Rep. 241; Jamieson v. Capron, 95 Pa. 20; Bank of Montgomery v. Reese, 26 Pa. 147; Leacock v. Paxson, 208 Pa. 602, 57 Atl. 1097.

If the amendment changed anything at all, it changed only the amount of plaintiff's claim, corresponding to the *ad damnum*; it was not a change in the cause of action, and did not introduce a new cause of action; it did not enlarge appellants' legal responsibility, and they are not discharged thereby.

Tassey v. Church, 4 Watts & S. 141, 39 Am. Dec. 65; Trego v. Lewis, 58 Pa. 463; Stainer v. Royal Ins. Co. 13 Pa. Super. Ct.

sureties on attachment or bail bonds of the kind indicated, because of a variance, where no amendment was made.

Amendments changing *ad damnum*.

There is some conflict of authority upon the question of whether an amendment in-

25; *Todd v. Quaker City Mut. F. Ins. Co.* 9 Pa. Super. Ct. 381; *William W. Bierce v. Waterhouse*, 219 U. S. 320, 334, 55 L. ed. 237, 242, 31 Sup. Ct. Rep. 241; *McNeilly v. Driscoll*, 208 Mass. 293, 94 N. E. 273; *Dunn v. Mayo Mills*, 67 C. C. A. 450, 134 Fed. 804; *Jamieson v. Capron*, 95 Pa. 15; *Hackett v. Carnell*, 106 Pa. 291; *Townsend Nat. Bank v. Jones*, 151 Mass. 454, 24 N. E. 593; *Vansciver v. Churchill*, 35 Pa. Super. Ct. 212.

Elkin, J., delivered the opinion of the court:

This is an appeal by the sureties on a bond given to dissolve a foreign attachment. The principal defendant, a foreign corporation organized for the purpose of

creasing the *ad damnum* works a discharge of the sureties on bonds of the character under consideration, but it is held by the weight of authority, in accordance with the decision in *COM. v. BAXTER*, that such an amendment does not work a discharge of the sureties, but that they are still liable up to the amount of their bond.

Thus, it has been held that sureties on such bonds were not discharged

—where a bond for \$500 was given to dissolve an attachment in a suit in which the *ad damnum* was laid at \$300, but was subsequently increased by amendment to \$500. *McNeilly v. Driscoll*, 208 Mass. 293, 94 N. E. 273;

—where a writ of attachment issued in an action for fraud in which it was sought to recover \$600, and a bail bond for \$1,000 was given, and an amendment without the express consent of the bail was made within the first three days of the term as allowed by statute, increasing the damages claimed from \$600 to \$1,200. *New Haven Bank v. Miles*, 5 Conn. 587;

—where, before the execution of a bond given to discharge an attachment, the *ad damnum* was reduced, and after the giving of the bond, an amendment was made restoring the *ad damnum* to the original amount. *Townsend Nat. Bank v. Jones*, 151 Mass. 454, 24 N. E. 593.

The court in *Townsend Nat. Bank v. Jones*, supra, said: "The liability of the surety is for the penal sum in the bond, with interest. In fixing a penal sum in the bond to dissolve an attachment, he has limited his liability to that amount. So long as no new cause of action has been introduced, his rights have not been affected. He has consented to become responsible, to the amount of the penal sum in his bond, for that which the plaintiff might recover upon the cause of action on which his writ was brought, however the same might have been described. No recovery of a larger sum thereon can affect this liability. If a different and additional cause of action had been introduced into the plaintiff's writ, whether the *ad damnum* had been increased or not, the defendant would have 42 L.R.A. (N.S.)

conducting a brokerage business, was brought into the court below on a writ of foreign attachment. The amount of the bank deposit attached, expressed in even numbers, was \$8,000; the margins called by the brokers, and paid by Gettman on his speculative account, were \$23,000; the liquidated damages claimed, being the sum demanded at the time the writ issued, were \$33,000; the penalty of the bond given to dissolve the attachment was fixed at \$65,000, about double the sum demanded in the cause of action; and by reason of an amendment to the original statement of claim allowed after the bond was filed, which amendment substituted a different measure of damages, judgment was obtained for \$89,000. In other words, Gettman, with

ground of objection, unless it could be clearly shown that the plaintiff had recovered only on the original cause of action. The liability of the surety is similar to the liability of bail, and where this liability is not increased, the increase of the *ad damnum* does not discharge the bail."

It has been held, however, that the sureties on a bail bond are discharged where the *ad damnum* in the original writ is increased after the execution of the bond. *Langley v. Adams*, 40 Me. 125. The court here said: "This was a material alteration in the contract for bail into which the defendant had entered, and by which his liability was changed. He had a right to insist on terms of his contract as originally made, and it was not competent for other parties, without his consent, to increase his liability on that bond; by so doing they destroyed its validity as to him."

Clearly the bail are not discharged by an amendment of a writ in an action on a judgment changing the respective amounts as to damages and costs to correspond with the judgment record, where the total of the amounts as amended and as they originally appeared are the same. *Enos v. Aylesworth*, 8 Ohio St. 322.

#### Amendments changing parties.

Where an amendment changing the parties to a suit does not introduce distinct parties and materially change those contemplated, it is generally held that the sureties on bonds given to dissolve attachments or on bail bonds are not discharged thereby. But an amendment altering the parties, so that they are distinct from those contemplated by the obligors, is held to release the sureties.

In the following cases the sureties on bonds of the character under consideration were held not discharged

—by striking out the name of one of the parties plaintiff. *Hackett v. Carnell*, 106 Pa. 291;

—where the suit was discontinued as to some of the defendants and other names were added, but the name of the principal

\$23,000 advanced as margins to his brokers, attached their bank deposit of \$8,000, upon a specific demand for \$33,000, was permitted to obtain a judgment for \$89,000, and now seeks to recover \$65,000 from the sureties on the bond given to dissolve the attachment. Can this be done? The answer depends upon several interesting questions of law. If the pleadings had not been amended, the liability of the sureties would have been measured by the liquidated damages demanded when the writ issued. The questions to be determined here are: (1) Whether that liability can be almost doubled by what subsequently occurred without their knowledge or consent; and (2) whether the sureties are totally dis-

charged from any liability by reason of the amendment.

At the outset, it may be remarked that the bond in the case at bar is not an official bond, or a bond of indemnity, or a bond to insure the faithful performance of duty, or to secure a proper accounting by persons acting in fiduciary relations, and therefore the rule in this class of cases, that a judgment against the principal is conclusive against his sureties as to his misconduct and failure to properly account, has no controlling force here. In the class of cases referred to, the surety submits himself to the acts of his principal as a legal consequence of his suretyship, because, as the courts have said, it was the intention of the parties to the undertaking to assume

defendant was retained, and those added were copartners. *Bedard v. Mahoney*, 30 R. I. 469, 136 Am. St. Rep. 965, 76 Atl. 113;

—where the original declaration sought to hold the defendants liable as individuals, and an amendment was subsequently made setting out their liability as copartners. *Carrington v. Ford*, 4 Cranch, C. C. 231, Fed. Cas. No. 2449;

—where the plaintiff in an action in assumpsit, after one of the two defendants was adjudged not liable, amended by striking the name of such defendant from the writ. *Knight v. Dorr*, 19 Pick. 48;

—where the original claim commanded the defendant in the original action to answer to two persons named "and one Richardson, deceased," and further on set forth the two names first referred to, followed by "the surviving parties of the said firm of Richardson, Lord, & Hurlbert," and an amendment was subsequently made striking out the matter quoted. *Lord v. Clark*, 14 Pick. 223;

—where the action originally commenced was against two defendants as copartners, to recover on a firm note, and a third person, who was also a partner in the firm, was brought in after plea in abatement and made a party by stipulation between the attorneys for the original parties, and the summons and complaint were also amended by inserting the name of the third defendant, although the change was made without the order of the court or the consent of the sureties. *Christal v. Kelly*, 88 N. Y. 285.

In *Slosson v. Ferguson*, 31 Minn. 448, 18 N. W. 281, the sureties on a bond given to discharge an attachment, conditioned that if "said plaintiff recovered judgment in the said action," they should be liable, etc., were held liable to one to whom the plaintiff had assigned for the benefit of creditors and who was substituted as plaintiff in the action.

And in *Salomon v. Buehler*, 129 Ill. App. 176, it was held that the sureties on a statutory recognizance given to release an attachment, conditioned to pay the judgment recovered against the "defendants," were

not discharged by the act of the plaintiff in discontinuing the action against one of the two defendants, since the statute governing recognizances made the sureties liable for any judgment recovered in the suit in question.

In the following cases, however, the changes were held materially to alter the sureties' obligation, and they were held to be released

—where the sureties undertook to become such for one who was solvent, and the pleadings were subsequently amended by striking out the initials of such person and inserting in place thereof the initials of his brother, who was insolvent. *Adams v. Jacoway*, 34 Ark. 542;

—where, after the action had been entered in court, the suit was dismissed as to one of the original defendants, and a new party was joined and summoned as a defendant, without notice to the surety. *Tucker v. White*, 87 Mass. 322;

—where a surviving partner and the administrator of the deceased partner were named as plaintiffs, and an amendment was subsequently made discontinuing as to the deceased partner's administrator, and continuing the suit in the name of the surviving partner. *Quillen v. Arnold*, 12 Nev. 234;

—where the suit was discontinued as to one of the defendants, who, however, was not a party to the bond, and a new defendant was summoned without notice to the surety. *Richards v. Storer*, 114 Mass. 101;

—where the plaintiff in an action in which there were two defendants dismissed the suit as to one of the defendants, and proceeded to judgment against the other. *Tyler v. Davis*, 63 Miss. 345.

And in *Andre v. Fitzhugh*, 18 Mich. 93, it was held that the sureties on a bond given to discharge an attachment were released where the plaintiff on the trial discontinued the action as to two of the three defendants against which it was instituted. The court said: "The bond to be given by the defendant or person found in possession of the goods is to be executed by sureties. When executed, it must be consid-

this liability. This rule applies to bonds of administrators and guardians, bonds of assignees for benefit of creditors, official bonds, bonds of indemnity, and other bonds of like character. Com. use of McDonald v. McDonald, 170 Pa. 221, 32 Atl. 410; Com. use of Shaffer v. Julius, 173 Pa. 322, 34 Atl. 21; Yung's Estate, 199 Pa. 35, 48 Atl. 692; Com. v. Fidelity & D. Co. 224 Pa. 95, 132 Am. St. Rep. 755, 73 Atl. 327; Little v. Com. 48 Pa. 337; Lindsey v. Reid, 101 Pa. 438; Masser v. Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668; Evans v. Com. 8 Watts, 398, 34 Am. Dec. 477. Nothing said in the present case must be understood as impairing or modifying the rule of the cases above cited and others of similar import.

The condition of the bond in the present case is to "pay the debt or damages, interest, and costs that may be recovered," and follows the requirements of the act of March 20, 1845, P. L. 188. This act provides, in all cases dissolving foreign attachments, the bail shall be bail absolute, in double the amount in controversy as nearly as the same may be ascertained, conditioned as above indicated. In order to determine what the legislature intended by the requirements of this act, it is necessary to review the state of the law at the time of its enactment. At common law bail was of two kinds, bail to the sheriff, called bail below; and bail to the action, called bail above. In bail above the sureties undertook generally, or in a sum cer-

ered as tacitly referring to the suit as then constituted in respect to parties, and not as it should possibly be thereafter constituted at the instance of the plaintiff, to avoid defeat. The sureties, on entering into the contract, measure the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ, and the ability of the latter in case of defeat to respond to the plaintiff, or the sureties themselves if called on. . . . Any such change of parties, however, as that made by the plaintiff in this case, would not only transform the prosecuted, cause of action from a joint to an individual one, but would necessarily alter the operation of the contract of the sureties, and without their consent."

In *Smith v. Shaw*, 30 N. C. (8 Ired. L.) 233, there is *dictum* that the sureties on a bail bond are discharged where the suit is brought in the name of a firm, and the writ is amended so that the names of several individuals are substituted for that of the firm name, although it recites that the persons named composed a firm of the same name as that originally set out.

#### Amendments changing form of claim or action.

It is generally held that an amendment merely changing the form of the cause of action does not release the sureties on bonds of the character here considered, where such amendments do not have the effect of creating or introducing a new cause of action.

Thus, the sureties on a bond given to discharge an attachment in an action in which the defendant is charged with negligently running into the plaintiff's sailboat and damaging it are not discharged by an amendment adding a count reciting that by the same act the plaintiff was injured in his person. *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647. The court here said: "The sureties upon a bond to dissolve an attachment are not discharged by an amendment of the declaration unless its effect is

to let in a new cause of action, and thus to impose upon them a liability greater than that which they assume by signing the bond. The original declaration may be imperfect and insufficient, but any amendment to cure such defect will not discharge a surety or release bail unless it introduces a new cause of action. The obligation of the surety is to pay the plaintiff in the action the amount he shall recover therein, and the surety cannot take advantage of formal defects in the declaration."

And in *Morton v. Shaw*, 190 Mass. 554, 77 N. E. 633, it was held that if the effect of amendments is merely to put in proper form the statement of the cause of action upon which the suit is brought, they are binding upon the sureties upon a bond given to dissolve an attachment, even though they greatly change the form or statement of the claim, or greatly enlarge the amount claimed according to the language of the original declaration.

And in *Russia Cement Co. v. LePage Co.* 174 Mass. 349, 55 N. E. 70, it was held that the sureties on a bond given to discharge an attachment in an action instituted in the United States circuit court were not discharged by an amendment to the declaration, where it appears from an inspection of the declaration and the amendment, that they were for the same cause of action for which the suit was originally commenced.

And in the following cases the sureties on bonds of the kind under consideration were held not released

—where the original declaration in an action to recover the forfeiture incurred by being a party to a fraudulent and deceitful judgment demanded the value of the property taken to satisfy the judgment, and an amendment was made by adding a new count containing facts which appeared to be the same as those contained in the original count, but which concluded by demanding the amount of the money contained in the judgment. *Wright v. Brownell*, 3 Vt. 435;

—by amendments to the declaration changing it from a declaration on a con-

tain, that if the defendant should be convicted, he should satisfy the plaintiff, or render himself into custody. The rule as to the liability of sureties in bail above varied according to the practice in the common pleas and in the King's bench. Bail above were liable in the King's bench only for the amount sworn to and costs, while in the common pleas they were liable for the whole debt and costs, without reference to the amount sworn to, not exceeding the penalty of the bond. The practice differing in the two courts, there was much discussion by the English judges as to which was the safer and more equitable rule. Many of the common pleas judges expressed the opinion that the practice of the King's bench more equitably defined the rights of

sureties, although they felt bound by precedent to follow their own practice. Sellon, Pr. pp. 156-158, 189, 190; Tidd, Pr. 280; Mitchell v. Gibbons, 1 H. Bl. 76; Howell v. Wyke, 4 J. B. Moore, 167; Martin v. Moor, 2 Strange, 922; Taylor v. Wilkinson, 5 Nev. & M. 189. A study of these cases will show that the practice in the King's bench was approved by both courts, although only followed in one. This practice was best expressed in the case of Martin v. Moor, above cited. In that case the latitat was with an *ac etiam* for £80, the declaration was *ad damnum* £150, the verdict was for £104, and the question arose whether the bail should be liable *pro tanto*, or totally discharged. The English court, after reviewing all the authorities, decided that,

tract in writing to one on an oral contract, or by an amendment merely correcting a clerical error as to the amount of goods actually delivered under the contract and those refused to be delivered. Morton v. Shaw, 190 Mass. 554, 77 N. E. 633;

—where an action in covenant was amended to one in assumpsit. Blue v. Stout, 3 Cow. 354;

—by an amendment of a declaration for money had and received by adding a count for wages, although the cause of action as originally stated did not show quite so large a liability as did the corrected declaration, but it appeared that the wages were a part of the cause of action relied upon when the suit was instituted. Driscoll v. Holt, 170 Mass. 262, 49 N. E. 309;

—where, in an action in which the declaration contained a count in contract and one in tort, but which were not alleged to be for the same cause of action, after a demurrer to the declaration was sustained on account of misjoinder, the count in tort was stricken out, and an amendment made without notice to the sureties, by which a new count in tort was added, which was stated to be for the same cause of action. Kellogg v. Kimball, 142 Mass. 124, 7 N. E. 728;

—where a declaration on money counts was amended by adding counts upon promissory notes, although it did not appear on the record that the amended counts were for the same cause of action as the original ones. Wood v. Denny, 7 Gray, 540;

—by the filing of an amended petition seeking a recovery of the same amount as specified in the original petition, where the amended petition merely sets forth the cause of action in a different form from that used in the original complaint. Jaynes v. Platt, 47 Ohio St. 262, 21 Am. St. Rep. 810, 24 N. E. 262;

—where, in a suit in which the declaration contained a count for use and occupation of certain premises, an amended count, without notice to the sureties, was allowed, which merely stated in detail the mode in which the sum payable was ascertained and 42 L.R.A. (N.S.)

agreed upon. Cutter v. Richardson, 125 Mass. 72.

And the surety on a bond given in an action for specific performance, conditioned "that the defendant will comply with any judgment or decree rendered herein, and pay any and all costs recovered by the plaintiff," is not discharged by an amendment asking for damages for the breach of contract instead of specific performance, but is liable where his principal makes default in satisfying the judgment recovered. Doon v. American Surety Co. 110 App. Div. 215, 97 N. Y. Supp. 270, affirmed in 186 N. Y. 598, 79 N. E. 1103.

And the sureties on a bond given to dissolve an attachment in a suit in which the declaration was in assumpsit on the common counts, and also stated that the purpose of the suit was to recover the amount due upon certain contracts and accounts annexed, are not discharged by an amendment of the declaration striking out the special count, and leaving only the common counts, or by an amendment of the claim for damages increasing it over the original claim, or by amending a voucher originally filed by striking out a certain credit, since by such amendments no new cause of action is set forth, and no additional liability is imposed upon the sureties. Warren Bros. Co. v. Kendrick, 113 Md. 603, 140 Am. St. Rep. 445, 77 Atl. 847.

So, where the original declaration contained one count, which stated that the action was brought to recover against the defendant as indorser of a draft, but copies of four drafts were attached to the declaration, which, however, did not describe these drafts accurately, it was held that it might be seen from the declaration that a recovery was sought on each of the drafts, and that an amendment of the declaration without notice to the sureties, setting forth correctly in four counts the defendant's liability on the four drafts, did not discharge the sureties on a bond given to discharge an attachment. Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 N. E. 593.

And in Chapman v. Stuckey, 22 Ill. App. 31, it was held that the allowance, accord-



as, on the one hand, there was no color to subject the bail to more than they were bound in, let the demand be ever so much, so, on the other hand, there was no reason why the plaintiff should suffer by his moderation in taking bail, and therefore the recognizance should be considered as an agreement to pay £80, or deliver up the defendant.

It is true this was the rule of the King's bench, and not of the common pleas; but in our state the practice in the King's bench was approved by this court in *Eldridge v. Robinson*, 4 Serg. & R. 548, where it was held in a foreign attachment proceeding, that the plaintiff must stand on his original affidavit, and could not file a supplemental affidavit so as to affect the liability of

sureties. This was the rule of law when the act of June 13, 1836, P. L. 568, was passed. Section 62 of this act provided that if the defendant in the attachment shall, at any time before the money paid, put in and perfect bail to the action in the sum demanded, or in such sum as the court shall order, the attachment shall be dissolved, and the action shall then proceed in like manner as if the same had been commenced by a *capias*. This section was nothing more than a legislative declaration of the existing practice as recognized by this court. In 1842 (act July 12, 1842, P. L. 339) imprisonment for debt was abolished, and this necessarily abrogated the alternative condition in the bail bond, which was to surrender the body of the de-

ing to the statutory right, of an amendment to the affidavit in a writ of attachment, so that it included additional items of indebtedness, as set forth in the declaration, did not discharge the sureties on a bond given to release the attached property, since they must be presumed to have had knowledge of this right of amendment.

And in *Brown v. Howe*, 3 Allen, 528, where the original counts in a declaration set forth a written contract by which the defendants agreed that the plaintiff should have the exclusive right to manufacture certain sewing machines, and undertook to pay a certain price for each machine manufactured, and they alleged a breach of the contract by neglect and refusal to pay for the machines and for the work and materials furnished, and a bill of particulars filed with the writ set forth as items machines and work and materials and incidental expenses in making the machines, it was held that the sureties on a bond given to discharge an attachment were not released by an amendment adding a count for work done and materials found, which corresponded with the bill of particulars, since it did not introduce a new cause of action, although the sureties had no notice of such amendment.

In the following cases, however, the amendments were held materially to change the cause of action, and the sureties were held to be discharged

—where the original complaint declared upon an account for labor and services performed, but the complaint was amended by showing a judgment obtained in another state on the same cause. *Cassidy v. Saline County Bank*, 7 Ind. Terr. 543, 104 S. W. 829;

—where the writ was altered from debt to case. *Bryan v. Bradley*, 1 N. C. pt. 2, p. 54 (Taylor, 77);

—where an amendment was made containing new counts which did not appear by the record to be for the same cause of action as those set forth by the count in the writ at the time of service. *Willis v. Crooker*, 1 Pick. 203;

—where a declaration containing only 42 L.R.A. (N.S.)

the common money counts was amended by adding a count upon a bill of exchange. *Hyer v. Smith*, 3 Cranch, C. C. 437, Fed. Cas. No. 6,979;

—where a declaration on money counts was amended by adding a count on a guaranty of a debt due from a third person to the plaintiff. *Wood v. Denny*, 7 Gray, 540;

—where, in an action for obtaining money by false pretenses, the declaration was amended so that the fraudulent representations were differently described and added to by varying the localities and amounts. *Fish v. Barbour*, 43 Mich. 19, 4 N. W. 502.

And where one who had been sued for a certain amount brought a counter action for a balance of account, the balance being arrived at by deducting the amount of the plaintiff's claim against him, the sureties on a bond given to dissolve an attachment upon the property of such plaintiff are discharged, where it appears that judgment was entered against the one bringing the counter action, and paid, and he amended his declaration in his action against the other party by adding to the balance originally claimed the amount paid by him on the judgment, no notice thereof having been given to the sureties on the bond, since the effect of the amendment was to change the claim against the plaintiff from the balance of the account to one for the entire account. *Prince v. Clark*, 127 Mass. 599.

And in *Hyer v. Smith*, supra, it was held that the bail was discharged where the plaintiff amended his declaration by adding a count upon a cause of action which could not have been given in evidence under the original declaration as set out with the writ, and which was not contained in the affidavit to hold to bail.

Effect of amendment where judgment is rendered on original demand only.

Notwithstanding the fact that an amendment introduces a new cause of action, it has been held that the sureties on bonds given to discharge attachments and on bail bonds are liable if judgment was entered on one of the original counts.

fendant, if the debt was not paid. This no doubt led to the passage of the act of 1845, under which the bond in the present case was given. It seems clear that the purpose of this act was to give the plaintiff bail absolute as security in lieu of the right to demand a surrender of the body of the defendant, of which right he had been deprived by the act of 1842. But even if this was not the intention of the legislature, and the primary purpose of the act was to give the plaintiff a better security, there does not appear to be any reason for holding that it was intended to increase the liability of the bail. Under the act of 1836, the sum demanded was the criterion by which to determine the liability of the bail, while under the act of 1845, "the debt or damages, interest, and costs" measure the liability. The words "debt or damages" evidently refer to the form of action, which may be indebitatus assumpsit for a specific amount, or trespass for damages in such sum as the facts warrant. But in either event, these words, which are made a condition of the bond, relate to the sum demanded in the cause of action, and the extent of the liability is necessarily measured thereby. Where the sum demanded is a sum certain, or where the amount of the demand is stated in the affidavit of the cause of action, or where the amount is fixed by the court on application to reduce the bail, the liability of the bail is primarily governed by the sum so demanded. The act of 1845 requires bail absolute, which means bail to which the plaintiff has consented, or which he has approved, as contradistinguished from bail *de bene esse*; that is, bail put in by the defendant in the first instance, subject to exception by the plaintiff afterwards. It seems clear that

the purpose of the act in requiring bail absolute was to recompense the plaintiff in some degree for depriving him of the personal security of the body of the defendant, by providing that bail should not be taken unless satisfactory to him. Nothing contained in the act of 1845 warrants the conclusion that the bail is bound to pay the judgment recovered without regard to the sum demanded; but, on the other hand, the liability of the bail is to be determined by the debt or damages recovered upon the demand made in the cause of action. It necessarily follows in the present case that the extent of the liability of the sureties depends upon the sum demanded in the cause of action upon which the writ of foreign attachment issued.

This raises another question of law and one not free from difficulty. Can the original cause of action be amended after the bond has been filed by introducing a new cause of action, or by substituting a different measure of damages? Upon questions incidental to this inquiry there is a great variety of opinion in our American cases. All authorities agree that an entirely new cause of action cannot be introduced, and some of them hold that a different measure of damages cannot be substituted. The test of the power of courts to allow amendments under our statute was stated by Mr. Justice Duncan in *Cassell v. Cooke*, 8 Serg. & R. 268, 11 Am. Dec. 610, to be: "The true criterion is whether the alteration or proposed amendment is a new and different matter,—another cause of controversy; or whether it is the same contract or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proof and the merits

Thus, in *Warren v. Lord*, 131 Mass. 560, it was held that the amendment of one count of a declaration will not discharge the surety on a bond given to dissolve an attachment, from liability for the sum sued for in another count originally inserted in the writ, and not affected by the amendment.

And in *Seeley v. Brown*, 14 Pick. 177, it was held that, although an amendment embraced a new demand, yet where a judgment was rendered on the original demand only, the bail were not discharged, but were liable to the extent of the original demand.

#### Change of return day.

It has been held that an amendment of the return day by changing it to a later date releases sureties on bonds given to dissolve attachments.

Thus, where a writ, after the execution of a bond given to discharge an attachment, is altered by the consent of all parties ex-

cept the surety on the bond, so as to be returnable at a later term, the surety on the bond is thereby discharged. *Simeon v. Cramm*, 121 Mass. 492. The court in this case said: "The alteration in this case was equivalent to the commencement of a new action; it is the same in effect as if the old writ had been destroyed, and a new one substituted in its place returnable at a different term of the court. This changes the liability of the surety; he has the right to say that the suit in which *Simeon* was charged as trustee was not the suit recited or contemplated in his bond."

And in *Wilson v. Fisk*, 22 R. I. 100, 46 Atl. 272, it was also held that the sureties on a bond given to dissolve an attachment were discharged, where the return day was changed to a date later than that originally named in the writ, by someone whose identity does not appear, and the writ was entered in court upon the return day last named.

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of his case." The authority of this case has been approved by our court as late as *Holmes v. Pennsylvania R. Co.* 220 Pa. 189, 123 Am. St. Rep. 685, 69 Atl. 597; *Hodges v. McGovern*, 230 Pa. 368, 79 Atl. 636. Another test of the right to allow an amendment was stated in *Rodrigue v. Curcier*, 15 Serg. & R. 81, to be: When the merits of the case cannot be reached without an amendment, it is to be granted, provided the cause of action be not changed. The authority of this case has been recognized in many subsequent cases. According to these tests, it may be accepted as the settled rule in Pennsylvania that an amendment of the *ad damnum* clause, without changing the ground of recovery relied on, does not introduce a new cause of action. While the mere increase of the *ad damnum* does not introduce a new cause of action, there is a question as to whether an amendment which introduces a different measure of damages may be allowed. The question has not been squarely raised and decided in our state. This court has held that, where the original claim was for actual damages caused by the unlawful cutting of timber, the statement could not be amended so as to claim double or treble damages under the statute. *Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 15 Atl. 656; *Fairchild v. Dunbar Furnace Co.* 128 Pa. 485, 18 Atl. 443, 444, 17 Mor. Min. Rep. 242. These cases were put upon the ground that a claim for double or treble damages for cutting timber is an action for a statutory penalty, not for redress of the injury committed, and the cause of action, although arising from the same subject-matter, is different from that accruing at common law. In some other jurisdictions it has been held that the two tests by which to determine whether an amendment introduces a new cause of action are: (1) Whether the same evidence will support both the original and amended declarations; and (2) whether the same measure of damages will apply to both; and if both of these fail, the new pleadings must be held to introduce a new cause of action. *Burt v. Kinne*, 47 N. H. 361; *Scovill v. Glasner*, 79 Mo. 449; *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44; *Schwab Clothing Co. v. St. Louis, I. M. & S. R. Co.* 71 Mo. App. 241; *Kramer v. Gille* (C. C.) 140 Fed. 682.

While the authorities are at variance, the true rule seems to be that the proposed amendment must not change the nature of the cause of action, nor destroy the identity of the original transaction, and that the damages are to be ascertained by the same standard. The amount of the damages claimed may be increased in the *ad dam-*

*num*, if the standard by which to measure the extent of the injury remains the same. Applying this rule to the case at bar, it is clear that the nature of the cause of action was not changed by the amendment, nor was the identity of the original transaction destroyed; but it is equally clear that a different standard for measuring the damages was set up. In the original claim, the difference between the purchase price of the stocks, and the highest price at which the same stocks sold up to the time of filing the statement, was stated to be the measure of damages, which were liquidated by the plaintiff upon this basis. The amendment gave plaintiff the right to recover upon the basis of the highest selling price up to the time of trial, and increased his damages nearly \$60,000. The difference between these two standards of measuring damages in speculative stocks, of rapidly fluctuating values, frequently means disaster; the present case being a good illustration. However, in the view we take of this case, it is not necessary to finally decide: (1) Whether the mere substitution of a different measure of damages is the introduction of a new cause of action; and (2) whether the amendment substituted an entirely different measure of damages. In none of our cases has it been held, as it has been in some other jurisdictions, that a change in the measure of damages alone, disconnected with any other change in the pleadings, amounted to the introduction of a new cause of action.

No exception seems to have been taken at the original trial to the allowance of the amendment, and no assignment of error in the present case raises the question here, so that, as the record stands, we do not feel warranted in finally disposing of it, because the extent of the liability of the sureties is not necessarily dependent upon whether the amendment was properly or improperly allowed.

It is suggested in the argument for appellants that it was necessary for the plaintiff to liquidate his damages before instituting the foreign attachment proceeding, because the action would not lie in tort for unliquidated damages. If it was necessary for the plaintiff to liquidate his damages in order to secure the writ of foreign attachment, and he did so, it would follow as of course that all parties to the litigation, including the sureties on the bond, were bound by what the law requires, and the extent of their liability would be measured accordingly. Prior to 1905 the law was that a writ of foreign attachment would not lie for unliquidated damages arising from tort or breach of contract; but would lie in actions *ex contractu* when the amount

of the demand was ascertained, or, though not liquidated in the strict sense, was susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff by affidavit to aver it, or a jury to find it. *Carland v. Cunningham*, 37 Pa. 228; *Girard F. & M. Ins. Co. v. Field*, 45 Pa. 129; *Strock v. Little*, 45 Pa. 416. As late as 1902 this court held, in *Wood v. Virginia Hot Springs Co.* 202 Pa. 40, 51 Atl. 586, that a foreign attachment would not lie on a claim founded on tort for unliquidated damages. In this state of the law, the act of March 30, 1905, P. L. 76, which amends § 44 of the act of 1836, was passed. This act provides that a writ of foreign attachment may be "issued in all actions *ex contractu*, and in actions *ex delicto* for a tort committed within this commonwealth." The title to the act was amended "so as to make all the provisions of said act apply to certain actions *ex delicto* as well as to all actions *ex contractu*."

While the title made it apply "to certain actions *ex delicto*," the body of the act provided that it should apply to actions *ex delicto* "for a tort committed within the commonwealth." As both the title and the body of the act express the intention that a writ of foreign attachment may be issued in all actions *ex contractu*, and in certain actions *ex delicto*, meaning torts committed within the commonwealth, in which latter case the damages must of necessity be unliquidated, it would seem to necessarily follow that the act means what it says, and that the writ may be issued in all actions *ex contractu*, including an action for unliquidated damages, and in actions *ex delicto* for a tort committed within the commonwealth. The legislative history of the passage of the act as well as the express language of its provisions show conclusively that this was the intention of the legislature.

Again, it has been suggested that the writ will not lie against a foreign corporation even for a tort committed within the commonwealth under the act of 1905. To sustain this contention, it is argued that foreign corporations were not within the purview of § 44 of the act of 1836, which was amended by the act of 1905, but were governed by § 76 of the act of 1836, which was not amended. This is an erroneous view of the effect to be given the act of 1836 as amended by the act of 1905. It is true that § 76 of the act of 1836 did provide for the issuance of a writ of foreign attachment against foreign corporations, either aggregate or sole; but this was merely declaratory of the existing law at that time. The action of foreign attachment in Penn-

sylvania is based upon one of the customs of London. *Laws & Privileges of London*, 113-140; *Brandon, Foreign Attachment*. The purpose of the custom was to compel the appearance of the defendant, and this is also true in our state. *Fitch v. Ross*, 4 Serg. & R. 557; *Albany City Ins. Co. v. Whitney*, 70 Pa. 248. Both by the custom and by our statutes, the writ lay against a foreign corporation. Under the custom a writ of foreign attachment lay to attach a debt owing to a corporation aggregate.

— *v. Hamburg Co.* 1 Mod. 212; *London v. London Joint Stock Bank*, L. R. 6 App. Cas. 393, 50 L. J. Q. B. N. S. 594, 45 L. T. N. S. 81, 29 Week. Rep. 870. In *Bushel v. Commonwealth Ins. Co.* 15 Serg. & R. 173, this court held, under our act of 1705, 1 Sm. Laws, 45, that a writ of foreign attachment lay against a foreign corporation. This case was decided in 1827, nine years before the act of 1836 was passed, and no doubt this act was passed to make the rule of that case the express statute law of the state. Independently, therefore, of the act of 1836, the writ lay against a foreign corporation. Again, §§ 43 to 79, inclusive, of the act of 1836, relate to the practice and proceedings on a writ of foreign attachment, any one section of which is necessarily connected with and dependent upon the other sections. These sections form practically a single statute and deal with one subject of legislation. It is a settled rule of construction that an original statute and all its amendments must be read together, and be viewed as if forming a single act. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26; *McKibben v. Lester*, 9 Ohio St. 627; *Harrell v. Harrell*, 8 Fla. 46; *Holbrook v. Nichol*, 36 Ill. 161. Consequently, the act of 1905 must be read into the act of 1836, and be viewed as forming a part of it. When so understood § 76 will apply in all cases of foreign attachment in which, by the amendatory act of 1905, that writ now lies.

It is strongly urged here that the allowance of the amendment about which complaint is made had the effect of discharging the sureties, and the cases cited by both sides relate very largely to this question. We have examined with care all of the cases cited, and many not cited, and have reached the conclusion that the weight of authority is against the contention of appellants that the sureties are totally discharged by allowing the amendment, which resulted in very largely increasing the damages. There is a great variety of opinion on the question, and very good authority may be cited in support of either side of it. Much said by the courts in the discussions relate to cases in which a total discharge

of the sureties was claimed. No doubt the courts did not look with favor upon a rule, somewhat technical, which had the effect of discharging sureties from any responsibility whatever, and this may account for the trend of decision relaxing the old rule, and holding bail to liability commensurate with the extent of their undertaking. But whatever the reason, the weight of authority in modern cases is against the doctrine that the sureties in a case like the one at bar are entirely discharged from any liability because the plaintiff thought proper to increase his claim for damages. In *Langley v. Adams*, 40 Me, 125, and in several cases in other jurisdictions, it was held that an amendment increasing the *ad damnum* had the effect of discharging the bail from all liability. We cannot accept this as a sound rule. If the liability of bail is not increased by such an amendment, it does them no harm, and there is no just ground upon which they can claim to be discharged; on the other hand, the plaintiff should not be debarred from receiving the full amount to which he is entitled on the contract of suretyship, because he may have erroneously or otherwise increased his demand in the cause of action. In its ultimate analysis the real question is what was the contract of the parties. In the present case the condition of the bond is for the payment of the "debt or damages, interest, and costs that may be recovered;" but the amount of the debt or damages is measured by the sum demanded in the affidavit of the cause of action. It is upon that amount the penalty of the bond is calculated, and this is right and equity should fix the liability of the bail. If, in the present case, the claim subsequently introduced by way of an amendment had been originally included in the statement, the bond demanded would have been \$180,000, instead of \$65,000. It cannot be assumed that bail who are willing to enter into a bond of \$65,000 would have been willing to execute a bond for \$180,000; and it would seem to be an act of gross injustice to make them liable for an amount of damages not in contemplation of the parties at the time the bond was given, which they had no reason to anticipate, and of which they had no notice. The appellee elected to liquidate his damages by demanding a specific sum in his cause of action, and upon this demand the amount of the bond was fixed. Under these circumstances, the sum demanded must be regarded as the basis of the contract of suretyship, and the liability of the bail is to be measured by the amount thus demanded. This conclusion is supported by reason and authority, and it gives force and effect to the real intention

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of the parties. Under this rule the appellants are not discharged from all liability, but will be required to pay the damages liquidated by the plaintiff in the original cause of action, together with interest and costs. This was what the sureties undertook to do, and they are bound according to their undertaking.

Judgment reversed, and record remitted to the court below for the purpose of having judgment entered in accordance with the views herein expressed.

#### TENNESSEE SUPREME COURT.

ANNIE E. FLEMING, Plff. in Certiorari,  
v.  
CITY OF MEMPHIS.

(— Tenn. —, 148 S. W. 1057.)

**Municipal corporations — special exemption from liability for negligence — constitutionality.**

1. Exempting a particular municipality from liability for injuries caused by defects in highways violates a constitutional pro-

*Note. — Constitutionality of legislation relieving municipalities, counties, or towns, from liability for defects in highway, street, or sidewalk.*

The validity of requirement of written notice of defect to render municipal corporations liable for injuries caused by defective highway is discussed in notes to *MacMullen v. Middletown*, 11 L.R.A.(N.S.) 391, and *Tonn v. Helena*, 36 L.R.A.(N.S.) 1136.

Some of the cases attack legislation of this character upon the ground that it makes an unconstitutional discrimination between municipalities.

The case of *Williams v. Taxing Dist. 16 Lea*, 531, holding that an act exempting a taxing district, and the county in which it is situated, from liability for injuries caused by defective streets, was not unconstitutional as conferring a special immunity upon a particular municipality, is overruled by the reported case *FLEMING v. MEMPHIS*.

And in accord with the reported case, it is held in *Hincks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 735, 1 N. W. 230, that a charter provision exempting the city from any liability for injuries to persons or property incurred at any place therein where work is being done on streets or sidewalks by contractors under contract with the board of public works, in consequence of the condition of such streets or sidewalks, and arising from the doing of such work, but declaring the contractors liable for such injuries caused by their negligence, is invalid, as granting to said city a special immunity against the general rule of law to which other municipal corporations are

vision prohibiting the granting of special privileges and immunities.

**Constitutional law — special privileges and immunities — classification.**

2. A classification applicable only to municipalities of the state having less than a specified number of inhabitants according to a particular Federal census is not sufficient to save a statute from condemnation as conferring special privileges and immunities.

(June 22, 1912.)

**C**ERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the circuit court for Shelby county in defendant's favor in an action

subject. The above case follows the ruling of *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500, where a charter provision exempting a particular city from a general law as to the payment of costs was held invalid.

So it is held in *Kennedy v. McGovern*, 246 Ill. 497, 92 N. E. 942, that an amendment making commissioners in a county not under township organization personally liable for injury to persons or property due to failure to keep the highway in repair, but imposing no such liability upon commissioners in counties under township organization, the commissioners in both classes of counties having the same general responsibility, is unconstitutional as making a classification by counties without any reasonable basis.

But a provision of a city charter exempting the city from liability for damages occasioned by obstructions on its sidewalk is held in *MacLam v. Marquette*, 148 Mich. 480, 111 N. W. 1079, not invalid as class legislation. The court said that *Hincks v. Milwaukee*, supra, sustained a contrary contention, but was not in harmony with the decisions of this court in relation to what constitutes class legislation.

In *Madden v. Lancaster County*, 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 188, a statute giving a right of action against counties for failure to keep highways and bridges in repair, if brought within thirty days after the injury, was assailed as unconstitutional on the ground that it grants special immunity to counties from actions for negligence during all but thirty days of the four years within which they may be brought against others, and because it is in effect an amendment of the general statute of limitations on the subject, and does not contain or repeal the section amended; but it was held that since counties, being not municipal corporations proper, but quasi corporations, were not liable for negligence in the care of public highways and bridges in the absence of the act in question, such act did not therefore grant any special privilege or immunity to such quasi corporations, nor did it shorten the term in which actions already authorized could be

brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. J. S. Duval and James H. Malone, for plaintiff in certiorari:

Classification by population will not stand unless there is a good reason for such classification.

1 Dill. Mun. Corp. 5th ed. § 151; *Cooley*, Const. Lim. 7th ed. 558-559; *Sutton v. State*, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; *Murray v. Ramsey County*, 81 Minn. 359, 51 L.R.A. 828, 83 Am. St. Rep. 379, 84 N. W. 103; *State ex rel. Knisely v. Jones*, 66 Ohio St. 453, 90 Am. St. Rep. 592, 64 N. E. 424; *State ex rel. Atty. Gen.*

brought, nor amend the general statute of limitations; but it imposed a new liability upon, and gave a new right of action against, them for thirty days after any injury caused by such negligence.

So a statute relieving a city from liability for damages for injuries sustained on its streets in consequence of their being out of repair, which affords an ample remedy against those whose acts or negligence was the cause of the injury, is not a violation of the constitutional right of acquiring and protecting property. *Parsons v. San Francisco*, 23 Cal. 462.

Nor is a charter provision expressly exempting a city from any liability to persons for injuries received on account of streets being defective or out of repair unconstitutional as impairing the obligation of contracts. *O'Harra v. Portland*, 3 Or. 525.

And in *Templeton v. Linn County*, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795, it is held that the repeal of a statute which created a right of action against a county for injury resulting from a defective bridge or highway does not violate the constitutional provision that every man shall have a remedy by due course of law for injury done him in person, property, or reputation, although the statute was in force at the adoption of the Constitution.

It seems (*Balls v. Woodward*, 51 Fed. 646) that the charter provision involved in *O'Harra v. Portland* and *Templeton v. Linn County*, supra, while relieving the city from liability for injury by defective street, did not exonerate any officer of the city, or any other person, from such liability where the casualty or accident was caused by the wilful neglect of duty enjoined upon such officer or person by law, or by gross negligence or wilful misconduct.

But a charter provision vesting in the mayor and council the control of streets, which provides that neither the city nor any member of the council shall be liable, is held in *Mattson v. Astoria*, 39 Or. 577, 87 Am. St. Rep. 687, 65 Pac. 1066, repugnant to the constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person

v. Beacom, 66 Ohio St. 491, 90 Am. St. Rep. 599, 64 N. E. 427; 1 Elliott, Roads & Streets, § 521.

In Tennessee the law is that the duty imposed upon a city to keep its streets in repair is a corporate, as contradistinguished from a governmental, duty.

Memphis, v. Lasser, 9 Humph. 757; Nashville v. Brown, 9 Heisk. 1, 24 Am. Rep. 289; Niblett v. Nashville, 12 Heisk. 684, 27 Am. Rep. 755; Knoxville v. Bell, 12 Lea, 157; Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565.

Subsequent legislation has so changed the statutes of the city of Memphis, considered as a distinct municipality or legal entity, that the act of 1881 has been repealed, and

cannot now be sustained as a constitutional act.

Williams v. Taxing Dist. 16 Lea, 537; Wells v. State, 3 Lea, 70.

Messrs. C. M. Bryan and Leo Goodman for defendant in certiorari.

Lansden, J., delivered the opinion of the court:

Plaintiff sued the city of Memphis for damages for injuries which she received as the result of the alleged negligence of the defendant in maintaining certain streets so as to suffer a dangerous hole, ditch, or washout to be and remain thereon. The city demurred to the declaration, assigning as cause thereof that the plaintiff was

and property. The court said that "a provision, therefore, of the city charter, exempting the city from liability for damages resulting from defective streets, is not violative of the constitutional provision referred to, because it does not wholly deny the injured party a remedy for the wrong suffered. The charter provision in question, however, goes further. It provides that neither the city nor any member of the council shall be liable; and if valid prevents a common-law action against the members of the council for their negligent acts or omission, and is practically therefore a denial of any remedy, as they are the only officers charged with the duty of keeping the streets in repair."

And following the above case, it is held in Batdorff v. Oregon City, 53 Or. 402, 100 Pac. 937, 18 Ann. Cas. 287, that where a recovery for injury by reason of a defective street is restricted by the act of incorporation to gross negligence, and limited to the officers of a city, the charter practically denies a remedy to any person injured, contravenes that provision of the state Constitution providing that everyone shall have a remedy for injury done to person or property, and leaves the liability as it existed at common law, whereby the city is accountable for such negligence.

A statutory exemption of municipal corporations from liability for defective condition of footways, except when caused by the city or its authorized agents, is held not unconstitutional in Wilmington v. Ewing, 2 Penn. (Del.) 66, 45 L.R.A. 79, 43 Atl. 305, even if that part of the statute, which attempts to impose the liability therefor on abutting owners is invalid.

But an act which imposes on the abutting owner the sole responsibility for damages to persons or property resulting from defects in the footway in front of his property is held, in Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451, unconstitutional and void, where that responsibility is imposed upon the city by its charter, which it has accepted and acted under, without the right to alter or amend being expressly reserved by it or secured by the Constitution.

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In Gray v. Brooklyn, 50 Barb. 365, an action against the city for injuries sustained by reason of a street being out of repair, the charter provided that the city should not be liable in damages for the nonfeasance or misfeasance of the common council or any officer of the city or appointee of the council, of any duty imposed on them or any of them by the statute, but that the remedy should be by mandamus or other proceedings to compel the performance of duty, or by action against the members of council or officer. It was held that the statute was a defense to the city. The court said: "I am unable to see why the same legislature may not create a city and limit its liability. The power is constantly exercised." This decision was affirmed on appeal in 2 Abb. App. Dec. 267. But this same statute was, in Bieling v. Brooklyn, 120 N. Y. 98, 24 N. E. 389, held inapplicable, and not available as a defense in action against the city for injury caused by an awning falling upon a person passing along the sidewalk.

The following cases involving actions against municipalities or their officers for damages for injuries caused by defective highways, streets, or sidewalks, while not passing upon the constitutionality of any statute, recognize the rule that a municipal charter may specially exempt the corporation from liability for a failure to keep its highways, streets, or sidewalks in repair. Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Bessemer v. Carroll, 154 Ala. 506, 45 So. 419; Hall v. Norwalk, 65 Conn. 310, 32 Atl. 400; Huntington v. Calias, 105 Me. 144, 73 Atl. 829; Schigley v. Waseca, 108 Minn. 94, 19 L.R.A. (N.S.) 689, 118 N. W. 250, 16 Ann. Cas. 169; Goddard v. Lincoln, 69 Neb. 594, 96 N. W. 273; Piercy v. Averill, 37 Hun, 360; Bennett v. Whitney, 94 N. Y. 302; Curry v. Buffalo, 135 N. Y. 366, 32 N. E. 80; Rankin v. Buckman, 9 Or. 253; Sheridan v. Salem, 14 Or. 328, 12 Pac. 925; Watson v. Tripp, 11 R. I. 98, 23 Am. Rep. 420; Schaefer v. Fond du Lac, 99 Wis. 333, 41 L.R.A. 287, 74 N. W. 810; Byington v. Merrill, 112 Wis. 211, 88 N. W. 26.

J. D. C.

not entitled to recover in this case because the city of Memphis "by special dispensation from the legislature is not liable for the negligence of its agents, employees, and servants in the construction of bridges and highways, nor for their negligence in leaving the same in a dangerous condition in the city of Memphis."

The question presented for determination is the validity of Acts, 1879, chap. 11, as amended by chapter 96 of the Acts of 1881, which, after amendment, reads as follows:

"That the counties in which the taxing districts are situated, and the taxing districts themselves, shall not be liable for damages or injuries to persons or property by reason of defects in the streets or alleys or other property under the control and within said taxing districts, or for the conduct of those managing the affairs of such districts."

This statute applies to no other municipality than the city of Memphis. The learned trial judge sustained the demurrer and dismissed the suit, which action was affirmed by the court of civil appeals upon the authority of *Williams v. Taxing Dist.* 16 Lea, 531, and an unreported case said to have been decided by this court in 1907. Section 8 of article 11 of the Constitution of this state provides as follows:

"The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land, nor to pass any law granting to an individual or individuals, rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."

We think it too clear for argument at this late day that the exemption, or "special dispensation," as counsel denominate it, in favor of the city of Memphis in the foregoing provision of its charter, is violative of the section of the Constitution just quoted. This question has been determined time and again by this court, and resort need not be had to other authority than our own reported cases. There is not a single case, unless it be *Williams v. Taxing Dist.* supra, which intimates to the contrary. Commencing with our least case of *Malone v. Williams*, 118 Tenn. 425, 121 Am. St. Rep. 1002, 103, S. W. 807, we will review only a few of them. In this last case, the court said:

"It is true that the legislature has power to grant special charters to municipal corporations, and may, in general, include

within those charters such peculiar provisions, not to conflict with the Constitution, as may be needed for the convenience and well-being of the particular community. But where these provisions are so general as to fall within a classification common to all the citizens of the state, there can be no justification for erecting a single city into a class by itself, with provisions more onerous than are imposed upon all other citizens occupying the same situation, or more advantageous. It was so held many years ago, in a case cited *infra*, where the legislature attempted to exonerate the city of Memphis from the burden of executing cost or appeal bonds. By the general laws of the state, applicable to all citizens, tax officers are permitted to distrain for delinquent taxes. Nowhere else in the state are they permitted to distrain for tax not delinquent except in the city of Memphis, under the section above quoted. The said section creates an unconstitutional discrimination in favor of the city of Memphis, and thus is in violation of the section of the Constitution above referred to."

It is true that laws public in their character, and otherwise unobjectionable, may extend to all citizens, or be confined to particular classes. With respect to the provision of the Constitution under consideration, citizens or municipalities may be classified when the object of the legislature is to confer upon them certain rights, privileges, immunities, or exemptions not enjoyed by the community at large. But this classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the objects sought by the legislation, and there must be some good and valid reason why the particular municipality upon whom the benefit is conferred should be so preferred. *Stratton Claimants v. Morris Claimants* (*Dibrell v. Lanier*) 89 Tenn. 522, 12 L.R.A. 70, 15 S. W. 87; *State v. Nashville, C. & St. L. R. Co.* 124 Tenn. 1, 135 S. W. 773, Ann. Cas 1912 D, 805; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

It was determined at an early day in *Humes v. Knoxville*, 1 Humph. 403, 34 Am. Dec. 657, that a municipal corporation for the government of a town or city is the proprietor of the streets, which it holds as easements, in trust for the benefit of the corporation, and which it has the power to grade, pave, or otherwise improve. "And it is well settled at this day," said the court, "both in England and America, that such a corporation is liable to be sued in actions of tort in like manner as natural



persons." *Memphis v. Lasser*, 9 Humph. 757; *Nashville v. Brown*, 9 Heisk. 1, 24 Am. Rep. 289; *Niblett v. Nashville*, 12 Heisk. 684, 27 Am. Rep. 755.

In *Knoxville v. Bell*, 12 Lea. 157, the court reviewed the authorities in this state, and held that the doctrine was established that "municipal corporations are liable in civil actions for injuries to persons, sustained by reason of their neglect or failure to keep their streets in safe condition for persons traveling or passing the same, too firmly now to be shaken." and declined to consider authorities from other jurisdictions holding to the contrary. Therefore the general rule of law, applicable alike to all municipalities, at the date of the passage of the statute in question, made each of them liable to any citizen for injuries received as a result of its negligence in failing to properly maintain its streets. If this section of the defendant's charter is valid, we have a general law applying to all other municipalities, which, by express legislative enactment, is suspended for the benefit of the city of Memphis. That such a law is not the law of the land is clearly settled by *Budd v. State*, 3 Humph. 483, 39 Am. Dec. 189, reaffirmed in *Alexandria v. Dearmon*, 2 Sneed, 104, and followed in *Hatcher v. State*, 12 Lea, 368. Even in *Williams v. Taxing Dist.* supra, the correctness of this position is recognized, because the court said that "it is very true that a provision of a municipal charter which undertakes to make a law for, or in regard to, that municipality different from the general law, or to withdraw from the operation of a general law, applicable to all municipal corporations, a particular corporation, or class of such corporations, would be obnoxious to the clause of the Constitution last cited, because not the law of the land."

Whatever may be said of the correctness of the decision of the court in that case, it seems that the statute under consideration was confused with statutes granting particular franchises or rights to certain municipalities. This statute confers an immunity upon the municipality, and, if it could be valid at all, it must be general to all municipalities, or the particular municipalities to which the immunity is granted must be classified so that every municipality which is in, or may come in, the situation and circumstance which constitute the reasons for and basis of the classification, can be entitled to the immunities conferred by the statute. And the classification itself must rest upon some difference which bears a

reasonable and just relation to the immunity granted to the class, and it can never be made arbitrarily and without reasonable basis.

We have already seen, and this is recognized by *Williams v. Taxing Dist.* that the general rule of law in this state makes all municipal corporations liable for neglect of their streets, and it is immaterial whether this rule originates with a statute or is found in the common law. It is a rule of law, both in England and America, and has been repeatedly so announced by this court before the passage of the act of 1881. It can make no difference what the rule is called, whether it be regarded as "only a consensus of decision" or otherwise. It is equally effective to determine the liability of all municipalities for neglecting their streets, and judgments, for such neglect, based upon such liability, are daily enforced against them by the courts of this state. It is a seizing of the word and a dodging of the idea to say that this rule of liability, so long and constantly enforced, is not a general law of the land suspended by the act in question for the particular benefit of the city of Memphis. Such is its effect and substance, as well as its form. With its policy, this court has nothing to do. But it is its highest duty, as well as its pleasure, to require that this and all other statutes shall square with the Constitution.

The foregoing opinion was prepared and announced at the close of the last term, but a rehearing was granted upon an earnest petition filed by counsel for the city, insisting that under the terms of the defendant's original charter, it being chapter 11 of the Acts of 1879, all municipalities of this state could have the benefit of the exemption in question by surrendering their charters as provided by § 22 of that act, and reincorporating as taxing districts. This insistence is based upon the following provision of the city's charter:

"That the several communities embraced in the territorial limits of all such municipal corporations in this state as have had their charters abolished, or as may surrender the same under the provisions of this act, are hereby created taxing districts, in order to provide the means of local government for the peace, safety and general welfare of such districts. . . .

"That whenever any community under the government of a municipal corporation at the time this act takes effect, having a population of less than 35,000 inhabitants according to the Federal census of 1870,

may desire to be governed by the provisions of this act, the authorities of such corporation shall cause an election of the qualified voters of such municipal corporation to be held."

It is insisted that, under the foregoing provisions of the charter, any community of the state may take the benefit of the taxing district act, and for that reason the statute is general, and falls within the principle of *Cook v. State*, 90 Tenn. 407, 13 L.R.A. 183, 16 S. W. 471, and *Burnett v. Maloney*, 97 Tenn. 697, 34 L.R.A. 541, 37 S. W. 689. But in this assumption counsel are clearly in error. It is only municipal corporations having a population of less than 35,000 inhabitants, according to the Federal census of 1870, which are permitted to reincorporate under the act in question, and such an inflexible classification was held void in *Woodard v. Brien*, 14 Lea, 520; *Burkholtz v. State*, 16 Lea, 71; and *Sutton v. State*, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697. This section is void, because it does not apply equally and alike to all municipalities then and thereafter having the requisite population; nor does it extend to nor embrace all such which may come into the like situation and circumstances, for the reason that the classification is based solely upon the Federal census of 1870. This question is fully discussed in the cases last cited, and the principle there decided has never been questioned by anyone. It necessarily follows that the clause of the charter of the city of Memphis under discussion is indeed "a special dispensation accorded to that city by the legislature," and is vicious class legislation.

We have not discussed in this opinion the various arguments presented by counsel, for the reason that the questions involved are deemed to be so elementary and so firmly settled that no amount of discussion could add to their clearness or their strength. We have not considered the proposition of counsel which urges the court to overrule the long line of cases establishing the general doctrine in this state of the liability of municipal corporations for injuries resulting from neglect of their streets. We decline to reconsider these cases, or to entertain an argument which has for its object a reopening of the questions settled by them; and as we adhere to this line of authority, it is imperative that the section of the defendant's charter under consideration be declared void.

The petition to rehear is dismissed.  
42 L.R.A. (N.S.)

## WEST VIRGINIA SUPREME COURT OF APPEALS.

### STATE OF WEST VIRGINIA

v.

MARTIN FRALEY, Plff. in Err.

(— W. Va. —, 76 S. E. 134.)

#### Embezzlement — check.

1. A check on a bank is the subject of embezzlement under § 19, chapter 145, Code 1906.

#### Indictment — check — description.

2. "One check of the value of forty-two and 50/100 (\$42.50) dollars," in an indictment under said § 19, chapter 145, Code 1906, sufficiently describes a check charged to have been embezzled.

#### Evidence — embezzlement — sufficiency.

3. The agency of one charged with the embezzlement of money or other property, under said § 19, chapter 145, Code 1906, is sufficiently established by evidence showing that the agency related to but the single transaction of intrusting the property embezzled to the defendant; no previous relationship of principal and agent is necessary.

Headnotes by MILLER, J.

#### Note. — Check as subject of larceny or embezzlement.

As to valuation of commercial paper for purposes of graduating offense of larceny, see note to *State v. McClellan*, 23 L.R.A. (N.S.) 1063.

At common law a check, *qua* check, as a valuable piece of property representing the dollars which it named, was not the subject of larceny.

The theory of the common-law rule was that a check was but a token, representing property located elsewhere, but valueless in itself, and therefore not the subject of larceny.

In England and in most of the states of the Union, statutes have been enacted which expressly make it larceny to steal checks and other securities.

In harmony with *STATE v. FRALEY*, it was held in *State v. Hinton*, 56 Or. 428, 109 Pac. 24, that a check is the subject of larceny under a statute declaring the unlawful taking of a bill of exchange or other thing in action larceny.

A check may be the subject of larceny under a statute defining property, as used in relation to the crime of theft, as any writing containing evidence of existing debt, contract, or liability, and writings of every description which possess ascertainable value. *Worsham v. State*, 56 Tex. Crim. Rep. 253, 18 Ann. Cas. 134, 120 S. W. 439; *Fulshear v. State*, 59 Tex. Crim. Rep. 376, 128 S. W. 134.

A check drawn by a United States pension agent upon the assistant treasurer of the United States is an obligation "for the payment of money," within the meaning of a statute defining larceny. *State v. Bishop*,

**Embezzlement — agency — compensation.**

4. The "agency" thus established is within the statute on embezzlement, whether the contract of agency provides for compensation or not.

**Same — check — collection — embezzlement.**

5. Although the property (a check in this case) may have been voluntarily turned over to the defendant by his principal, for collection, he is guilty of embezzling it, if, in obtaining possession thereof and before collecting it, he used fraud or deception in getting it, and had conceived the guilty intention of misappropriating it, or the proceeds thereof, and actually did so.

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98 N. C. 773, 4 S. E. 357. To the same effect is *State v. Stewart*, 1 Marv. (Del.) 542, 41 Atl. 188 (berry check).

A certificate of deposit issued by a bank is subject to larceny by virtue of a statute which makes the felonious taking of "any right of action" larceny. *State v. O'Connell*, 144 Mo. 387, 46 S. W. 175.

And in *State v. Small*, 26 Kan. 209, it was said that the statute defining property subject to embezzlement as "any money, goods, rights in action, property, or valuable security, or other effects," embraces all classes of personal property. This case, however, did not involve a check.

**Unindorsed check.**

Under a statute making checks the subject of larceny, an unindorsed check payable to order is so subject. *State v. McClellan*, 82 Vt. 361, 23 L.R.A. (N.S.) 1063, 73 Atl. 993; *Burrows v. State*, 137 Ind. 474, 45 Am. St. Rep. 210, 37 N. E. 271; *Fulshear v. State*, 59 Tex. Crim. Rep. 376, 128 S. W. 134.

**Checks indorsed in blank.**

A check indorsed in blank is the subject of larceny. *State v. Hinton*, 56 Or. 428, 109 Pac. 24. The court said: "Neither the terms of the instrument nor its legal effect have been changed; it was collectable by the payee, and having been taken without his consent, he was deprived of its value."

**Undelivered check.**

Under a statute making checks the subject of larceny or embezzlement, an undelivered check is the subject of larceny (*Rex v. Metcalf*, 1 Moody, C. C. 433; *Rex v. Heath*, 2 Moody, C. C. 33; *Com. v. Yerkes*, 29 Phila. Leg. Int. 60, reported also in 12 Cox C. C. 208; *Reg. v. Perry*, 1 Den. C. C. 69, 1 Car. & K. 725, 1 Cox, C. C. 222; *State v. Levine*, 79 Conn. 714, 10 L.R.A. (N.S.) 286, 66 Atl. 529; *Worsham v. State*, 56 Tex. Crim. Rep. 253, 120 S. W. 439, 18 Ann. Cas. 134) or embezzlement (42 L.R.A. (N.S.)

**E**RROR to the Circuit Court for Cabell County to review a judgment affirming a judgment of the Criminal Court convicting defendant of embezzlement. Affirmed.

The facts are stated in the opinion.

Mr. R. L. Blackwood for plaintiff in error.

Mr. William G. Conley, Attorney General, for defendant in error:

The simple larceny count in the indictment would support a verdict for embezzlement.

*State v. Lewis*, 69 W. Va. 474, 72 S. E. 475; *State v. Halida*, 28 W. Va. 499, 6 Am. Crim. Rep. 407; *State v. Edwards*, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429.

When one assumes to act as agent, he is

(*Livingston v. Fidelity & Deposit Co.* 27 Ohio C. C. 662).

An undelivered check may be the subject of larceny under a statute defining property subject to larceny as any writing containing evidence of existing debt, contract, or liability, and writings of every description which possess ascertainable value, since the delivery of a negotiable instrument is not essential to its validity in the hands of an innocent holder for value, and this is true though the maker lost possession by theft. *Worsham v. State*, 56 Tex. Crim. Rep. 253, 120 S. W. 439, 18 Ann. Cas. 134.

In *Com. v. Yerkes*, 29 Phila. Leg. Int. 60, it was said that the moment the check was so far completed as to enable anyone obtaining it to draw the money, it was the subject of larceny in the hands of the drawer; that the fact that the check, after its payment by the bank, was returned to the drawer, did not affect the case, since its value, that for which the law makes it the subject of larceny, was gone.

In *Rex v. Metcalf*, 1 Moody, C. C. 433; *Rex v. Heath*, 2 Moody, C. C. 33; *Reg. v. Perry*, 1 Den. C. C. 69, 1 Car. & K. 725, 1 Cox, C. C. 222, the accused was intrusted with the check with instructions to deliver it to the payee.

In *Livingston v. Fidelity & Deposit Co.* 27 Ohio C. C. 662, it was held that the conversion of checks by a secretary of a building and loan association constituted embezzlement, where the checks had been placed in his custody by the treasurer of the association to be delivered to the payees, who were fictitious property owners recommended to the association by the secretary as applicants for loans.

**Unstamped check.**

It has been held that an unstamped check is not a valuable security within the statute making such instruments the subject of larceny, because it would be unlawful for the drawee to pay. *Rex v. Yates*, 1 Moody, C. C. 170, Car. Crim. Law, 333; *Rex v. Pooley*, Russ. & R. C. C. 12, 2 Leach, C. L. 887; *Reg. v. Perry*, supra.

A. L. R.

an agent within the embezzlement statute, and if intrusted with property in that capacity, and he converts it to his own use, he is guilty of embezzlement.

People v. McLean, 135 Cal. 306, 87 Pac. 770; People v. Butts, 128 Mich. 208, 87 N. W. 224; State v. Spaulding, 24 Kan. 1; State v. Barter, 58 N. H. 604; Wynegar v. State, 157 Ind. 577, 62 N. E. 38; State v. Moyer, 58 W. Va. 146, 52 S. E. 30, 6 Ann. Cas. 344.

Miller, J., delivered the opinion of the court:

On an indictment in three counts, for embezzlement, the first two based on § 19, chapter 145, Code, the third a common count for larceny, defendant was found guilty, as charged in the indictment, of the embezzlement of "one check of the value of forty-two and  $\frac{50}{100}$  (\$42.50) dollars," which the indictment in each count charges to have been the property of one Johnson McClure. And the judgment of the criminal court, on the verdict, affirmed by the circuit court, was that defendant be confined in the penitentiary for the period of two years.

Of the errors assigned here, the first is that the demurrer to the indictment, going to each count, should have been sustained. The ground of demurrer is that a check, which at common law was not the subject of larceny, is not covered, in specific terms at least, by the statute.

It is true that a "check" is not, as in Virginia, specifically covered by our statute, and the question is, Does it fall within any of the words of general description contained therein? The statute, among others, contains the general words, "security for money," and "any effects or property of any other person." The general rule is that penal statute should be strictly construed. However, Mr. Bishop, 2 Bishop's New Crim. Law, § 357a, of his chapter on embezzlement, says: "Property is a word quite flexible in meaning, and it is very broad in some connections. A statute making indictable the embezzlement of 'any money or property of another' includes promissory notes, bills of exchange, and other 'property' of the like sort; such, for example, as shares of stock." A check is a bill of exchange, sometimes defined an inland bill of exchange. Cox v. Boone, 8 W. Va. 506, 23 Am. Rep. 627; Purcell v. Allemon, 22 Gratt. 739; 2 Enc. Dig. Va. & W. Va. Rep. 406; 2 Words & Phrases, 1109. Our case of Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 609, 6 L.R.A. (N.S.) 628, 53 S. E. 928, 937, says: "Anything capable of beneficial ownership is property." A check is certainly capable of such ownership. Before 42 L.R.A. (N.S.)

our present negotiable instruments law, § 189, chapter 81, Acts 1907 (Code Supp. 1909, chap. 99, § 8a189), a check was held to constitute an equitable assignment *pro tanto* of the funds in bank on which it is drawn. Hulings v. Hulings Lumber Co. 38 W. Va. 351, 18 S. E. 620. And now, except as otherwise provided, the usual rights pertaining to a bill of exchange apply. Section 185, chapter 81, Acts 1907 (Code Supp. 1909, chap. 99, § 8a185). These authorities would seem to settle the question in favor of the sufficiency of the indictment. Another point arising on the demurrer, but not presented by counsel, and which occurred to us in council, was that the check was probably not sufficiently described in the indictment to identify it and give the defendant notice; but when applied to the statutory offense of embezzlement, the point seems to be without merit. Whalen v. Com. 90 Va. 544, 19 S. E. 182; 25 Cyc. 77; Com. v. Bretun, 100 Mass. 206, 97 Am. Rep. 95; People v. Lovejoy, 37 App. Div. 52, 55 N. Y. Supp. 543.

On the merits, the first point of error raised by defendant's motion to set aside the verdict of the jury, and award him a new trial, is that there is no proof that defendant was an agent of McClure, within the meaning of the statute. The statute provides that, "if any . . . agent, clerk, or servant of any firm or person, or company or association of persons not incorporated, embezzle, or fraudulently convert to his own use, bullion, money, bank notes, security for money, or any effects or property of any other person, which shall have come into his possession, or been placed under his care or management, by virtue of his office, place, or employment, he shall be guilty of larceny thereof." The proof is, not that defendant, at the time the check in question was delivered to him by McClure, was in some general employment of McClure, and by virtue of such agency the check was turned over to him for collection, but that the agency covered the single transaction of intrusting the check to Fraley for collection and accounting to McClure for the proceeds. Is such an agency covered by the statute? We think it is. At one time it was thought the employment should extend beyond one transaction. Now, says Mr. Bishop, 2 Bishop, New Crim. Law, § 346, the doctrine is "settled that the employment need not extend beyond the one transaction." We think this the proper interpretation of our statute.

It is argued, however, that, as our case of State v. Moyer, 58 W. Va. 149, 52 S. E. 30, 6 Ann. Cas. 344, and other cases cited, held the statute on embezzlement to have been enacted for the purpose of supplying

what were regarded defects in the common law of larceny, and that, in order to constitute the offense (embezzlement), "it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes," we have given our statute a construction different from that stated by Mr. Bishop, and have said, in effect, that the trust relation must have been previously established, and not one arising out of a single transaction, and therefore that the case at bar is not within the statute. The language of the court must be considered in connection with the facts in the case before it. In that case the agency had existed for some time prior to the time of the offense charged against him. The court did not say, nor intend to intimate, that an agency covered by the statute could not relate to a single transaction. We have decided, with respect to attorney and client, that the relationship begins as soon as the client has expressed a desire to employ the attorney, and the latter has given his consent to act in that capacity. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806. We see no reason for a different rule of agency in the case at bar. So that, the relationship being thus established and property thereafter intrusted to the agent, he must be said to have received it by virtue of his employment, and that such a case falls clearly within not only the spirit but the letter of the law. The following cases so interpret statutes like ours, or apply the principle of agency enunciated: *State v. Barter*, 58 N. H. 604; *Wynegar v. State*, 157 Ind. 577, 62 N. E. 38; *People v. Butts*, 128 Mich. 208, 87 N. W. 224; *People v. McLean*, 135 Cal. 306, 67 Pac. 770.

It is suggested that because there was no contract for compensation the relationship of agency was not established. One may agree to become an agent without compensation, and the relationship be thereby established. Definitions of agency include such agents. And the relationship, being one of trust and confidence, would fall within the statute relating to embezzlement. *Black, Law Dict.* page 50; 31 Cyc. 1190; 1 Am. & Eng. Enc. Law, 2d ed. 938; 1 Words & Phrases, 262.

The second and last point is that, as the check was voluntarily turned over to defendant, whatever the nature of his employment, there could have been no embezzlement of the check, it having come to his hands directly from the master, and not from a third person. Such seems to have been the English interpretation given these statutes. 2 Bishop, New Crim. Law, § 365. But in § 366, following, the same authority shows 42 L.R.A. (N.S.)

that in this country the courts give these statutes a much wider range, making them cover fraudulent conversions of money or other property delivered to the agent, whether by the principal, or in his behalf by a stranger. And in reason, says Mr. Bishop, this interpretation ought to be followed generally in this country; but adds: "It cannot, however, fully prevail in a state wherein there can be no conviction for embezzlement on facts which constitute a larceny." Now our statute makes one guilty of embezzlement guilty of larceny, and punishes him in the same way; the offense, by statute, being of the same grade. And 2 Bishop, New Crim. Law, § 328, says: "Where both crimes are of the same grade, it accords with established principles to hold that if an act is sufficiently covered by the terms of the statute, it is embezzlement, while, still, if before the statute came, it was larceny, it remains such, and it may be indicted as the one or the other at the election of the prosecutor." And, "in fact," says he, "most of the statutes on this subject make embezzlement a felony, the same as larceny." Our statute makes it felony or misdemeanor according to the value of the money or property embezzled.

Apropos to the point just disposed of, it is contended, on authority of *State v. Edwards*, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429, that the taking of the check by defendant was not felonious, because the check was voluntarily delivered to him by McClure, and was not obtained by means of any fraud or device, so as to make the taking felonious, within the meaning of the *Edwards Case*. That case holds: "When possession is obtained by means of fraud, trick, or device, so as to make the taking felonious, and the taker converts the property to his own use, the offense is common-law larceny, and a conviction may be had upon a common-law indictment for larceny." The rule of this decision, we think, would hold good, where by some fraud or trick one has procured himself to be made the agent of another for the purpose of obtaining possession of the property and appropriating it or its proceeds to his own use. At first we had some difficulty with this question, in its application to the case at bar. Our inquiry was, Should not the defendant have been indicted for embezzling the money, the proceeds of the check, rather than the check itself? In *Rapalje on Larceny & Kindred Offenses*, § 385, page 513, we found reference to the *Arkansas case of Dotson v. State*, 51 Ark. 119, 10 S. W. 18, the doctrine of which is approved, holding that "one who is intrusted with a horse to sell, with the intention that he shall give the money received to the owner, is a bailee,

within Mansfield's Dig. § 1640, providing that, if any carrier or other bailee shall embezzle or convert to his own use any money, etc., which shall have come into his possession or been placed in his care, he shall be deemed guilty of larceny, although he shall not break, etc.; but, the proof being that he received a check which he collected entirely in paper currency, an indictment charging him with the conversion of certain paper currency and certain pieces of gold, and in another count with the conversion of the check, does not sufficiently describe the money converted and, there being no embezzlement of the check, no conviction can be had." Carr v. State, 104 Ala. 43, 55, 16 So. 155, 159, involved a check intrusted to a banking officer, who was indicted for embezzling money, the proceeds of the check. It appeared that this bank officer had sent the check to New York for collection, where the proceeds had been placed to the credit of his bank, and that in fact he had never had actual possession of any of the money. He was held not guilty of embezzlement of the money as charged; but the Alabama court says: "It may be that, conceding the truth of this evidence, the defendant would still be guilty of embezzling the check, but that charge is not made in this case." The question so mooted could only be affirmed, it seems to us, on the theory that the criminal intent was present in obtaining the check, or before parting with it, and we think on the principles of our case of State v. Edwards, supra, if the evidence is sufficient to justify the jury in believing that the prisoner obtained the check by fraud and deceit, as it certainly tends to show, by falsely pretending he was a brother Odd Fellow, and in other professions of friendship, and with the intent to get away with the proceeds or any part of them, formed before parting with the check, as the jury may rightfully have concluded from the evidence, he was guilty of embezzling the check, as well as the money, and was liable to indictment and conviction of either offense.

Upon the foregoing considerations we are of opinion to affirm the judgment.

#### IOWA SUPREME COURT.

B. F. JONES, Appt.,

v.

F. T. HUGHES.

(— Iowa, —, 137 N. W. 1023.)

**Injunction — against suit in another state — harassment.**

1. The mere bringing of a suit and attachment of property in another state, by a citizen of one state against another citizen of the same state, to recover damages for a tort committed in the state of their residence, is not such annoyance or harassment as will warrant an injunction against its maintenance.

**Venue — removal to county of residence — extraterritorial suit.**

2. A statute providing for the removal of suits to the county of defendant's residence has no application to suits brought in other states.

**Abatement — former action pending — effect.**

3. The pendency of an action in one state does not prevent the bringing of another action in another state on the same cause of action.

(October 21, 1912.)

**A**PPPEAL by plaintiff from an order of the District Court for Lee County dissolving a preliminary injunction restraining defendant from maintaining an action in a court of Missouri to recover damages for alleged personal wrongs. Affirmed.

**Statement by McClain, Ch. J.:**

This is an action in equity to enjoin the prosecution by defendant against plaintiff of a suit, aided by attachment, in a court of Missouri, to recover damages for slander and malicious prosecution for words spoken and acts done in Lee county of this state, of which county the plaintiff and the defendant are both residents. After the filing of an answer, the court, on motion, dissolved a preliminary injunction which had been granted on plaintiff's application, and from such order the plaintiff appeals.

**Messrs. Herminghausen & Herminghausen, B. F. Jones, and Barnard A. Dolan** for appellant.

**Messrs. Hughes & McCold,** for appellee.

An injunction will not be allowed simply because of the fact that a suit brought in a foreign state is vexatious, harassing, and annoying to the party seeking the injunction.

Gray v. Coan, 36 Iowa, 296; Patterson v. Seaton, 64 Iowa, 115, 19 N. W. 869; White, Stokes & Allen v. Caxton Book-Binding Co. 10 N. Y. Civ. Proc. Rep. 148; 21 Cyc. 72; Hammond v. Baker, 3 Sandf. 704; Car-

**Note.**— For injunction against action or proceeding in foreign jurisdiction, see notes to Thorndike v. Thorndike, 21 L.R.A. 71, and O'Haire v. Burns, 25 L.R.A. (N.S.) 267, and other annotations referred to in the latter note. And see later case, Mason v. Harlow, 33 L.R.A. (N.S.) 234.

son v. Dunham, 149 Mass. 52, 3 L.R.A. 203, 14 Am. St. Rep. 397, 20 N. E. 312.

After suits are commenced in one state, it is inconsistent with interstate comity that their prosecution shall be controlled by the courts of another state.

Harris v. Pullman, 84 Ill. 20, 25 Am. Rep. 416; Johnstown Min. Co. v. Morse, 44 Misc. 504, 90 N. Y. Supp. 107.

So an injunction will not issue to restrain a proceeding already pending in the courts of a sister state. The commencement of a suit in a sister state may be enjoined, but the prosecution of one already commenced will not be.

Carroll v. Farmers' & M. Bank, Harr. Ch. (Mich.) 197; Lockwood v. Nye, 2 Swan, 515, 58 Am. Dec. 76; Mead v. Merritt, 2 Paige, 402; Smith v. Reed, 74 N. J. Eq. 776, 70 Atl. 961.

Courts can only compel its citizens by injunction to respect the state laws.

Teager v. Landsley, 69 Iowa, 725, 27 N. W. 739; Hager v. Adams, 70 Iowa, 746, 30 N. W. 36; Sturges v. Jackson, 88 Miss. 508, 6 L.R.A.(N.S.) 491, 117 Am. St. Rep. 754, 40 So. 547; Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 71 Atl. 153.

Defendant in the court below dismissed the suit in the said superior court before the motion to dissolve was filed. This avoided any possible question as to the right to continue the suit sought to be enjoined.

Ball v. Keokuk & N. W. R. Co. 71 Iowa, 306, 32 N. W. 354.

The defendant has a legal right to bring as many suits for the same cause of action, and against the same parties, as he chooses, provided he brings the suits in different jurisdictions or different states, and the pendency of one such action will not abate the other.

1 Cyc. 36; 22 Cyc. 757; Schmidt v. Posner, 130 Iowa, 347, 106 N. W. 760; Willard v. Sturm, 96 Iowa, 555, 65 N. W. 847; Wurtz v. Hart, 13 Iowa, 515; Douglass v. Phenix Ins. Co. 138 N. Y. 209, 20 L.R.A. 118, 34 Am. St. Rep. 448, 33 N. E. 938; Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris) 96 U. S. 588, 24 L. ed. 737; Jenks v. Ludden, 34 Minn. 482, 27 N. W. 188.

McClain, Ch. J., delivered the opinion of the court:

The case as presented involves the question whether a court of equity in this state may, at the suit of a citizen of the state brought against another citizen of the state, enjoin the prosecution in a court of another state of an action to recover damages for personal wrongs committed in this state. 42 L.R.A.(N.S.)

In order to discuss this question with reference to its proper solution under the facts appearing in this case, the following statement of the circumstances will be sufficient:

In November, 1909, an action entitled, "R. C. McIlwain and Felix T. Hughes v. William Sinton, B. A. Dolan, and B. F. Jones," was brought in the superior court of the city of Keokuk, in which it was alleged that the defendants, conspiring together and acting jointly and severally to injure the good name of the plaintiffs, maliciously prosecuted a suit in said court, which was afterwards dismissed, and spoke of and concerning the plaintiffs certain false and slanderous words. In April following, and while the action in the superior court at Keokuk was still pending, Felix T. Hughes, as sole plaintiff, instituted an action aided by attachment against B. F. Jones as sole defendant, in the circuit court of Clarke county, Missouri, alleging substantially the same wrongs, and asking the recovery of the same damages, as were made the basis of the action in the superior court of Keokuk. Under the attachment, land of the defendant was seized in Missouri. Thereupon B. F. Jones, the sole defendant in the action brought in Missouri, and one of the joint defendants in the action instituted in the superior court of Keokuk, brought this action in equity against Felix T. Hughes, the sole plaintiff in the action brought in the Missouri court, to enjoin said Felix T. Hughes from maintaining his action in Missouri, alleging as ground for such relief the pendency of the action in this state; that both he and defendant are residents of Keokuk; that plaintiff has unencumbered property in that city of considerable value; that the cause of action alleged in the Missouri court was based solely upon facts that happened and arose in Lee county (in which the city of Keokuk is situated); that by the laws of Missouri the attachment upon the plaintiff's land there situated had become effectual as a lien without the giving of any bond, and that defendant instituted said action and obtained said attachment against the plaintiff's land in Missouri for the sole purpose of harassing, annoying, and worrying the plaintiff by putting him to great expense in defending said action in another state; and, further, that the object of instituting the action in Missouri was to take advantage of a rule of law recognized in the courts of Missouri, by which a recovery could be had for malicious prosecution which could not be had by the rules of law recognized on the same subject in the courts of Iowa. On the prayer of the plaintiff a preliminary injunction was granted; whereupon defendant

answered under oath, denying any intent or purpose of harassing and annoying the plaintiff by the institution of the suit in Missouri, and denying that the rules of law recognized in Missouri with reference to the recovery of damages for malicious prosecution were any more favorable to the plaintiff in such a suit than those recognized in the courts of Iowa. There are also allegations in the answer as to the joinder of plaintiffs and defendants in the action in the superior court of Keokuk, which are not material in the view which we take of the case. On the filing of his answer, the defendant moved to dissolve the preliminary injunction for various reasons, which, so far as it is necessary to notice them, relate to the jurisdiction of the courts of one state to interfere with the prosecution of actions between its own citizens in another state, and the propriety of doing so under the circumstances which are developed in this case. Although the appeal is one from the dissolution of a temporary injunction, the argument extends to the ultimate question of the right of the plaintiff to have the final relief prayed for in his petition.

There can be no controversy as to the jurisdiction of a court of equity to render a decree *in personam* against a defendant, enjoining him from resorting to the courts of another state. Such jurisdiction does not involve in any sense the exercise of a supervisory jurisdiction over the courts of another state, but only supervisory jurisdiction over the acts of the defendant threatening injury to the plaintiff. Such power "proceeds from the undoubted authority that a court of equity possesses over persons within its jurisdiction to restrain them from doing anything that is contrary to equity and good conscience, to the wrong and injury of others, whether the threatened inequitable conduct consists in the prosecution of an action, or whatever it may happen to be. The court of equity thus appealed to acts *in personam*, and it is immaterial whether the threatened inequitable conduct is to be carried on within or without the limits of the jurisdiction." *Bigelow v. Old Dominion Copper Min. & Smelting Co.* 74 N. J. Eq. 457, 71 Atl. 153. But conceding the jurisdiction of the court to thus enjoin, and bring within the control of its process, the prosecution of a suit in the courts of another state, the question still remains whether in a particular case the court should exercise that power. As expressing quite clearly the considerations that will control in this respect, we indulge ourselves in further quotation from the opinion of Chancellor Pitney in the case just cited, which was a case in which the 42 L.R.A. (N.S.)

New Jersey court of equity was asked to enjoin proceedings in a court of the commonwealth of Massachusetts having adequate jurisdiction to determine the rights of the parties in the case there pending. "But on general principles equity will not interfere with the right of any person to bring an action for the redress of grievance—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised. . . . They must be very special circumstances that will justify this court in restraining the prosecution of an equitable action already pending in a court of such ample jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of that commonwealth; that it can weigh evidence better, or more justly apply to the facts any general principle of law or equity; nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth." The chancellor then proceeds at considerable length to discuss the cases in which courts of equity have felt authorized to restrain the prosecution of actions in the courts of another jurisdiction, and concedes that they have the power to do so on various grounds enumerated, among which are that the suit in the foreign jurisdiction is in contravention of the rights of creditors who are pursuing their remedies in the jurisdiction in which an injunction is asked, and that the defendant is resorting to a suit in a foreign jurisdiction in order to evade some distinct prohibition of the local law of the common domicile, or is attempting to unjustly harass or oppress his debtor to his irreparable injury.

Within these classes of cases fall nearly, if not quite, all the precedents relied upon for the appellant. Thus it has been held that a creditor will not be allowed to resort to another jurisdiction in order to defeat the benefits which are guaranteed to his debtor by the exemption laws of the state. *Teager v. Landsley*, 69 Iowa, 725, 27 N. W. 739; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448. An attempt to evade the effect of the violation of a state statute as to the sale of patent rights was enjoined in *Sandage v. Studabaker Bros. Mfg. Co.* 142 Ind. 148, 34 L.R.A. 363, 51 Am. St. Rep. 165, 41 N. E. 380. An attempt to evade the effect of the insolvent laws of the state



was enjoined in *Dehon v. Foster*, 4 Allen, 545. And to the same effect, see *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269. In *O'Connor v. Root*, 130 Iowa, 553, 107 N. W. 608, it was held that the creditor of an estate might be enjoined from resorting to a foreign administration for the purpose of evading the distribution of the property of the estate through a local administration. In *Miller v. Gittings*, 85 Md. 691, 37 L.R.A. 654, 60 Am. St. Rep. 352, 37 Atl. 372, a resident of the state was enjoined from prosecuting a suit in another state on a contract which was void by express provision of the state statutes relating to gambling transactions.

But beyond the prevention of some threatened evasion of the specific laws of the state intended to regulate the relations of its citizens to each other in some definite manner, courts have been reluctant to interfere with the exercise of the undeniable right of a resident to go into the courts of another state to secure such relief as may there be available to him, and have not felt justified in scrutinizing his motive in doing so. Thus it has been held that a resident creditor may rightfully pursue his legal remedy by attachment of property for debt in another state. *Jenks v. Ludden*, 34 Minn. 482, 27 N. W. 188.

And it seems to have been uniformly held wherever the ground for invoking relief by injunction was that, according to the general rules of law and practice in another state, the plaintiff would secure some advantage which he would not have if suit were brought in the state of his residence, this is no ground for interfering with the generally recognized right to sue in any court having jurisdiction of the cause of action and competent to afford relief. *Royal League v. Kavanaugh*, 233 Ill. 175, 84 N. E. 178; *Carson v. Dunham*, 149 Mass. 52, 3 L.R.A. 203, 14 Am. St. Rep. 397, 20 N. E. 312; *Edgell v. Clarke*, 19 App. Div. 199, 45 N. Y. Supp. 979; *Bigelow v. Old Dominion Copper Min. & Smelting Co.* supra. In the *Massachusetts* case just cited the court expressly refers to and limits the application of the cases of *Dehon v. Foster*, 4 Allen, 545, and *Cunningham v. Butler*, 142 Mass. 47, 56 Am. Rep. 657, 6 N. E. 782, previously decided by that court, and sometimes cited in support of a broader rule, to the circumstances involved in those cases, relating to an attempt to defeat the operation of the insolvent laws.

While it has sometimes been stated in a general way that a resident creditor will be enjoined from resorting to the courts of another state for the purpose of annoying

and harassing a resident debtor, we do not find any authority for holding that the mere bringing of suit against, and an attachment of property of, a resident defendant in another jurisdiction, constitutes such unjustifiable annoyance and harassment as to warrant the intervention of a court of equity.

In this state it has been held that a court of equity will not interfere by injunction to restrain causeless and vexatious litigation, and that the jurisdiction of equity to prevent a multiplicity of suits does not apply to the case of the repetition of a suit. *Gray v. Coan*, 36 Iowa, 296. To the same effect, see *Patterson v. Seaton*, 64 Iowa, 115, 19 N. W. 869. We ought to say with reference to the case before us that we have nothing but the statements of the plaintiff by way of his own conclusions, that the sole purpose of the defendant in instituting the suit in Missouri was to harass, annoy, and worry the plaintiff by putting him to great expense, and compelling him to employ counsel, and bring his witnesses from the county of his residence into the county of Missouri in which the suit was instituted; and that these allegations are denied by defendant in his answer under oath, coupled with the statement that the county of Missouri in which the action was brought adjoins the county of the residence of the parties in Iowa.

Some other points made by counsel for appellant in argument may be briefly noticed. The statutory provision for removal of cases to the defendant's county of residence in this state, when brought in another county of the state, such removal to be at the expense of the plaintiff on defendant's motion (see Code, § 3504), plainly has no bearing on the question now before us, as it would be impossible to remove to the county of defendant's residence a suit brought against the defendant in another state. The statutory provision cannot be construed into a prohibition of the bringing of an action in the courts of another state against a resident of a county of this state. There was some effort to make it appear that this defendant instituted the suit in Missouri for the purpose of evading the statute of limitations; but the contention is without merit. The suit in the superior court of Keokuk was instituted within the statutory period, and was still pending when suit was brought in the Missouri court; and the later action was instituted by suing out an attachment before the bar of the Iowa statute had accrued. There is no indication, therefore, of a purpose to evade the statute of limitation of this state. The objection that, when the action in Missouri was instituted, there was

an action pending in this state to recover damages for the same wrongs, is without force.

The statutory provisions with reference to abatement on the ground of another action pending have no application to actions in another state. *Schmidt v. Posner*, 130 Iowa, 347, 106 N. W. 760. The objection is unfounded, in fact, for the reason that it appears that the defendant had caused the action in the superior court of Keokuk to be dismissed before the motion to dissolve the preliminary injunction was made.

No good reason appears in the record why this defendant should not be allowed to maintain his action in Missouri to secure any relief available to him there as against this plaintiff, and the trial court did not err therefore in dissolving the preliminary injunction.

**Affirmed.**

#### NORTH CAROLINA SUPREME COURT.

J. M. DALTON, Chairman of the Board of Road Trustees,  
v.

GEORGE C. BROWN & COMPANY, Appt.

(159 N. C. 75, 75 S. E. 40.)

#### Highway — report of traffic — power of legislature.

1. The legislature may require under pen-

*Note. — Discrimination as to persons or vehicles subject to license or privilege tax for use of highway, as affecting validity of the tax.*

As to license fee for use of streets by vehicles, generally, see note to *Tomlinson v. Indianapolis*, 36 L.R.A. 413.

Upon the question of discrimination as to amount of tax or license fee on different vehicles, as affecting validity of tax, see notes to *Waters-Pierce Oil Co. v. Hot Springs*, 16 L.R.A.(N.S.) 1035, and *Fiscal Court v. F. & A. Cox Co.* 21 L.R.A.(N.S.) 83.

As to right to grade license tax according to number of animals or vehicles employed in the business, see note to *Birmingham v. Goldstein*, 12 L.R.A.(N.S.) 568.

As to validity of excise or license tax upon automobiles, see notes to *Christy v. Elliott*, 1 L.R.A.(N.S.) 215, and *Mark v. District of Columbia*, 37 L.R.A.(N.S.) 440.

As to validity of license tax on vehicles used in business for which a general occupation tax is required, see note to *Newport v. Fritzer*, 21 L.R.A.(N.S.) 279.

As to applicability to vehicles owned by nonresidents, of city ordinance imposing a license upon the use of vehicles, see note to *Pegg v. Columbus*, 23 L.R.A.(N.S.) 453. 42 L.R.A.(N.S.)

alty monthly reports from persons hauling heavy logs over public highways as to the amount of traffic done by them.

#### Tax — maintenance of highway — traffic rate.

2. The legislature may lay a special tax upon persons hauling lumber over the public highways, which hauling has a tendency to impair their usefulness, for the purpose of maintaining them in repair, without infringing the constitutional provisions as to uniformity of taxation, the granting of special privileges, and denial of due process of law.

#### Same — amount — mileage tax — use of highway.

3. A tax of 2 cents per mile per thousand feet of lumber hauled over the public highways of the state for the purpose of keeping them in repair is reasonable.

(Brown and Allen, JJ., dissent.)

(May 28, 1912.)

**A**PPEAL by defendant from a judgment of the Superior Court for Macon County affirming a judgment of a Justice of Peace in plaintiff's favor in an action brought to recover a penalty for failure of defendant to make the monthly reports required by statute. **Affirmed.**

The facts are stated in the opinion.

Mr. T. J. Johnston, for appellant:

The Macon county road law cannot be sustained as a police regulation or as an act passed in the exercise of the police power.

While the cases passing upon the validity of license or privilege taxes for the use of streets or highways, as affected by discrimination as to the persons or vehicles subject thereto, are not numerous, they have almost invariably upheld the classification of subjects in question, and the validity of the statute or ordinance depending thereupon. Thus it has been held that a statute authorizing cities of the first class to require residents to pay a tax for the privilege of keeping and using wheeled vehicles, which tax shall be appropriated and used exclusively for repairing and improving the streets of the city, is not void on the ground that it discriminates in favor of nonresidents of the city who may use its streets. *Ft. Smith v. Scruggs*, 70 Ark. 549, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679.

Nor is a city ordinance taxing, for the privilege of using the streets of the city, all owners of certain vehicles or of vehicles used for certain purposes, invalid on the ground of unjust discrimination, in that it does not include out of town vehicles used on the streets of the city (*Kellaher v. Portland*, 57 Or. 578, 112 Pac. 1076); or omits to tax the vehicles of nonresidents except for certain uses upon the streets of the city (*Kersey v. Terre Haute*, 161 Ind. 471, 68 N. E. 1027).

4 Bl. Com. 162; Cooley, Const. Lim. 572; Raleigh v. Sorrell, 46 N. C. (1 Jones, L.) 49; State v. Moore, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; State v. Bean, 91 N. C. 554; Ives v. South Buffalo R. Co. 201 N. Y. 272, 34 L.R.A.(N.S.) 162, 94 N.

E. 431, Ann. Cas. 1912 B, 156; State v. Whitlock, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; St. Paul v. Traeger, 25 Minn. 248,

So, a city ordinance imposing upon all residents of the city a license fee or tax for the use of the streets of the city with different kinds of vehicles, varying according to the character of the vehicle and the effect that its use would have upon the streets, and requiring nonresidents to pay a certain license fee only when they come into the city using vehicles for the purpose of hauling heavy articles, such as coal, brick, tiling, etc., or engage in the business of peddling milk or vegetables over and upon the streets of the city,—is not unconstitutional and void on the ground that it discriminates unfairly between residents and nonresidents of the city. Sterling v. Bowling Green, 26 Ohio C. C. 581.

And a statute which provides that the owners of all vehicles used upon the streets of cities of a certain grade and class shall pay certain annual license fees, but excepts from the requirement vehicles used by farmers marketing the products of their farms or hauling produce into the city, is not invalidated by the exception, on the ground that it makes unjust discriminations in favor of such farmers. Marmet v. State, 45 Ohio St. 63, 12 N. E. 463.

A city ordinance requiring every person, firm, or corporation keeping and using any conveyance for carrying persons or property for hire, to pay a license fee or tax as compensation for using the streets of a city, which the city is required by statute to keep in repair, is not unjustly discriminative, or obnoxious to a constitutional provision that all laws of a general nature shall have a uniform operation, or in contravention of constitutional provisions relating to the assessment and collection of taxes, in that it further provides that it shall not be construed as applying to carriages and other vehicles kept and used strictly and entirely in ordinary livery business. Des Moines v. Bolton, 128 Iowa, 108, 102 N. W. 1045, 5 Ann. Cas. 906.

And a city ordinance imposing upon the owners of certain vehicles a license tax for the privilege of using such vehicles on the streets of the city, as a means of revenue for the maintenance and repair of the streets, is not invalid for discrimination, under constitutional provisions against special privileges and immunities, or a denial of the equal protection of the laws, in that it excludes from its scheme of taxation electric street cars and automobiles. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027.

Nor is a city ordinance taxing, for the privilege of using the streets of the city, all owners or keepers within the city of any vehicle used for the conveyance of persons or goods, or for any other business, illegal and void on the ground that it is discrim-

inatory in that it expressly excepts from its operation vehicles used for pleasure only, and those included under another ordinance which licenses peddlers and hawkers of merchandise upon the streets by means of vehicles. Kellaher v. Portland, 57 Or. 578, 112 Pac. 1076.

In State v. Holloman, 139 N. C. 642, 52 S. E. 408, cited in both the prevailing and the dissenting opinions in DALTON v. GEORGE C. BROWN & Co., the statute involved and upheld imposed a license tax upon "any person, firm, or corporation desiring to use any of the public roads of a township for carrying on his or its business of hauling mill logs or timber or other heavy material with log wagons, log carts, or other heavy vehicles," and the question of discrimination in the statute as to the persons subject to the tax does not seem to have been raised, the statute applying, generally, to everyone using the highways for hauling heavy materials with heavy vehicles.

Upon the authority of the Holloman Case and DALTON v. GEORGE C. BROWN & Co., it was held in State v. Bullock, — N. C. —, 75 S. E. 942, that a statute imposing a license tax upon any person or corporation carrying on the business of hauling logs, timber, or lumber over the roads of any one of the road districts thereby created, does not violate the constitutional provisions as to uniform taxation, special privileges, and due process of law, the court saying that this statute was in all material respects like the one sustained by a unanimous court in the Holloman Case, and that it met the objections of the justices dissenting in the case of DALTON v. GEORGE C. BROWN & Co.

On the other hand, a city ordinance taxing, for the privilege of using the streets of a city, all owners or keepers within the city of any wagon, automobile, or other vehicle used for the conveyance of persons or goods, or for any other business, as follows, naming a list of vehicles including every vehicle used for business purposes drawn by horses, and, of automobiles, only those used for hire, and omnibuses used in transporting passengers without hire,—has been held to be illegal and void for discrimination, in that it does not include automobiles used by the owners in their own business, and not for hire, while vehicles drawn by horses and used in the same way are taxed. Kellaher v. Portland, 57 Or. 578, 112 Pac. 1076. The court said: "It is an arbitrary classification to say that an automobile using the streets for the same purpose as those vehicles drawn by horses which are taxed shall pay no vehicle tax. Such classification is not made on a reasonable basis, and renders the ordinance void."

A. C. W.

33 Am. Rep. 402; *State v. Moore*, 113 N. C. 698, 22 L.R.A. 472, 18 S. E. 342; *State v. Tyson*, 111 N. C. 687, 16 S. E. 238; *Tiedeman, Pol. Power*, 274; *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 16 L.R.A. (N.S.) 1035, 109 S. W. 293, *State v. Dannenberg*, 151 N. C. 718, 26 L.R.A. (N.S.) 890, 66 S. E. 301; *State v. Walker*, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257; *People v. Ringe*, 125 App. Div. 592, 110 N. Y. Supp. 74, 197 N. Y. 143, 27 L.R.A. (N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; *Belleville v. St. Clair County Turnp. Co.* 234 Ill. 428, 17 L.R.A. (N.S.) 1071, 84 N. E. 1049; *Brooks v. Tripp*, 135 N. C. 159, 47 S. E. 401; *Vansant v. Harlem Stage Co.* 59 Md. 330; *Asheville v. Means*, 29 N. C. (7 Ired. L.) 407; *Gray, Taxing Power*, § 1450, p. 723; *State v. Caspare*, 115 Md. 7, 80 Atl. 606; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 23 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Bonnett v. Vallier*, 136 Wis. 193, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; *Seaboard Air Line R. Co. v. Simon*, 56 Fla. 545, 20 L.R.A. (N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234; *State v. Williams*, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; *Eidge v. Bessemer*, 164 Ala. 599, 26 L.R.A. (N.S.) 394, 51 So. 246; *French v. Birmingham*, 165 Ala. 669, 51 So. 254; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *People ex rel. Wineburgh Advertising Co. v. Murphy*, 129 App. Div. 260, 113 N. Y. Supp. 855, 195 N. Y. 126, 21 L.R.A. (N.S.) 735, 88 N. E. 17; *Chicago v. Pittsburg, C. C. & St. L. R. Co.* 244 Ill. 220, 135 Am. St. Rep. 316, 91 N. E. 422; *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401; *Logan v. Postal Teleg. & Cable Co.* 157 Fed. 570; *Hatcher v. Dallas*, — Tex. Civ. App. —, 133 S. W. 914; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A. (N.S.) 707, 79 N. E. 836; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Wright*, 53 Or. 344, 21 L.R.A. (N.S.) 349, 100 Pac. 296.

And it should be sustained as a valid exercise of the taxing power.

*State v. Powell*, 100 N. C. 525, 6 S. E. 424; *Redmond v. Tarboro*, 106 N. C. 122, 7 L.R.A. 539, 10 S. E. 845; *Kyle v. Fayetteville*, 75 N. C. 445; *Gatlin v. Tarboro*, 78 N. C. 119; *Worth v. Wilmington & W. R. Co.* 89 N. C. 291, 45 Am. Rep. 679; *Worth v. Petersburg R. Co.* 89 N. C. 308; *Puitt v. Gaston County*, 94 N. C. 709, 55 Am. Rep. 638; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Efland v. Southern R. Co.* 146 N. C. 42 L.R.A. (N.S.)

135, 59 S. E. 355; *Calwell Land & Lumber Co. v. Smith*, 151 N. C. 75, 65 S. E. 641; *People ex rel. Phillips v. Raynes*, 136 App. Div. 417, 120 N. Y. Supp. 1053, affirmed in 198 N. Y. 539, 92 N. E. 1097; *State v. Finch*, 78 Minn. 118, 46 L.R.A. 437, 80 N. W. 856; *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401; *Leonard v. Reed*, 46 Colo. 308, 133 Am. St. Rep. 77, 104 Pac. 410; *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912 B, 822; *State v. Garbroski*, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 285, 77 Am. St. Rep. 765, 55 S. W. 627; *Com. v. International Harvester Co.* 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703; *American Tobacco Co. v. Com.* — Ky. —, 115 S. W. 756; *State v. Nashville, C. & St. L. R. Co.* 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912 D, 805; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 809, 7 N. E. 631; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; *Stratton Claimants v. Morris Claimants (Dibrell v. Lanier)* 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Ames v. People*, 25 Colo. 508, 55 Pac. 725; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 20 L.R.A. (N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247; *Seaboard Air Line R. Co. v. Simon*, 56 Fla. 545, 20 L.R.A. (N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234; *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 16 L.R.A. (N.S.) 1035, 109 S. W. 293.

Messrs. J. F. Ray and Johnston & Horn, for appellee:

Chapter 115 § 15, of the Public Local Laws of 1911, is constitutional.

*State v. Powell*, 100 N. C. 526, 6 S. E. 424; *Piedmont R. Co. v. Reidsville (Richmond & D. R. Co. v. Reidsville)* 101 N. C. 404, 2 L.R.A. 284, 2 Inters. Com. Rep. 416, 8 S. E. 124; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Worth v. Wilmington & W. R. Co.* 89 N. C. 295, 45 Am. Rep. 679; *Re Watson*, 157 N. C. 340, 72 S. E. 1049; *Rosenbaum v. Newbern*, 118 N. C. 92, 32 L.R.A. 123, 24 S. E. 1; *State v. Holloman*, 139 N. C. 642, 52 S. E. 408.

The working of the public roads, and the method by which they are worked and kept in repair, properly fall under the police regulation of the state.

Black's Const. Law, chap. 14, p. 291; State v. Wheeler, 141 N. C. 776, 5 L.R.A.(N.S.) 1139, 115 Am. St. Rep. 700, 53 S. E. 358; State v. Moore, 113 N. C. 701, 22 L.R.A. 472, 18 S. E. 342; Stone v. Mississippi, 101 U. S. 814-818, 25 L. ed. 1079, 1080.

Clark, Ch. J., delivered the opinion of the court:

Chapter 115, Pub. Local Laws 1911, entitled, "An Act to Provide a Better System for Working and Keeping up the Public Roads of Macon County," is a substitute for the former system of working the roads in that county. Section 15 of said chapter provides "any lumber company, corporation, person or persons, engaged in the lumber business, and desiring to use any of the public roads of any of the townships of Macon county, for the purpose of carrying on its or their business of hauling, either by itself or themselves, or by hiring or contracting with other persons, mill logs, lumber, or other heavy material with log wagons, logs carts, or other heavy vehicles, shall pay a license or privilege tax of two (2) cents per mile on each 1,000 feet of mill logs, lumber, or other heavy material so hauled." Then this section provides that such corporations, firms, or persons shall make a monthly report to the road trustees of the amount of feet hauled each month, and a penalty of \$10 per day for each day they fail to make report, etc. This action was begun before a justice of the peace for accumulated penalties aggregating \$50 for failure to make the monthly reports required by the statute. On appeal to the superior court by the defendant from the judgment of \$50 imposed by the justice, the defendant filed a written demurrer alleging that the statute was unconstitutional because in violation of the 14th Amendment and in violation of Const. (N. C.) art. 5, § 3, which requires taxation by uniform rule of all property, and also because in violation of article 1, § 7, of the state Constitution, which prohibits special privileges, and also in violation of article 1, § 17, which prohibits the deprivation of life, liberty, or property except by the law of the land. The demurrer was overruled. The only point actually presented is as to the power of the legislature to require reports by lumber companies of the quantity of lumber hauled by them each month over the roads of Macon county.

The statute expressly provides this penalty for failure to perform that duty. The 42 L.R.A.(N.S.)

failure to pay is made a misdemeanor subject to a fine of \$50, and the civil action for failure to make the report is expressed to be in addition to the fine for failure to pay. There can be no question as to the right of the legislature to require such report. The state is certainly sovereign as to the regulation of its dirt roads. State v. Sharp, 125 N. C. 632, 74 Am. St. Rep. 663, 34 S. E. 264; State v. Wheeler, 141 N. C. 776, 5 L.R.A.(N.S.) 1139, 115 Am. St. Rep. 700, 53 S. E. 358. This would dispose of this appeal. But the question was debated before us upon the broader proposition whether the act was unconstitutional by reason of the tax being a discrimination, and therefore in violation of the constitutional provisions referred to in the demurrer.

It is a matter of common knowledge that lumber companies and others engaged in lumber business do great injury to the public roads. The legislature deemed it unjust to make the owners of farm land and free labor pay road tax and work the public roads, and then to allow lumber companies and others hauling lumber to cut them to pieces without any remuneration or any legal method provided to make them bear an adequate proportion of the burdens. It does not appear upon the face of the act, which is all that is before us upon this demurrer, that there is any other business carried on in that community which would tend to cut up the road as the hauling of lumber is calculated to do. But even if this did appear, the legislature can classify vocations and lay a tax of a different amount upon the different occupations. The only requirement is that the tax shall be uniform upon all in each classification. In State v. Powell, 100 N. C. 526, 6 S. E. 424, the town of Morganton was authorized to levy privilege taxes of different sums on general occupations, including livery stables, selling sewing machines, etc., and fixing a penalty for carrying on each business without paying the license. This court held that "a tax is uniform which is the same upon all persons in the same class," and that it is in the discretion of the taxing power to place different rates of taxation on the different classes, citing State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663, and Puitt v. Gaston County, 94 N. C. 709, 55 Am. Rep. 638. Smith, Ch. J., pointed out that the error in opposing the validity of the taxation consisted "in regarding the tax as imposed on property in which both uniformity and the ad valorem principle must be observed. This is not a property tax, but a tax upon an occupation or vocation, and is not less so because the appurtenances of a livery stable necessary in conducting the business may

be horses, carriages, and other property. Indeed, these articles, though so used, are still subject to the ad valorem assessment as property. As other trades, purely personal, without regard to the magnitude of the business carried on, may be subjected to a tax of a fixed sum, we see no reason why those which require the use of property may not be." On turnpike roads which are kept up by private enterprise, there is one rate for lighter vehicles and a heavier rate for heavier vehicles. There is no reason why the legislature cannot authorize the county to lay a rate of 2 cents per thousand feet for the use of roads in hauling lumber over them, and content itself with exacting no tax upon other conveyances which do less damage, and for which the legislative judgment is that the regular road tax was a sufficient return.

In *Piedmont R. Co. v. Reidsville* (Richmond & D. R. Co. v. Reidsville) 101 N. C. 404, 2 L.R.A. 284, 2 Inters. Com. Rep. 416, 8 S. E. 124, the court sustained the validity of an ordinance of the town which levied a \$50 tax on every railroad running through the town, saying that it was not repugnant to our own Constitution nor to the Constitution of the United States. In *Worth v. Wilmington & W. R. Co.* 89 N. C. 295, 45 Am. Rep. 679, Smith, Ch. J., said: "The 'uniform rule' to be observed in the exercise of the taxing power seems to be so far applicable to the taxes imposed on 'trades, professions, franchises, and incomes' as to require that no discriminating tax be imposed upon persons pursuing the same vocation, while varying amounts may be assessed upon vocations or employments of different kinds." It was further added that this principle had been sustained by Mr. Justice Miller in *State Railroad Tax Cases*, 92 U. S. 612, 23 L. ed. 663, which held that it was sufficient "that the rule as to innkeepers be uniform as to all innkeepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies."

In *Rosenbaum v. Newbern*, 118 N. C. 92, 32 L.R.A. 123, 24 S. E. 2, Avery, J., says: "The law of uniformity does not prohibit the classification by the municipality of dealers in a particular kind of merchandise separately from those whose business it is to sell other articles falling within the same generic terms." To same effect, *Schaul v. Charlotte*, 118 N. C. 733, 24 S. E. 526. In *Lacy v. Armour Packing Co.* 134 N. C. 572, 47 S. E. 54, the subject is fully discussed, and it was held to be well settled that "a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed." It has been held that the tax may be different upon a dealer

in whisky by retail and a dealer in the same article by wholesale, if uniform as to each class (*Gatlin v. Tarboro*, 78 N. C. 122); on tobacco buyers as a specific class (*State v. Irvin*, 126 N. C. 989, 35 S. E. 430), on hotel keepers as a class graduated in amount by the gross receipts, and exempting those whose yearly receipts are less than \$1,000 (*Cobb v. Durham County*, 122 N. C. 307, 30 S. E. 338); on the total amount of purchases by a merchant in or out of the city, except purchases of farm products from the producer (*State v. French*, 109 N. C. 722, 26 Am. St. Rep. 590, 14 S. E. 383); in cities and towns according to population (*State v. Green*, 126 N. C. 1032, 35 S. E. 462; *State v. Carter*, 129 N. C. 560, 40 S. E. 11). In *State v. Stevenson*, 109 N. C. 734, 26 Am. St. Rep. 595, 14 S. E. 387, it is said: "It is within the legislative power to define the different classes and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at a different rate from others in the same occupation as classified by legislative enactment." This is stated as a universal rule. 1 *Cooley, Taxn.* 3d ed. p. 260." The court further said in reference to the 14th Amendment: "It has been repeatedly decided by the Supreme Court of the United States that this section of the Constitution does not forbid the classification of property or persons for the purposes of taxation, but merely compels the equal application of the law to all members of the same class, when the classification is based upon reasonable ground, and not an arbitrary selection,"—citing numerous cases. The court also said: "The legislature is sole judge of what subjects it shall select for taxation (other than a property tax, which must be uniform and ad valorem), and the exercise of its discretion is not subject to the approval of the judicial department of the state. A very full discussion of the whole matter, concluding as above, will be found in *State v. Hammond Packing Co.* 110 La. 180, 98 Am. St. Rep. 459, 34 So. 368." *Lacy v. Armour Packing Co.* 134 N. C. 567, 47 S. E. 53, is cited, and the above doctrine reiterated by Hoke, J., in *Caldwell Land & Lumber Co. v. Smith*, 151 N. C. 75, 65 S. E. 644. In *State v. Holloman*, 139 N. C. 642, 52 S. E. 408, the court sustained a very similar statute to this, except that, instead of the tax being levied in proportion to the quantity of lumber hauled, it laid a flat rate of an annual license tax for each cart or vehicle used for hauling lumber, without reference to the quantity in each load or the number of loads made. The court said (139 N. C. 646): "This statute deprives no citizen of any right to use the highway. It does not restrain trade, nor is it op-

pressive. Heavily loaded vehicles cut up and injure the public road, and a reasonable license tax, the proceeds of which are appropriated to repairing the damage thus produced, is exceedingly equitable. The method of providing for working and keeping in repair the public roads is a matter solely for the legislative department." The tax of 2 cents per mile per thousand feet is reasonable, and is not discriminative simply because it does not include all vehicles. As is said in *State v. Holloman*, supra: "This license tax is simply a mode of regulating the use of the public roads and requiring that those desirous of using them for extraordinary purposes, as hauling heavy lumber and logs over the roads in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway, and paying a license tax for the privilege." The report required to be filed monthly of the quantity of lumber hauled is no hardship on defendants. It is only a method by which the road trustees can ascertain accurately the quantity of lumber hauled by each person engaged in the lumber business, and proportion the tax levied accordingly. The 14th Amendment does not require equality in levying taxation by the state, nor does it interfere with the police power. "How a state shall levy its taxation is a matter solely for its legislature, subject to such restrictions as the state Constitution throws around legislative action. If, on the other hand, working the roads by labor is a police regulation or a public duty, certainly it is not a matter of Federal supervision." *State v. Wheeler*, 141 N. C. 776, 5 L.R.A. (N.S.) 1139, 115 Am. St. Rep. 700, 53 S. E. 358; *Brannon*, 14th Amend. 149, 298, 323, and cases there cited.

The other two sections of the state Constitution prohibiting special privileges, and prohibiting the deprivation of life, liberty, and property except by the law of the land, which are referred to in the demurrer, have no application to this case. The legislature was within its legitimate powers in prescribing regulations for the maintenance of the public roads of Macon county, and in laying a tax upon the use of heavy vehicles for the purpose of raising a fund to repair the damages usually inflicted on the roads by such traffic.

Affirmed.

**Brown, J., dissenting:**

I would be very glad to sustain the act of the general assembly in question if I could reconcile it with the principles of taxation embodied in our Constitution. I recognize the inherent justice and value of 42 L.R.A. (N.S.)

such legislation, for it is an admitted fact that lumber companies do use the public roads to a far greater extent than private citizens. I agreed to the decision in *State v. Holloman*, 139 N. C. 642, 52 S. E. 408, because the statute was framed upon a very different principle from the one under consideration. There is a wide difference between this law and the Hertford county law. The latter applies to all persons, firms, or corporations using the public roads of the township; whereas the Macon county law is confined in its operation to any lumber company, corporation, or persons engaged in the lumber business, and levies a tax of 2 cents per thousand feet upon the lumber belonging to such users of the public road. This tax cannot be sustained as an exercise of police power. It does not in any way tend to promote health, peace, morals, and good order of the people. *Cooley*, Const. Lim. 572. It is not a license tax or regulation tax in any sense. *Cooley*, Taxn. 408. It is a contract pure and simple for keeping up the public roads, levied solely upon the property of those who happen to be engaged in the lumber business. It does not apply to the private individual who may haul hundreds of thousands of feet of lumber over the same road for his individual benefit. Nor does it apply to those engaged in hauling as a business brick, clay, coal, or other heavy material over the same road. The tax cannot be called uniform, because it does not apply to all persons using the public roads, but to a particular class who happen to be engaged in a certain kind of business. I admit that there is certain discretion given to the lawmaking power in regard to legislation affecting the public roads, but it is not an uncontrollable discretion, and, when the tax is confined to one particular class of persons, and not extended to all alike who use the same road, it cannot be called a regulation, but it is a revenue measure, pure and simple, and, inasmuch as it is not uniform and does not bear alike upon all who use the public roads, it violates the uniformity of taxation, which is one of the essential features of our Constitution. *Gray*, Taxing Power, § 1450; *State v. Moore*, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342.

It is said, however, that this action for the penalty may be sustained because the legislature has a right to make the defendants report monthly to the road trustees the number of feet of lumber, logs, and other heavy material hauled during the preceding month, in order that the tax of two cents per thousand feet may be collected.

It is apparent from reading the statute that this report is simply a part of the machinery for collecting taxes, and, inasmuch

as the statute must be taken as a whole, if the tax is void for lack of uniformity, then the whole statute falls to the ground.

Allen, J., concurs in this opinion.

Petition for rehearing denied.

# PENNSYLVANIA SUPREME COURT.

CHARLES ENEU JOHNSON COMPANY

v.

CITY OF PHILADELPHIA, Appt.

(236 Pa. 510, 84 Atl. 1014.)

## Municipal corporation — refuse in street — liability for fire.

1. A municipal corporation which requires a street, upon which a contractor is making repairs, to be kept open for public travel, is liable for permitting inflammable material to be deposited therein in such close proximity to the property of an abutting owner as to amount to a wilful or wanton or negligent disregard of the rights of the abutting owner, and to remain there for an unreasonable time, which becomes ignited and sets fire to and destroys the building of such owner.

## Same — duty of abutting owner.

2. One owning property abutting on a public street who knows that inflammable material has been deposited in the street in such manner as to endanger his property, must make all reasonable efforts to protect his property from the impending danger.

## Evidence — judgment in other action.

3. The record of an action by an abutting property owner against a street contractor for destruction of his building by a fire started in the street is not admissible in evidence in an action by the property owner

to hold the municipal corporation responsible for the loss.

(May 22, 1912.)

**A** PPEAL by defendant from a judgment of the Court of Common Pleas, No. 5, for Philadelphia County in plaintiff's favor in an action brought to recover damages for the burning of his building. Reversed.

Plaintiff owned a building in the city of Philadelphia on Ritner street, which was being repaired by Edwin H. Vare, a city contractor. There was evidence that large quantities of inflammable material which had been deposited in the street were permitted to lie exposed for several weeks, when it caught fire from a lighted match or cigar and the fire was communicated to plaintiff's building. He brought suit both against the city and the contractor, and the court refused to admit in evidence the record of the contractor's suit.

The following points were presented by defendant:

"(4) The uncontradicted evidence shows that whatever inflammable material was placed in the street was placed there by an independent contractor with the city. If you believe this to be the fact, the city was not liable for the consequences of that act, and your verdict should be for the defendant."

Answer: "Refused."

"(2) If you find that the fire did originate in the bed of Ritner street, and that such fire was caused by the throwing upon ignitable material there of a lighted cigar or lighted cigarette by a third party, the proximate cause of the injury to the plaintiff was the throwing of the lighted cigar or cigarette, an act for which the defendant is not liable and your verdict must be for the defendant." Answer: "Refused."

**Note.** — The general question who is an independent contractor is treated in the notes to *Richmond v. Sitterding*, 65 L.R.A. 445, and *Knically v. West Virginia Midland R. Co.* 17 L.R.A.(N.S.) 371. As to liability of municipality for injuries inflicted by the negligence of employees engaged in the repair or construction of highways, see notes to *Barree v. Cape Girardeau*, 6 L.R.A.(N.S.) 1090, and *Kippes v. Louisville*, 30 L.R.A.(N.S.) 1161. In this connection, see also note to *Alberts v. Muskegon*, 6 L.R.A.(N.S.) 1094, as to liability of municipality for fire set by sparks from a steam roller engaged in repairing street.

The general subject of municipal liability for defects or obstructions in streets is considered in the note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513.

The general question whether a judgment

in favor of an immediate actor in an alleged wrong precludes an action against one whose wrong, if any, was derivative or constructive, is fully discussed in the opinion to *Portland Gold Min. Co. v. Stratton's Independence*, 16 L.R.A.(N.S.) 677, and in the annotation referred to in the note appended to that case. See also supplementary note to *Southern R. Co. v. Harbin*, 30 L.R.A.(N.S.) 404, as to the effect of a verdict for servant in an action against master and servant for servant's negligence or misfeasance. Apparently, however, the court in *CHARLES ENEU JOHNSON Co. v. PHILADELPHIA* did not regard the liability of the municipality as derivative merely, but seems to have assumed that it was guilty of negligence in not removing the danger independently of the negligence of street contractor in creating it.



And the following by plaintiff:

"(8) If you find defendant's inspector inspected the grading of Ritner street in proximity to this property, and that he knew, or ought to have known, that the street was being filled with large quantities of combustible materials, it is evidence of notice to the defendant of the condition of said street, and of the character of materials placed therein." Answer: "That I affirm."

Further facts appear in the opinion.

Messrs. Joseph P. McCullen, James J. Breen, and Michael J. Ryan for appellant.

Messrs. Louis F. J. Hepburn and Fred Taylor Pusey, for appellee:

The contract was not an independent contract, which would relieve the employer, the city of Philadelphia, from liability for the manner in which the work was done.

Sadler v. Henlock, 4 El. & Bl. 570, 24 L. J. Q. B. N. S. 138, 1 Jur. N. S. 677, 3 Week. Rep. 181, 3 C. L. R. 760; Allen v. Willard, 57 Pa. 381; First Presby. Congregation v. Smith, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; Sipe v. Pennsylvania R. Co. 222 Pa. 400, 71 Atl. 847; Foehr v. New York Short Line R. Co. 40 Pa. Super. Ct. 7; Stork v. Philadelphia, 199 Pa. 462, 49 Atl. 236; Fox v. Porter, 18 Pa. Co. Ct. 641.

The city is responsible whether the contract was independent or not.

Sanford v. Union Pass. R. Co. 16 Pa. Super. Ct. 393; Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621; Norbeck v. Philadelphia, 224 Pa. 34, 73 Atl. 179, 16 Ann. Cas. 430; Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770; Smith v. St. Joseph, 42 Mo. App. 392; Drake v. Seattle, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231; Birmingham v. McCary, 84 Ala. 469, 4 So. 630; Jefferson v. Chapman, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33; Newman v. New York, 57 Misc. 636, 108 N. Y. Supp. 676; Denver v. Aaron, 6 Colo. App. 232, 40 Pac. 587; Thomp. Neg. p. 604, § 665; First Presby. Congregation v. Smith, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; Berberich v. Ebach, 131 Pa. 165, 18 Atl. 1008; Mahoney Twp. v. Scholly, 84 Pa. 140; Burger v. Philadelphia, 196 Pa. 41, 46 Atl. 262.

The defendant not only had constructive notice of the condition of Ritner street, but it also had actual notice.

Burger v. Philadelphia, 196 Pa. 41, 46 Atl. 262; Norbeck v. Philadelphia, 224 Pa. 34, 73 Atl. 179, 16 Ann. Cas. 430; Koch v. Williamsport, 195 Pa. 488, 46 Atl. 67; Born v. Allegheny & P. Pl. Road Co. 101 Pa. 384; Nicholson v. Philadelphia, 194 Pa. 460, 45 42 L.R.A. (N.S.)

Atl. 375; Trego v. Honeybrook, 160 Pa. 76, 28 Atl. 639; Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621.

The record in Johnson v. Vare was not admissible in evidence.

Baker v. Small, 17 Pa. Super. Ct. 423; Pennebaker v. Parker, 33 Pa. Super. Ct. 458; Dutton v. Lansdowne, 198 Pa. 563, 53 L.R.A. 469, 82 Am. St. Rep. 814, 48 Atl. 494; Mehaffy v. Share, 2 Penr. & W. 361; Wiest v. Electric Traction Co. (Weist v. Philadelphia) 200 Pa. 148, 58 L.R.A. 666, 49 Atl. 891; Rowland v. Philadelphia, 202 Pa. 50, 51 Atl. 589; Goodman v. Coal Twp. 206 Pa. 621, 56 Atl. 65; Brookville v. Arthurs, 130 Pa. 501, 18 Atl. 1076; Chandler's Appeal, 100 Pa. 262; Walker v. Philadelphia, 195 Pa. 168, 78 Am. St. Rep. 801, 45 Atl. 657; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Moser v. Philadelphia, H. & P. R. Co. 233 Pa. 271, 40 L.R.A. (N.S.) 519, 82 Atl. 362; Kelsey v. Murphy, 28 Pa. 78; Pennsylvania R. Co. v. Spicker, 105 Pa. 142; Fearn v. West Jersey Ferry Co. 143 Pa. 122, 13 L.R.A. 366, 22 Atl. 708; Peterson v. Lothrop, 34 Pa. 223; Fifth Mut. Bldg. Soc. v. Holt, 184 Pa. 572, 39 Atl. 293; Giltinan v. Strong, 64 Pa. 242; Sutter v. Kansas City, 138 Mo. App. 105, 119 S. W. 1084; Severin v. Eddy, 52 Ill. 189; Nelson v. Illinois C. R. Co. 98 Miss. 295, 31 L.R.A. (N.S.) 689, 53 So. 619; Staunton Mut. Telegraph Co. v. Buchanan, 108 Va. 810, 62 S. E. 928; Thompson v. Chicago, St. P. & K. C. R. Co. 71 Minn. 89, 73 N. W. 707; Pennsylvania R. Co. v. Spicker, 105 Pa. 142.

Elkin, J., delivered the opinion of the court:

We have concluded that there must be a reversal of the judgment in this case. The case was not tried on a proper theory, and as a result the rights and liabilities of the parties were not carefully defined. The liability or nonliability of an independent contractor is not vital to the question here involved. A municipality is not always relieved from liability for injuries resulting from the work of an independent contractor in repairing its streets. If at the time of the commission of the negligent acts complained of the contractor did not have the exclusive control of the street, with the authority to prohibit the use of it by the public, the city may be liable for failure to perform its duty in exercising proper care in the supervision and control of that street as a public highway. If, as we understand the facts in the present case, the city required the street to be kept open for use by the public while the repairs were being made, the duty rested upon it to maintain the street in a reasonably safe condition for every purpose of a public highway. Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621;

Norbeck v. Philadelphia, 224 Pa. 30, 73 Atl. 179, 16 Ann. Cas. 430.

It is argued for appellant that this rule only applies to travel upon the street and to injuries resulting to travelers thereon. No reason is suggested for thus restricting the rule, and we find no authority for so doing. In many jurisdictions it has been held that a municipality making improvements, or doing work upon its streets, whether by an independent contractor or otherwise, is bound to take notice of the character of the work and the condition of its streets, as affected by the prosecution and performance of such work, in so far at least as such streets may be rendered unsafe and dangerous by the work being done. *Beatrice v. Reid*, 41 Neb. 214, 59 N. W. 770; *Smith v. St. Joseph*, 42 Mo. App. 392; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136, 20 N. E. 33. If the city is bound to take notice of dangers occasioned by the repairs being made to the street, while it is being used by the public, it is its duty to exercise reasonable care in removing those dangers so as to avoid such injurious consequences as should have been reasonably anticipated. The evidence was not sufficient to sustain the charge that the city had negligently caused the inflammable materials to be placed on the street, and, if this were the only ground upon which the right to recover depended, we would be compelled to say that no case had been made out. But it is also charged that the city had "permitted said inflammable rubbish to be and remain in and upon said public highway in large quantities in close proximity to plaintiff's establishment, unprotected and unguarded, for a long space of time prior to said April 21, 1908, to wit, for several weeks prior thereto," and by reason of permitting such inflammable rubbish to be accumulated upon the public highway a fire broke out and was communicated to the establishment of plaintiff, an abutting owner. If the city is liable at all in this case, it is not upon the ground that it caused the inflammable rubbish to be placed in the street, but because it failed to remove what amounted to a dangerous menace to the property of plaintiff, that it should have anticipated the consequences of a fire breaking out in the inflammable rubbish, and that failure to anticipate these dangers and remove them constitutes a negligent disregard of the rights of the complaining abutting owner. The vital question is, What duty did the city owe to the abutting property owner under the facts of this case? This question was entirely disregarded at the trial. for the reason, no doubt, that the city defended upon the ground that the

negligence charged was that of an independent contractor, for which it was not liable, while the appellee, on the other hand, tried the case upon the theory that the duty of the city to an abutting property owner was substantially the same as to a traveler upon the street. Both theories are wrong. The rights of an abutting property owner, on one hand, and the duty of the city, on the other, were not defined, and the case was not submitted to the jury in such manner as to afford an opportunity for intelligent consideration and correct conclusion upon these questions. What duty did the city owe the complaining abutting owner? In *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392, it was said: "A city has no more power over its streets than a private individual has over his own land, and it cannot under the plea of public convenience be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages without being responsible itself. The same law that protects the right of property of one private individual against invasion by other individuals must protect it from similar aggression on the part of municipal corporations."

Upon this question we quote with approval the following language taken from an opinion of the supreme court of New Hampshire, in *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175: "Indeed, for all purposes of construction and repair, towns stand in a position which differs in no substantial respect from that of an owner of the fee; their control of the premises is so far absolute and exclusive. This, as it seems to me, obviously imposes upon them a duty towards the owner of adjoining land, which, so far as regards the consequences of their acts and omissions in building and repairing, is not to be distinguished from the duty of an ordinary adjoining proprietor of land with respect to the premises of his neighbor. The purpose for which the land has been taken is to build and maintain upon it a road for the use and accommodation of the public. To build and maintain such road in a suitable and proper manner must, of course, always be held a reasonable use of the land, because this is the use to which it has been condemned. . . . But when it comes to a matter of an unsuitable and improper construction, or of a wanton or negligent disregard of the rights of the landowner in maintaining the highway, I see no reason why the maxim, *Sic utere tuo ut alienum non lædas*, should not apply. To hold otherwise would, as it seems to me, be not only gross injustice, but a palpable violation of legal principles that are quite fundamental and elementary."

These cases are authority for the rule that the duty of a city in exercising control and supervision over its streets to an abutting property owner is analogous to the duty which an individual landowner owes to the premises of his neighbor. This view also finds support in other jurisdictions where the question has been raised, and we find nothing in our own cases to the contrary. This rule seems to be sound, and we see no reason why it should not be followed. Under this rule, the city in the case at bar would only be liable for damages to an abutting owner if the facts warranted the inference that it had permitted large quantities of inflammable materials to be placed in the street in such close proximity to the property of appellee as to amount to a wilful or wanton or negligent disregard of the rights of such abutting owner. The city would not be liable to the adjoining property owner for injuries caused by the ordinary use of the street, or for damages indirectly resulting from the ordinary and usual accumulation of waste materials upon the street. To permit a recovery in this case, it must be shown that the accumulation of inflammable materials was unusual, extraordinary, and dangerous, and that the city should have anticipated the danger to the property of appellee as a consequence of a fire breaking out in the rubbish deposited so close to its property. While the city had certain duties to perform, appellee company also had duties which could not be disregarded. It was its duty to make all reasonable efforts to protect its own property, to guard against fire, and the greater the danger, the more imperative the duty; and, if it failed to perform its duties, it would be guilty of contributory negligence and there could be no recovery. All of these legal positions depend upon the facts, which, if sufficient, must go to the jury. We have indicated at some length the legal principles which should govern at the trial, because we find no precedent in our cases for the precise question involved in this controversy.

The learned court below was clearly right in refusing to admit in evidence the record of the suit against the contractor. When the record was offered no judgment had been entered, and the suit was still pending. But, aside from this, that was an independent action, and it in no way affected the case at bar. The plaintiff was clearly within its legal rights in instituting two suits on the theory that one party or the other, or perhaps both, had committed the negligent acts about which complaint is made. In such cases it sometimes happens that two separate judgments may be recovered, but there can be only one satisfaction. *Seither v. Philadelphia Traction Co.* 125 Pa. 42 L.R.A. (N.S.)

397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338, *Thorp v. Boudwin*, 228 Pa. 165, 77 Atl. 421. The fact that the plaintiff failed in its suit against the contractor will not defeat this action, if the charges of negligence against the city are sustained by sufficient evidence.

One of the assignments of error raises the question of proximate cause. We cannot agree that the city is relieved from all liability unless it be shown that some of its officers, or employees, started the fire, because this is not the negligence charged. We do agree that the question of proximate cause as it relates to the charges of negligence in this case was not defined, or explained to the jury, so as to adequately instruct them upon the legal rights and duties of the parties.

Judgment reversed, and a venire facias de novo awarded.

#### MARYLAND COURT OF APPEALS.

HARRY STANNARD, Appt.,

v.

WILCOX & GIBBS SEWING MACHINE COMPANY et al.

(— Md. —, 84 Atl. 335.)

**Libel — attempt to collect debt — notifying debtor's employer of nonpayment — liability.**

Writing a nonresident employer of the resident manager of a business, for the purpose of assisting in the collection of a debt, that the manager's wife had bought property for her private use for which she and the manager refused to pay according to contract, and that a civil suit would be

**Note. — Libel and slander; imputing to one not in business nonpayment of debts or want of credit.**

As to privilege of private report on financial standing, see the note to *Richardson v. Gunby*, post, 520. And see the other notes therein referred to.

As to giving a person an indefinite rating or refusing to give any rating in a mercantile agency as a libel, see the note in 25 L.R.A. (N.S.) 1021.

As to blacklisting dealers, see the notes in 49 L.R.A. 612, and 8 L.R.A. (N.S.) 783.

Like *STANNARD v. WILCOX & G. SEWING MACH. CO.* some of the early English courts made the question whether an imputation of want of credit was actionable, depend upon whether the plaintiff required credit in his vocation or business.

Thus, in *Anonymous*, 2 Lofft, 322, the court seems to have regarded the question whether an imputation of financial irresponsibility or insolvency was actionable as depending upon whether the person spoken of was in trade. It was held that a statement that

brought against the manager unless payment was made, is not actionable *per se*.

(May 10, 1912.)

**A**PPEAL by plaintiff from an order of the Court of Common Pleas of Baltimore City sustaining a demurrer to the declaration in an action brought to recover damages for an alleged libel. Affirmed.

The facts are stated in the opinion.

a wool comber, who must of necessity buy wool to work with, was not worth a penny and would run away, was actionable though the court said *obiter* that such a remark with respect to a farmer would not be actionable, since a farmer was not in trade.

However, in *Dobson v. Thornistone*, 3 Mod. 112, it was held that to say of a husbandman that he owed more than he was worth, had run away, and was broke, was actionable. It was unsuccessfully contended in this case that, since a farmer did not get his living by buying and selling, the words were not actionable (citing *Phillips and Phillips, Style*, 420), and that to warrant a recovery it must not only appear that the plaintiff has a trade (citing *Hawkins v. Cutts, Hutton*, 49), but also that he gets his living thereby (citing *Emerson v. Fairfax*, 1 Sid. 299).

In *Chapman v. Lamphire*, 3 Mod. 155, the judges were divided on the question whether it was actionable to say of a carpenter that he was broke and run away, the apparent point of difference being as to whether a carpenter built upon credit so as to support an action.

Calling a tradesman a rogue, and stating that he compounded his debts at five shillings in the pound, was held in *Stanton v. Smith*, 2 Ld. Raym. 1480, to be actionable although there was no colloquium of his trade (disapproving *Marshall v. Allen, Noy*, 77).

The publication of a false statement that one has in a particular instance refused to pay a claim against him until its validity has been adjudicated, is not libelous *per se* when unconnected with any business relations. *Pascone v. Morning Union Co.* 79 Conn. 523, 65 Atl. 972.

In *Barnes v. Trundy*, 31 Me. 321, a complaint in an action for slander by saying that the plaintiff had no character, and no property, and that his debts were uncollectable, was held insufficient for want of an averment that the words were spoken of the plaintiff as a trader.

*Windsor v. Oliver*, 41 Ga. 538, seems to stand for the rule that a statement that a firm has sold out, and is not worth fifty cents on the dollar, is slanderous *per se*, if the firm was in business when the words were spoken, but that if at the time, the firm had sold out, and was not in trade, there could be no recovery without proof of special damage.

It is not libelous to publish of a debtor 42 L.R.A. (N.S.)

**M. Henry H. Dinneen**, for appellant:  
The communication to plaintiff's employer was libelous.

*Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Kilgour v. Evening Star Newspaper Co.* 98 Md. 24, 53 Atl. 716; *Wilson v. Cottman*, 65 Md. 197, 3 Atl. 890; *Sillars v. Collier*, 151 Mass. 50, 6 L.R.A. 680, 23 N. E. 723; *Fitzgerald v. Redfield*, 51 Barb. 491; *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105; *Frolich v. McKiernan*, 84

that he pleaded the statute of limitations in an action on the claim, where the statute defines libel to be the malicious defamation of a person made public by writing, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; and the publication is not rendered libelous by characterizing such conduct on his part as dishonest. *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518. Probably in this case the court intended to hold only that such a communication is not libelous *per se*; for on a second appeal in an action for the same wrong, to recover "for an alleged libel . . . and for loss of time and injury to reputation and means of support," the plaintiff was held entitled to recover damages, it appearing that he was discharged from his position as a result of the communication. *Hollenbeck v. Ristine*, 114 Iowa, 358, 86 N. W. 377.

But it has been held that a statement to an employer that his employee has removed from premises, leaving rent due, which cannot be collected, is not actionable *per se*; and the subsequent discharge of the servant is too remote to constitute an item of special damage which will support the action. *Speake v. Hughes* [1904] 1 K. B. 138, 73 L. J. K. B. N. S. 172, 89 L. T. N. S. 576.

Words spoken of the holder of shares in the joint stock of a boat, imputing to him a large indebtedness and a disinclination to pay, are actionable if special damage be alleged; but the averment of special damage is not sufficient to support the action, without the averment of a colloquium respecting the plaintiff as a shareholder in the boat, and that it was a business requiring credit. *Turner v. Foxall*, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255.

A statement that a tenant has made no arrangement for the payment of his rent is not libelous *per se*, and no recovery can be had thereon under allegations of special damage, where the complaint does not show how the words, harmless in themselves, produced the alleged damage. *Bush v. McMann*, 12 Colo. App. 504, 55 Pac. 956.

An unprivileged newspaper article stating that one has transferred his property to avoid paying a note is libelous *per se*. *Todd v. Every Evening Printing Co.* 6 Penn. (Del.) 233, 66 Atl. 97. L. A. W.

Cal. 177, 24 Pac. 114; Johnson v. Shields, 25 N. J. L. 116; Barron v. Smith, 19 S. D. 50, 101 N. W. 1105; Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874; McDonald v. Press Pub. Co. 55 Fed. 264; Robertson v. Wyld, 7 L. J. C. P. N. S. 196; McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60; Fowles v. Bowen, 30 N. Y. 20; Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773; Macauley v. Elrod, 16 Ky. L. Rep. 291, 27 S. W. 867; Carpenter v. Hammond, 1 N. Y. S. R. 551; Rammell v. Otis, 60 Mo. 365; Over v. Schiffing, 102 Ind. 191, 26 N. E. 91; Ohio & M. R. Co. v. Press Pub. Co. 48 Fed. 206; Johnson v. Shields, 25 N. J. L. 116; Carpenter v. Dennis, 3 Sandf. 305; Jones v. Greeley, 25 Fla. 629, 6 So. 448; Arrow S. S. Co. v. Bennett, 73 Hun, 81, 25 N. Y. Supp. 1029; Goldsborough v. Orem, 103 Md. 671, 64 Atl. 36; Brinsfield v. Howeth, 107 Md. 278, 24 L.R.A.(N.S.) 583, 68 Atl. 566, 110 Md. 520, 73 Atl. 289; De Witt v. Scarlett, 113 Md. 47, 77 Atl. 271; Weeks v. News Pub. Co. — Md. —, 83 Atl. 162; Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869; Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744; Mertens v. Bee Pub. Co. 5 Neb. (Unof.) 592, 99 N. W. 847; Muetze v. Tuteur, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123; Marshall v. Addison, 4 Harr. & McH. 537; Nelson v. Borchonius, 52 Ill. 236; Sanders v. Hall, 22 Tex. Civ. App. 282, 55 S. W. 594.

Mr. Charles McH. Howard, for appellees:

The letter written by defendants to plaintiff's employer was not actionable *per se*.

Newbold v. J. M. Bradstreet & Son, 57 Md. 38, 40 Am. Rep. 426; Reg. v. Coghlan, 4 Fost. & F. 316; Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; McDermott v. Union Credit Co. 76 Minn. 84, 78 N. W. 967, 79 N. W. 673; Windisch-Muhlhauser Brewing Co. v. Bacon, 21 Ky. L. Rep. 928, 53 S. W. 520, 23 Ky. L. Rep. 977, 64 S. W. 629; Fry v. McCord Bros. 95 Tenn. 678, 33 S. W. 568; Muetze v. Tuteur, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123; Sanders v. Edmonson, — Tex. Civ. App. —, 56 S. W. 611.

Stockbridge, J., delivered the opinion of the court:

In the year 1911 Harry Stannard was the local manager in the city of Baltimore of the Holmes Electric Protective Company, a corporation having its main office in the city of New York. In July of that year that company received a letter, over the 42 L.R.A.(N.S.)

signature of "Wilcox & Gibbs S. M. Co., R. G. Best, Mgr.," which read as follows:

Gentlemen:

On July 15, 1910, Mrs. H. S. Stannard, wife of your local manager here, purchased from us, on the instalment plan, a sewing machine valued at \$60. After paying four months' instalments, they declined to make any further payments, and requested us to remove the machine; this after they had had some six months. We, of course, refused to accept the return of the machine, as we do not do business that way, and have made several requests of Mr. Stannard to pay what was owing. As long ago as last December he promised the writer he would do this, since which time, however, we have not received a penny from him, and we are writing him to-day that unless all back payments are in this office within one week from to-day the matter will be placed in the hands of our attorneys for settlement. If this is of any interest to you, and you do not desire to see one of your managers brought up in a civil suit for goods purchased on the instalment plan, we would suggest that you communicate with him to the effect that he take some steps towards meeting a just obligation incurred by his wife, and which he is legally responsible for. Thanking you in advance for whatever you may determine to do in the matter, we are,

Yours truly,

Wilcox & Gibbs S. M. Co.,  
R. G. Best, Mgr.

Not unnaturally, Mr. Stannard, upon being made aware of the writing of this letter, felt aggrieved, and accordingly in September instituted an action against the Wilcox & Gibbs Sewing Machine Company and Royal G. Best to recover damages for an alleged libel. The defendants demurred, the demurrer was sustained, and a judgment of *non pros*. entered, in default of a sufficient declaration, and judgment for defendant for costs, and the case now comes to this court in that shape for review.

The narr. makes no claim of any special damage caused the plaintiff by reason of the writing and sending of the foregoing letter, but insists that it is actionable *per se*. It is perfectly apparent that the purpose of this letter was simply to aid the defendant in the collection of a debt claimed to be due and owing it; that the writer was not prompted by any desire to make an application of the Golden Rule, nor was he so far interested in the employer of the plaintiff that there was any altruistic motive behind the sending of the communication. But, however reprehensible or disingenu-

ous the communication may have been, this court is only concerned in the narrow, legal proposition: Is the letter, dated July 26, 1911, and written by one of the defendants in the name of both, libelous *per se*, so as to make either or both of the defendants liable in damages to the plaintiff?

In the case of *Weeks v. News Pub. Co.* — Md. —, 83 Atl. 162, decided in January of the present year, all of the earlier decisions in this state were carefully reviewed, and the general principle stated as to what constituted a libelous publication, as follows: "A false and malicious printed or written publication, which imputes conduct or qualities tending to disparage or degrade the plaintiff, or expose him to contempt, ridicule, or public hatred, or prejudice his private character or credit, are libelous *per se*,"—adopting the language of Judge Burke in *Goldsborough v. Orem*, 103 Md. 681, 64 Atl. 40. Substantially the same rule has been laid down in a large number of cases in various states of the country. It is practically conceded that the letter which forms the basis of the action in this case would not have afforded a sufficient ground of action for the plaintiff merely as an individual; but what is claimed for it is that the alleged libel was one tending to affect the plaintiff in his business, and that for that reason this action may be maintained.

The appellant has cited a large number of authorities, with regard to a number of which a mere statement will show their inapplicability. Thus, in *Arrow S. S. Co. v. Bennett*, 73 Hun, 81, 25 N. Y. Supp. 1029, special damage was alleged in the declaration, and because of that fact the demurrer was overruled. In the case of *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869, it was alleged that, by reason of a letter which the defendant had written, the plaintiff had lost a certain valuable contract, which loss was set up as matter of special damage, and by reason of that fact a recovery was permitted. In the case of *Fowles v. Bowen*, 30 N. Y. 20, evidence was adduced to show special damage, and therefore the action was held maintainable. In *Hardy v. Williamson*, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874, recovery was had for a publication charging the engineers of a contracting company with an overvaluation of property, but the recovery was allowed largely on account of the phraseology of the Georgia statute. And in *Baron v. Smith*, 19 S. D. 50, 101 N. W. 1106, a recovery was had because of the express provision of the South Dakota statute.

Numerous cases were cited where suit had been brought against commercial agencies. In *Windisch-Muhlhauser Brewing Co.* 42 L.R.A. (N.S.)

*v. Bacon*, 21 Ky. L. Rep. 928, 53 S. W. 520, a false report that the plaintiff in that case had failed to pay a debt was held not to be actionable *per se*, but any special damage which could be shown as the result would afford a ground for recovery. In *McDermott v. Union Credit Co.* 76 Minn. 86, 78 N. W. 967, 79 N. W. 673, a publication that a certain man was slow pay was held, in an action for libel, to afford a good ground for such an action; but upon a reargument in that case the court reversed its original holding and held it not liable. In two Texas cases, *Sanders v. Hall*, 22 Tex. Civ. App. 282, 55 S. W. 594, and *Sanders v. Edmondson*, — Tex. Civ. App. —, 56 S. W. 611, a letter was written in each case to a creditor of the plaintiff, saying substantially that the plaintiff was about to leave the country, that he was unable to pay his debts, and that, if he did leave, the creditor's claim would be worthless; and in each of these cases the letters were held not libelous *per se*, but, if special damage could be shown, that recovery might be had for such publication.

The case of *Johnson v. Shields*, 25 N. J. L. 116, was an action for slander; the language in that case having been spoken of an officer of the company in his official capacity, and charged that he had sold the property of the company and pocketed the money. This was held in effect to charge a crime, and the language was therefore actionable *per se*. So, too, in *Rammell v. Otis*, 60 Mo. 365, in an action of slander containing two counts, the first charged the defendant with having accused the plaintiff of larceny, and the second with keeping false and dishonest books in his profession as a miller, and it was held in that case that in order to support this second count it was necessary to show special damages. Closely akin to this case is that of *Macauley v. Elrod*, 16 Ky. L. Rep. 291, 27 S. W. 867, also a slander case, where the language, "I discharged M. for stealing," was held actionable *per se* because it imputed a crime, but that the words "M. beat B. out of \$1,000 when he worked for B." and "he robbed you, B., out of \$1,000 while he worked for you," were held not to be actionable *per se*, because not imputing a felony, and that therefore special damage must be alleged and shown.

Just what is meant by the expression used in various decisions, "a libel upon a person in his business," will be best gathered from a consideration of some of the cases. In *Homer v. Engelhardt*, 117 Mass. 539, it was said of an individual that he had availed himself of the prohibitory law to defeat an indebtedness for liquor which had been sold to him, and he brought

a suit for the libel; but he failed to recover, because the law gave him the right to interpose such a defense, and therefore it was not libelous to say of him that he had done that which the law permitted him to do. The same rule was followed in *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518. In that case a letter had been written, saying that a certain man had owed for several years for medical services that had been rendered to him, that his attention had been frequently called to such indebtedness to no purpose, that, being sued therefor, and "having no defense, he cowardly slunk behind the statute of limitations," and that such a course was not in accordance with the writer's idea of integrity; but in this case the plaintiff failed to recover, because the statute of limitations was one which the law authorized to be pleaded. Another similar case to this is that of *Donaghue v. Gaffy*, 54 Conn. 257, 7 Atl. 552.

The case of *Jones v. Greeley*, 25 Fla. 638, 6 So. 448, probably goes as far as any case in the direction of sustaining such an action, and much farther than most of the cases. In that case the publication concerning a man who was a banker and money lender, that he was "pretending to be a philanthropist and a benefactor, . . . when in fact he has been a grasping and penurious gradgrind, whose greed has inflicted untold sorrow upon the widow and orphan," was held libelous of him as a money lender, though doubt was expressed whether it was so as an individual, a distinction that is somewhat difficult to appreciate or follow.

The cases which have sustained an action for libel written or published of a man in his business may be fairly illustrated by *Obaugh v. Finn*, 4 Ark. 110, 37 Am. Dec. 773, in which case a publication appeared in the newspaper, cautioning the public against Finn, stating him to be a plasterer by trade, who had absconded without paying any of his numerous debts, and of swindling Obaugh out of \$55, advanced on a promise to do certain work; by *Carpenter v. Hammond*, 1 N. Y. S. R. 551, where the defendant issued a circular charging the plaintiff with being in debt, with improper business methods and unsound and visionary business ideas, with spending trust money, with doctoring accounts, with being a treacherous wretch, "having a shallow head and unprincipled heart," and with secretizing defendant's assets; and by the case of *Fitzgerald v. Redfield*, 51 Barb. 491, where it was said of a man, who was a mason by trade, "He was no mechanic; that he could not make a good wall or do a good job of plastering; that he was no workman; and

that he was a botch." In each of these cases the words spoken or written had a direct relation to the business which the party aggrieved was carrying on.

The test by which all such cases are to be passed upon, and which has been adopted with approval in this state, is that laid down in *Lumby v. Allday*, 1 Crompt. & J. 301, 1 Tyrw. 217, 9 L. J. Exch. 62, and adhered to in *Miller v. David*, L. R. 9 C. P. 118, and is expressed as follows in *Wilson v. Cottman*, 65 Md. 190, 3 Atl. 890: "Their actionable character [of the language] must be tested by the question whether they impute to the plaintiff the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of a clerk." To the same effect is *Nichols v. Daily Reporter Co.* 30 Utah, 74, 3 L.R.A.(N.S.) 339, 116 Am. St. Rep. 796, 83 Pac. 573, 8 Ann. Cas. 841, where it is said: "It may be conceded that words charging nonpayment of debts, insolvency, or which tend to impute want of credit or integrity, are actionable without alleging special damages, when they refer to merchants, tradesmen, and others in occupations where credit is essential to the successful prosecution; but generally these same words are not *per se* actionable when they do not refer to persons in their office, profession, trade, business, or calling." To the same effect is *Hanaw v. Jackson Patriot Co.* 98 Mich. 506, 57 N. W. 734.

A generalization from all these cases leads to the conclusion that in order for words not ordinarily actionable in themselves to be libelous *per se*, because affecting the plaintiff in respect to his business, occupation, or profession, it is necessary that the words have a reference to him in that capacity. Words which impute to persons engaged in business, such as merchants, traders, and others in occupations where credit is essential to the successful prosecution of their occupation, nonpayment of debts, want of credit, or actions which tend to lessen their credit, are libelous *per se*, unless they are privileged communications.

In this case Mr. Stannard was not in business on his own account. He was the local manager for a nonresident corporation. It is not alleged or suggested that he had any occasion for the use of credit, or that his credit had been in any way impaired or affected. The statements in regard to him in no way related to the manner of his performance of his duties as manager of the Holmes Electric Protective Company, or charged him with being unfit for the proper performance of them; nor did he lose his position because of the letter in question, in which case he would have sustained spe-

cial damage. Under these conditions, and applying the rule of law already stated, the letter cannot be regarded as actionable *per se*, and the trial court committed no error in sustaining the demurrer.

That the letter was actuated by malice is admitted by the demurrer, and apparent from the paper itself, and deserving of the most emphatic reprobation; but that will not justify this court in departing from well-established principles upon so important a subject.

Judgment affirmed, with costs to the appellee.

### KANSAS SUPREME COURT.

M. E. RICHARDSON, Appt.,

v.

J. F. GUNBY.

(— Kan. —, 127 Pac. 533.)

#### Libel — commercial report — privilege.

1. Where a letter is addressed to a bank or banker, asking for information concerning the credit and standing of a business corporation and its officers, and a communication is sent in answer to the letter, containing matter libelous *per se* against the secretary of the corporation, but within the reasonable purview of the inquiry, and there is nothing in the correspondence indicating other than an honest purpose, the communication *prima facie* is conditionally privileged.

#### Evidence — libel — malice — burden of proof.

2. In civil actions for libel, where a communication of the nature referred to above is conditionally privileged, the burden of

Headnotes by BENSON, J.

#### Note. — Libel and slander: privilege of gratuitous report on financial responsibility and integrity.

This note does not include cases involving communications and circulars of commercial agencies, credit associations, and the like.

The question of privilege of communications between principal and agent, including mercantile agencies, is discussed in the note to 36 L.R.A. (N.S.) 449.

As to the qualified privilege of communications between members of an association or of a private corporation, see the note in 26 L.R.A. (N.S.) 1080.

As to the qualified privilege as to communications to employer with respect to employee, see the note in 16 L.R.A. (N.S.) 1017.

As to the qualified privilege of statements made to the employer by a former master, see the note to *Wabash R. Co. v. Young*, 4 L.R.A. (N.S.) 1108.

For the discussion of other related questions, see the note dealing with imputation against the credit of one not in business, appended to *Stannard v. Wilcox & G. Sewing Mach. Co.* ante, 515, and the other notes therein referred to.

proof is upon the plaintiff to show malice or a wrongful purpose in publishing it.

#### Libel — inviting — effect.

3. A person who instigates or procures a libelous communication to be published against himself, for the purpose of predicating a suit for damages upon it, cannot recover in such an action. But if he instigates or sets on foot inquiries for the purpose of ascertaining the source of evil reports, in order that they may be counteracted, or for any other proper purpose, and not for the purpose of predicating an action for damages in his own behalf, he is not estopped thereby from maintaining such an action.

(November 9, 1912.)

**A**PPEAL by plaintiff from a judgment of the District Court for Wilson County in defendant's favor in an action brought to recover damages for an alleged libel. Reversed.

The facts are stated in the opinion.

Mr. P. O. Young, for appellant.

If the libelous portions in issue were so *per se*, the defenses of truth and privilege were for the defendant.

*Woodson Mach. Co. v. Morse*, 47 Kan. 430, 28 Pac. 152; 16 Cyc. 932; *Meeh v. Missouri P. R. Co.* 61 Kan. 631, 60 Pac. 319; *Scandinavian Coal & Min. Co. v. Whittaker*, 40 Kan. 125, 19 Pac. 349; *Felix v. Walker*, 60 Kan. 471, 57 Pac. 128; *Collier v. Monger*, 75 Kan. 554, 89 Pac. 1011; *England v. Danham*, 93 Mo. App. 13; *Home F. Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047; *Anderson v. Shockley*, 159 Mo. App. 334, 140 S. W. 755; *Vanloon v. Vanloon*, 159 Mo. App. 255, 140 S. W. 631; *Palmer v. Adams*, 137 Ind. 72, 36 N. E. 695; *Blackwell v. Johnson*, 21 Ky. L. Rep. 1720, 56 S. W. 12;

tions, see the note dealing with imputation against the credit of one not in business, appended to *Stannard v. Wilcox & G. Sewing Mach. Co.* ante, 515, and the other notes therein referred to.

There is a *dictum* in *Storey v. Challands*, 8 Carr. & P. 234, to the effect that a statement that one is unprincipled and does not pay his debts, spoken in response to inquiries by one who proposed to deal with him, was privileged, the court saying that everyone is quite at liberty to state his opinion bona fide of the respectability of persons about whom inquiries are made. There was a similar *dictum* in *King v. Watts*, 8 Carr. & P. 614.

When one person applies to another for credit, and the latter seeks information from a third as to the propriety of giving credit to the applicant, a privileged occasion arises for communications bearing upon the subject, and the privilege is not affected by the fact that the statement was made in such a manner as to evince indig-



Louisville Courier-Journal Co. v. Weaver, 13 Ky. L. Rep. 599, 17 S. W. 1018.

A decoy letter, even if written at instance of the plaintiff, would not be a complete defense.

Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 478, 37 N. W. 914; Bailey v. Hyde, 3 Conn. 463, 8 Am. Dec. 202; Price v. United States, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366; Rosen v. United States, 161 U. S. 42, 40 L. ed. 610, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251; Andrews v. United States, 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798; State v. Stickney, 63 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714; State v. Jansen, 22 Kan. 499, 5 Cyc. 1044; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 365; State v. Currie, 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 691, 102 N. W. 875; Camp v. First Nat. Bank, 44 Fla. 497, 103 Am. St. Rep. 173, 33 So. 241; State v. Abley, 109 Iowa, 61, 46 L.R.A. 862, 77 Am. St. Rep. 521, 80 N. W. 225, 12 Am. Crim. Rep. 279; Vallery v. State, 42 Neb. 123, 60 N. W. 347; Robbins v. Robbins, 140 Mass. 528, 54 Am. Rep. 488, 5 N. E. 837; Trimble v. Foster, 87 Mo. 49, 56 Am. Rep. 440; Callahan v. Ingram, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020.

Messrs. T. J. Hudson, D. J. Sheedy, and E. D. Milkesell, for appellee:

Plaintiff voluntarily assumed the burden of proof, and by doing so, thereafter waived any right to reversal on that account, regardless of the pleadings or instructions of the court.

Parker v. Richolson, 46 Kan. 283, 26 Pac. 729; McCormick v. Holmes, 41 Kan. 265, 21 Pac. 108; People's Gas Co. v. Fletcher, 81 Kan. 76, 41 L.R.A. (N.S.) 1161, 105 Pac. 34; Badger Min. & Mill. Co. v. Ellis, 76 Kan. 795, 92 Pac. 1114.

nation at the business conduct of the plaintiff, where it involved nothing beyond what was pertinent to the inquiry, and was honestly believed by the defendant; nor is the communication any less privileged because there were persons present when the statement was made who were not lawfully interested in the subject, where their presence was a mere casual incident not in any sense procured by the defendant. Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 261.

And it is held that a statement in response to an inquiry, of an opinion concerning the integrity and standing of a tradesman, is privileged, though untrue, when made in good faith and without malice. Melcher v. Beeler, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181.

The statement of a banker as to the financial responsibility of the maker of a note, in response to inquiries in behalf of one who has sent the note to the banker for collection, is privileged. Ritchie v. Arnold, 79 Ill. App. 406, 42 L.R.A. (N.S.)

The determination of whether the matter under the pleadings was privileged or qualifiedly privileged was a question of law for the court to determine.

Byam v. Collins, 111 N. Y. 143, 2 L.R.A. 129, 7 Am. St. Rep. 726, 19 N. E. 75; Rude v. Nass, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555; Locke v. Bradstreet Co. 22 Fed. 771; Denver Public Warehouse Co. v. Holloway, 34 Colo. 432, 3 L.R.A. (N.S.) 696, 114 Am. St. Rep. 171, 83 Pac. 131, 7 Ann Cas. 840.

The appellant could not by a decoy letter procure himself to be libeled and then recover damages therefor.

Howland v. George F. Blake Mfg. Co. 156 Mass. 543, 31 N. E. 656; Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Nott v. Stoddard, 38 Vt. 25, 88 Am. Dec. 633; Patterson v. Frazer, 100 Tex. 103, 94 S. W. 324; Beeler v. Jackson, 64 Md. 589, 2 Atl. 916; Billings v. Fairbanks, 139 Mass. 66, 29 N. E. 544; Miller v. Donovan, 16 Misc. 453, 39 N. Y. Supp. 820; Heller v. Howard, 11 Ill. App. 554; Haynes v. Leland, 29 Me. 233; State v. Stickney, 63 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714.

Benson, J., delivered the opinion of the court:

This is an action to recover damages for an alleged libel. E. H. Neal, of Indianapolis, Indiana, addressed a letter to the Altoona State Bank asking for information concerning the Altoona Portland Cement Company and its officers. The letter stated that the company was bidding for investors. Responding to this inquiry, the appellee, who was president of the bank, wrote a letter to Mr. Neal in which it was stated that the cement company had been characterized as a paper concern by the state bank exam-

So, a written communication from a banker to one who has sent a note to him for collection, that the maker was unable to pay at maturity, is privileged, and is therefore not actionable in the absence of express malice. Lewis v. Chapman, 16 N. Y. 369.

And a communication made by the cashier of a bank to a stockholder, with reference to the solvency of the plaintiff, who was surety upon an official bond to the bank, is privileged, and it is not necessary to justify the communication, that it be in response to an inquiry made by the stockholder. Rothholz v. Dunkle, 53 N. J. L. 438, 12 L.R.A. 655, 26 Am. St. Rep. 432, 22 Atl. 193.

A terminal carrier's communication to the initial carrier, and by it transmitted to a consignor, stating that the goods remained undelivered because of the inability of the consignee to pay the freight charges, is privileged, and therefore, though untrue, is not actionable without proof of special damage. Campbell v. Bostick, — Tex. Civ. App. —, 22 S. W. 828. L. A. W.

iner; that none of its stock had been placed locally, because "no one locally has any faith in the integrity or ability of its officers. Its secretary is regarded as one of the most tricky men in this community and a good man to leave strictly alone, and all of his projects." The letter otherwise reflected upon the credit and standing of the company, and closed with the statement: "The above information is submitted in confidence and in reply to your inquiry for same, and if of any value to you, we will expect such information so treated," and was signed, "J. F. Gunby, President." The appellant was the secretary of the company. The language of the letter contained within the quotation was held to be actionable *per se*, in *Schreiber v. Gunby*, 81 Kan. 459, 106 Pac. 276.

The answer admits that the defendant wrote the letter complained of, but alleges that he believed that his Indianapolis correspondent, whose letter head bore the imprint, "Internal Revenue Service, 6th Dist. of Indiana, Collector's Office," was an honorable man holding an office of trust under the government, and an investor honestly inquiring for information; and that he answered the letter in good faith and in confidence. For a separate defense it was alleged that the letter of inquiry was written at the instance of the plaintiff as a decoy to induce the defendant to make some statement upon which to predicate an action. A demurrer filed to this defense was overruled. The verdict and judgment were for the defendant.

The first assignment of error argued by the appellant arises upon an instruction placing the burden of proof upon the plaintiff. The effect of this general instruction can best be understood by considering other cognate instructions with it. The jury were informed that the part of the letter quoted above, referring to the secretary and officers of the company, was actionable *per se*, but that malice must be proven before the plaintiff could recover; that is, that it must appear that the defendant was prompted to write the letter by a desire to injure the plaintiff. The requirement of proof of malice was placed upon the ground of privilege. The court said: "The business man who receives a confidential inquiry relative to the business standing of some individual, firm, or corporation may answer the same, and his answer is qualified as privileged; that is, if his answer be fairly and honestly made in response to the inquiry, and the things that he states he has reasonable and probable cause to believe true, the law will protect him and hold him harmless of damage. But if, in response to an inquiry of this nature, such individual makes false

answers, or answers with a reckless disregard as to whether or not the statements he makes are true, then and in that event the law will not protect him." It therefore appears that the burden placed upon the appellant by the general instruction complained of was to prove a wrongful motive on the part of the appellee. The appellant contends that privilege was not pleaded.

The petition alleges that the letter was not written or intended as a privileged communication. The answer contained a general denial and an averment that the letter was written in good faith, believing that it was true, and for honest purposes, without malice or intent to injure. Thus it appears that the question of privilege was tendered by a negative averment in the petition, and met by the affirmative allegations of good faith in the answer. The pleadings are deemed sufficient to present the question of privilege.

The privilege above referred to is not absolute, but of the class called qualified or conditional, comprised of cases where "the circumstances are held to preclude any presumption of malice, but still leave the party responsible if both falsehood and malice are affirmatively shown." *Cooley, Torts*, \*247; *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316.

"A conditionally privileged publication is a publication made on an occasion which furnishes a *prima facie* legal excuse for the making of it, and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. . . . The proper meaning of a privileged communication is 'that the occasion on which it was made rebuts the inference arising *prima facie* from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact.'" *Townshend, Slander & Libel*, 4th ed. § 209.

Where a communication is made by one having a duty to perform, and it is made in good faith in the belief that it comes within the discharge of that duty, it is privileged. *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418; *Rude v. Nass*, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep. 717, note, p. 722. The duty here referred to is not limited to legal obligations, but extends to moral or social duties of imperfect obligation. *Pollasky v. Minchener*, 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N. W. 5; *Odgers, Libel & Slander*, 252.

With respect to communications made upon business inquiries, the author last cited, at page 253, quotes *Brett, L. J.*, in *Waller v. Loch*, L. R. 7 Q. B. Div. 622: "If a person who is thinking of dealing with an-

other in any matter of business asks a question about his character from someone who has means of knowledge, it is for the interests of society that the question should be answered; and if answered bona fide and without malice, the answer is a privileged communication." Of this nature is a letter from the cashier of a bank to a stockholder regarding the financial standing of a surety on an official bond to the bank. *Rothholz v. Dunkle*, 53 N. J. L. 438, 13 L.R.A. 655, 26 Am. St. Rep. 432, 22 Atl. 193. Another illustration is a case where one seeks information concerning the trustworthiness of another who has applied to him for credit. An answer to the request for such information is privileged, if made in good faith in the belief that the applicant desires the information for a proper purpose. *Fahr v. Hayes*, 50 N. J. L. 275, 13 Atl. 261. Other illustrative instances will be found in *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705; *Billings v. Fairbanks*, 139 Mass. 66, 29 N. E. 544; *Briggs v. Garrett*, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513, and in a note in 103 Am. St. Rep. p. 145. Whether, upon a particular state of facts, a communication is privileged, is a question of law to be determined by the court. But the questions of good faith, belief in the truth of the statements, and existence of malice, are questions for the jury. *Gassett v. Gilbert*, 6 Gray, 94; *Hamilton v. Eno*, 81 N. Y. 116; *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555.

The communication containing the alleged libel was set out in the pleadings with the inquiry to which it related. There was nothing in the correspondence indicating other than an honest purpose. The reference to the officers, although actionable *per se*, was within the purview of the inquiry. In this situation good faith might be presumed. The communication appeared, therefore, to be conditionally privileged. *Lewis v. Chapman*, 16 N. Y. 369, 375. Within the rule just stated, it was the duty of the court to consider it as privileged, and to place the burden to prove malice, or a wrongful purpose in writing it, upon the plaintiff. *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Denver Public Warehouse Co. v. Holway*, 34 Colo. 432, 3 L.R.A.(N.S.) 696, 114 Am. St. Rep. 171, 83 Pac. 131, 7 Ann. Cas. 840; *Townshend, Slander & Libel*, p. 299.

These views are in harmony with the principles decided in *Kirkpatrick v. Eagle Lodge*, *supra*, although that was a case arising out of lodge duties and membership. Analogous principles were also discussed in

*Coleman v. MacLennan*, 78 Kan. 711, 20 L.R.A.(N.S.) 361, 130 Am. St. Rep. 390, 98 Pac. 281.

The appellant contends that the separate defense relating to the alleged decoy letter was insufficient, and that his demurrer thereto should have been sustained. This defense was thus stated: "That the letter written by the said Neal to defendant, heretofore set out in defendant's second defense, was written at the instance and request of the plaintiff, and that said letter was not written by the said E. H. Neal in good faith and as an honest inquirer after the truth, but was written for the purpose of inducing defendant to make some statement upon which plaintiff could predicate a suit in damages against this defendant, with the intent and purpose of injuring and embarrassing this defendant in his position of president of the Altoona State Bank."

The argument of the appellant is that such devices for the detection of crime are approved by judicial precedents, and the same rule should apply to one who assails reputation as to one who commits a crime. On the other hand, it is argued by the appellee that the law will not tolerate a recovery of damages for a libel which a person has been instrumental in publishing against himself.

In *Vallery v. State*, 42 Neb. 123, 60 N. W. 347, in a prosecution for criminal libel, it was held to be no defense to the writing, where it was a repetition of previous oral statements, that the defendant was induced to make the written publication by the acts of the person concerning whom the libel was published. The court said: "We are not aware that there exists, in the law of criminal libel at any rate, any doctrine akin to that of contributory negligence, whereby a prosecution is barred if the person defamed has in some manner induced the publication."

In *Howland v. George F. Blake Mfg. Co.* 156 Mass. 543, 31 N. E. 656, a civil action, it was held that where no previous publication had been made, if the fact appears that the publication of the alleged libel was procured through the agency of a person acting for the plaintiffs and at their request, the publication was privileged. The court said that this was in accordance with the views expressed by English judges in cases cited, and was sound in principle, and added: "If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it."

In *Melcher v. Beeler*, 48 Colo. 233, 130

Am. St. Rep. 273, 110 Pac. 181, a request for an instruction to the effect that the plaintiff could not recover if he had procured the writing of the letter complained of with a view of bringing an action upon it was approved. The court said: "If the defendants were guilty of no wrong against the plaintiffs with respect to the Finn letter, except a wrong invited and procured by them, to be committed for the purpose of making it the foundation of an action, it would be unjust to permit them to profit by it." See also Odgers, Libel & Slander, pp. 294, 295.

Whatever may be the rule in criminal cases, where the object is punishment for a public offense, in a civil action a party cannot be allowed to recover damages for a libel which he procured or instigated to be published against himself for the purpose of laying the foundation of a lawsuit for his own pecuniary gain. It would be contrary to the principles declared in analogous cases to sustain such an action. It follows that the demurrer to the defense referred to was properly overruled.

Another feature of the case closely related to this remains to be considered. In the tenth instruction the court, referring to the defense last considered, said: "If this letter written by Mr. Neal was the result of a decoy letter sent to Mr. Gunby at the instance and request of Mr. Richardson, plaintiff cannot recover, for the reason that it would place the plaintiff in the situation of publishing a libel against himself,—a thing which the law will not tolerate." This statement lacks an important qualification. The reason why a person cannot recover in such a case, where he instigates or invites the libel, is that he does it, as charged in the reply, for the purpose of predicated an action for damages upon it. He may not thus assist in building up a cause of action for the purpose of gathering the fruitage to himself. If, however, the plaintiff instigated or set on foot the inquiry for the purpose of ascertaining whether the defendant, or the bank of which he was president, was disseminating evil reports concerning the cement company or its officers, in order that such influences might be counteracted, or for any other proper purpose, not for the purpose of predicated an action for damages in his own behalf, he was not estopped from maintaining an action. In *King v. Waring*, 5 Esp. 13, Lord Alvanley said: "The question is, if, in consequence of the letter so written by the defendant, and which letter was false and unfounded, the plaintiff was prevented from getting a place? It has been decided that giving a character to a servant, however injurious 42 L.R.A. (N.S.)

to him, yet if fairly given, would not sustain an action; but if the letter was procured by another letter not written with a fair view of inquiring a character, but to procure an answer upon which to ground an action for a libel, such evidence, I think, ought not to be admitted." This decision is quoted in Odgers on Libel and Slander, p. 296, as an illustration of the author's text on the subject of statements invited by the plaintiff, at page 294, already cited in this opinion. It is also quoted as an illustrative case in Newell on Slander & Libel, 2d ed. p. 518.

Following the instruction last quoted, if the jury found from the evidence that the so-called decoy letter was written at the instance and request of appellant, they were precluded from giving him a verdict, regardless of his purpose or motive in causing the inquiry. This was an error affecting his substantial rights, and for this the judgment is reversed, with directions to grant a new trial.

All the Justices concur.

Petition for rehearing denied.

## ARKANSAS SUPREME COURT.

ENSLEY DOUGLAS, Appt.,

v.

STATE OF ARKANSAS.

(— Ark. —, 150 S. W. 860.)

**Rape — assault with intent — awakening woman.**

1. Touching the hand of a sleeping woman to awaken her to solicit sexual intercourse is not an assault with an intent to commit rape.

**Same — use of weapon to secure assent — effect.**

2. The use of a weapon to compel a woman to consent to sexual intercourse is not an assault with intent to commit rape, if there is no overt attempt to commit the act itself.

(Hart, J., dissents.)

(November 4, 1912.)

**Note. — Preparation to commit assault with intent to rape or ravish as distinguished from overt act in commission of offense itself.**

Outside of *DOUGLAS v. STATE*, little authority is to be found on the subject here presented.

Before the jury would be authorized to find the accused guilty of the offense of assault with intent to rape, it was said, in

**A** PPEAL by defendant from a judgment of the Circuit Court for Pulaski County convicting him of assault with intent to commit rape. Reversed.

The facts are stated in the opinion.

Messrs. Jackson & Jones, Bradshaw, Rhoton, & Helm, and A. M. Pulk, for appellant:

The *corpus delicti* was not established.

Anderson v. State, 77 Ark. 40, 90 S. W. 846; Williams v. State, 88 Ark. 91, 113 S. W. 799; Paul v. State, 99 Ark. 558, 139 S. W. 287.

Messrs. Hal L. Norwood, Attorney General, and William H. Rector, Assistant Attorney General, for the State:

The verdict is supported by the evidence.

Briones v. State, — Ark. —, 150 S. W. 416; Harvick v. State, 49 Ark. 514, 6 S. W. 19; Skaggs v. State, 88 Ark. 62, 113 S. W. 346, 16 Ann. Cas. 622.

McCulloch, Ch. J., delivered the opinion of the court:

The defendant, Ensley Douglas, was indicted for the crime of assault with intent to commit rape upon Nina Carroll, a girl about sixteen years of age. The trial jury convicted him of the charge, and he was sentenced to the penitentiary for a term of ten years, and appeals from the judgment of conviction.

The offense is alleged to have been committed in the city of Little Rock on or about June 10, 1912, at night in the bedroom of Nina Carroll and her elder sister, Goldie Carroll, who occupied the room together.

Gaskin v. State, 105 Ga. 631, 31 S. E. 740, that "it must have appeared not only that he intended to have carnal knowledge of the girl alleged to have been assaulted, forcibly and against her will, but that he did some overt act towards the accomplishment of his purpose, which amounted in law to an assault upon her. That both the criminal intent and concomitant assault towards its execution are essential elements of the offense is manifest from its very name,—'assault with intent to commit a rape.'" And therefore, where the trial judge, in effect, told the jury that if the accused, with intent to commit a rape upon the girl, secretly entered her room and concealed himself there, awaiting an opportunity to execute his criminal design, and upon detection, fled, the necessary element of assault would be made out, and they would be authorized to convict the accused of the offense charged, it was held that the charge was erroneous. It was said: "We think that the hypothesis stated by the court, if true in fact, would have amounted only to preparation for an attempt to commit the offense. After the preparation, there was no overt act done by the accused to effectuate the criminal de- 42 L.R.A. (N.S.)

Nina Carroll was, as before stated, about sixteen years old, and her sister was about twenty-one years old. They were both well acquainted with the defendant, and he and Goldie Carroll had been on terms of intimacy for several years. She testified that he had promised to get a divorce from his wife and marry her, and that they had frequently had sexual intercourse. It is claimed that he wrongfully entered the bedroom of these young ladies in the nighttime, and attempted, by force and threats, to have intercourse with the younger of them.

There are several assignments of error, and the one to which we shall address our attention is that the evidence is not sufficient to make out a case of assault with intent to rape, and, as the conclusion we reach on that question is decisive of the case, the other assignments need not be discussed.

Nina Carroll testified that she recognized the defendant as her assailant, and she gave the following testimony concerning the assault:

Q. Who woke you up?

A. He was in the room.

Q. This defendant?

A. Yes; he was down on his knees by the side of my bed, and had hold of my hand, and woke me up. He was whispering to me. I think he was saying, "Girlie." I asked his business in there. I think he was on his knees. He told me to keep still, to keep quiet, or he would kill me. He talked there for a few minutes, talking to me. I

sign which would amount to an assault upon the girl."

Anderson v. State, 77 Ark. 37, 90 S. W. 846, while another case within the scope of the instant note, is sufficiently set out in DOUGLAS v. STATE.

But Paul v. State, 99 Ark. 558, 139 S. W. 287, which is also cited in DOUGLAS v. STATE as authority for the proposition that an overt act committed merely in preparation for the perpetration of an assault with intent to rape or ravish, and not in the commission of the crime itself, does not seem to be in point. An examination of the facts of the case discloses that it went off on the question of intent; it not being shown that the accused had the intention of having carnal intercourse with the female forcibly and against her will.

A case that may be of some interest on the present subject, even though not in point, is State v. Sanders, — S. C. —, ante, 424, 75 S. E. 702. There it was held that mere solicitation for sexual intercourse, with intent to force compliance, but without any demonstration or menace of any kind, does not amount to an assault essential to the offense of assault with intent to rape or ravish.

E. M. S.

didn't say anything. He told me to keep still, and I did. I pushed my sister with my arm and woke her up. She called him by name, and asked what was the matter.

Q. What did she call him? Ensley?

A. She called him by name. I didn't say anything to her at all. He said to her. "You over there, you keep still." He told us what he was there for.

Q. What did he say?

A. He said: "You got to do business with me right here. You over there, you are sick. You can't, I know. You can't come across. You are not, and you have to come across."

Q. That's to you?

A. Yes; he was still down there talking to me.

Q. What did he have with him when he said he would kill you?

A. He had a gun. . . .

Q. What did you say to him when he said you had to come across, to do business with him?

A. I didn't say anything. I just laid there. She commenced talking to him and begging for me.

Q. What did she say?

A. She said: "For God's sake, don't ruin my little sister. She has no mother. For God's sake, don't ruin her." She said: "I will take it all on myself to save her." He said: "You are sick. I don't want you. She's the one I want." She said: "For God's sake, I will do anything in the world to save her." He said, "Well, since you begged so hard, come on. You get on this side of the bed." He told me to get over there. I went to the foot of the bed, and she crawled over the head of the bed, and I went to the head. We were sleeping with our heads to the foot. I got on the other side, and she got on the side I was on. I don't know, I guess he thought I was trying to get out of bed. He thought I was trying to get out for something. He said: "Being you are getting out somewhere, I will just put my hands on you." I said something to him. I don't remember just what I said to him. He said, "Just for that, I will put my hands on you;" and he did. I didn't say anything to him at all.

Q. Was he trying to have intercourse with you against your will? Was that against your will?

A. Yes.

Q. Did he tell you that he would kill you there in the presence of your sister with the gun?

A. Yes; if I didn't. She begged him out of it.

This is all the testimony on the subject, and the question is, Was it sufficient to con-  
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stitute an assault with intent to commit rape? The evidence shows that there was a technical assault by touching or taking hold of the hand of the girl by the defendant, and also, after he had desisted from his attempt to induce her to have sexual intercourse with him, by again touching her person. Drawing a gun with intent to use it or to coerce her was also a technical assault. But did these technical assaults constitute a part of the essential element of the crime of rape, namely, the act of sexual intercourse? If not, the crime of assault with intent to commit rape was not complete. Undoubtedly, if he had drawn the pistol for the purpose of inflicting death upon the assaulted girl, the crime of assault with intent to kill would have been complete, even though he desisted from carrying out his intention; and if he had placed his hand upon the girl as a part of the act of having sexual intercourse, and with intent to secure carnal intercourse with her, this would have completed the offense of assault to commit rape. But, according to this testimony, his taking hold of the hand of the girl for the purpose of waking her up, and the drawing of the pistol on her, were merely a part of the preparation for the act, and not an overt attempt to commit the act itself. He did not try to have sexual intercourse with her, but was merely attempting to induce her to yield to his embraces, or, by threats, to coerce her into doing so.

The case is, we think, controlled by the decision of this court in *Anderson v. State*, 77 Ark. 37, 90 S. W. 846. There the accused found a ten-year-old girl waiting at a railroad station for the arrival of a train, and on some false pretext induced her to leave the station with him. After they got out of the station and got to the mouth of an alley, he kissed the girl, and tried to pull her into the alley. She commenced crying, and he turned her loose, and she ran back to the station. He was indicted and convicted of the crime of assault with intent to rape, and this court reversed the case on the ground that the evidence did not show that the assault with such intent was complete. Judge Battle, delivering the opinion of the court, said: "The statutes of this state requiring the unlawful act to be coupled with the present ability to do the injury clearly indicated that the unlawful act must be the beginning or part of the act to injure, of the perpetration of the crime, and not of preparation to commit some contemplated crime." Applying that rule to the facts of the present case, it is clear that the only overt act was committed merely in preparation for the perpetration of the crime, and not in the commission of the crime itself. Another case which is decisive

of this is *Paul v. State*, 99 Ark. 558, 139 S. W. 287. There the court reiterated the doctrine of the *Anderson Case* upon a somewhat different state of facts, but to which the same principle was applicable.

The attorney general relies upon the recent case of *Briones v. State*, — Ark. —, 150 S. W. 416, in which we held that where the accused entered, in the nighttime, the sleeping apartments of two young ladies, the jury were warranted in drawing the inference that he did so for the purpose of forcibly having sexual intercourse with one of them, and that this was sufficient to sustain a conviction for the crime of burglary. The case here is different. The offense of burglary was complete upon the forcible entry of the house with intent to commit rape, whether there was an actual assault committed or not; but upon the charge set forth in the indictment in this case, there must have been an actual assault made upon the girl with intent to have sexual intercourse before the crime was complete. We are convinced, therefore, that the judgment is not sustained by the evidence, and it must therefore be reversed. The evidence may be sufficient to justify a conviction of a lower degree of assault, and for that reason the cause is remanded for a new trial.

Hart, J., dissents.

#### IOWA SUPREME COURT.

O. C. BROWN

v.

WARREN COUNTY, Appt.

(— Iowa, —, 135 N. W. 4.)

#### Attorney — disbarment proceedings — right to fees.

No constitutional right of an attorney is infringed by a statute requiring him to prosecute disbarment proceedings by direction of the court without fees.

(March 14, 1912.)

**Note.** — *Constitutionality of statute requiring an attorney to perform services for the public without remuneration.*

Although it is the common practice in many states, at least, for members of the bar, under assignment by the court, to defend poor persons without compensation, yet the few cases which have considered the constitutionality of statutes requiring attorneys to render public services without compensation, with one exception, are opposed to *BROWN v. WARREN COUNTY*, and hold such statutes to be unconstitutional.

Thus, in *Blythe v. State*, 4 Ind. 525, it 42 L.R.A. (N.S.)

**A**PPEAL by defendant from a judgment of the District Court for Warren County in plaintiff's favor in an action brought to recover attorneys' fees for services rendered by him in certain disbarment proceedings. Reversed.

Statement by Evans, J.:

Action at law to recover attorneys' fees against the defendant county for services rendered by the plaintiff, an attorney at law, in certain disbarment proceedings, and under regular appointment by the court to such services. There was a demurrer to the petition, which was overruled. The defendant elected to stand upon its demurrer, and judgment was accordingly entered for the plaintiff, and the defendant appeals.

Messrs. J. R. Howard and J. O. Watson for appellant.

Mr. O. C. Brown for appellee.

Evans, J., delivered the opinion of the court:

It is made to appear from the petition that in September, 1903, disbarment proceedings were instituted against one Mosher upon order of the district court; and, upon a like order, the plaintiff and others were appointed to take charge of the prosecution of such proceedings. In such proceedings the plaintiff performed services to the value of \$1,075. The appointment of the plaintiff was made under the provisions of § 325 of the Code Supplement, which is as follows: "The proceedings to remove or suspend an attorney may be commenced by the direction of the court or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it. If an action is commenced by direction of the court, the costs shall be taxed and disposed of as in criminal cases; provided, however, that no allowance shall be made in such case for the payment of attorney fees." The defendant's

is held that so much of a statute as requires an attorney at law to prosecute or defend without fee is void, because in conflict with the constitutional provision that no man's particular services shall be demanded without just compensation.

And in *Howard County v. Pollard*, 153 Ind. 371, 55 N. E. 87, and *Clay County v. McGregor*, 171 Ind. 634, 87 N. E. 1, 17 Ann. Cas. 333, there are *dicta* to the same effect.

In *Webb v. Baird*, 6 Ind. 13, where the question was whether an attorney appointed to defend a pauper, who had performed the services, was entitled to compensation from the county, it was said that a law which requires gratuitous services of an

demurrer is based upon the express provision "that no allowance shall be made in such case for the payment of attorney fees." Manifestly, upon the face of the statute, the demurrer should have been sustained. We are met with the contention at this point, however, that the statute is unconstitutional, in that it requires the performance of labor without just compensation. It is argued that it is in violation of § 18, art. 1, of the Constitution, which provides that "private property shall not be taken for public use without just compensation first being made." The learned trial court adopted this view.

In *Hyatt v. Hamilton County*, 121 Iowa, 292, 63 L.R.A. 614, 100 Am. St. Rep. 354, 96 N. W. 855, it was held that the county was liable to the attorney for the value of services rendered in such a case. This holding was based in part upon the fact that the statute then in force required the services, and was silent upon the subject of compensation. The liability of the county was therefore found as matter implied from the statute. Similar reasoning was adopted in the case of *Hall v. Washington County*, 2 G. Greene, 473. The services involved in the latter case were those rendered by an attorney under an appointment of the court to defend a pauper criminal. In the opinion of this court in that case it was said: "Whilst the statute requires the court to

appoint counsel in a case like this, it is silent on the subject of pay for his services. It leaves that matter to be disposed of upon the principles of the practice of the common law." Since those cases were decided, the statute has been amended and appears now as § 325 above quoted. The appellee contends as already stated, that the statute in its present amended form is unconstitutional, and there is some authority for this contention. *Carpenter v. Dane County*, 9 Wis. 274; *Dane County v. Smith*, 13 Wis. 585, 80 Am. Dec. 754. We find no other authorities directly in point upon this particular question which so hold. We do not feel called upon at this time to determine the question of the constitutionality of this statute. If it be unconstitutional as the appellee plaintiff contends, then it is ineffective to create in the appellee plaintiff an affirmative right.

The services for which the plaintiff claims his compensation were rendered under the call of this statute. This is a call for services to be rendered without compensation from the public treasury. If the legislature had no constitutional power to call for such services without compensation, as therein provided, then clearly the plaintiff was not bound to perform such services. If the plaintiff had declined the appointment of the court on this ground, the court could have accepted the declination, and could

attorney in defending a poor person in effect imposes a tax to that extent upon him in violation of the Constitution, which provides for uniform and equal rate of assessment and taxation upon all citizens. It is further said: "That any class should be paid for their particular services in empty honors is an obsolete idea belonging to another age and to a state of society hostile to liberty and equal rights. . . . To the attorney his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public as to remuneration than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic."

And in *Dane County v. Smith*, 13 Wis. 585, 80 Am. Dec. 754, it was held that the legislature cannot require that the services of an attorney in defending a poor person under order of court shall be rendered without compensation, and so a statute which declared that a county shall not be liable to pay for such services was declared void.

The only case other than *BROWN v. WARREN COUNTY*, found holding such a statute constitutional, is *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876, where it was contended that to compel attorneys at law to render services gratuitously is in effect to cast a burden or to levy a tax upon them not borne by citizens engaged in any other profession or business, and that it

is a taking of the time and labor, in other words, the property, of counsel without compensation and without due process of law, all of which is in violation of the Constitution, citing *Webb v. Baird* and *Dane County v. Smith*, supra. The court, in disapproving the reasoning in those cases, said: "In some instances, no doubt, it is a hardship upon an attorney to be obliged to defend poor persons without compensation, but, when called upon, it is a duty which he owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance, nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. . . . One of the duties of attorneys enjoined by law in this state is 'never to reject, from any consideration personal to himself, the cause of the defenseless or oppressed.' . . . An attorney is an officer of the court, and he takes his office with all its burdens as well as all his rights and privileges. And among the burdens thus assumed is that of being obliged, when requested by the court, to conduct, without compensation, the defense of those who are destitute of means, and are accused of crime." In spite of the authority against it, this reasoning seems to accord with the better view of the relations of members of the bar to the court and the public.

J. H. B.



have looked for a more willing appointee. If the court had refused to accept the declination, the plaintiff, appellee herein, could then have put the constitutionality of the statute to the test. He did not do so. He accepted the appointment without protest, and he must be held to have done so under the terms of the statute. It will not do to say that only the last clause of the statute is unconstitutional. The question involved at this point is the liability of the county. It is clearly within the prerogative of the legislature, both to provide and to limit the liability of counties. If the statute is unconstitutional, it is because it provides for a compulsory service without any compensation from any source.

Some analogy to this case may be found in the case of *Samuels v. Dubuque County*, 13 Iowa, 536. That was a case against the county for attorneys' fees for services rendered to a pauper defendant in criminal cases. The statute under which the appointment was made provided for fees in specific amounts. The statutory fees for the services rendered by the plaintiff in that case amounted to \$25, but the plaintiff's services were worth \$110. He therefore sued for the value of his services. The holding of this court was adverse to him. In the opinion in that case it was said: "The inconclusiveness of this reasoning is too manifest to require a formal notice. It overlooks the fact that compensation in cases of this kind must be paid from the county revenue, the collection and disbursement of which are under the general control of the legislature. It also overlooks the still more important fact that attorneys are officers of the law, whose fees, duties, and responsibilities may legitimately be the subject of legislative regulation, like that of other officers, and, inasmuch as a class they enjoy certain special privileges under the law, something is justly expected from the *esprit de corps* of the profession in effectuating the policy of the government in giving to every pauper offender arraignment for trial the assistance of learned counsel." A similar question was involved in *Howard County v. Pollard*, 153 Ind. 371, 55 N. E. 87. This was an action for attorneys' fees for services rendered under appointment in an action in behalf of a poor person, in pursuance of a statute. We quote as follows from the opinion in that case: "The evident answer to this objection is that the attorney cannot be compelled to perform the services, for the reason, at least, that the statute providing for his appointment denies him compensation, and, if he does render them at the request of the court, he does so voluntarily, and with the knowledge that he is to receive no fee or reward therefor. Having undertaken the

employment, voluntarily and gratuitously, he had no ground for a claim to compensation either from the poor person or the county. In our opinion the language of this statute excludes the idea that compensation shall be made to the attorney from any source, and we think the courts have no power under it to tax fees or distribute rewards, when the statute declares that none is to be expected." The plaintiff in that case relied upon a particular provision of the Indiana Constitution, being § 21 of article 1, providing in express terms "that no man's particular services shall be demanded without just compensation," and also upon the earlier case of *Webb v. Baird*, 6 Ind. 13, which is relied upon to some extent by the appellee in this case. If the constitutionality of our statute were put to the test as above suggested, there are cogent reasons of public and professional policy and duty which suggest themselves to the mind in support of the statute. The substance of these is that the privileges of an attorney as such carry with them their appropriate and corresponding burdens. One of these burdens is to see that the proper standards of the profession be maintained. For a discussion of such question, see the following cases: *Lamont v. Solano County*, 49 Cal. 158; *Rowe v. Yuba County*, 17 Cal. 62; *Elam v. Johnson*, 48 Ga. 348; *Wright v. State*, 3 Heisk. 256; *Arkansas County v. Freeman*, 31 Ark. 266; *House v. Whitis*, 5 Baxt. 690; *People ex rel. Ransom v. Niagara County*, 78 N. Y. 622. We may as well say in this connection that we see no sound reason to hold the statute to be unconstitutional. It is our conclusion that in any event the plea of the unconstitutionality of the statute was not available to the plaintiff appellee in this case, and that the learned trial court erred in overruling the defendant's demurrer.

For that reason the order must be, and it is, reversed.

Deemer, J., especially concurring:

I prefer to place my concurrence wholly upon the ground that the statute is a perfectly valid exercise of legislative power. The attorney, having been directed by the court to perform the service, was in duty bound as an officer of court to do so, and I do not think he waived anything by obeying the order of court.

A petition for rehearing having been filed, *Evans, J.*, on September 24, 1912, handed down the following additional opinion (— Iowa, —, 137 N. W. 474):

A reversing opinion was filed on the original submission. It was there held that the plea of unconstitutionality of the statute

under consideration was not available to appellee, but this holding was not concurred in by all members of the court.

We are united in the view that the statute in question does not contravene any provisions of the Constitution, and that the case must in any event be reversed, under the express terms of the statute as amended. Code Supp. § 325. In view of our unanimity on this question, and our difference of opinion on the ground of reversal stated in the original opinion, we prefer to put the reversal upon the ground herein stated, and the former opinion is accordingly modified.

With this modification, the petition for rehearing is overruled.

### IOWA SUPREME COURT.

ELLSWORTH COLLEGE OF IOWA  
FALLS et al., Appts.,

v.

EMMET COUNTY et al.

(— Iowa, —, 135 N. W. 594.)

#### Tax — exemption — endowment fund — property in hands of trustees.

1. Real estate given to trustees in trust to sell and pay the proceeds to a college as an endowment fund is exempt from taxation in the hands of the trustees, under a statute providing that real estate owned by an educational institution as part of its endowment fund shall not be taxed.

**Note.** — *Real property given to trustees to sell and pay proceeds to certain institution as within exemption from taxation extended to real property of such institution.*

While very little authority has been found on this precise question, it seems clear, under the general rules as to the taxation of trust funds for exempt institutions (37 Cyc. 939, 942), that, as held in *ELLSWORTH COLLEGE v. EMMET COUNTY*, real property in the hands of trustees to sell and pay the proceeds to a certain institution is within an exemption from taxation extended to real property of such institution, if the income from the property, while held by the trustees pending sale, is payable to the institution, so that, while not given the immediate control of the property, the institution is the equitable owner and is entitled to the proceeds of the present use thereof,—though if the income from the property, while held by the trustees pending sale, is to go to another, it would seem that the property should be taxed during that period.

Where a testator by his will directs his executors to establish a trust fund, the trustees of which are to be the same as the executors of the will, and the duration of which is to be five years from the date of 42 L.R.A. (N.S.)

#### Same — creation of charitable home.

2. A gift of real estate to trustees to sell and devote the proceeds to the establishment of a home for aged women is not exempt from taxation in the hands of the trustees, if there is nothing to show that the home itself, when constructed, would be exempt, and it is immaterial that the property is a parcel of a tract the balance of which is to be devoted to the endowment of a college which is exempt from taxation.

(April 3, 1912.)

**A** PPEAL by plaintiffs from a decree of the District Court for Emmet County, dismissing the petition in a suit to set aside and cancel a tax levied upon certain real estate, and to enjoin the collection of said tax. Reversed.

Statement by Deemer, J.:

Suit in equity to set aside and cancel the tax levied upon certain real estate in Emmet county, to enjoin the collection of said tax, and for other equitable relief. Decree dismissing the petition, and plaintiffs appeal.

Messrs. Nagle & Nagle and Birdsall & Birdsall for appellants.

Mr. J. W. Morse for appellees.

Deemer, J., delivered the opinion of the court:

The case involves a construction of paragraph 2 of § 1304 of the Code Supplement

the testator's death, during which time the executors and trustees are to dispose of all real estate not otherwise disposed of by the will, and when all the remainder of the estate has been reduced to cash, they are to terminate the "trust fund" by paying all the gross proceeds thereof to the proper authorities for the endowment fund of a certain institution, which, by the terms of its charter, is exempt from taxation,—the real property remaining unsold in the hands of the executors and trustees during the five years is exempt from taxation, under the charter exemption of the beneficiary. *Norton v. Louisville*, 118 Ky. 836, 82 S. W. 621.

In this case the court said: "If the income from the property or from its proceeds were to go to another during the five years, then it would be very clear that the property or fund should be taxed during that period. When one is the equitable owner of the property, and is entitled to the income from it, he has the enjoyment of every benefit that could come to anyone who might own the property. . . . In the case at bar it is admitted that the entire proceeds of the property sought to be taxed, and the income arising therefrom, will go to the orphans' home under the will. In our opinion, the property is exempt from taxation."

A. C. W.

as it existed when the taxes complained of were levied against certain real estate in Emmet county. That part of the section referred to, so far as material, reads as follows: "The following classes of property are not to be taxed: . . . (2) All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations, or corporations for public use, and not for private profit, and for literary, scientific, charitable, benevolent, agricultural, and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding 160 acres in extent, and not leased or otherwise used with a view to pecuniary profit; but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment; the books, papers, and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution used for their education; moneys and credits belonging exclusively to such institutions, and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; provided, however, that real estate owned by an educational institution of this state, as part of its endowment fund, shall not be taxed." We may say, parenthetically, in order that there may be no misunderstanding of the written law, that the proviso found in the last sentence of the paragraph was repealed by chapter 61, Acts 34th G. A., and a substitute enacted. With this substitute we have nothing to do, for the taxes complained of were levied before the adoption thereof. The lands in question were taxed by the authorities of Emmet county as other real estate for the years 1909 and 1910. They were owned by Eugene S. Ellsworth, deceased, at the time of his death, which occurred in February of the year 1907, and passed by a will from which we shall presently quote at some length. Ellsworth College is an institution of learning organized some years ago, under the statutes of this state, for literary, scientific, and educational purposes, with its principal place of business at Iowa Falls, in Hardin county. Admittedly it is such an educational institution as is referred to in the paragraph from the Code Supplement just quoted. The only question in the case, then, is this: Were the lands in controversy "real estate owned by the college as a part of its endowment fund" at the time the taxes were levied and assessed?

This inquiry can only be answered by reference to testator's will, construed in con-  
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nection with such allegations of the petition as may properly be considered, for the case was decided by the court below upon a demurrer to the petition. The petition contained by reference a copy of the will, an order for the probate thereof, letters testamentary to E. O. Ellsworth and F. A. Gowan as executors, articles of incorporation of Ellsworth College, and certain amendments thereto. What are called the amended and substituted articles of incorporation, adopted in July of the year 1907, name the following persons as trustees: "S. M. Weaver, F. D. Peet, E. O. Ellsworth, W. H. Woods, J. H. Carleton, Z. K. Hoag, William Weldon, John B. Parmelee, and Hattie A. Ellsworth." Who the original trustees may have been the record does not disclose. Coming now to the will, we find the following provisions material to the proper determination of the case: After devising certain real estate and personal property to his wife, children, and certain other relatives, and making certain bequests to various charitable and eleemosynary institutions, testator made the following provisions: "(12) I give, devise, and bequeath to Ernest Orlando Ellsworth, John B. Parmelee, and W. H. Woods, all of Iowa Falls, Iowa, as trustees, to be held by them in trust." Here follows the description of many tracts of land, including that in controversy. The will then provides: "Said trustees are given full power and authority to sell said real estate for the best obtainable prices and to make conveyances therefor, and they are hereby directed to sell the same as soon as it can be done to reasonable advantage at not less than the following prices." Here follows description of the lands with prices affixed. The will then reads: "The said trustees are directed to devote the proceeds from the sale of the above-described lands as follows: "First. Twenty-five thousand (\$25,000) dollars of the sum or sums received from the sale of said land shall by them be set apart for the purpose of building and maintaining a home for the aged at Iowa, Falls, Iowa, said home for the aged to be under the control of five (5) trustees, of which my wife shall be one, the other four of whom shall be residents of Iowa Falls, Iowa, and who shall in the first place be appointed by the trustees first above named, and shall hold their office for the term of one (1), two (2), three (3), four (4) and five (5) years respectively, and their successors shall be appointed by the judge of the district court at a session of said court, in Hardin county; and on their appointment, giving bond and qualification of said trustees, the twenty-five thousand (\$25,000) dollars of proceeds derived from the sale of said lands shall

be paid to them, and of said fund, and not to exceed ten thousand (\$10,000) dollars of said fund, may be used in the erection of buildings and improvements upon the following described real estate." This is followed by a description of the real estate upon which the home is to be located. The will then proceeds:

"It is my wish that the benefits of said home for the aged to be opened in the first instance to residents of Iowa Falls, Iowa, such residents always being entitled to precedence in the matter of admittance. Then, if the accommodations will permit, to residents of Hardin county, and lastly, to residents of other parts of the state of Iowa.

"Second. From the remainder of the proceeds derived from the sale of said lands, I direct my said trustees to pay to the trustees of Ellsworth College of Iowa Falls, Iowa, for the sole use and benefit of such college as an endowment fund, and to pay from the proceeds derived from the sale of said land, encumbrances, if any, upon the said lands, also to pay encumbrances, if any, upon Ellsworth College, except such as are held by me, and to pay the balance to the trustees of Ellsworth College as an endowment fund for said college, the income to be used for the support of the school; and I direct my executors to release all mortgages held by me against said Ellsworth College, and to cancel and surrender the notes of said college held by me. The funds received from the sale of said lands and paid to the trustees of said college shall be invested in United States bonds, state or municipal bonds, or first mortgages on farm lands in the state of Iowa or Minnesota."

A residuary clause is included in the will, and E. O. Ellsworth, L. E. Jones, and F. A. Gowan were named as executors. It will be noted that one of these, to wit, E. O. Ellsworth, was also made a trustee under the will, and it is to be inferred perhaps, although not charged in the petition, that the three trustees named in the will are the same persons of that name who, with six others, constituted the trustees of the college. If that be true, no reliance is put upon the fact, however, and the claim made in the petition is that the property was devised to the trustees named in the will in trust for the college as part of its endowment fund. It is charged in the petition that, after the payment by the trustees of the money received from the sale of lands to the trustees of the home for the aged to be established after testator's death, the remainder of the funds received from the sale of the lands were to be paid by said trustees to the trustees of the college for the sole use and benefit of said college and as an endowment fund; the income to 42 L.R.A. (N.S.)

be used for the support of the school. The petition further alleges: "That under and in pursuance of the terms and provisions of the said will of the said Eugene S. Ellsworth, deceased, the said trustees named, Ernest O. Ellsworth, John B. Parmelee, and W. H. Woods, accepted said trust, and on or about April, 1907, qualified as such trustees, and took possession of all of said real estate, and have ever since been in possession, thereof as such trustees, under the provisions of said will. That under and by virtue of the provisions of said will, and the probate and record thereof as hereinbefore set forth, said real estate became, constitutes, and is a part of, the endowment fund of said college, and to build and maintain at Iowa Falls, Iowa, a home for the aged, and has so been at all times since the probate and record of said will, and said real estate is held and administered as such endowment, and the rents and profits derived therefrom are devoted exclusively to the maintenance of said college."

These are the only relevant facts as gathered from the record, and the primary inquiry is: Was the land in Emmet county real estate owned by the college as a part of its endowment fund at the time the taxes were levied against it? It is manifest that the devise was not to the college directly, nor to trustees of the college as such, and it is also apparent that the devise of the legal title is to trustees who are directed to sell the lands at given minimum prices, and from the amounts so received to pay a given sum to the trustees for a home of the aged, and from the remainder of the proceeds derived from the sale, he directed his trustees to pay the trustees of the college, for the sole use thereof as an endowment fund, the income, to be used for the support of the school, and he also provided that the funds to be paid to the trustees of the college should be invested in United States or municipal bonds, or in first mortgages upon farm lands.

It is quite clear that in this neither the college nor its trustees secured the legal title to the lands or any part thereof under the will. The most that can be claimed is that the trustees named in the will held the legal title in trust for the college, and that in fact it was the equitable owner of the land. It is well settled that, under such a will as we have here, the trustees took the legal title, or as some of the cases put it, the fee simple title. See cases cited in 28 Am. & Eng. Enc. Law, 2d ed. 925; Welch v. Allen, 21 Wend. 147.

The trust is an active one, and the statute of uses does not apply. In other words, the statute does not execute the trust.

Newhall v. Wheeler, 7 Mass. 189; Wood v. Wood, 5 Paige, 596, 28 Am. Dec. 451.

As a general rule, real and personal property held under a testamentary or other trust is taxable to the trustee or trustees, and not to the *cestui que trust* or beneficiary. *Goodsite v. Lane*, 72 C. C. A. 281, 139 Fed. 593, 2 Ann. Cas. 849, and note; *Elliott v. Louisville*, 123 Ky. 278, 90 S. W. 990; *Dunham v. Lowell*, 200 Mass. 468, 86 N. E. 951; *Richardson v. Boston*, 148 Mass. 508, 20 N. E. 166; *Trowbridge v. Horan*, 78 N. Y. 439; *Greene v. Mumford*, 4 R. I. 313; *Catlin v. Hull*, 21 Vt. 152.

These are the general rules everywhere announced, without reference to any statutory exemptions. But it is claimed that the home for the aged yet to be created and Ellsworth College were and are the equitable owners, not only of the property, but of the income therefrom, and that, as the property to which the college is entitled is expressly made a part of its endowment, it is exempt from taxation under the statute hitherto quoted. That statute does not require that the college be the owner of the legal title to the property. It says that real estate owned by an educational institution as part of its endowment fund shall not be taxed. The word "owned" is broad, and undoubtedly comprehends as equitable, as well as a legal, ownership, and the question of exemption, so far as the interest of the college is concerned, depends primarily upon whether or not the college is the equitable owner of the property devised and of the income derived therefrom while the property is in the name of the testamentary trustees. Manifestly we think the income from the property, aside perhaps from such part thereof as might be necessary to take care of the gift to the home of the aged, belonged to the college; and it is equally clear that the college was the equitable owner of the property devised subject to the trust for the home for the aged yet to be created. It appears from the record that the income from the property has been paid to the college, and that all parties have put this construction upon the will. These facts, while not controlling, are entitled to great weight.

Certainly is it true that the increase in the value of lands goes to the college. Indeed, it is the general rule that, under a devise of lands to a trustee or trustees to be converted into money for the benefit of a *cestui que trust*, rents and profits accruing before actual conversion is accomplished pass to the beneficiary under the will. *Lewin, Tr.* 12th ed. 1223; *Moncrief v. Ross*, 50 N. Y. 431; *Sargent v. Sargent*, 103 Mass. 297; *Lent v. Howard*, 89 N. Y. 169.

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It is manifest that under the terms of the will no part of the income before conversion is to pass to the home for the aged. This income, as well as the proceeds of the property after conversion, with the income therefrom is expressly made a part of the endowment fund of the college, and this fact gives color to the equitable ownership of the college in the lands devised to the trustees. By the terms of the will, the trustees are to convert the real property into money for a permanent endowment of the college, and, in determining the nature of the equitable ownership or title to the lands, a court of chancery regards that as done which is directed to be done. Of course, the doctrine of equitable conversion does not apply to revenue statutes and convert real estate into personalty or personalty into real estate; but in dealing with the subject of taxation and construing exemption statutes, the doctrine of equitable conversion may be resorted to in order to ascertain the nature of the equitable ownership of the beneficiary. See, as supporting this view, *Gould v. Taylor Orphan Asylum*, 46 Wis. 106, 50 N. W. 422; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

By the devise in question the trustees were given the legal title to the land, and while the beneficiaries had no interest in the legal or equitable estate expressly devised to the trustees, yet the equitable interest must necessarily have vested in someone. In order to ascertain who the equitable owners are, the court must inquire for whose benefit was the trust created. That being ascertained, the person or persons who are to be the ultimate beneficiaries are regarded in equity as the equitable owners. *Pearson v. Lane*, 17 Ves. Jr. 101.

It is well settled, of course, that a trustee such as created the will in question is not the holder of a beneficial interest. He holds the legal title merely to perform the duties imposed by the trust.

In *Montgomery v. Wyman*, 130 Ill. 17, 22 N. E. 845, the supreme court of Illinois said: "No matter where the legal title to the property may be vested, it is sufficient for the operation of the statute if the institution is the ultimate or beneficiary owner. Most usually the title is held by the society or corporation which manages and controls the institution of learning, but not necessarily so; for there may be no corporation or organized society, and yet be 'an institution of learning' in respect to which the ownership of property, within the true intent and meaning of the law, can be predicated. But in such case, it would seem, there must, in the

nature of things, be a trustee or trustees to hold the legal title to the property in trust for the purposes and objects of the institution of learning. The idea of ownership of property can only be connected with that which we call 'an institution of learning' by means of the interposition of either a society or corporation or a trust. If the title is in the controlling corporation, or if it is vested in a trustee or trustees for the objects to be accomplished through the instrumentality of the institution, in either event the property is, within the contemplation of the statute, the property of the institution of learning." See also *Gerke v. Purcell*, 25 Ohio St. 229; *Norton v. Louisville*, 118 Ky. 836, 82 S. W. 621.

In the case last cited it is said: "While the beneficiary of the trust fund is not given the immediate care and control of it, it is the equitable owner of it, and it could not rightfully be diverted to any uses or purposes other than those designated by the testator. If the condition required it, the beneficiary could by appropriate proceedings rescue the fund from any misappropriation of it. It is the owner of the fund, though temporarily controlled by others. While *Norton* and *Barr* are designated as trustees under the will, still they are the trustees for the beneficial owner. They are accountable to it for the management of the property and the execution of the trust. The practical effect of the provision of the will under consideration is that the fund is given to the orphans' home, but it is to be managed for it for the specified time by the trustees named by the testator. If the income from the property or from its proceeds were to go to another during the five years, then it would be very clear that the property or fund should be taxed during that period. When one is the equitable owner of property, and is entitled to the income from it, he has the enjoyment of every benefit that could come to anyone who might own the property. To hold that the property should be taxed because it is controlled by others than the trustees of the orphans' home for a specified period is giving effect to the shadow, and not the substance, of things."

In *Williston Seminary v. Hampshire County*, 147 Mass. 427, 18 N. E. 210, the supreme court of Massachusetts said: "An ordinary *cestui que trust* has a property in a fund held for his benefit; he has a right and interest which he may vindicate in various ways. If trustees violate their duty, make improper investments, misuse or misappropriate the funds, the *cestui que trust* may bring them to account, and are the proper persons to do so. But especially

in the present case the property held in trust is, to all practical intents and purposes, the property of the seminary. The legal title is in the trustees; but the whole beneficial interest, unless indeed the annuitants are to be taken into account, is in the seminary. It would be a strained construction of the statutes to hold that this fund is to be considered as property of the seminary for the purpose of taxation, but not for the purpose of exemption. The more natural and reasonable construction is that personal property which, under the general tax laws, would otherwise be taxable to the enumerated institutions, shall be exempt from taxation. . . . For the purpose of taxation, it is to be deemed their property. They are the taxable owners. Nobody else can be assessed for it. In the present case, the seminary, as a body politic and corporate, stands as the person for whose future benefit the fund is held, and therefore, according to the method prescribed by the general provision of law, would be taxable for it. But, under the exemption clause, its personal property is exempt from taxation." The following cases are to the same general effect: *State v. Watkins*, 108 Minn. 114, 121 N. W. 390; *Litz v. Johnston*, 65 N. J. L. 169, 46 Atl. 776; *Masonic Education & Charity Trust v. Boston*, 201 Mass. 320, 87 N. E. 602; *People ex rel. Crook v. Wells*, 179 N. Y. 257, 71 N. E. 1126.

Following these rules, it is apparent, we think, that the lands were exempt from taxation, except perhaps to the amount of the devise to the home for the aged yet to be created. As to that institution, a different question is presented. The home has not yet been created, and no one knows what the nature of the institution will be when it is established. Moreover, there are no allegations in the petition which would exempt the property, were it or any part of it owned by the home. The trustees were specifically directed to set aside from the proceeds of the sale of the land the sum of \$25,000 for the purpose of building a home for the aged at Iowa Falls, and the residue was given to the college as a part of its endowment. This home for the aged, although not yet created, was as much the beneficial owner of \$25,000 of the funds to be derived from the sale of the lands as was the college to the remainder, and there is no showing whatever which would justify an exemption of that amount out of the lands. If the devise could be so treated as to vest the equitable ownership of the entire property in the college with a charge against it to the extent of \$25,000, a different question would be presented. But the will will not bear such interpre-

tation. The gift to the home was quite as specific as to the college, and each has an equitable ownership in the lands; the home to the extent of \$25,000, and the college to the remainder. No sound legal or equitable reason appears why the lands should be wholly exempt because the college is entitled to the larger share of the funds. Its equities are no greater than those of the home for the aged, and neither the money nor the property given to the home is exempt under any statute to which our attention has been called. The result of the whole matter is that the lands were exempt from taxation in the hands of the trustees, save as to the amount given in trust for the establishment of the home for the aged, to wit, the sum of \$25,000. To that amount, and to that only, should the lands have been assessed. In other words, there should have been deducted from the total value of the lands assessed all in excess of \$25,000. All this was not done, but the lands were decreed to be assessable to their full value without any exemption.

The decree must be reversed, and the cause remanded for one in harmony with this opinion.

Weaver, J., taking no part.

Petition for rehearing denied.

#### WISCONSIN SUPREME COURT.

R. W. MONK, Resp.,  
v.

WILLIAM HURLBURT, Appt.

(— Wis. —, 138 N. W. 59.)

#### Parent and child — medical services to child — liability of stepfather.

One is liable for medical and surgical services rendered to his stepson, who is a member of his family, where, although the boy's father is living and under obligation to contribute a certain amount towards the boy's support, and no direct request for the services is made by the stepfather, the

latter's action shows approval of the physician's conduct in rendering the services.

(October 29, 1912.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Clark County in plaintiff's favor in an action brought to recover for medical and surgical services rendered by plaintiff to defendant's stepson. Affirmed.

#### Statement by Siebecker, J.:

In February, 1910, John Murray, then seventeen years of age, while attending school at Neillsville, became ill. The plaintiff, a practising physician and surgeon at Neillsville, was called by Murray's roommate to treat him. In 1901 Murray's mother was divorced from his father. The decree of divorce gave the custody of the child to the mother, and ordered the father to pay to her \$5 per month during the minority of the child for his support. Murray's father has not made these payments. Five years before Murray became ill, the defendant, who is a farmer residing some miles from Neillsville, married Murray's mother. A couple of weeks after his mother's marriage to the defendant, Murray, then twelve years of age, came to the home of the defendant to live. At the time of her marriage to the defendant, Murray's mother had between \$300 and \$400. She has since received about \$100 from her father's estate. Murray was never legally adopted by the defendant. On the day after Murray became ill, he went to the home of a married sister in Neillsville, and while he was there he was treated by the plaintiff. Shortly after Murray became ill, the defendant brought his mother to her daughter's home, and she remained there to nurse him. Early in March, 1910, a necessary operation was performed on Murray. Another physician assisted the plaintiff in operating. Supplies and medicines for Murray were procured from a drug store and charged to the defendant. Several times during Murray's illness the defendant came from his farm to see him. During these visits he met the plaintiff,

#### Note. — Liability of stepparent for necessities furnished stepchild.

At common law and under the statute, 43 Eliz. chap. 2, providing that the father, grandfather, etc., of every poor and disabled person, should maintain him, a husband who agreed with his wife that they should live separate was not liable for necessities thereafter furnished by a third person for the support of the wife's child by a former husband. *Tubb v. Harrison*, 4 T. R. 118.  
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In *Stone v. Carr*, 3 Esp. 1, it was held that one who had taken a stepchild into her house, provided for it, and allowed it to live as part of his family, was liable to a schoolmaster who maintained and educated the child at the mother's request while the stepfather was absent on a voyage. The court distinguishes this case from *Tubb v. Harrison*, supra, saying that there was no doubt that if a man married a woman having children by a former husband, he might refuse to provide for them, and could not be compelled to do so; but if he did not re-

but did not direct him to care for Murray, or to perform the operation; nor did he object to such treatment of Murray by the plaintiff. When Murray had recovered sufficiently so that his mother's attendance was no longer necessary, she returned to the farm, and, when Murray was able, he also went there. While he was at the farm the plaintiff called to treat him, and Murray called at the plaintiff's office for treatment. The plaintiff last treated Murray in the month of July, 1910.

The claim of the physician who assisted the plaintiff in the operation on Murray, and the claim for medicines and drugs, have been assigned to the plaintiff, and he seeks to recover for them and for his own services, on the ground that the defendant

stood in the place of a parent to Murray and had occupied the position of a lawful parent to him, particularly with reference to supporting and maintaining him and supplying him with necessities. The plaintiff kept his account in Murray's name. Some credits on the account were paid by Murray and others, but the defendant has made no payment on any of these accounts. Judgment was rendered in justice court in plaintiff's favor, and an appeal was taken by the defendant to the circuit court.

In addition to the facts above set out, the evidence tends to show that the defendant advised with his wife concerning Murray and his education; that he kept no account of the cost of his board and lodging, or of any of the articles furnished him; that he

fuse to maintain them, and took them into his family, he stood in *loco parentis* as to them, and if he, going abroad, left them in the care of his wife, he would be bound by her contracts for their maintenance and education.

A search has disclosed only the following cases in this country involving the liability of a stepparent for necessities furnished by a third party to a stepchild:

In *St. Ferdinand Loretto Academy v. Bobb*, 52 Mo. 357, it was held that a stepfather was liable for the board and tuition of his stepdaughter at an academy to which she had been taken by her mother, the daughter having previously made her home with her mother and stepfather. It was held that instructions were proper that if the jury believed that the stepdaughter was a member of the family, and was held out to the world as such by the stepfather, and that the latter knew of her being placed at the school and made no objection, and the education was reasonably suited to the means and social position of the defendant, and the charge reasonable, the stepfather was liable; and that instructions were slightly refused that the stepfather was not liable unless he held the stepdaughter out to the academy as a member of his family, or if the services were rendered at the request of the mother, and not of the stepfather having been properly covered by the above. It was also held that a statement by the mother to the superior of the school when the daughter entered it, that the child would receive an inheritance from her father's estate out of which it was intended that the tuition would be paid, did not relieve the stepfather from liability, on the theory of a contract between the mother and the school to pay the expenses out of the daughter's estate.

One who is living apart from his wife and stepchildren, upon her request after trouble between them, and who has notified merchants not to sell to her upon his credit, is not at common law liable for necessities thereafter furnished upon his wife's credit for the stepchildren. *Menefee v. Chesley*, 98 Iowa, 55, 66 N. W. 1038. It was also 42 L.R.A. (N.S.)

held that the stepfather was not liable under a statute providing that the expenses of the family are chargeable upon the property of both husband and wife, the word "family" not including stepchildren living apart from the stepfather. The court said: "While he may have been liable for the expenses of such a family so long as he continued to live in and be a part of it, yet when he threw off these obligations toward his stepchildren, as he had the right to do, his liability for their support ceased. They were no longer a part of his family, and he should not be held liable for the support of persons to whom he owed no duty."

In *Chicago Manual Training School Assn. v. Scott*, 159 Ill. App. 350, where a minor son living with his mother and stepfather was taken by the former to a manual training school, it was held that the stepfather was liable for the tuition, although the natural father of the child had given the mother money for the tuition for several years, and at his request she had signed a note for that part of the tuition in controversy, which he had promised to pay, but which death had prevented his doing. The court approved instructions that if the son was a member of the stepfather's family, and held out by the latter to the world as such, the stepfather was to be considered as voluntarily assuming the relation of parent, and if he knew that the child had been placed by the mother in the school, and made no objection thereto, and the education was suitable to his social position, and the charge reasonable, the stepfather was liable; although the law would have allowed him to refuse to provide for the stepchild, or to take him into his family, and although, if he had not taken him into his family and stood toward him in the relation of a parent, he would not have been liable for such charge.

It was also held in the *Scott Case* that the giving of the note signed by the mother only would not relieve the stepfather from liability, unless it was given or received as absolute payment of the indebtedness.

R. E. H.



permitted him to remain upon the farm and to attend school; that, when Murray attended high school at Neillsville, he paid grocery bills contracted by him and charged to the defendant; and that he permitted Murray to retain and spend any moneys he earned during vacations. Later he paid Murray for work he did on the farm when he could have earned money elsewhere. The defendant testified that he never asserted or had control of Murray. The jury returned a special verdict finding that the services and the medicines furnished Murray were necessities; that the defendant, after Murray came to his home to live with him, treated him as a son with reference to accepting his services and providing for his support and maintenance up to and including the time when the services were rendered by the plaintiff and the medicines were furnished; and that the plaintiff and the druggist had reasonable grounds for believing that the defendant stood in the position of a parent to Murray and had assumed the obligation of supporting him. After the rendition of the verdict, the court denied defendant's motion to change answers to the questions of the special verdict, and allowed and permitted an amendment to the complaint, alleging that for more than two years before the services were rendered by the plaintiff and the medicines furnished, the defendant had stood in the place of a parent to Murray; that he had during that time furnished him with board, clothing, and schooling; that he had permitted Murray to obtain goods upon defendant's credit; that he had allowed Murray to make his home with him during school vacations, and had accepted Murray's services without compensating him therefor and without keeping account of board, clothing, and other necessities furnished him; that the rendition of the services and the furnishing of medicines to Murray were necessities; that the defendant had notice within a few days of the rendering of the services and the furnishing of the medicines, and had knowledge that the services were being rendered and the medicines furnished; that the defendant knew that the operation was to be performed; that the defendant furnished Murray with a horse to go from the farm to Neillsville to receive treatment from the plaintiff and to obtain medicines; and that the defendant had never objected to the services being rendered, or the medicines furnished, and had not then denied liability therefor. This is an appeal from the judgment on the verdict.

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Mr. R. J. MacBride, with Mr. E. W. Crosby, for appellant:

The defendant was not liable to any third person for necessities furnished his stepson. 29 Cyc. 1608; Owen v. White, 5 Port. (Ala.) 435, 30 Am. Dec. 572; Judge v. Barrows, 59 Wis. 115, 17 N. W. 540; Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538; Gotta v. Clark, 78 Ill. 229; Murphy v. Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424; Schnuckle v. Bierman, 89 Ill. 454; Tomkins v. Tomkins, 11 N. J. Eq. 512; Townsend v. Burnham, 33 N. H. 270; Johnson v. Smallwood, 88 Ill. 73; Rogers v. Turner, 59 Mo. 116; Bartels v. Moore, 9 Daly, 235; Crane v. Baudouine, 55 N. Y. 256; Van Valkenburgh v. Watson, 13 Johns. 480; Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73; 29 Cyc. 1608; Keaton v. Davis, 18 Ga. 467; McMillen v. Lee, 78 Ill. 443; Allen v. Jacobi, 14 Ill. App. 277; Clark v. Gotta, 1 Ill. App. 454; Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Freeman v. Robinson, 38 N. J. L. 383, 20 Am. Rep. 399; Raymond v. Loyl, 10 Barb. 483; Carney v. Barrett, 4 Or. 171; Gordon v. Potter, 17 Vt. 348; Varney v. Young, 11 Vt. 258; Jackson v. Mull, 6 Wyo. 55, 42 Pac. 603; Shelton v. Springett, 11 C. B. 452.

Mr. S. M. Marsh, for respondent:

Defendant occupied the position of parent to Murray, and was liable for the medical and surgical services rendered to him.

McGoon v. Irvin, 1 Pinney (Wis.) 526, 44 Am. Rep. 409; Zilly v. Dunwiddie, 98 Wis. 428, 40 L.R.A. 579, 67 Am. St. Rep. 820, 74 N. W. 126; Beilfuss v. State, 142 Wis. 665, 126 N. W. 33; Spencer v. Spencer, 97 Minn. 56, 2 L.R.A. (N.S.) 851, 114 Am. St. Rep. 695, 105 N. W. 484, 7 Ann. Cas. 901; Porter v. Powell, 79 Iowa, 151, 7 L.R.A. 176, 18 Am. St. Rep. 353, 44 N. W. 295; Clark v. Clark, 46 Conn. 586; Deane v. Annis, 14 Me. 26; Johnson v. Smallwood, 88 Ill. 73; Murphy v. Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424.

Siebecker, J., delivered the opinion of the court:

The objection to the amendment of the complaint after verdict, upon the ground that it operated to defendant's injury, is not sustained. It appears that the parties litigated the questions embraced in this amendment at the trial, both before the justice and in the circuit court. By allowing the amendment the court did no more than to conform the pleadings to the proof, pursuant to the provisions of § 2830, Stats. All the facts embraced in this pleading were before the court. Under such a state

of the case, the action of the court in no way injured the appellant, was promotive of justice, and is abundantly supported by the adjudications. See the following cases and those referred to therein: *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55; *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826; *Hopkins v. Chicago M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330.

The contention is made that the facts and circumstances shown do not establish defendant's liability for the professional services plaintiff rendered for Murray, defendant's stepson. The facts of the case sufficiently appear in the foregoing statement, and need not be repeated. The jury found that the defendant stood in the position of parent to his stepson; that plaintiff had reasonable grounds for believing that this relation existed; that the defendant had assumed the obligation of providing the boy with necessities; and that a special exigency as to the boy's health existed requiring medical and surgical treatment. It is manifest that the defendant was fully apprised of the boy's sick condition, that he understood such treatment was necessary, that he knew it was being furnished by the plaintiff, that he interposed no objection thereto, and that he so acted throughout the period of the boy's illness as to show approval of plaintiff's course in rendering the services. Under this state of the facts, the defendant's liability for the value of the services rendered by the plaintiff is fully established within the principle that the law implies a promise where a parent, with full knowledge of the facts and without objection, allows and approves of his child being furnished with necessities. We consider the instant case to be within the rule approved in *McGoon v. Irvin*, 1 Pinney (Wis.) 526, 44 Am. Dec. 409, and *Zilley v. Dunwiddie*, 98 Wis. 428, 40 L.R.A. 579, 67 Am. St. Rep. 820, 74 N. W. 126.

The claim that the court erred in not incorporating defendant's requested questions in the special verdict is not supported. The court practically adopted defendant's question relating to the existence of a special exigency for furnishing medical services. The verdict fully covers all the inquiries suggested by the rejected questions, and embraces the litigated issues in the case.

We have examined the exceptions cited to our attention to rulings on evidence and to instructions given the jury. They are not of sufficient importance to require restatement here. No prejudicial error was committed as regards them.

The judgment appealed from is affirmed. 42 L.R.A. (N.S.)

## KENTUCKY COURT OF APPEALS.

GEORGE BRAUNSTEIN, Appt.,

v.

CITY OF LOUISVILLE.

(146 Ky. 777, 143 S. W. 372.)

### Municipal corporation — negligence in operating workhouse — liability for injury.

1. A municipal corporation is not liable for injuries inflicted upon a person on a neighboring highway by the negligence of its servants in operating a quarry at its workhouse, although by their negligence they create a nuisance and render the way unsafe, since they are discharging a governmental function.

### Highway — injury by blasting — liability of municipality.

2. That a municipal corporation is bound to keep its streets in safe condition does not render it liable for injury to a person in the street by a rock thrown by a blast set off on property near the street by a person for whose act it is not responsible.

(February 15, 1912.)

**A**PPPEAL by plaintiff from a judgment of the Common Pleas Branch, Second Division of the Circuit Court for Jefferson County, sustaining a demurrer to the petition in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **Sheld & Campbell**, with Mr. **Camden R. McAtee**, for appellant:

Admitting the workhouse and its quarries are maintained by the city in the exercise of a governmental function, the city is liable for a nuisance thereby created.

*Wood, Nuisances*, § 142; *Chicago v. Robbins*, 2 Black, 426, 17 L. ed. 303; *James v. Harrodsburg*, 85 Ky. 192, 7 Am. St. Rep. 589, 3 S. W. 135; *Louisville & N. R. Co. v. Com.* 13 Bush, 390, 26 Am. Rep. 205; *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200, 20 S. W. 435; *Paris v. Com.* 29 Ky. L. Rep. 485, 93 S. W. 907.

The city must keep its highway safe for its citizens.

*James v. Harrodsburg*, 85 Ky. 192, 7 Am. St. Rep. 589, 3 S. W. 135; *Henderson v. Sandefur*, 11 Bush, 550; *Paducah v. Johnson*, 29 Ky. L. Rep. 532, 93 S. W. 1035; *Central Consumers Co. v. Booher*, 32 Ky. L. Rep. 794, 107 S. W. 198.

For failure to discharge its duty, the city is liable just as an individual.

**Note.** — As to liability of municipality for tort in connection with quarry worked by it, see note to *Radford v. Clark*, 38 L.R.A. (N.S.) 281.

Prather v. Lexington, 13 B. Mon. 559, 56 Am. Dec. 585; McGraw v. Marion, 98 Ky. 673, 47 L.R.A. 593, 34 S. W. 18; 20 Am. & Eng. Enc. Law, 2d ed. 1209; Paris v. Com. 4 Ky. L. Rep. 599; Com. v. Paducah, 6 Ky. L. Rep. 292; Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279; St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Walker v. New York, 107 App. Div. 351, 95 N. Y. Supp. 121; Norman v. Ince, 8 Okla. 412, 58 Pac. 632; Ewing v. Louisville, 140 Ky. 726, 31 L.R.A.(N.S.) 612, 131 S. W. 1016; Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 459, 28 L.R.A. 394, 53 Am. St. Rep. 414, 30 S. W. 971; Cornwall v. Louisville & N. R. Co. 87 Ky. 77, 7 S. W. 553.

Mr. Clayton B. Blakey, with Mr. Huston Quin, for appellee:

In the operation and maintenance of a city workhouse, a municipal corporation is an arm of the state, and performs certain state duties. And in the performance of such governmental functions it is not liable for the negligence of its agents or employees.

Pollock v. Louisville, 13 Bush, 221, 26 Am. Rep. 260; Greenwood v. Louisville, 13 Bush, 226, 26 Am. Rep. 263; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; Jones v. Corbin, 30 Ky. L. Rep. 374, 98 S. W. 1002; Morgan v. Shelbyville, — Ky. —, 121 S. W. 617; Jackson v. Owingsville, — Ky. —, 25 L.R.A.(N.S.) 180, 121 S. W. 672; Bell v. Cincinnati, 80 Ohio St. 1, 23 L.R.A.(N.S.) 910, 88 N. E. 128; Ulrich v. St. Louis, 112 Mo. 138, 34 Am. St. Rep. 372, 20 S. W. 466; Having v. Covington, 25 Ky. L. Rep. 1617, 78 S. W. 431; Twyman v. Frankfort, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446, 4 Ann. Cas. 622; Ernst v. West Covington, 116 Ky. 850, 63 L.R.A. 652, 105 Am. St. Rep. 241, 76 S. W. 1089, 3 Ann. Cas. 882; Simons v. Gregory, 120 Ky. 116, 85 S. W. 751; Park Comrs. v. Prinz, 127 Ky. 470, 105 S. W. 948; Schwalk v. Louisville (Columbia Finance & T. Co. v. Louisville) 135 Ky. 570, 25 L.R.A.(N.S.) 88, 122 S. W. 860; Kippes v. Louisville, 140 Ky. 423, 30 L.R.A.(N.S.) 1161, 131 S. W. 184; Jones v. Corbin, 30 Ky. L. Rep. 374, 98 S. W. 1002; Morgan v. Shelbyville, — Ky. —, 121 S. W. 617; Jackson v. Owingsville, — Ky. —, 25 L.R.A.(N.S.) 180, 121 S. W. 672; Hershberg v. Barbourville, 142 Ky. 60, 34 L.R.A.(N.S.) 141, 133 S. W. 985, Ann. Cas. 1912 D, 189; Louisville v. Carter, 142 Ky. 443, 32 L.R.A.(N.S.) 637, 134 S. W. 468; Danville v. Fox, 142 Ky. 476, 32 L.R.A.(N.S.) 636, 134 S. W. 883; Bowling Green v. Rogers, 142 Ky. 558, 34 L.R.A.(N.S.) 461, 134 S. W. 921, 42 L.R.A.(N.S.)

Plaintiff is not entitled to recover on the theory that the sidewalk where he was walking was rendered unsafe by reason of the blasting.

Greenwood v. Louisville, 13 Bush, 226, 26 Am. Rep. 263; Bell v. Henderson, 24 Ky. L. Rep. 2434, 74 S. W. 206; Danville v. Fox, 142 Ky. 476, 32 L.R.A.(N.S.) 636, 134 S. W. 883; Kippes v. Louisville, 140 Ky. 423, 30 L.R.A.(N.S.) 1161, 131 S. W. 184; Louisville v. Carter, 142 Ky. 443, 32 L.R.A.(N.S.) 637, 134 S. W. 468; Higgins v. Superior, 134 Wis. 264, 13 L.R.A.(N.S.) 994, 114 N. W. 490; Barber v. Roxbury, 11 Allen, 318; Pratt v. Weymouth, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538; Hixon v. Lowell, 13 Gray, 59; Hewison v. New Haven, 34 Conn. 136, 91 Am. Dec. 718; Addington v. Littleton, 50 Colo. 623, 34 L.R.A.(N.S.) 1012, 115 Pac. 896, Ann. Cas. 1912 C, 753; Temby v. Ishpeming, 140 Mich. 146, 69 L.R.A. 618, 112 Am. St. Rep. 392, 103 N. W. 588; Hubbell v. Viroqua, 67 Wis. 343, 58 Am. Rep. 866, 30 N. W. 847.

Hobson, Ch. J., delivered the opinion of the court:

On September 15, 1910, George Braunstein was at work on a sewer, as a construction foreman, on Spring street in the city of Louisville, about 200 yards from the quarries of the city workhouse. While he was so at work, the servants of the city operating the rock quarries at the workhouse, without warning to him or other persons upon the street, negligently set off a number of blasts of dynamite and other explosives for the purpose of getting out rock in the quarries, and thereby negligently threw large fragments of rock into the air with such force that they were caused to fall around plaintiff, where he was working in the street; one of the fragments striking him and inflicting serious injuries. The servants of the city who were operating the quarries knew, or could have known by ordinary care, of the danger to persons on the highway from the blasts which they set off; the charges used in setting off the blasts were excessive, and the blasting, as it was done, created a nuisance dangerous to the lives of all persons in the much frequented vicinity rendering the street dangerous and unsafe for public use. Braunstein filed a suit against the city to recover damages for his injuries, in which he alleged the foregoing facts. The circuit court sustained a demurrer to his petition, and, he failing to plead further, the action was dismissed.

The city workhouse was erected pursuant to the charter of the city. The quarries referred to are a part of the workhouse. In maintaining the workhouse, in which persons convicted of offenses are confined,

the city is discharging a governmental function, and, while its officers and servants there are themselves responsible for any negligent acts by which they injure others, the city is not responsible for the acts of its agents employed in its governmental functions. There is no doubt, under the allegations of the petition, that the persons who fired off the blasts were negligent, and would be liable to the plaintiff for the damages he sustained by reason of their negligence. But the liability of the city for their wrongful acts is a different matter. In *Jones v. Corbin*, 30 Ky. L. Rep. 374, 98 S. W. 1002, Jones was locked up in the city station house, and while there took a deep-seated cold, because the city authorities failed to keep the prison comfortable. He sued the city for the injury to his health. It was held that he could not recover; that the maintenance of the prison was in pursuance of the city's governmental function, and in so doing it was but an arm of the state in upholding the public peace and safety. A number of previous cases are collected in that opinion. The same ruling was made in *Morgan v. Shelbyville*, — Ky. —, 121 S. W. 617, and in *Jackson v. Owingsville*, — Ky. —, 25 L.R.A.(N.S.) 180, 121 S. W. 672, where a prisoner received injuries, while in prison, at the hands of others, by reason of the negligence of the keeper. In *Bell v. Cincinnati*, 80 Ohio St. 1, 23 L.R.A.(N.S.) 910, 88 N. E. 128, the same rule was applied, where one of the servants of the city was injured in the quarries of the workhouse, by reason, as alleged, of the negligence of the other servants there; the court laying down the rule that the maintenance of the workhouse was the exercise of a governmental function by the city, and that, although the quarry was some distance from the workhouse, it was used for workhouse purposes, and the plaintiff's claim was not stronger than if he had been injured in the workhouse itself. In *Danville v. Fox*, 142 Ky. 476, 32 L.R.A.(N.S.) 636, 134 S. W. 883, the plaintiff was injured by reason of the negligence of the servants of the city in the operation of a steam roller in the repairing of its streets. It was held that the repairing of the street was a governmental function; and that the city was not answerable for the negligence of its servants in charge of its steam roller. In *Bowling Green v. Rogers*, 142 Ky. 558, 34 L.R.A.(N.S.) 461, 134 S. W. 921, it was held that the city was not liable to an adjoining proprietor for damages because the city prison was not properly kept, and the adjoining property was thereby made less valuable. A number of other cases are discussed in these opinions.

It is insisted, however, for appellant 42 L.R.A.(N.S.)

that this case is to be distinguished from those cited, by reason of the fact that facts are alleged here showing that the blasting was a nuisance. But it must be remembered that the blasting was a nuisance because of the way in which it was done. The negligence of those in charge of the work in using too large charges of explosives, and in firing off the blasts without giving notice, was the cause of the trouble. The blasting, if properly done, was not a nuisance *per se*. While a city may not take or injure private property without compensation, as required by § 242 of the Constitution, there is nothing in this constitutional provision to make the city liable for the torts of its officers, inflicting personal injury on others, where the officers are employed by the city in the discharge of its governmental function. *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 459, 28 L.R.A. 394, 53 Am. St. Rep. 414, 30 S. W. 971, *Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422, 63 S. W. 981, and the other similar cases cited were cases where property was injured or taken. But this principle has no application here. In *Clayton v. Henderson*, 103 Ky. 228, 44 L.R.A. 474, 44 S. W. 607, and *Id.*, 22 Ky. L. Rep. 283, 53 L.R.A. 145, 57 S. W. 1, the city had violated a statute which gave a right of action to any person injured thereby.

It is also insisted that the plaintiff may recover because he was injured in a public street; and that it was the duty of the city to keep its streets reasonably safe. It is the duty of the city to keep its street in reasonable repair for public travel, and to maintain it in a reasonably safe condition for this purpose. But the plaintiff was not injured by reason of any defect in the street. The street was in good condition; the trouble arose wholly from the casting of rocks into the streets. In *Addington v. Littleton*, 50 Colo. 623, 34 L.R.A.(N.S.) 1012, 115 Pac. 896, *Ann. Cas.* 1912 C, 753, a suit was brought against the city to recover for an injury to the plaintiff, inflicted by a vicious dog running at large; and it was insisted that the city was liable, because it suffered the dog to run at large and did not keep its streets in a reasonably safe condition. Rejecting this contention, the court said: "The manner in which a street is used is a different thing from its condition as a street. The construction and maintenance of a street in a reasonably safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate, powers; and for any act or omission of duty in regard to the enforce-

ment of such ordinances there is no liability, in the absence of a statute imposing one."

The city is no more liable to plaintiff when he was struck in the street than it would have been if he had been struck in his own yard adjoining the street. If the city is not responsible for the negligence of the person who set the rock in motion, it is hard to understand how it can be responsible because the rock happened to fall in the street. Whether the city is responsible for an injury suffered by an object falling in the street must depend upon whether or not the city is liable for the object being in the air above the street. To illustrate, if the operator of an aeroplane should lose control of it, and it should fall in the street of a city and hurt someone, the city would be no more responsible for this than for an object falling into the street from any other cause over which it had no control; and the city, not being responsible for the negligence of the persons who set the rocks in motion, cannot be held liable, simply because the rocks happened to fall in the street, or hit a person in the street.

Judgment affirmed.

Petition for rehearing denied.

#### GEORGIA SUPREME COURT.

S. T. STEPHENS, Plff. in Err.,  
v.

CENTRAL OF GEORGIA RAILWAY  
COMPANY.

(138 Ga. 625, 75 S. E. 1041.)

**Carrier — tickets — connecting carrier — compulsory sale.**

1. A statute which provides a penalty against a common carrier for "refusing to put on sale," or to sell, tickets of a connecting carrier for the transportation of passengers over the connecting line, or any

Headnotes by HILL, J.

**Note. — Constitutionality of statute requiring carrier to sell tickets good on connecting line.**

In order clearly to understand the reasoning as well as the holding in *STEPHENS v. CENTRAL OF GEORGIA R. Co.*, it is necessary to know the point of view assumed by the court with reference to the purpose of the statute, the standing in court of the parties to the suit, and the real meaning of the statute. This information can be obtained from former decisions.

In *Wimberly v. Georgia S. & F. R. Co.* 5 Ga. App. 263, 63 S. E. 29, and in *Jones v. Louisville & N. R. Co.* 132 Ga. 11, 63 S. 42 L.R.A. (N.S.)

portion thereof, at the rate prescribed by the railroad commission of the state, does not violate the provisions of article 1, § 1, ¶ 3, of the Constitution of the state, which declares that no person shall be deprived of property except by due process of law.

(a) Nor is such a statute obnoxious to the 14th Amendment of the Constitution of the United States, which declares that no state shall deprive any person of property without due process of law, nor deny to any person the equal protection of the laws.

(b) Nor does such a statute violate the provision of the Constitutions above referred to, because it interferes with and destroys the right of private contract.

(c) Nor because it compels a railroad company to become the debtor of another railroad company against its consent.

(d) Nor because it compels a railroad company to become the agent of another railroad company, or to appoint another railroad company its agent, against its consent.

(e) Nor because it deprives a railroad company of the right to select its own agents, and compels it against its consent to transact its business through the agents of another railroad company.

(f) Nor for the reason that it requires a railroad company to enter into contractual relations with another railroad company against its consent.

**Same — refusal to sell — penalty.**

2. Where a connecting line of railroad, having an office or agency, has on sale tickets furnished by another connecting railroad, for the transportation of passengers over the latter, and refuses to sell said tickets to a prospective passenger, who applies to the agent of the initial carrier for such tickets, at the price fixed by the railroad commission of this state, the railroad so refusing is subject to the penalty provided by the Civil Code, § 2755.

**Pleading — petition — sufficiency.**

3. The petition, as amended, set forth a good cause of action, and the demurrer thereto should have been overruled.

(July 11, 1912.)

**ERROR** to the Superior Court for Carroll County to review a judgment sustaining a demurrer to the petition in an action

E. 627, it was held that the only legislative object, as disclosed by a correct interpretation of this act, was to prevent one railroad company from discriminating against another connecting therewith, contrary to the other's wishes; that a party demanding a ticket, and bringing an action under the law for the refusal to sell, is regarded as a mere informer, his recovery being for a penalty, and not for actual damages sustained by him; and that if neither of the two connecting roads demands an agreement of the other, there can be no violation of the statute. The constitutionality of the statute was not passed upon in either of these two cases.

brought to recover the penalty provided by statute for refusal of defendant to sell tickets at the price fixed by the railroad commission. Reversed.

The facts are stated in the opinion.

Messrs. Watkins & Latimer, for plaintiff in error:

Where a railroad refuses to put on sale, or refuses, at the price fixed by the railroad commission, to sell any ticket of any connecting railroad company, being furnished with such ticket with the right to sell the same, such railroad company is subject to a penalty of \$1,000 for each refusal.

Jones v. Louisville & N. R. Co. 132 Ga. 18, 63 S. E. 627; Tilley v. Savannah, F. & W. R. Co. 4 Woods, 427, 5 Fed. 641; Georgia R. & Bkg. Co. v. Smith, 70 Ga. 694; Central of Georgia R. Co. v. McLendon, 157 Fed. 961; Wimberly v. Georgia S. & F. R. Co. 5 Ga. App. 263, 63 S. E. 29; Southern R. Co. v. Melton, 133 Ga. 308, 65 S. E. 665; Logan v. Central R. Co. 74 Ga. 684, 77 Ga. 804, 2 S. E. 465; Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315; Bridwell

v. Gate City Terminal Co. 127 Ga. 520, 10 L.R.A.(N.S.) 909, 56 S. E. 624.

Mr. S. Holderness also for plaintiff in error.

Messrs. Hall & Cleveland, Hall & Hall, and R. D. Jackson for defendant in error.

Hill, J., delivered the opinion of the court:

Stephens brought his action against the Central of Georgia Railway Company to recover the penalty provided in the Civil Code, §§ 2752 to 2755, inclusive. The petition, as amended, shows substantially the following: The defendant company is a common carrier operating passenger trains from Whitesburg, Carroll county, Georgia, to and beyond Newnan, Coweta county, and the defendant is directly and indirectly connected with the Atlanta & West Point Railroad at Newnan, Georgia, their tracks crossing there. The most direct route from Whitesburg to Atlanta is over the defendant railway, *via* Newnan, and the Atlanta & West Point Railroad. The rate of fare fixed

Would a carrier's refusal of an agreement with all connecting carriers be a violation of the statute? The wording of the statute would make this an offense, but in view of the general purpose of the statute, a discrimination would seem to be necessary in order to constitute a violation. This question has not been directly before the Georgia courts, although in the Wimberly Case, *supra*, the court said: "... We agree with counsel for the plaintiff in error that it is not necessary to show that the effect of such refusal would work a discrimination against such company." But even this would not cover a case where the defendant assumes the burden of proof and shows affirmatively that there was no discrimination, for the court was here discussing the sufficiency of the petition.

The court in STEPHENS v. CENTRAL OF GEORGIA R. Co. takes care to point out the fact that the arrangement had actually been made between the two roads, and that the violation consisted in the defendant's refusal to sell at the price fixed by the order, thus clearly performing the act which the legislature had regarded as a discrimination.

Bearing in mind the purpose of the statute, the question is, Can the legislature, in order to prevent unjust discrimination among carriers, to the detriment of some of the carriers, pass a valid statute requiring carriers to sell tickets good on connecting lines? This question suggests a line of inquiry, but the scope of this note is not limited thereto.

If such power exists in the legislature, it must be by virtue of the police power of the state. As is pointed out, the principle of the right of a state or government to regulate carriers and rates for public serv- 42 L.R.A.(N.S.)

ice performed is not new. Nor is the right of a state to enact legislation for the prevention of discrimination open to question. These general principles are not within the scope of this note.

Do the prohibited acts constitute unjust discriminations? If so, is the public benefit great enough to justify the state in its interference with private rights to the extent to which the statute goes? These questions test the applicability of the general principles to the particular statute.

There are no cases exactly the same, in point of facts, as the case above reported. Therefore, comment is here made upon a few cases which seem to involve the same principles, but this note is not exhaustive of analogous cases.

That the statute here considered is not repugnant to the "due process of law" clause of either the state or the Federal Constitution, the court in STEPHENS v. CENTRAL OF GEORGIA R. Co. regards as settled by Wadley Southern R. Co. v. State, 137 Ga. 497, 73 S. E. 741, in which case it was held that an order of the railroad commission of Georgia, made and violated after a hearing, was not violative of those clauses, as against the contention that it was so on account of excessive penalties provided in the statute from which the commission derived its authority. The purpose of the order was to compel a railroad company to cease discriminating in the matter of collecting freight charges, between two competing roads connected therewith, to the detriment of the one road and all of its shippers. The discrimination charged was the refusal to accept the freight coming over the one road unless the freight charges were prepaid, while that was not required of shippers over the other

by the railroad commission from Whitesburg to Newnan is 28 cents, and from Newnan to Atlanta, 78 cents, making a legal passenger charge from Whitesburg to Atlanta of \$1.06 as fixed by the railroad commission. The plaintiff demanded of the defendant, on the dates named in the petition, tickets from Whitesburg to Atlanta, over the connecting line of railroad, and the defendant refused to sell such tickets at the lawful rate fixed by the commission, but charged and secured 15 cents in excess of the legal rate. The failure to sell such tickets at the rate fixed by the commission was in violation of Civil Code, § 2755, and subjected the defendant to the penalty of \$1,000, prescribed by that section, for each offense, and suit was brought for \$2,000 for the two offenses. It was also alleged that, while the defendant refused to put on sale or to sell tickets as aforesaid, it had, at all times since the rate was fixed by the railroad commission, on September 2, 1907, sold tickets from Whitesburg to Newnan for 28 cents, and the Atlanta & West Point Railroad Company sold tickets from New-

nan to Atlanta for 78 cents. On and from the above date the defendant was authorized to sell and did sell tickets of the Atlanta & West Point Railroad and its own line from Whitesburg, via Newnan, to Atlanta. Tickets reading from Whitesburg to Atlanta over the lines of the defendant company and the Atlanta & West Point Railroad Company, to Newnan and Atlanta, had been placed by the latter company with the defendant company at all times since the 2d day of September, 1907, and it was within the power of the defendant company to sell the plaintiff the ticket applied for over the connecting lines, at the price fixed by the railroad commission. The tickets sold to the plaintiff, reading over such connecting lines of the defendant and the Atlanta & West Point Railroad Company, were received by these companies for passage over their connecting lines; but, notwithstanding it was within the power of the defendant to sell tickets on the dates on which the plaintiff sought to buy them from Whitesburg to Atlanta over the connecting lines of the two companies, the defendant refused to sell

road. A penalty of not over \$5,000 for each violation of the order, the amount to be fixed by the court, was provided by the statute. It will be observed that the purpose of this legislation was practically the same as that of the statute in the other cases, *supra*, except it applied to freight. The contention here was that the penalties provided were so great that the defendant would be forced to submit to the law rather than risk the penalty in testing the law, hence it was deprived of property without due process of law. This doctrine was upheld in *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, but the court here distinguishes the *Young Case* from the one under consideration. Since this general doctrine is applicable only where the penalty is excessive, it is foreign to the subject here considered, but it has been here stated as explanatory of one point in the reported case.

In the *Wadley Case*, *supra*, it was also contended that the order is invalid in that the commission is not vested with power to force the defendant into contractual relations with other lines, or to prevent it from selecting those with whom it shall deal on terms of mutual confidence and trust. (These are the same objections that were urged in the *CENTRAL OF GEORGIA CASE*, but they attacked the power of the commission instead of that of the legislature. But if the commission had the power, *a fortiori*, the legislature also possessed it.) The court said: "Though the collection of the entire freight charge at destination implies an obligation to account for the connecting carriers' share of it, nevertheless this is but one incident of a course of business voluntarily adopted 42 L.R.A.(N.S.)

by the carrier, whereby facilities respecting the interchange of freight are afforded to one connecting carrier, and denied to another connecting carrier, in contravention of the statute against unjust discrimination."

A statute providing for "through freight rates" to be established by a commission in default of their establishment by the connecting carriers, and providing that "carload lots shall be transferred without unloading from the cars in which the shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and such transfer be made without unreasonable delay," was in *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98, held to be constitutional, as against the contention that it enforces contractual relations against the will of the parties, etc. It was pointed out in the objection that the carrier collecting the freight is made the agent of the others, and must account to them for their proportional part thereof.

The two cases last cited are included herein for the purpose of showing that statutes compelling through freight rates are based upon the same principle, and are open to the same constitutional objections, as the statute before the court in *STEPHENS v. CENTRAL OF GEORGIA R. CO.* Observe also the citation to this point in the opinion. On the subject of through freight rates, see notes in 12 L.R.A. 437, and 40 L.R.A. 389.

As to transfer between lines of different street railway companies, see note in 32 L.R.A.(N.S.) 720. J. W. M.

such tickets, though requested to do so, at the price fixed by the railroad commission, but sold such tickets at a price and rate in excess of that fixed by the railroad commission of Georgia. The defendant filed its demurrer to the petition, which was sustained by the trial judge, and the petition dismissed. To this judgment the plaintiff excepted, and brought the case here for review.

1. This is a suit to recover the penalty provided by the Civil Code, § 2755. The facts are substantially set forth above. The material portions of §§ 2753, 2754, and 2755 of the Code are as follows:

"No railroad company having an office or agency within the state of Georgia shall refuse to put on sale, or refuse to sell, any ticket of any other railroad company with which the same may be directly or indirectly connected, at the price or rate fixed by the railroad commission of this state, for passage over lines of such connecting roads, less such amount as may be directed to be deducted from such rate by any one or more of said connecting lines."

"No railroad company operating or doing business wholly or partly within this state shall refuse to put on sale with the agents of any other railroad company, wherewith it may be, directly or indirectly connected, tickets for any point upon its lines of road, or refuse to receive such tickets for passage over its lines, or refuse to receive and transport baggage which may be checked upon said tickets so sold."

"For every violation of any of the provisions of the two preceding sections, the railroad company shall be subject to a penalty of \$1,000, which may be recovered in any superior or city court of the county in which such violation may occur. Suit may be brought by the railroad company whose road may be discriminated against, or by the person offering to buy a ticket over such road; and such penalty may be recovered by each of said parties, and the recovery by one shall not be a bar to recovery by the other."

It is alleged that the defendant company refused to sell tickets of the Atlanta & West Point Railroad Company, its connecting line of railroad, from Newnan to Atlanta, and its own tickets from Whitesburg to Newnan, at the price fixed by the railroad commission of this state, although the defendant had received from the Atlanta & West Point Railroad Company, and had on sale, and did sell, tickets over that line and over its own to the plaintiff at a price in excess of the rate fixed by the railroad commission. There is no question raised as to the form of the tickets had and sold.

It is insisted by the defendant in error 42 L.R.A. (N.S.)

that the above-recited statute, on which this suit is founded, is invalid and unconstitutional, because it violates the provisions of article 1, § 1, ¶ 3, of the Constitution of this state (Civil Code, § 6359), which declares that no person shall be deprived of property except by due process of law, and of the 14th Amendment to the Constitution of the United States, which declares that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Civil Code, § 6700. We think the case, on this point, is controlled by the decision in the case of *Wadley Southern R. Co. v. State*, 137 Ga. 497 (3), 504, 73 S. E. 741, and therefore no further discussion of it is necessary. See also *Atlantic Coast Line R. Co. v. State*, 135 Ga. 546 (3) 557, 32 L.R.A. (N.S.) 20, 69 S. E. 725.

But it is insisted that, even if the act quoted from is not unconstitutional upon the above grounds, it interferes with and destroys the right of private contract with reference to the matters dealt with in said statute, and requires a railroad company to become the debtor of another railroad company, and to become its agent, against its consent, etc. We do not think that these contentions are sound. The right of the legislature to pass laws regulating common carriers has been constantly questioned in this state, but this is no longer an open question. The opinion in the case of *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694, and the uniform line of decisions subsequent thereto, are to the effect that the legislature, within its constitutional limitations, has that right. In the *Smith Case*, supra, it was ruled: "The object of the constitutional provision conferring power upon the legislature to regulate railroad freights and passenger tariffs, to prevent unjust discrimination, and require reasonable and just freights and tariffs, and making it the duty of the legislature to pass laws in furtherance of this provision, was to give proper protection to the citizens against unjust rates for the transportation of freights and passengers over the railroads of the state, and to prevent unjust discrimination, even though the rates might be just."

The principle of the right of a state or government to regulate carriers and rates for public services performed is not new, but seems to date back to a very ancient period. So far as the writer's research extends, it goes at least as far back as about 2,250 years before the birth of Christ, to the reign of Hammurabi, the King of ancient Babylon, who had a complete code of laws for that time. Indeed, our laws of the present day have few underlying prin-



ciples that do not seem to be contained in this primitive code. In it we read that "if a man be on a journey and he give silver, gold, stones, or portable property to a man with a commission for transportation, and if the man do not deliver that which was to be transported where it was to be transported, but take it to himself, the owner of the transported goods shall call that man to account for the goods to be transported which he did not deliver, and that man shall deliver to the owner of the transported goods fivefold the amount which was given to him." The Code of Hammurabi, 2d ed., University of Chicago Press, 1904, § 112. Again we read: "If a man hire an ox for a year, he shall give to its owner four gur of grain as the hire of a draft ox, and three gur of grain as the hire of an ox." Id. §§ 242, 243. "If a man hire a sailboat, he shall pay 2½ se of silver as its hire." Id. § 276. "If a man hire oxen, a wagon, and a driver, he shall pay 180 ka of grain per day." Id. § 271. "If a man hire a wagon only, he shall pay 40 ka of grain per day." Id. § 272. "If he hire an ass to thresh, 10 ka of grain is its hire." Id. § 269. Numerous other instances from this ancient code could be cited. So the principle of regulation is not new, but has come down to us from the ancients.

But we are not remanded to ancient history or law for precedent on this question. The constitutional and statutory right to regulate common carriers in this state, within the limitations imposed, is too well settled to require argument or citation of authority. Our Reports abound in decisions on the subject of railroad regulation. The question presented for determination is: Has the legislature the right to compel one railroad to place its tickets on sale with another connecting railroad, and to require the latter railroad to sell them, at the price fixed by the railroad commission? In this case the question does not really come to that, for the defendant railroad had on sale the tickets alleged to have been placed by the railroad connecting with it, and sold them; and the real question is: Is the railroad selling the tickets at a greater rate than that prescribed by the railroad commission of Georgia, subject to the penalty provided by law for the violation of the statute here sought to be enforced? The penalty is "for every violation of any of the provisions of the two preceding sections." Is the sale of the tickets at a rate in excess of that fixed by the railroad commission a violation of any provision of the statute? We think it is. A simple reference to the statute quoted above is sufficient to establish this. If the position of the defendant in error is sound, and can be maintained, the whole law regu-

lating common carriers and requiring railroads to connect, interchange freight, to prevent discrimination, to make physical connection, and the like, is wiped out.

In some of the cases coming to this court on this and similar questions, the same argument was used as here. In the case of Atlantic Coast Line R. Co. v. State, supra, it was argued that the legislature could not, under the police power conferred upon it, require a railroad company to furnish a certain kind of headlight; but this court (135 Ga. 557) said: "All property is held subject to the police power of the state. The determination by the railroad company that the reflector and the light in use by it constitute an adequate light cannot be conclusive on the general assembly, which has the authority to exercise the police power of the state, and, in the interest of public safety, to declare such light inadequate. It is a matter of great importance for the protection of persons and property in the train, the persons on the locomotive, persons and property on the track, and persons and property on other trains with which a collision may be had, that there should be an adequate headlight on such locomotive. The general assembly, in the exercise of the police power of the state, has the right to require adequate headlights on such engines; and if in conformity to the requirements of such law, the railroad company is compelled to do away with the headlights already in use by it, and substitute others therefor at its own expense, there is no taking of property without just compensation, in violation of the due process clauses of the state and Federal Constitutions. In such a case there is no taking of property. The due process clauses are not intended to limit the right of the state to properly exercise the police power in the enhancement of the public safety. The fact that the railroad company will, in order to equip its engines with the required headlights, be forced to do away with the reflectors and lights which it has in use, is only incidental to a compliance with the police regulation and requirement made in the act, which is a valid and reasonable requirement." In the case of Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 48 L. ed. 1151, 22 Sup. Ct. Rep. 900, it was held: "The act of the legislature of Minnesota, creating a railroad commission, is not unconstitutional in assuming to establish joint through rates or tariffs over the lines of independent connecting railroads, and apportioning and dividing the joint earnings. . . . Without deciding whether or not connecting roads may be compelled to enter into contracts as between themselves, and establish joint rates, it is none the less true

that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related to transportation over a single line." See also *Beale & W. Railroad Rate Regulation*, § 830; *Wadley Southern R. Co. v. State*, 137 Ga. 497, 504, 73 S. E. 741.

It is true this court has held that a shipper cannot require a carrier to issue a through bill of lading (*Coles v. Central R. & Bkg. Co.* 86 Ga. 253, 12 S. E. 749; *State v. Wrightsville & T. R. Co.* 104 Ga. 437, 30 S. E. 891), not for constitutional reasons, but for lack of statutory legislation on the subject. Our statute requires one railroad company to receive and take cars from another railroad, as well as freight for transportation. Civil Code, § 2750. The argument here against requiring one connecting railroad to furnish, and the other to sell, passenger tickets, is the same that has been held not sound by this court and others in the numerous cases on that question. If the contention is sound that a given railroad has the power to contract with one railroad, and not with another, and it is held that it cannot be required to do so because you force them to contract with one another, the effect would be to obliterate all the law preventing discrimination. We hold, therefore, that the act under review is not void on the ground that it interferes with and destroys the right of private contract with reference to the matters dealt with in the statute; nor on the ground that it requires one railroad company to become the debtor of another railroad company, or to become the agent of another railroad company, against its consent.

2. In the case of *Jones v. Louisville & N. R. Co.* 132 Ga. 11, 63 S. E. 627, the plaintiff alleged neither that the "defendant had been furnished tickets of this kind for sale by such connecting carrier, nor that it had been tendered such tickets for sale and had refused to put them on sale," and hence no cause of action was stated under the statute, and the case was properly dismissed. But here the case is different, and the amendment seems to have been drawn with special reference to the *Jones Case*, supra, and brings this case within the reasoning in that. It is alleged here that the Central of Georgia Railway Company was furnished the tickets by the Atlanta & West Point Railroad Company, its connection, and, having the tickets, refused to sell them to the plaintiff at the rate prescribed by the railroad commission, but sold them at a price or rate in excess of that fixed by the railroad commission, and that these tickets were accepted by the two railroad companies, respectively. This case therefore comes 42 L.R.A. (N.S.)

clearly within the reasoning in the *Jones Case*, supra. We hold that, when one railroad places its tickets with another railroad which has an office or agency and physical connection with the former, this is substantially a request to sell such tickets. And if the carrier having them for sale refuses to sell them at the rate fixed by the railroad commission of this state, this constitutes a discrimination within the purview of the statute, and the carrier so refusing violates the sections of the Civil Code first above cited, and is liable for the penalty provided by that statute.

3. The learned judge in sustaining the demurrer did not state the ground of his decision; hence we look with especial care to each ground, and in doing so conclude that the petition, as amended, set forth a good cause of action, and that the demurrer, both on the general and the special grounds thereto, should have been overruled.

Judgment reversed.

All the Justices concur.

Petition for rehearing denied September 18, 1912.

## PENNSYLVANIA SUPREME COURT.

LINDSAY BROTHERS

v.

CURTIS PUBLISHING COMPANY, Appt.

(236 Pa. 229, 84 Atl. 783.)

**Landlord and tenant — alterations — electric wiring.**

Wiring, conduits, and switch boards fastened to the walls of a leased building by a tenant, to enable him to light and operate machinery placed in the building by him for the conduct of his business, are not within the meaning of a clause in the lease requiring "alterations, improvements, and additions" to be left on the premises at the expiration of the lease.

(April 29, 1912.)

*Note.* — *Scope of provision that lessees shall leave alterations, improvements, additions, etc., on the premises.*

As to right of tenant to remove fixtures of chattel nature, see note to *Collamore v. Gillis*, 5 L.R.A. 151; also note to *Friedlander v. Hewitt*, 9 L.R.A. 700; and note to *Overman v. Sasser*, 10 L.R.A. 723.

Cases are not here included where the limitation upon the lessee's right of removal related to specific articles or structures named, but only where a general expression was used, such as additions, al-

**A** PPEAL by defendant from a decree of the Court of Common Pleas, No. 3, for Philadelphia County, enjoining it from removing electric wiring, conduits, and switch boards from the leased premises. Reversed.

The facts are stated in the opinion.

The conclusions of law found, *inter alia*, by the court below, were as follows:

"(1) Whatever the purpose of the defendant in installing the electric wiring, conduits, and switch boards, they must be regarded as alterations, improvements, and additions, and as such could not be removed from the demised premises without the consent of the complainant."

"(3) A decree should be entered making

terations, improvements, repairs, fixtures, and the like.

The right of the tenant to remove trade fixtures may well enough be called rather a privilege than a property, and it is one that he may lawfully waive or modify by the terms of the lease without the form of either a pledge or a mortgage. *Ex parte Morrow*, 1 Low. Dec. 386, Fed. Cas. No. 9,850.

However, covenants restricting the tenant's ordinary right to remove trade fixtures are always strictly construed. *Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* 153 Mo. App. 387, 134 S. W. 35; *Montello Brick Co. v. Trexler*, 93 C. C. A. 118, 167 Fed. 482.

Such an agreement on the part of a lessee partakes nothing of the character of a chattel mortgage, nor is it a matter of any consequence, in view of such an agreement, whether the property upon which it operates is to be deemed personal or real in its nature. *Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn*, 60 Misc. 209, 111 N. Y. Supp. 576.

These cases resolve themselves into ones of interpretation and construction, which must depend upon the facts of each individual case and the intention of the parties as shown by their contract. *Lesser v. Rayner*, 21 Misc. 666, 47 N. Y. Supp. 1102.

Since the general expressions used in leases as defining the articles to be left upon the premises are the particular subjects of construction or interpretation in these cases, the arrangement of the cases under the various headings is based upon those expressions, and not upon the particular articles or character of the articles involved.

#### Improvements.

The word "improvements" may be said to comprehend everything that tends to add to the value or convenience of a building or a place of business, whether it be a store, manufacturing establishment, warehouse, or farming premises. It certainly includes repairs of every description. It necessarily includes much more than the 42 L.R.A.(N.S.)

permanent the preliminary injunction heretofore entered restraining the defendant, its agents or servants, from removing the electric wiring, conduits, and switch boards now upon the premises, from the demised premises."

The court entered the following decree: "It is ordered, adjudged, and decreed that the exceptions of respondent to the findings of fact and law of the trial judge be, and they are hereby, dismissed, and that the said findings be, and they are hereby, confirmed, and that in accordance therewith the preliminary injunction heretofore entered in the above entitled cause, restraining respondent, its agents or servants, from removing the electric wiring, conduits, and switch boards now upon the premises 804,

term "fixtures." Indeed, it is difficult to conceive any additions made to a building by a tenant for his own convenience in the conduct of the business, which may not properly be included in the term "improvements." The fact that the articles so connected to the building and applied to such use may be removed is not decisive. *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. 623.

"The covenant is to surrender all the improvements that may have been placed thereon. Improvements, clearly, as the word is here used, embrace every addition, alteration, erection, or annexation made by the lessees during the demised term, to render the premises more available and profitable, or useful or convenient to them. It is a more comprehensive word than 'fixtures,' and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say that all improvements which may be placed on the premises shall belong to the lessor, it is difficult to say what, if anything, would be excluded." *French v. New York*, 29 Barb. 363, 16 How. Pr. 220.

"Improvements made upon" certain premises must savor of the realty, and such an expression does not refer to improvements in the nature of chattels brought upon or placed in the demised premises; the true inquiry is not whether the presence of these things is an improvement of the place in the general sense, but whether they can properly be deemed to be of that fixed character which is necessary in order to make them improvements of the real estate or its appurtenances; to constitute such an improvement, they must have been actually annexed to the realty and intended to be a permanent acquisition to the freehold; an annexation simply incidental to the staying of the articles, and not constructive or incorporative of those articles into the realty, is ineffective to bring them within the scope of such a provision in a lease. *Ames v. Trenton Brewing Co.* 56 N. J. Eq. 309, 38 Atl. 858, affirmed in 57 N. J. Eq. 347.

806, and 808 Sansom street, is hereby made permanent, and that the same is hereby dissolved with respect to the other articles specified in the complainant's bill. The costs of the cause to be paid by the respondent."

Messrs. John G. Johnson and James Wilson Bayard for appellant.

Messrs. Edmund W. Kirby and W. Norman Morris for appellee.

Potter, J., delivered the opinion of the court:

In this case it appears that certain premises were leased by appellant to be used as a printing and publishing establishment. The lease provides that the lessee shall not make alterations, additions, or improve-

ments to the premises without the written consent of the lessor, and that "after such consent has been given, unless otherwise agreed upon in writing, all alterations, improvements, and additions made by the lessee at his own expense, upon the premises, shall, at the option of the lessor, remain upon the premises at the expiration" of the lease, and become the property of the lessor. The appellant installed its presses and printing machinery in the building, and as a part of its plant put in electric power and lighting appliances to furnish power and light for its presses. The presses were bolted to the floors, and the wires were placed in conduits fastened to the walls, but not embedded therein. At the expiration of the lease, the lessee

In a lease of a quartz ledge, a provision that if the lessee does not purchase at the expiration of the lease, "then he shall deliver up said premises with improvements on the ground, or that may be on the ground, for working the lead," includes a steam engine and pump used to pump water from the shaft and to raise the quartz rock to the surface, bolted to timbers that rest upon the ground. *Merritt v. Judd*, 14 Cal. 59, 6 Mor. Min. Rep. 62.

And in a lease of a farm, the provision that the lessee is to make improvements on the premises to a certain value during the term, and to leave the same upon the premises at the end of the term, includes farm buildings erected upon posts sunk in the ground, and buildings upon stone foundations with cellars. *Peters v. Stone*, 193 Mass. 179, 79 N. E. 336.

And in a lease of a store, the provision that all improvements of the building shall belong to the landlord at the expiration of the term includes shelves resting on a base counter and fastened to the wall, also a furnace put in the basement, and awnings over the windows. *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. 623.

A lease of "Castle Garden" in New York city provided that the lessee was to surrender the premises at the end of the term, "and all the improvements that may have been placed thereon" by the lessee, and that these improvements were to belong to the lessor, "all of which are to be surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted," and these provisions were held to include gas pipes, burners, gas ladders, meters, lumber, doors, hinges, and locks, floor, glass case, benches, stage, gas pendant, picket fence, and sheds. *French v. New York*, supra.

In a lease of a farm and building thereon, a covenant on the part of a lessee to vacate the premises at the end of the term, and to leave them in as good condition as they then were or might be made by improvements, includes a large and substantial kitchen erected in the place of an old 42 L.R.A. (N.S.)

one that was torn down, and securely fastened to the main building; also a house erected for curing tobacco, resting on stone walls. *Carver v. Gough*, 153 Pa. 225, 25 Atl. 1124.

And in a lease of premises for a roller skating rink, the provision that all improvements erected or placed in the building are to be and remain at the expiration of the lease the property of the lessor includes a new floor, though not fastened to the building, and not coming close up to the walls, but lying on blocks placed upon the old floor. *Harris v. Kelly*, 10 Sadler (Pa.) 185, 13 Atl. 523.

And where a lease of a business block provided that the lessee was not to remove, destroy, or damage in any way improvements made upon the premises by him, and where he removed an old elevator, permanently closed up the openings through the floors through which it operated, and later, with the permission of the lessor, put in a new elevator in connection with a new staircase, it was held that this new elevator was included in the above provision. *McKay v. Meyer Jonasson & Co.* 44 Pa. Super. Ct. 293.

Likewise, the provision in a lease of a mill, that all improvements which may be put on the premises by the lessees during the term shall be left upon the premises, and shall become the property of the lessor as soon as they shall be annexed to the premises, includes a machine known as a middling separator, and fixtures connected with the same, being 12 ft. long, 4 ft. wide, and 6 or 8 ft. high, although merely set upon the floor and easily removable, and although invented after the lease was executed. *Poertner v. Russel*, 33 Wis. 193.

But under a provision in a lease of a lot, that the lessee is to leave all permanent improvements to be paid for by the lessor, a grading of the lot, and shrubbery and fruit trees planted thereon for the lessee's own comfort, were held not included so as to be allowed as credit to the lessee on mortgage foreclosure by the lessor. *Deishler v. Golbach*, 2 Ky. L. Rep. 231.

began to remove the electrical appliances, whereupon the present bill was filed, and a special injunction was issued restraining the lessee from removing the electric wiring, conduits, and switch boards from the demised premises. This preliminary injunction was afterwards made permanent. Exceptions to the findings of the trial judge were dismissed by the court in banc, and from the final decree entered by the court below, this appeal has been taken.

The trial judge states in his opinion that the conduits which contained the electric wires "were exposed to view, and were not embedded in the walls except where it was necessary to pass them through the floors, and they were fastened to the walls by extension bolts and other fastenings.

They were installed by defendant for its own convenience, and could have been removed without serious damage to the premises." In construing the terms of the lease, however, which was the contract between the parties, he considered himself bound by the decision in *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329, to give to the words "alterations, improvements, and additions" an application which would include the provision of the electric light wires, conduits, and switch boards, and would therefore prevent their removal by the tenant. We are clear that in the lease now before us the agreement that the "alterations, improvements, and additions" made by the tenant should remain upon the premises and become the property of the lessor was

And under a lease of a theater, providing that all improvements made by the lessee, and all embellishments and reconstructions of the property, are to remain in the building, permanent repairs to the building or appurtenances should remain, but articles which do not enter into, or form any part of, the property leased, articles which are separate therefrom, and not attached to or connected with the property, should go to the lessee. *Morris v. Pratt*, 114 La. 98, 38 So. 70.

And the provision in a lease of a store, that all improvements placed in the buildings by the lessee, "viz., elevators, boilers, heating apparatus, etc.," should be deemed fixtures not to be removed, does not include a small engine, pump, and pressure tank used for lighting purposes and for running an elevator, and not so attached to the building as to become fixtures or in any proper sense improvements thereto; the clause quoted relates only to the articles named and those things so connected with them as to form a part of them. *Loeser v. Liebmann*, 39 N. Y. S. R. 12, 14 N. Y. Supp. 569.

And where a lease of salt wells, works, machinery, land, buildings, and appurtenances provided that, in case of a failure of the water within three years, the lessees might remove all the "metal and improvements," thereby implying that if the lease was given up after three years for failure of the wells, the improvements were to belong to the lessor, but where the latter event did not occur, the court was inclined to think that the clause referred to erections of a more permanent character than an engine, and that therefore it would not include such an erection, even if the event had occurred. *Lemar v. Miles*, 4 Watts, 330.

And in a lease of certain premises, a provision that all improvements made by the lessee are to belong to the lessor at the termination of the lease, except any greenhouse, the exception is valid and must be given effect. *Sleddon v. Cruikshank*, 16 Mees. & W. 71, 16 L. J. Exch. N. S. 61. 42 L.R.A. (N.S.)

#### Alterations.

The provision in a lease of a saloon, that all alterations which may be made by either of the parties upon the premises, except movable fixtures, shall be the property of the lessor, and shall remain upon and be surrendered with the premises at the termination of the lease, clearly includes wooden storm houses with glass windows and doors, and a marble slab step, when they are substantial alterations taking the place of the store entrances as they existed at the time the lessee took possession. It was also held in this case that the use of the words "movable fixtures" was intended to limit the lessee's right to remove ordinary trade fixtures, and to confine such right of removal to such fixtures and alterations only as were movable, and attached or affixed to the building in such manner that their removal required no interference with or detriment to the walls, ceiling, or floors, and therefore wooden partitions around a toilet room and the fixtures and connections therein should not be removed, but chandeliers could be. *Excelsior Brewing Co. v. Smith*, 125 App. Div. 668, 110 N. Y. Supp. 8, affirmed in 198 N. Y. 519, 92 N. E. 1084.

#### Additions.

Where a lease of mineral lands and machinery provided that any addition made by the lessee to the machinery or to the property on the premises shall be the property of the lessor, but that any independent machine or property which shall be placed on the premises by the lessee shall remain his, an engine governor and boiler not attached to the soil or in any way affixed are to be deemed independent machines, and so belong to the lessee. *Jones v. Clark*, 28 Iowa, 593.

#### Alterations or improvements.

Where a lease of saloon property provided that whatever alterations or improvements should be made by the lessee should be deemed permanently annexed to the free-

intended to apply to alterations, improvements, and additions to the building, or to what was in the nature of a building, and not to machinery, or that which is in the nature of machinery or other apparatus forming part of the contents of the building, and introduced into it by the tenant in pursuance of the business for which the building was leased. Reference to the decision in *Isman v. Hanscom* shows that it was not necessary in that case to discriminate closely between all the various items of property installed by the tenant upon the demised premises. Many of the improvements which he added, such as the toilet rooms, inlaid floors, dumb-waiters, etc., were clearly in the nature of improvements in, and additions to, the building it-

self, and were not at all, as in the present case, merely adjuncts to the machinery, necessary to its operation, properly introduced into the rooms and fitted therein. An additional reason why close discrimination in considering the character of the items was unnecessary in that case was because of the insertion in the lease of a clause most sweeping in its character, under which the tenant was permitted to remove from the premises nothing but movable furniture which had been put in at his own expense. The words "alterations, additions, and improvements" were there construed in connection with and in the light of that rigid additional limitation upon the rights of the tenant. Under that limitation, if the objects sought to be re-

hold, and become the property of the owners of the premises, and where the tenant put in a mahogany ceiling composed of panels in large sections fastened to the plaster with screws, and connected with the bar and fixtures and side walls so as to constitute one piece, and also put in wainscoting, baseboards, marble floor, and toilet fixtures with marble platforms and slabs, it was held that all these articles were included in the provision. *Center v. Everard*, 19 Misc. 156, 43 N. Y. Supp. 416.

Also the provision in a lease of a lot with buildings thereon for business, storage, and stabling purposes, that all improvements and alterations made by the lessee on the premises shall be and become the property of the lessor, includes the introduction of stalls or partitions in such buildings, affixed by screws, cleats, and slides, thereby converting mere sheds into stables. *Lesser v. Rayner*, 21 Misc. 666, 47 N. Y. Supp. 1102.

Likewise, a provision in a lease of a brewery, that in case the tenant should make any alterations or improvements of the premises, the same are not to be removed by him, but shall belong and be surrendered to the lessor at the end of the term, includes a boiler used for the purposes of the brewery, the court remarking that such boiler is certainly an alteration or an improvement, and perhaps both. *Agnew v. Whitney*, 10 Phila. 77.

Also the provision in the lease of a building for hotel and saloon purposes, that all improvements, betterments, changes, or alterations shall, at the expiration of the lease, be and remain in the premises, does not include chairs, tables, bar, ice boxes, mirrors, and other usual and necessary articles in the saloon business, but does include permanent mosaic tiling and drain built into the floor and a partition put in through the full width of the building and affixed to the floors and walls. *Wright v. La May*, 155 Mich. 119, 118 N. W. 964.

So, the provision in a lease of a saloon that in case of any alterations, repairs, or improvements made upon the premises by the lessee, he should leave the same undis-

turbed at the expiration of the term, for the benefit of the premises, does not include bars and their equipment, partitions, shelvings, and swinging doors attached to the floors and walls only as a means of staying them in place, but does include chandeliers, brass gas fixtures, and electric light globes which are as solidly and permanently connected with the pipes as the nature of their use will permit. *Ames v. Trenton Brewing Co.* 56 N. J. Eq. 309, 38 Atl. 858, affirmed in 57 N. J. Eq. 347.

And where a lease of a saloon provided that the lessee was to make certain alterations according to specified plans, and was also to surrender the premises with all improvements and repairs thereon to the landlord, and that all improvements and alterations which might be placed or made on the premises should belong to and become the property of the lessor when so made, and should be treated as fixtures annexed to the freehold, these provisions were held to apply to the alterations made under the specified plan, but not to ordinary, easily removable trade fixtures, such as a bar, mirrors, rails, screens, doors, ice box, radiators, chandeliers, chairs, and bottles, none of which were so affixed as not to be easily removed. *Weber v. Franklin Brewing Co.* 123 App. Div. 465, 108 N. Y. Supp. 251, affirmed in 198 N. Y. 509, 92 N. E. 1106.

#### Additions or improvements.

The provision in a lease of an ice cream plant, that all improvements or additions made by the lessee are not to be detached from the property, but are to remain for the benefit of the lessor, includes mixers, freezers, washers and sterilizers, motors, shafting and belting, pumps, and connections. *Re Bahl's Ice Cream & Baking Co.* 195 Fed. 986.

But where a lease of a factory provided that all permanent additions and improvements which the lessee should construct and make on the premises were to remain, and where such lessee also covenanted to make a certain amount of alterations and additions and improvements, and to introduce

moved were not included under the description "movable furniture put in at the expense of the lessees," then, under the terms of that lease, they could not be taken away by the tenant. It is plain that all the alterations and additions which were made could not be classed as movable furniture.

In the present case we are not confronted by such a narrow limitation, nor do we find in the language of the lease any compelling reason requiring the words "alterations, improvements, and additions" to be extended in their application to anything more than the building. We see neither necessity for, nor any propriety in, holding that they should be so extended as to deprive the tenant of the right to remove

machinery necessary for the purposes of the business contemplated, it was held that such provision did not include an engine screwed into a separate foundation built for the purpose, and otherwise fastened to the building, nor did it include boilers and shafting. *Hey v. Bruner*, 61 Pa. 87.

#### Additions or alterations.

Where a lease of land with a wooden lumber house upon it provided that the lessee might erect at his own expense any building which he might deem necessary for storehouse or for manufacturing purposes, and should have the right to remove the same, and that the lessee might change the location of the lumber house then on the premises and make such alterations and additions to the same as he might deem desirable, and provided that such alterations or additions should inure to the benefit of the premises at the expiration of the lease, and where the lessee later built a brick building up beside the lumber house with a strip of tin flashing covering the joint between them, and with doorways cut through the walls to allow passage from one to the other, and placed machinery in the lumber house with belts and shafting connecting it with an engine in the brick building, it was held that such brick building was not an addition to the lumber house, but a building which the lessee had a right to remove. *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229.

#### Additions, alterations, or improvements.

*Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329, which construes a provision of this kind, is sufficiently set out in the reported case.

In a lease of a room, the provision that all alterations, additions, or improvements which may be made by either of the parties shall be and remain the property of the lessor, and shall remain upon and be surrendered with the premises, includes a long partition from which shorter ones are carried to the wall, bolted or screwed to blocks set in the concrete floor, and 42 L.R.A. (N.S.)

personal property placed by it upon the premises during the term of the lease. As we read the words, they do not properly apply to the contents of the building, even though those contents may consist of heavy machinery and the appliances in connection therewith, which are needful to furnish light and power for its operation.

The principle of construction which we seek to apply is illustrated in *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146. In that case the lease contained a covenant to deliver up in good order "all future erections and additions" to or upon the premises. In construing it, the supreme court of Massachusetts held that the covenant was to be limited, in purpose and effect, to new buildings erected or

fastened by screws and bolts to the wall, although such partitions can be easily removed; the additions themselves were physical changes in the premises, and their removal would leave the floors and walls defaced. *Levin v. Improved Property Holding Co.* 141 App. Div. 106, 125 N. Y. Supp. 963.

Under a provision in a lease of a store, that all alterations, improvements, or additions put in by the lessee, except movable office furniture, shall become the property of the lessor, glass and mahogany partitions, some of which extend to the ceiling and are apparently erected in a very substantial manner, are not to be deemed movable office furniture, but must go with the premises. *Bigalke & E. Co. v. Wm. Knabe & Co. Mfg. Co.* 65 Misc. 29, 119 N. Y. Supp. 1114.

But where a lease of a theater provided that the lessee was to enlarge it by alterations, additions, and improvements, to a certain seating capacity, and added that all additions, alterations, and improvements that shall or may be made to the premises or any part thereof shall be and remain a part thereof, and shall and will be surrendered and left therein at the expiration of the term, and where, after the enlargement, the lessee put in more than 1,000 chairs, fastening them to the floor with screws, it was held that these chairs would not be deemed included in the provision without a clearer expression of that design; that the provision related to alterations and changes in the building itself, that is, to the seating capacity, and not to the seats themselves. *Metropolitan Concert Co. v. Sperry*, 9 N. Y. S. R. 342, affirmed without opinion in 120 N. Y. 620, 23 N. E. 1152.

And where a lease of a series of rooms and a corridor in an office building provided that all alterations, additions, or improvements which might be made by either of the parties upon the premises, except movable office furniture, should be the property of the lessor, and should remain upon and be surrendered with the premises as part thereof, and where later, under a separate agreement to restore them, the per-

additions to old ones, and that it could not be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises. *Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172, presents a case very similar in its facts to the one now under consideration. It was there held that dynamos and other electrical machinery used to furnish power for an electric light system placed within a building were not included within the terms of a lease requiring "erections and additions" thereto to be surrendered with the premises to the landlord on the termination of the lease.

The same sound policy of the law which favors a tenant in the matter of the removal of trade fixtures requires that, in the construction of an agreement containing words whose meaning is doubtful, the construction of the words most favorable

to the tenant shall prevail. Nothing short of the clearest expression of an agreement by the parties to that effect can justify the extension of the grasp of the landlord so as to cover chattels or personal property brought upon the premises by the tenant, in pursuance of the business for which the premises were leased. We find no such clear agreement in the language of the lease which constitutes the contract between the parties in this case. It follows that the appellant is entitled to remove from the premises described in the lease the electric wiring, conduits, and switch boards which are the subject of this controversy.

The seventh, eighth, ninth, tenth, and eleventh assignments of error are sustained, and the decree of the court below is reversed, and it is ordered that the injunction be dissolved and the bill be dismissed.

manent partitions were removed by the lessee, and in their place were erected temporary partitions not extending to the ceiling and lightly nailed to the floors and walls, and called "sectional," and "interchangeable," and "movable" by witnesses, and where the evidence showed that they were not considered permanent by the parties, it was held that such temporary partitions did not fall within the provision, but within the express exception, and therefore might be removed. *United Booking Offices v. Pittsburgh Life & T. Co.* 65 Misc. 31, 119 N. Y. Supp. 216.

And it has been said that the provision in a lease of a store, that all improvements, alterations, repairs, and additions put upon the premises by the lessee shall be left for the benefit of the lessor, does not include glass cabinet partitions, brass chandeliers, and a showcase, the court remarking that such provisions ordinarily refer to changes and additions made to the freehold, and not to the mere introduction of movable chattels brought in by the tenant for his personal use and the convenience of his trade. Here the articles had been purchased by the tenant, and were upon the premises nearly three years before the lease was made, while he held under another arrangement. *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176.

#### Improvements and erections or buildings.

The provision in a lease of a shop, that the lessee is to deliver up the premises at the end of the term, together with all sheds, erections, buildings, and improvements which shall be erected, built, or made upon the premises, includes a plate glass front put in in place of the former sash window, and brought to the premises completely made, set in and fastened with wooden wedges, with no screws, nails, or glue, and easily removed without injury to the building. *Burt v. Haslett*, 25 L. J. C. P. N. S. 42 L.R.A. (N.S.)

295, 2 Jur. N. S. 974, 18 C. B. 162, 4 Week. Rep. 679.

And the provision in the lease of a house, that the lessee is to yield up the premises and all erections, buildings, and improvements which may be erected thereon during his term, includes a veranda, the lower part of which is attached to posts which are fixed in the ground. *Penry v. Brown*, 2 Starkie, 403.

Likewise, in the lease of a dwelling house with outhouses, garden, and fields, the provision that the lessee is to keep the same in repair and yield up the premises with all such future buildings and improvements made thereon during his term, includes a greenhouse, and he may not remove it, even under parol license from the lessor. *West v. Blakeway*, 3 Scott, N. R. 199, 2 Mann. & G. 729, 9 Dowl. P. C. 846, 10 L. J. C. P. N. S. 173, 5 Jur. 630.

And the provision in a lease of mills, that the lessee is to keep the mills and machinery in order and to yield up the premises and all buildings and improvements thereafter to be made upon the premises, includes all machinery added by the lessee for the better working of the mill, whether simply replacement of the old kind or an improved kind, except mere movable chattels standing by their own weight only, and not in any way affixed to or connected with the soil, which have been brought in by the tenant for trade purposes. *Cosby v. Shaw*, Ir. L. R. 19 Eq. 307.

But where a lease of a mine with buildings and machinery with the right to erect such buildings, machinery, and improvements as might be necessary and convenient, provided that at the end of the term the lessee was to surrender the premises with all the stopes, supports, shafts, and other improvements and erections that might be thereon, engines, boilers, machinery, tools, implements, and other movable personal chattels excepted, it was held that a boiler and engine and hoisting machin-



ery, though set in masonry and firmly attached to the land, fell within the exception. *Lake Superior Ship Canal R. & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692.

#### Improvements, additions, and extensions.

In the case of a lease for 999 years of three brick plants, together with all other plants which might during the term of the lease be acquired by the lessor, and all erections, extensions, or additions to the same which might at any time thereafter be located or constructed on the premises, with the right in the lessee to erect other works as he might deem advisable, it was held that the provision that, at the expiration of the lease, the lessee was to surrender the premises with all improvements, additions, and extensions, without any compensation, did not include a new and separate plant built by the lessee, that provision referring only to the plants then existing and any later ones acquired by the lessor. *Montello Brick Co. v. Trexler*, 93 C. C. A. 118, 167 Fed. 482, s. c. on former appeal, 163 Fed. 624.

#### Fixtures.

The provision in a lease of certain premises, that the lessee was to yield up the same with the appurtenances and all things which then were or might be fixed or fastened to or set up in or upon the premises, together with the fixtures, includes a building resting on blocks of wood not let into the ground, also a building resting on stumps, also a building laid upon scantling and old posts not let into the ground. *Allardice v. Disten*, 11 U. C. C. P. 278.

Also, in a lease of a building to be fitted up for musical performances, the provision that the lessee is to deliver up the premises, together with certain articles enumerated and other things which now are or may be fixed or fastened in or about the buildings or premises, is said to include "landlord's fixtures," and where the lease further provides that in a certain event the landlord shall have the power to re-enter and seize and retain not only the tenant's fixtures, "but all fixtures whatsoever, whether tenant's or trade fixtures or otherwise," the tenant thereby renounces his ordinary right to remove tenant's fixtures, such as gas chandeliers and seats. *Dumergue v. Rumsey*, 2 Hurlst. & C. 777, 33 L. J. Exch. N. S. 88, 10 Jur. N. S. 155, 9 L. T. N. S. 775, 12 Week. Rep. 205.

But the provision in a lease of a store, that the lessee is not to remove fixtures placed therein by him, does not include mere furniture, but only fixtures strictly so called, and accordingly such provision does not include sets of drawers fitted to the shop, but not fastened, but does include gas fixtures and shelving. *Ex parte Morris*, 1 Low. Dec. 386, Fed. Cas. No. 9,850.

And in a lease of land upon which the tenant is to erect certain buildings and works, the provision that he is to yield and

deliver up the premises with their appurtenances and all the fixed materials used in the business, except salt pans and other movable articles, does not include trade fixtures. *Summer v. Bromilow*, 34 L. J. Q. B. N. S. 130, 11 Jur. N. S. 481.

And where a lease of a ship building slip makes a distinction, with respect to the tenant's right of removal, between fixtures set up by the tenant and used in that business, and fixtures not used in such business, one set to go to the lessor and the other to the lessee, this distinction must be given effect. *Stansfeld v. Portsmouth*, 4 C. B. N. S. 120, 27 L. J. C. P. N. S. 124, 4 Jur. N. S. 440, 6 Week. Rep. 296.

#### Buildings or erections.

A provision in a lease that the lessee is to leave the premises together with all such erections and buildings as then are or shall be at any time thereafter built or set up thereon includes a limekiln. *Thresher v. East London Waterworks Co.* 2 Barn. & C. 608, 4 Dowl. & R. 62, 2 L. J. K. B. 100.

And in a lease of land for purposes of an oil refinery with buildings then on the same and all to be erected, the provision that the lessee is to yield up the same with certain articles named, erections, and all pumps, pipes, cisterns, and other things now or to be fixed or fastened to the freehold, includes trade fixtures and cisterns bricked up to the brim, the term "erections" being broader than mere brick or stone houses. *Bidder v. Trinidad Petroleum Co.* 17 Week. Rep. 153.

And the provision in a lease of premises for the manufacture of salt, that the lessee is to yield and deliver up the same and all such buildings, kays, works, edifices, and engines as are then upon or may be erected, set up, built, or made thereon, includes salt pans placed on a brick frame. *Mansfield v. Blackburne*, 6 Bing. N. C. 426, 8 Scott, 720, 10 L. J. C. P. N. S. 178, 6 Mor. Min. Rep. 36.

Likewise, a provision in a lease that the lessee is to yield up in repair, at the expiration of the lease, all erections and buildings then upon the premises or thereafter built thereon, includes buildings erected and used by the tenant for purposes of trade and manufacture, if such buildings are let into the soil or otherwise fixed to the freehold, but not such buildings as merely rest upon blocks or pattens. *Naylor v. Collinge*, 1 Taunt. 19.

And a provision in a lease that the lessee is to leave all buildings which then are or shall be erected upon the premises during the term means those buildings which are annexed to and become a part of the reversionary estate, and does not include sheds or Dutch barns. *Dean v. Allalley*, 3 Esp. 11.

#### Erections and additions.

*Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172, is sufficiently set out in the reported case. In a lease of a factory building with

water privileges, the provision that the lessee is to quit and deliver up the premises and all future erections and additions to or upon the same is limited to new buildings or additions to old buildings, and does not include countershafting, pulleys, hangers, and belts, portable boilers and steam pipes, which must be considered trade fixtures and are therefore removable. *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146.

#### Fixtures, fastenings, and improvements.

The provision in a lease of a mill, that the lessee was to surrender and yield up the premises together with certain articles named and other fixtures, fastenings, and improvements which were then or might under the lease be fixed, fastened, or set up upon the premises, includes new mill-stones with gear and machinery set up in place of old ones worn out, the lower one rammed in, the upper supported on its axis. *Martyr v. Bradley*, 9 Bing. 24, 2 Moore & S. 25, 1 L. J. C. P. N. S. 147.

#### Additions, improvements, and fixtures.

Under a lease of a house providing that the lessee was to surrender and yield up the premises together with fixtures named in a schedule, and other additions, improvements, fixtures, and things which were then or might be during the term set up or fixed or fastened in or on the premises, it was held that the representative of the lessee could not make a good and marketable title to fixtures not named in, and not *ejusdem generis* with the ones specified in, the schedule, such as stoves, cooking apparatus, gas chandeliers, and bath fittings, so as to enable him to sell them or remove them from the premises. *Wilson v. Whateley*, 1 Johns. & H. 436, 3 L. T. N. S. 617, 7 Jur. N. S. 908, 9 Week. Rep. 331.

#### Buildings, machinery, and fixtures.

Where a lease of land for a power plant which the lessee was to construct provided that, in case the lease should terminate before a certain date, the buildings, machinery, fixtures, and other property of the lessee erected or placed on the premises by him should become the property of the lessor, and where a fire occurred and the lease was terminated before the date named, and the question arose as to the ownership of the wreckage of the buildings and of the fixtures, it was held that the lessor was entitled to the brick walls, twisted I-beams, steel girders, floor plates, iron furnaces, absorber cylinders, molten lead, and all fixtures or additions that were built into and constituted a part of the plant, that is, all that went into its construction, the plant operating as a unit, and no part being separable without destroying the efficiency of all other parts. *Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn*, 60 Misc. 209, 111 N. Y. Supp. 576, s. c. on another appeal, 132 App. Div. 442, 117 N. Y. Supp. 42 L.R.A. (N.S.)

10, affirmed in 197 N. Y. 542, 91 N. E. 1118.

#### Erections, buildings, improvements, and fixtures.

In a lease of premises for a boot and shoe manufactory, the provision that the lessee was to deliver back the same, together with specific articles named and all other erections, buildings, improvements, fixtures, and things which might be fixed, fastened, or belong to the premises, was held to apply only to things *ejusdem generis* with those described in the particular enumeration, and therefore it did not include trade fixtures, such as shoemaking machines, which were not specifically mentioned. *Lambourn v. McLellan* [1903] 2 Ch. 268, 72 L. J. Ch. N. S. 617, 51 Week. Rep. 594, 88 L. T. N. S. 748, 19 Times L. R. 529, reversing [1903] 1 Ch. 806, 72 L. J. Ch. N. S. 400, 88 L. T. N. S. 263.

#### Improvements, repairs, and replacements.

Where a lease of a mining plant provided that the tenant was to keep the same in good running order and repair, making necessary improvements, repairs, and replacements for that purpose, "such improvements, repairs, and replacements when made" to become a part of the mill and the property of the lessor, and to be delivered to him at the expiration of the lease, it was held that this provision included only such improvements and repairs as were necessary to keep the mill in running order and repair, and did not include a sludge table and dummy elevator added for the tenant's use and convenience. *Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* 153 Mo. App. 387, 134 S. W. 35.

#### Erections, buildings, improvements and alterations.

The provision in a lease of land that the lessee is to erect a furnace and iron work thereon, and is to surrender the premises and all erections, buildings, improvements, and alterations to be thereafter erected, built, or set up, except the iron work, castings, machines, and movable implements used in the works, includes whatever is in the nature of a building or support of a building, although made of iron, and excludes whatever is in the nature of a machine or part of a machine or movable implements, and accordingly such lessee may remove boilers, piping, cupola, blast pipe, furnaces, grates, and castings, but may not remove cast-iron columns used for the support of the building. *Foley v. Addenbrooke*, 13 Mees. & W. 174, 14 L. J. Exch. N. S. 169, 8 Mor. Min. Rep. 349.

#### Repairs, improvements, additions, or fixtures.

In a lease of a hotel, the provision that the lessee shall not at any time remove any repairs, improvements, additions, or fixtures,

tures put on said premises, but that the lessor is to have all of the same at the end of the lease, does not embrace trade fixtures such as barroom shelving and counter, office counter nailed to the floor and walls, or an iron safe built into an opening in the wall, the court remarking that the term "fixtures" as here used must be taken to mean permanent ameliorations in the nature of repairs, improvements, and additions becoming actually a part of the freehold. *Cubbins v. Ayres*, 4 Lea, 329.

#### Ways, roads, and works.

A provision in a lease of premises for the manufacture of iron, that the lessee is to surrender the same together with all ways and roads, furnaces and other works, and other erections and buildings, which shall be upon the premises at any time during the last ten years of the lease, does not include sleepers and tram plates not fixed to the freehold, but movable. *Beaufort v. Bates*, 3 De G. F. & J. 381, 31 L. J. Ch. N. S. 481, 6 L. T. N. S. 82, 8 Jur. N. S. 270, 10 Week. Rep. 200, 6 Mor. Min. Rep. 75. H. C. Sh.

#### PENNSYLVANIA SUPREME COURT.

ERNEST H. BEIHL and Wife

v.

WILLIAM J. MARTIN, Appt.

(236 Pa. 519, 84 Atl. 953.)

#### Entireties — lien on expectancy — right to convey.

The expectancy of survivorship of a man holding an estate by entireties with his wife is not subject to a lien in favor of his individual judgment creditors, which will

#### Note. — Judgment against individual as lien on interest of tenant by entirety.

The present note is supplemental to the note to *Jordan v. Reynolds*, 9 L.R.A. (N.S.) 1026.

As shown in the earlier note, the courts are not in harmony upon the question whether a lien may be obtained upon the interest of one spouse in property held by the entirety, without the consent of both, although, as there suggested, the weight of authority and the better reason deny this right, where, under the so-called married woman's act, the husband no longer has the right to the possession and control of the property of the wife. This doctrine is also asserted by the majority of the later decisions on the subject. It finds support in *Bank of Glade Spring v. McEwen*, — N. C. —, 76 S. E. 222, holding that an estate by entirety cannot be sold for the debt of the husband without the consent of both husband and wife; and in *Hood v. Mercer*, 42 L.R.A. (N.S.)

prevent a good title to the property from passing by a joint deed of the owners.

(May 22, 1912.)

**A**PPEAL by defendant from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County, in favor of plaintiff in an action to determine the marketability of the title to certain real estate. Affirmed.

The facts as set forth in the case stated are as follows:

"(1) That Ellwood Smith and wife, by deed dated May 20, 1903, and recorded in Deed Book W. S. V. 139, page 535 et seq., conveyed unto Ernest H. Beihl and Clara L. Beihl, his wife (therein called the grantees,—the form of grant being, to wit, 'do grant, bargain, and sell, release, and confirm, unto the said grantees, their heirs and assigns'), all that certain lot or piece of ground with the brick messuage or tenement thereon erected, situate on the east side of Fifteenth street. . . .

"(2) That the habendum in said deed of conveyance provided as follows: 'To have and to hold the said lot or piece of ground, with the brick messuage or tenement thereon erected, hereditaments and premises hereby granted or mentioned, and intended so to be, with the appurtenances, unto the said grantees, their heirs and assigns, to and for the only proper use and behoof of the said grantees, their heirs and assigns, forever.'

"(3) That by virtue of the said deed of conveyance, the plaintiffs were vested with a good and marketable title in fee simple to said premises.

150 N. C. 699, 64 S. E. 897, holding that the interest of neither husband nor wife in an estate by entirety becomes subject to the lien of a judgment during their joint lives. This case is followed in *Healey Ice Mach. Co. v. Green*, 181 Fed. 890, affirmed in 111 C. C. A. 668, 191 Fed. 1004, applying the rule of North Carolina.

The doctrine also finds support in *Sharp v. Baker*, — Ind. App. —, 96 N. E. 627, affirming the doctrine of the earlier Indiana cases, holding that the husband has no separate right to the possession and proceeds of entirety property, which he can individually dispose of or encumber, or which can be sold on execution for his debts; and also in *Schliess v. Thayer*, — Mich. —, 136 N. W. 365, which affirms the rule of the earlier Michigan cases, denying the right of a creditor of either spouse to obtain any lien or claim upon entirety property for the collection of his debt, unless with the consent of the other spouse.

The decision of *BEIHL v. MARTIN* is an important one on this question, and also

"(4) That while the plaintiffs were so seised thereof, the said Ernest H. Beihl, was, on July 2, 1909, adjudged a voluntary bankrupt by the United States district court for the eastern district of Pennsylvania, the said Clara L. Beihl not joining in said bankruptcy proceedings, nor giving consent thereto; and on July 21, 1909, Charles J. Weiss was elected and duly qualified to be trustee in bankruptcy of the estate of Ernest H. Beihl, which trusteeship is still existing; there remaining unpaid an existing indebtedness on the part of the said Ernest H. Beihl of over \$14,000.

"(5) That while the plaintiffs were seised of said premises, judgment for \$1,307.23 was, on July 2, 1909, and another judgment for \$373.39 was, on July 9, 1909, entered upon the proper index in Philadelphia county against the said Ernest H. Beihl, by creditors who subsequently filed their respective claims, as shown by said judgments, with the referee appointed in the said bankruptcy proceeding.

"(6) That subsequently, in September, 1911, while plaintiffs were seised of said

premises in the manner hereinbefore recited, the defendant, William J. Martin, agreed to purchase the same for the price of \$6,500, and the plaintiffs agreed with the said defendant that the deed to be delivered by plaintiffs shall convey a good and marketable title unto the defendant, William J. Martin, and shall vest in him the title to said premises in fee simple, clear of any and all judgments and defects of every kind, and particularly clear of any contingent claim of ownership or interest which might or could be enforced against the said premises subsequent to the proper execution, delivery, and recording of said deed unto the said defendant."

Messrs. William B. S. Ferguson and George P. Rich, for appellant:

The plaintiffs could not convey a good and marketable title to the defendant, free from the lien of the judgments or from any right or title of the trustee in bankruptcy.

Fleck v. Zillhaver, 117 Pa. 213, 12 Atl. 420.

Mr. Harvey Gourley, for appellees:

The property in question, under a con-

lends support to the doctrine referred to, although not to the full extent, since it excepts from the operation of the doctrine the rule of Fleck v. Zillhaver, 117 Pa. 213, 12 Atl. 420, holding that an inchoate lien may be obtained upon entirety property, although based upon a claim against only one of the tenants, which lien may be enforced if the debtor tenant survives so that the entire property vests in him as survivor. But an important limitation is placed upon this decision by BEIHL v. MARTIN, in that the court holds that this inchoate lien cannot deprive the spouse who is not a party thereto of one of the valuable and important attributes of the ownership of property,—the right to sell or otherwise dispose of it with the consent of the other spouse, and that hence the lien may be defeated by a sale of the property by the husband and wife, and therefore such an inchoate lien upon the right of one of the tenants does not render the title of the tenants unmarketable.

It is to be observed that the result of the minority doctrine, holding that a lien may be obtained upon the interest of one of the tenants to land held by entirety, and that the holder of a lien may become a cotenant with one of the tenants by entirety, and may become absolute owner of the property by surviving such tenant, is in a great measure to destroy the value of this estate to the tenants, with no resulting advantage unless it be to the creditor, who is entitled to no particular consideration, inasmuch as the estate is invalid as against his claim unless created prior to the time the claim was contracted, to the extent at least that, as to an estate of this character subsequently created, he is entitled to subject to the payment of his claim any

money or property used by his debtor in creating the estate. Schliess v. Thayer, supra. Hence a creditor can hardly be said to lend credit to one tenant by entirety upon the strength of his interest in the property so held.

And this minority doctrine in effect takes the property of one spouse for the debt of the other. In this connection it should be remembered that estates by entirety are of ancient origin, and, while resting upon the legal fiction of the unity of the marital relation, nevertheless the fact is not lightly to be disregarded that the inducement to the creation of the estate is not so much the unity of the marital relation as the unity of the interest of the parties. In no other relation is this unity of interest to be found. The nearest approach to it is that of a partnership. It may fairly be assumed that the estate is created by the joint efforts or joint investments of the parties, in reliance upon this unity of interest, each party having reason to believe that the property may be subsequently disposed of by common consent, when such disposition will be to their joint interest; and in considering the question of survival, they are usually justified in believing that, no matter which party survives, the vesting of the entire title in either will ultimately be for the benefit of those in whom the parties are equally interested.

Hence, a rule which permits a creditor of one of the tenants by entirety so to tie up or cloud the title to the property as to prevent its free disposal by the common consent of the tenants takes from one of the tenants one of the valuable attributes of ownership, for the debt of the other tenant. In many instances this must amount

veyance from plaintiffs to defendant, cannot be made liable for the husband's debts.

*Gillan v. Dixon*, 65 Pa. 395; *Holcomb v. People's Sav. Bank*, 92 Pa. 338; *Dexter v. Billings*, 110 Pa. 143, 1 Atl. 180; *McCurdy v. Canning*, 64 Pa. 39.

The creditors of the husband could not acquire any lien by a judgment for the debts of the husband upon the real estate in question.

*Woodward v. Wilson*, 68 Pa. 211.

*Stewart, J.*, delivered the opinion of the court:

It may be that, because of modern innovations on the common law respecting the property rights of married women, the venerable estate known as estate by entirety has outlived the purpose of its creation and is out of harmony with present conditions. However this may be, if change is desired, it must come through legislative action, and not through judicial construction. This estate is too well established and too well defined to be subject to judicial impairment. Recognizing

in a great measure to the destruction of the pecuniary value of the interest of one tenant for a debt against the other tenant. As for illustration, this doctrine prevents or renders it imprudent for one tenant by entirety to make necessary improvements upon the property, when the title is thus clouded by a lien of a creditor of the other tenant, and no relief may be had by a partition of the property, since in jurisdictions sustaining this doctrine, the rule applies that the property is not subject to partition between one tenant by the entirety and a lien creditor of the other tenant. *Bartowick v. Sampson*, 73 Misc. 446, 133 N. Y. Supp. 401. This, of course, must be the rule where the right of survivorship remains.

Many other ways may be suggested in which this minority doctrine in effect impairs the interest of one tenant by entirety for a claim against the other. One such instance is illustrated in *Servis v. Dorn*, 76 N. J. Eq. 241, 76 Atl. 246, which holds that neither one nor both of the tenants of land by entirety are entitled to the whole or any part of the proceeds of a judicial sale under a proceeding foreclosing a mortgage executed by them jointly, where the creditors of one of them had judgment liens upon the property, but that such proceeds, after satisfying the mortgage foreclosed, must be retained by the court to wait the severance of the estate by the death of one of the parties, when they will or will not become available in satisfaction of the judgments, accordingly as the judgment debtor survives, or dies before the other tenant by entirety.

This decision suggests another instance where this minority doctrine may work a great hardship to one of the tenants. If 42 L.R.A. (N.S.)

its very anomalous character, we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject. Fundamentally the estate rests on the legal unity of husband and wife. It is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to legal intentment one and the same. Each is seised of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate. "A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit, made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes

insured improvements upon the estate by entirety should be destroyed by fire, under this doctrine, creditors of one of the tenants might tie up the proceeds of the insurance for an indefinite period of time, and until the death of one of the tenants, and in this manner render it impossible to use the proceeds of the insurance to replace the improvements destroyed.

The hardships imposed upon an innocent party by this doctrine suggest that in the jurisdictions where it obtains the so-called married woman's acts, at least as to such property, are not being enforced in a manner to relieve the property of the wife from the payment of her husband's debts, but in effect cast an additional burden thereon.

And see on this point *Meyer's Estate*, 232 Pa. 89, 36 L.R.A. (N.S.) 205, 81 Atl. 145, Ann. Cas. 1912 C, 1240, holding that the trustee in bankruptcy of one tenant by entirety cannot reach any portion of the estate so held; and *Meyer's Estate*, 232 Pa. 95, 81 Atl. 147, refusing to require husband and wife to enter security for the protection of the husband's trustee in bankruptcy for an estate by entirety in the event of the husband's surviving the wife; and *Weiss v. Beihl*, 232 Pa. 97, 81 Atl. 148, denying the trustee in bankruptcy of the husband any standing to maintain a bill in equity to restrain the husband and wife from alienating entirety property; and to the same effect is *Re Beihl*, 197 Fed. 870. In the latter case the court says that it would be a mistake to regard the husband's interest only, and to overlook his wife's. "So far as she is concerned, I certainly have no power to make an order that would interfere with her right to dispose of her own property, and I shall not attempt to do so."

A. G. S.

a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either the survivor takes no new estate. It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor, the same as it would continue in a corporation after the death of one of the corporators. . . . This has been the settled law for centuries." *Stuckey v. Keefe*, 26 Pa. 397.

It is this striking peculiarity of the estate—the entirety alike in husband and wife—that operates to exempt it from execution and sale at the suit of a creditor of either separately. The enforcement of such process would be the taking of the property of one to pay the debt of another. But may not the interest of either be seised in satisfaction of his or her appropriate and exclusive debt? Before answering, let us clearly understand what is here meant by interest. For convenience of illustration, take the case of a husband. Towards everybody in the world, except the wife, he has exclusive possession during her lifetime, and his right to the enjoyment of the estate during this period may not be interfered with at the suit of his creditor. So much is conceded, and has been expressly decided by this court in a number of cases, notably in *McCurdy v. Canning*, 64 Pa. 39. With possession denied a purchaser at an enforced sale during the joint life of the parties to the estate, what is there to acquire by purchase? Nothing but a bare expectancy, a chance that the husband may survive the wife and have the entirety to himself. May that expectancy be made the subject of a judicial sale? Certainly never up to this time have we said that it can be. The case of *Fleek v. Zillhaber*, 117 Pa. 213, 12 Atl. 420, marks the extremest limit to which we have gone in subjecting estates of this character to demands of separate creditors. We cannot allow that that case was an attempt to modify or escape from conditions which up to that time had been universally recognized as necessarily resulting from the nature and character of this peculiar estate. On the contrary, the result there reached can be vindicated only as it can be shown to be in harmony with these conditions; for it was along lines thought to be entirely consistent with these that the conclusion there expressed was reached. The controversy there arose after the death of the

wife. During the continuance of the estate creditors of the husband obtained judgments against him. Later on husband and wife joined in a mortgage of the land. Upon survival by the husband, execution was issued on the judgments that had been obtained against him, and the land was sold thereunder. A *sci. fa.* on the first mortgage followed, in which the party holding purchaser at sheriff's sale was served as terretenant. The efficiency of the sheriff's sale to pass title was the question in dispute, and this was the ruling of the court: "It was that kind of estate (entireties) which was bound by the lien of the mortgage given by Mary Holcomb; and it was the same kind of estate which was bound by the lien of the judgment against her husband. As against the wife, the mortgage was undoubtedly the first, and indeed only, lien. As against the husband, the judgment was the first lien, and the mortgage the second, simply because the judgment was obtained before the mortgage was given. Had the wife survived, the mortgage would certainly have had precedence to the exclusion of the judgment, because the estate bound by the lien of the judgment was defeasible by the death of the husband before the wife. For the same reason, if the husband survived the wife, the estate of the latter was divested, and the mortgage only became operative against the husband because he had joined in its execution. But as to him it was not the first lien; he having become subject to a judgment at a time anterior to the giving of the mortgage."

This case stands as authority with respect to what it expressly rules, *viz.*, that the interest of husband and wife, where they hold by entireties, may be the subject of lien, and that upon the death of either the lien against the survivor may be enforced. It is to be observed that it does not rule that there can be a severance in ownership in any other way than by the death of one or other of the parties, or by voluntary alienation by both. So it will become apparent, on a recital of the facts we have here, that the present case falls without the scope of that. Here the estate in the land as originally created continues, and what we have to determine is the capacity of the parties, husband and wife, by their joint deed, to convey the interest of both free and discharged of the lien of the husband's judgments. The property was acquired by deed of conveyance to husband and wife in 1903. On the 2d of July, 1909, the husband, Ernest H. Beihl, by the United States circuit court for the eastern district of Pennsylvania, was adjudged a bankrupt; his wife not being a party to the proceeding or consenting thereto. On

the same day several judgments were entered against the husband by creditors who subsequently filed their respective claims with the referee appointed in the bankruptcy proceedings. In September, 1911, Beihl and his wife entered into articles of agreement with William J. Martin, the defendant, whereby, for consideration of \$6,500, they covenanted to sell and convey the property so above acquired to said Martin, by good and sufficient deed in fee simple, "clear of any and all judgments and defects of every kind, and, particularly, clear of any contingent claim of ownership or interest which might or could be enforced against the said premises." The matter is submitted on a case stated, which provides that, if the court shall be of opinion that a proper deed from plaintiffs to defendant will convey such title to the said premises as is stipulated for in the agreement, then judgment shall be entered for the plaintiffs. The fact that we have here a referee or assignee in bankruptcy adds nothing to the complications. Anyone claiming an interest in the premises through such an officer would be in exactly the same position as a purchaser at sheriff's sale. The same result must follow, whether the attempted severance of the title is by assignee or sheriff. We may therefore disregard the bankruptcy feature of the case, and address ourselves to the naked question whether, under a joint conveyance from husband and wife, the purchaser will take the estate divested of separate liens acquired against either, if any. No case can be pointed to in our Reports where the exact question has been raised and met. We are therefore thrown back on general principles, so far as applicable to the peculiar features of this estate.

We start in the discussion with an admission which the case of *Fleek v. Zillhaver*, supra, compels, that the judgments here obtained against the husband were liens. But upon what? Certainly not upon the entirety that was in the husband, for the entirety of estate was in the wife equally with the husband, and, being in its nature indivisible, it would follow necessarily that any encumbrance upon the estate of the one would rest upon that of the other, a result which, of course, could not be justified or allowed, except as the inherent attributes of the estate are to be wholly disregarded. There remains to the husband a right of survivorship, by virtue of which, in case he survive the wife, while taking no estate, yet because the entirety in the wife is by her death extinguished, his entirety embraces every interest in the estate. Contingent though this ultimate divestiture be, the expectancy is nevertheless

less a vested interest, and as such may be the subject of lien. All possible titles, vested or contingent, in land, under our law, may be taken in execution and sold, provided it be a real interest, whether legal or equitable. "Accordingly," says Tilghman, Ch. J., in *Carkhuff v. Anderson*, 3 Binn. 4, "it has been long settled that a judgment is a lien on every kind of equitable interest in land. It is a lien on every kind of right vested in the debtor at the time of the judgment." The right to such a lien is not dependent alone on statutory authority. At common law judgments were not liens upon land; but the lien resulted from lands being subjected by statute to be taken in execution, and from this right the land was held bound from the date of the judgment. Our statutes with respect to liens simply enlarge and extend them. It was this contingent expectant interest in the husband that was in contemplation when, in *Fleek v. Zillhaver*, supra, this court held that the judgment against the husband acquired a lien at its inception.

Admitting, then, the lien on the expectant interest, the question occurs: When is it enforceable? At once, only upon the realization of the expectancy? A little reflection upon the nature of the estate by entireties should make it apparent, we think, that, while the estate continues, it is utterly impossible for either party, without the other joining, to sell or assign his or her interest therein, even the expectancy of survivorship. The rights of the parties are fixed by the deed of conveyance to them, and by that instrument each took an entirety made up of indivisible parts. Any alienation by one, the other not consenting, of any interest whatever in the estate, if allowed, would be an abridgment *pro tanto* of the rights of the other. By their joint act they admittedly have the right to sell and dispose of the whole estate; by their joint act they may strip the estate of its attributes and create a wholly different estate in themselves; but neither can divest himself or herself of any part without in some way infringing upon the rights of the other. The wife has the right to initiate as well as the husband. Suppose she desire to sell the land—a right which is hers—and the husband consent; what does his consent amount to if he has parted with his expectancy of survivorship to a stranger? Such circumstances would operate to deny to the wife the enjoyment of an inseparable incident of ownership, the right of alienation. Now, stating it broadly, but correctly, nothing can be taken in execution and sold as the property of a debtor, except property over which the debtor has the right of disposition by sale or otherwise.

If, then, the husband cannot sell or dispose of his expectancy of survivorship, it follows that it may not be taken in execution. By this reasoning we reach the conclusion that the lien on the expectant interest of the husband becomes enforceable only when the expectancy ripens into a realized fact; then execution is not upon an expectancy, but upon an actual existing estate.

Another unavoidable conclusion results, which must prove fatal to the appellant's contention here. If the husband may not alien his right of expectancy, and if because of this the expectancy may not be taken in execution,—since in either case it would be an appropriation of the wife's right of property, in that it would deprive her of the right to sell with the husband's consent,—for equal reason a judgment operating as a lien upon the husband's expectancy would be an interference with the wife's right of alienation with the consent of the husband, except as that lien is divested by such sale. The owner of such lien must hold it subject to its possible extinction in either of two events, the predecease of the husband, or the alienation of the estate by the joint act of the parties. The efficiency of the lien depends upon the nonhappening of either.

The effect sought to be given the case of *Fleek v. Zillhaver*, supra, has made this discussion seem necessary. But for that case we might well have rested this on what we regard as the decided weight of authority in other jurisdictions touching the questions here directly involved. We attempt no discussion of these conflicting decisions. They may be found cited and reviewed in a very carefully prepared annotation in the case of *Jordan v. Reynolds*, Maryland court of appeals, reported in 9 L.R.A.(N.S.) 1026, where the following conclusion is expressed by the learned editor: "The weight of authority, founded, as we think, upon the better reasoning, is that such acts [the reference being to enabling acts with respect to rights of property in married women] do not in any way affect estates by entirety, except that they deprive the husband of the right to the possession and enjoyment of the property held by himself and wife in this manner, to the exclusion of the wife. That such acts have the effect of freeing the wife's property from any liability to his creditors, and that therefore her right to the possession and enjoyment of property held in common with her husband by entirety cannot in any way be interfered with by his creditors; and hence the entire property, during their joint lives, is free from judgment or execution liens directed against either of them." In this conclusion we entirely concur, saving, however, whatever exception may be required to give effect as 42 L.R.A.(N.S.)

above indicated to the doctrine asserted in *Fleek v. Zillhaver*.

The decisions holding to a different view than that we here express would seem to rest largely upon considerations of policy; the governing consideration in each seeming to be that the exemption of the estate from executions and liens directed against husband or wife would be an invitation to fraud, and would operate as a shield of protection against the just demands of creditors. And this view has been strongly pressed upon our attention in the present case. But fixed rules of law do not give way to expediency or policy. If they did, and the question here was one of policy, our conclusion would be the same; for, as between the policies suggested, we would incline to that which would prevent a husband's expectancy in cases like this from being huckstered about and made the subject of waging contracts of dangerous character, rather than to one which would permit such traffic in order that creditors might have a security upon which they had no right to rely when they extended credit.

The learned court below adjudged the deed in this case from husband and wife sufficient to pass title free from the effect of the bankruptcy proceedings and the judgments against the husband, and free from any contingent interest or ownership therein by the said trustee in bankruptcy in the event of the bankrupt surviving his wife. In this the court was correct.

The exceptions are overruled, and the judgment is affirmed.

#### KENTUCKY COURT OF APPEALS.

INDEPENDENT LIFE INSURANCE COMPANY OF AMERICA, Appt.,

v.

MARY K. RIDER.

(150 Ky. 505, 150 S. W. 649.)

**Insurance — retention of policy — fraud.**

Retention of a life insurance policy issued without application, which contains provisions that it shall be void if, at the date of its delivery, insured is not in good health, or if he has been rejected by other insurers, has been attended by a physician, or has had certain diseases, by one within the operation of such provisions, is not

**Note.** — The effect of a stipulation in an application or policy of life insurance that it shall not become binding unless delivered to assured while in their good health is considered in the note to *Roe v. National L. Ins. Asso.* 17 L.R.A.(N.S.) 1144. The specific question as to the effect of an in-



such fraud as will prevent the operation of a clause in the policy making it incontestable from date except for fraud.

(November 12, 1912.)

**A**PPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. Paul Blackwood, for appellant.

An insurance company can enter into a contract with a person to insure life under certain restrictions and conditions which are fully set out in the contract; and, in the event such restrictions and conditions are violated by the insured, avoid payment of the policy at insured's death, and simply return the premiums paid to it, with interest.

Metropolitan L. Ins. Co. v. Moore, 117 Ky. 651, 79 S. W. 219; Western & S. L. Ins. Co. v. Davis, 141 Ky. 358, 132 S. W. 410; Ky. Stat. §§ 2515, 2519; 1 Cooley, Briefs on Insurance, 687; MacKinnon v. Mutual F. Ins. Co. 89 Iowa, 170, 56 N. W. 423; Wilcox v. Continental Ins. Co. 85 Wis. 193, 55 N. W. 188; Provident Sav. Life Assur. Soc. v. Puryear, 109 Ky. 381, 59 S. W. 15; Kirkpatrick v. London Guarantee & Acci. Co. 139 Iowa, 370, 19 L.R.A.(N.S.) 102, 115 N. W. 1107.

Messrs. Taylor & McKee for appellee.

Nunn, J., delivered the opinion of the court:

This action was brought by Mary K. Rider upon a life insurance policy issued by appellant upon the life of her husband, Walter E. Rider; she being the beneficiary named in the policy. The policy provided for the payment to her of \$228, subject to certain conditions named therein, upon the death of her husband. The contract of insurance provided for weekly payments of 20 cents, and this provision was complied with to the death of Walter E. Rider on January 4, 1910. By an answer and an amended answer, appellant presented as

contestable clause where insured is in poor health when policy is delivered is discussed in the opinion in Mutual Reserve Fund Life Asso. v. Austin, 6 L.R.A.(N.S.) 1064, and see note to that case.

As to validity of provision making policy incontestable from date as affected by fraud, see note to Reagan v. Union Mut. L. Ins. 42 L.R.A.(N.S.)

defense to the action the following grounds: It is alleged that it is not bound to pay the amount of insurance named in the policy, unless at the date of the delivery of the policy to the insured he was "alive and in sound health" as provided in the policy, which also provided: "This policy is void if the insured before its date has been rejected for insurance by this or any other company, or has been attended by a physician for any serious disease or complaint; or has had before said date any pulmonary disease, or chronic bronchitis, or cancer, or disease of the heart, liver, or kidneys," etc.

It is alleged that Rider was not in sound health at the time the policy was delivered; that he had been rejected for insurance by other companies, and had, previous thereto, been attended by a physician for some serious disease or complaint; that he had before the delivery of the policy been afflicted with all the diseases named in the clause above copied; and that he had, for these reasons, obtained the policy of insurance by fraud. It appears that Rider made neither a written nor oral application for the insurance, and it is nowhere alleged or proved that he concealed any fact or made any statements, either true or false, to induce appellant to issue the policy. The substance of appellant's claim is that, as the policy contained the clause above quoted, Rider's acceptance and retention of the policy amounted to fraud on his part. It does not appear that he ever read the policy, or that it was ever read to him. The pleadings assume that he knew the language referred to was in the policy, and that he understood its meaning and purport. The lower court sustained a demurrer to the answer and amended answer, except in so far as they denied the allegations of the petition, and rendered a judgment in behalf of appellee for the full amount of the policy. The contract sued on also contains the following provision, which aids elucidating the matter, to wit: "If this policy is or shall become void, all premiums paid shall be forfeited to the company, except as provided," etc. The only exception provided is where the policy is surrendered to the company within two weeks after its delivery to the insured. By another clause it is provided: "This policy shall be incontestable from

Co. 2 L.R.A.(N.S.) 821. For the effect of the incontestable clause on defense of want of insurable interest, see note to Bromley v. Washington L. Ins. Co. 5 L.R.A.(N.S.) 747. And as to applicability of that clause to nonpayment of premiums, see note to Thompson v. Fidelity Mut. L. Ins. Co. 6 L.R.A.(N.S.) 1039.

date, except for fraud or misstatement of age."

This policy seems to have been drawn with a view of defeating or of avoiding §§ 639 and 679 of our statutes. It is not alleged that Rider made any statements or representations to obtain the policy. Therefore the first section named does not apply, for it has reference to the making and the effect of such statements and representations; nor does the policy contain any reference to any application or by-law as forming a part of the contract. Therefore § 679 is avoided.

That provision of the policy which provides that it shall be incontestable from its date, except for fraud, eliminates all other questions. It is not claimed that Rider, either before the policy was issued, or at the time it was issued, or at any time thereafter, made any statement or refused to answer any questions with reference thereto; nor is it claimed that he in the slightest deceived or attempted to deceive appellant or its agent. Therefore it is difficult to understand how it can now plead that Rider fraudulently represented that none of the conditions existed. It certainly cannot say that it was thereby induced to insure him, for it only claims that his acceptance and retention of the policy constituted the fraud. Assume that all the conditions named in the policy existed and that Rider was an undesirable risk, that he received, read, and understood the purport of the policy, and retained it with the knowledge that he was not a proper subject for insurance, but little sympathy can be felt for a company that deals with persons who purchase industrial insurance that makes such fraud so easy. The policy contains no provision requiring Rider to return it if he learned upon reading it that he was an undesirable risk. In all probability Rider never thought of committing a fraud by retaining the policy. His idea, probably, was that to commit a fraud he must either do something, misrepresent something, or conceal something when asked, which would materially affect the risk. No policy like this one has ever been construed by this court that we can find or have been referred to. We agree with the court in the thought expressed by the following language: "If Rider was a good enough risk for defendant to accept his premiums without inquiry during his lifetime, he was a good enough risk for it to pay the insurance now that he is dead."

For these reasons, the judgments of the lower court is affirmed.  
42 L.R.A. (N.S.)

## IOWA SUPREME COURT.

WILLIAM LEHMAN, Appt.,  
v.  
GREAT WESTERN ACCIDENT ASSOCIATION.

(— Iowa, —, 133 N. W. 752.)

**Insurance — accident — strain — appendicitis.**

Appendicitis due to the irregular working of the muscles of the side because of their strain in bowling is not within a policy providing indemnity for loss of time resulting from disability due to external, violent, and accidental means.

(December 15, 1911.)

**A** PPEAL by plaintiff from a judgment of the District Court for Woodbury County in favor of defendant in an action brought to recover the amount alleged to be due under a policy of accident insurance. Affirmed.

*Note. — Accident insurance; injury or disability from strain as within provision as to external, violent, and accidental means.*

As to rupture of blood vessel as an accident within accident policy, see note to Shanberg v. Fidelity & C. Co. 19 L.R.A. (N.S.) 1206.

As to previous diseased condition as affecting liability for death or injury from accident, see note to Stanton v. Travelers' Ins. Co. 34 L.R.A. (N.S.) 445.

### Accidental means.

A conflict exists among the decisions as to what injuries are the result of accidental means within the contemplation of accident policies. It seems possible, however, to reconcile some of the cases upon the theory that injuries resulting from acts which were exactly what the insured intended and which were unaccompanied by any unintentional or involuntary muscular effort are not within the meaning of the provisions under consideration, while injuries are within these provisions where the insured's act bringing about the injury is accompanied by an unanticipated and unintentional movement or circumstance. A distinction is also drawn in some cases between "accident" and "accidental means;" the ground being that, while the result of an intentional act may be an "accident," the act itself, where intended, cannot constitute "accidental means."

The distinctions just suggested are emphasized in Clidero v. Scottish Acci. Ins. Co. (1892) 19 R. 355, 29 Scot. L. R. 303, where a stout man twisted his colon while stooping to pull on his socks, so that the injury resulted in his death, and it was held that there being no misadventure incidental to his act, such as a slip or a fall or anything

Statement by McOlin, J.:

Action on an accident policy to recover a stipulated benefit for disability resulting from accidental means. At the conclusion of plaintiff's evidence, the court, on defendant's motion, directed a verdict in its favor, and from a judgment on this verdict plaintiff appeals.

Mr. C. R. Jones, for appellant:

Plaintiff's injury was an accident within the meaning of an accident insurance policy insuring against accidental bodily injuries caused solely by external, violent, and accidental means.

Patterson v. Ocean Acci. & Guarantee Corp. 25 App. D. C. 46; Delaney v. Modern Acci. Asso. 127 Iowa, 35, 102 N. W. 190; 97 N. W. 91; Binder v. National Masonic

Acci. Asso. 127 Iowa, 35, 102 N. W. 190; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939; North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 61, 9 Sup. Ct. Rep. 755; Standard Life & Acci. Ins. Co. v. Schmaltz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Ludwig v. Preferred Acci. Ins. Co. 113 Minn. 510, 130 N. W. 5; Horsfall v. Pacific Mut. L. Ins. Co. 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; Rustin v. Standard Life & Acci. Ins. Co. 58 Neb. 792, 46 L.R.A. 253, 76 Am. St. Rep. 136, 79 N. W. 712.

external except in accord with his intention and by virtue of the volition of the insured, his death was not the result of injury caused by violent, accidental, external, and visible means. The court said: "The question, in the sense of this policy, is not whether death was the result of accident in the sense that it was a death which was not foreseen or anticipated. That is not the question. The question is, in the words of this policy, whether the means by which the injury was caused were accidental means. The death being accidental in the sense in which I have mentioned, and the means which lead to the death as accidental, are to my mind two quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death; but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now, if that is so, where does the question of accident come in here? There is no evidence . . . that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently, a most unfortunate and unexpected result happened,—the man's death. I cannot think that that falls within the description in this policy that death resulted from violent, accidental, external, and visible means."

So, in *Re Scarr* [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 82 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787, where an accident policy provided for indemnity in case the insured should "sustain any bodily injury caused by violent, accidental, external, and visible means" and the injury so sustained should be the sole and immediate cause of death within a given time of the accident, it was held that the injury resulting in the assured's death was not caused by "accidental means" within the terms of the policy, where on the day of the injury the assured, being in the apparent enjoyment of good

health, although without his knowledge his heart had been in a weak and unhealthy condition for some time, attempted to eject a drunken man from his master's premises, using some exertion by pushing or pulling in order to overcome the man's passive resistance, and it appeared that the effort caused a strain on his heart, the consequence being that the heart began to dilate and the dilation finally resulted in his death, which it appeared but for the strain would probably not have occurred until sometime later.

And in *McCarthy v. Travelers' Ins. Co.* 8 Bias. 362, Fed. Cas. No. 8,682, it was held that the rupture of a blood vessel while exercising with Indian clubs could not be regarded as accidental if the insured voluntarily used the clubs in the ordinary way, and no unusual circumstance interrupted or interfered with the use, or caused any unforeseen, accidental, or involuntary movement of the body; but it was held that if, while engaged in such exercise, an unforeseen, accidental, involuntary movement of the body occurred which in connection with the use of the clubs brought about the injury; or if any unforeseen or unexpected circumstance interfered with the usual course of the exercise, by which there was produced an involuntary movement, strain, or wrenching by means of which the injury was occasioned, such means would be accidental within the meaning of the policy.

In *Hamlyn v. Crown Accidental Ins. Co.* [1893] 1 Q. B. 750, 61 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663, it appeared that the assured, in stepping forward to pick up a marble as it rolled from him, separated his knees and leaned forward and made a grab, and in doing so he wrenched his knee and dislocated the cartilage. It was here held that the injury was within an accident policy against any bodily injury caused by violent, accidental, external, and visible means, excepting injuries arising from natural diseases or weakness or exhaustion consequent upon disease, it appearing that the insured before the accident had not suffered from any weakness of

Messrs. Bailey & Stipp and Milchrist & Scott for appellee.

McClain, J., delivered the opinion of the court:

The facts which the evidence introduced for plaintiff tended to show were that plaintiff, holding a policy in the defendant company, providing a stipulated indemnity for loss of time resulting from disability due to accidental means, engaged for three successive evenings in the violent exercise involved in the game of bowling or tenpins, and that in the course of the game on the third evening, which was January 20, 1909, he threw a certain ball, and strained his side. He felt the strain at once, but paid no attention to it. Later, as it grew worse,

he quit bowling. The next day he had a sore side, and the day following, in the afternoon, he was confined to his bed, and called a physician, who found a tenderness of the muscles of the front and back of the abdomen on the right side. In the opinion of the physician, this tenderness was due to a strain. The muscles were tender and slightly swollen, as could be ascertained by applying the hands to the right side of the abdomen. The physician further testified that on the next day, or the day following, the plaintiff developed a case of appendicitis, which the physician believed could be traced directly to the irregular working of the muscles and parts of the body around the abdominal region, which resulted from the strain. The physician further testified

the knee or knee joint; since as he did not mean to wrench his knee, and a wrench would not be the ordinary result of his action, the injury was accidental.

And in *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49, there was held to be sufficient evidence to sustain a finding that death was due to accidental means, where it was caused by rupture of a blood vessel in the insured's stomach, and it appeared that he was a railroad machinist and a strong man, and that he was accustomed, in the course of his work, to remove cylinder heads of engines, which he had frequently done without injury, but on the occasion in question the cylinder head on which he was working stuck, and he used a steel bar to remove it, and then, in order to prevent the cylinder head falling, he quickly dropped the bar and caught the cylinder head, after which he was immediately taken sick and vomited blood until he died.

And in *Atlanta Acci. Asso. v. Alexander*, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, the evidence was held sufficient to support the finding of death by accidental means, where it showed that the insured was a strong man, and was accustomed as part of his work as a blacksmith to use a heavy sledge hammer, and that on the occasion in question while striking a slanting blow with the sledge he suddenly felt a severe pain in the lower part of his abdomen, from which a rupture resulted, producing a hernia which in a few days brought about his death. The court in this case said that the jury could properly infer that the act which produced the injury was something unforeseen, unexpected, and unusual, and that the injury resulted directly and immediately from such act and therefore was produced by accidental means.

And in *Pervangher v. Union Casualty & Surety Co.* 85 Miss. 31, 37 So. 461, a declaration which alleged that the death of the assured was caused from bodily injuries to his lungs or stomach or some part thereof, or some part of his body adjacent thereto and connected therewith, or the rup-

ture of some blood vessel, caused by being strained in lifting or handling some heavy machinery or heavy substance, was held to state a cause of action upon a policy which insured against "bodily injuries sustained through external, violent, and accidental means."

In *Summers v. Fidelity Mut. Aid Asso.* 84 Mo. App. 605, where it appeared that a "hostler helper" in a railway shop, while attempting to lift a heavy truck, suddenly "gave down" and said, "I am hurt," and was taken home and found to be afflicted with hernia, which showed itself plainly by visible marks and indications upon his person, and from which he shortly thereafter died, it was held that his death was due to an accident produced by accidental or violent means within the provisions of a policy insuring him against such bodily injuries of which there should be visible marks upon the person as affected directly and solely by external, violent, and purely accidental means.

And in *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028, where a man accustomed to lift heavy weights assisted in lifting a particularly heavy bar of iron, and in so doing had to stand on top of a pile and reach below his feet in order to pick up the bar, thus putting himself at a disadvantage, it was held that a resulting dilation of the heart which caused his death in a few weeks was within the terms of a policy insuring against the effect of bodily injury "caused solely by external, violent, and accidental means."

Where the insured, in lifting a heavy mail sack in the performance of his duties as a railway postal clerk, ruptured a blood vessel on his right lung, and so strained, pulled, and injured himself as to cause several hemorrhages from the lung so injured, and the evidence showed that such a rupture was not a natural or probable effect of the lift, and that he had no hidden disease of the lungs, it was held that the question as to whether or not the injury was caused by external, violent, and acci-

that on his first examination he found no indication of appendicitis. An operation became necessary and eventually a second operation, so that the plaintiff was disabled from carrying on his occupation of bank cashier for more than four months, for which disability he claimed the sum of \$276 under the provisions of his policy.

By the language of the policy, plaintiff was insured "against the effects of personal bodily injury caused solely by external, violent, and accidental means," and the important question in this case is whether the disability due to appendicitis was within such provision of the policy. Much ingenuity has been exercised by the courts in attempting to define "accident," but we refrain from entering upon this general field

of inquiry, for the reason that the term is of popular significance only, and that it must be defined for various purposes in accordance with somewhat different rules. It may be necessary to determine whether an injury is accidental, for the purpose of excluding liability therefor as the result of negligence; but with this we have now no concern. Our inquiry must be limited to the more concrete question, arising under a policy of accident insurance, as to what is an injury caused solely by external, violent, and accidental means; for the defendant company had the right to limit its liability so as to exclude injuries not of that character.

In this case we have to consider a voluntary act of the insured, not intended nor

dental means was one for the jury. *Young v. Railway Mail Asso.* 126 Mo. App. 325, 103 S. W. 557.

And where a bridge builder, with his men, was raising a bent when the foot of one of the posts slipped from its position so that the top of the bent settled back and was unexpectedly thrown upon the pike poles of the men, and the insured was either struck in the side by the end of his pole or subjected to a severe strain which immediately disabled him and soon caused his death, it was held that there was sufficient evidence to go to the jury in support of the allegation that the accident was within the meaning and intent of a policy insuring against death resulting from bodily injuries through external, violent, and accidental means. *Reynolds v. Equitable Acci. Asso.* 59 Hun, 13, 1 N. Y. Supp. 738, affirmed without opinion in 121 N. Y. 649, 24 N. E. 1091.

So, in *Rose v. Commercial Mut. Acci. Co.* 12 Pa. Super. Ct. 394, where it appeared that the insured in the course of his employment had occasion, with an assistant, to raise a hinged iron plate weighing 100 or 125 pounds, the edges of which were more or less rusted in place, and that when they had succeeded in doing so the assured felt oppressed and left off work; that on the following day, having occasion to move a piece of stone weighing 250 or 300 pounds, he placed the point of a pick under it, and by a horizontal thrust against the handle sought to raise it enough for his assistant to get a bar under it, when he collapsed and was subsequently overtaken by a hemorrhage of the lungs,—it was held that, in the sense that the result of efforts made by the insured was unforeseen by him, it might be called accidental; and that the question whether the injury was affected through accidental means might properly have been submitted to the jury, if injuries by lifting, etc., had not been excepted from the risks assumed.

See also the cases of *Feder v. Iowa State Traveling Men's Asso.*; *Appel v. Aetna L. Ins. Co.*; *Shanberg v. Fidelity & C. Co.*; and *United States Mut. Acci. Asso. v. Bar-* 42 L.R.A. (N.S.)

ry, set out by the court in *LEHMAN v. GREAT WESTERN ACCI. ASSO.*

While cases in which the insurance was merely against "accident" are not strictly within the scope of this note, since, as has been previously mentioned, a distinction is drawn between "accident" and "accidental means," the following cases involving policies containing provisions undertaking to indemnify the insured against "accident," etc., are deemed of sufficient value to warrant their insertion in the present note:

A case of this character is found in *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46, where it was held that a strain received by the assured, who was an osteopath, while treating a patient in the ordinary course of his business, was an accident within the contemplation of a policy which undertook to protect him "against accidental bodily injuries caused solely . . . by external, violent, and visible means, which shall, independently of all other causes, disable the assured."

And in *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212, it was held that sufficient preliminary proof of death by accidental injury was furnished by affidavits which in effect alleged that the insured, while assisting in hauling in and unloading hay, accidentally strained himself, injuring his abdominal muscles, producing peritoneal inflammation which resulted in his death; and that such accident was the direct cause of his death.

In *Niskern v. United Brotherhood*, 93 App. Div. 364, 87 N. Y. Supp. 640, however, where the insured, a carpenter, claimed that he was suffering from a hardening of the blood vessels, and that he was subjected to a strain in lifting some heavy timbers which ruptured a blood vessel, and the evidence showed that he suddenly became dizzy while engaged in endeavoring to put up the frame and rafters of a porch, it was held that, since the most liberal inference that could be drawn from the evidence was that he made an effort in performing his work which proved too much

reasonably calculated to produce an injury of any kind; an unexpected and unintended result, which may, in one sense, be called an accidental result, in the nature of an injury, which was the straining of the muscles on the right side of the abdomen, producing a swelling and an irregular action of such muscles, this injury being slight in its nature and not reasonably calculated to produce disability; and, finally, a diseased condition of the appendix, due to the swelling and irregular action of the strained muscles, resulting in the disability for which plaintiff seeks recovery. In order to properly apply the language of the policy, we must ascertain whether there was an ex-

ternal, violent, and accidental means, the proximate result of which was the attack of appendicitis which caused the disability.

The act of bowling in itself was not an accidental means, for it was voluntary. The act in itself did not cause the appendicitis. There is no evidence tending to show that, without the intervening accidental result of swollen and strained muscles, causing friction of the appendix by their irregular action, the disability complained of could have resulted. The accidental means, therefore, causing the disability was not the external and violent act of bowling, but the internal condition of swollen and strained muscles. True it is that this condition was

for his physical condition, an accidental injury was not established.

In *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 436, 92 N. W. 53, where the policy insured against injuries resulting from an accidental cause, the insured, who was just recovering from pneumonia, upon being suddenly aroused from sleep, arose in a confused mental condition and attempted to remove his nightshirt over his head in a hurry, and during the operation, while his arms were above his head, they became entangled and he ruptured a blood vessel while attempting, in a more or less violent attempt, to free himself. In this case an instruction that "an accidental cause is such as may happen by chance; unexpected taking place; not according to the usual course of things or not as expected,"—was held error, since the use of the word "may" served to weaken the definition given of "accident," and suggested by inference that the element of chance and unexpectedness was not always necessary to an accidental result; and it was also held that, while the insured's confused condition might have caused him to become entangled in his garments, and might have made him incapable of exercising ordinary care and prudence in the physical exertions employed by him in escaping therefrom, yet those exertions were voluntary, in the proper sense of the word, and therefore the fatal result could not be regarded as accidental.

#### External and violent means.

A provision in an accident policy that it shall not cover injuries of which there is no visible, external mark upon the body of the insured, does not require that the effects of the accident shall be visible immediately, and it is sufficient where the effects of a strain are visible within a few days after the accident. *Pennington v. Pacific Mut. L. Ins. Co.* 85 Iowa, 468, 39 Am. St. Rep. 306, 52 N. W. 482.

In *Summers v. Fidelity Mut. Aid Asso.* 84 Mo. App. 605, the insured's death was held to be due to an accident produced by "external and violent means," where he was a "hostler's helper" in railway shops, and suddenly "gave down" while attempt-

ing to lift a heavy truck, and said that he was hurt, and upon being taken home it was found that he was afflicted with hernia, from which he shortly died, it appearing that the hernia showed itself plainly by visible marks and indications upon his person.

In *Gale v. Mutual Aid & Acci. Asso.* 66 Hun, 600, 21 N. Y. Supp. 893, it was held in an action upon an accident policy for injuries consisting of a strain of the diaphragm and abdominal muscles, that, although there was no objective evidence visible to the eye showing that the muscles had been injured, their rigidity, ascertained by manipulation, together with the fact that pressure upon them caused the insured to suffer pain, was a sufficient external and visible sign of injury within the requirements of the policy.

And in *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028, it was held that deathly paleness, cold extremities, and cold perspiration on hands and face, and a permanent change of color on the following day from a ruddy hue to a bluish gray, resulting from a dilatation of the heart due to a heavy lift, constituted a visible, external mark within the meaning of an accident policy insuring against injuries, but which provided that it did not cover injuries where there was no visible, external mark upon the body produced at the time of and by the accident.

And it was held in *Hamlyn v. Crown Accidental Ins. Co.* [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663, where the insured dislocated the cartilage of his knee in stooping and reaching after a marble, that as the means by which the injury was caused was the stooping and reaching after the marble, it might properly be described as external, and therefore visible.

But where the insured's death was occasioned by a displacement of his colon, resulting from exertion in putting on his stockings, it was held that the means causing the injury were not violent. *Clidero v. Scottish Acci. Ins. Co.* (1892) 19 R. 355, 29 Scot. L. R. 303. J. T. W.

discoverable externally by the physician, but likewise many internal conditions of portions of the body resulting in disease may be discovered by the physician through external symptoms.

It would be futile to attempt a discussion of all the cases which might be cited as having some bearing on the solution of the question before us. We think that a reasonable solution may be found in considering a few of our own cases on the subject.

In *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683, we held that death from voluntarily taking an overdose of morphine tablets, the act of taking the medicine being intentional, both as to the thing taken and the amount, was not a death due to external, violent, and accidental means; a distinction being insisted upon between accidental means and accidental result.

In *Feder in Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252, we held that death due to the rupturing of a blood vessel, directly resulting from the voluntary physical effort of closing a window shutter, was not death occurring from an accidental cause the distinction between a voluntary act as the means and an unexpected result being against insisted upon.

In *Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91, our holding was that death due to blood poisoning, resulting from an accidental cut on the finger, was a death resulting "solely from accidental injuries;" the rule being announced that death from disease, which was the natural, though not the necessary, consequence of an external, accidental, physical injury, is an accidental death, and not exclusively a death from disease.

In *Binder v. National Masonic Acci. Asso.* 127 Iowa, 25, 102 N. W. 190, a recovery on account of death due to paralysis, resulting from a fall as an accidental cause, but so resulting on account of the diseased condition of decedent's arteries, was denied on account of a stipulation in the policy that there could be no recovery for death happening, directly or indirectly, wholly or in part, accidentally or otherwise, from any disease or bodily or mental infirmity. In that case it was not questioned that, but for the exception in the policy, there might have been a recovery for the death as accidental.

In the recent case of *Jenkins v. Hawkeye Commercial Men's Asso.* 147 Iowa, 113, 30 L.R.A. (N.S.) 1181, 124 N. W. 199, we held that death from blood poisoning, resulting from a wound inflicted in the rectum by a fish bone accidentally swallowed, was a death resulting from an injury "through

external, violent, and accidental means;" the death being held to be the proximate result of the wound, which was accidental.

In all of these cases we have recognized the necessity of proximate connection between some accidental means and the injurious result complained of; and according to the great weight of authority such proximate connection must appear. It is not sufficient that there be an accidental—that is, as unusual and unanticipated—result. The means must be accidental; that is, involuntary and unintended. Thus, in *United States, Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755, it was held that, "if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means;" and the court sustained a recovery in that case for an injury following the voluntary jumping from a platform, on the ground that the evidence tended to show some unforeseen or involuntary movement, turn, or strain of the body, or some unforeseen circumstance causing the injured person to alight in a different position or way from that which he intended or expected. And this case is followed under quite similar circumstances and reasoning in *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49, in which our case of *Feder v. Iowa State Traveling Men's Asso.* supra, was distinguished, on the ground that no unusual or unexpected exertion there appeared.

In *Shanberg v. Fidelity & C. Co.* 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1, it was held that disability or death following a rupture of the heart, due to voluntary physical exertion, was not the result of accidental means.

In *Appel v. Aetna L. Ins. Co.* 86 App. Div. 83, 83 N. Y. Supp. 238, affirmed by memorandum in 180 N. Y. 514, 72 N. E. 1039, peritonitis, resulting from the riding of a bicycle, was held not to have been due to accidental means, inasmuch as the injured person did nothing which he did not fully intend to do, or that what he did was not done precisely as he intended.

In *Niskern v. United Brotherhood*, 93 App. Div. 364, 87 N. Y. Supp. 640, the same distinction is made as in the preceding cases between an accidental means and an accidental result, following *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574, Fed. Cas. No. 13,182, in which it was held that intentionally jumping from a railroad car

and running a considerable distance, not under any emergency requiring extraordinary efforts for personal safety, was not an accidental means which would render the insurance company liable for the accidental result of a rupture, which caused disability.

In *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976, disability, due to intentional exertion on the part of one who was in a feeble condition, was held not the result of accidental means.

Quite in point in its peculiar facts is *Streeter v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779, in which case it was held that, although a physical injury produced insanity, and the injured person in this condition committed suicide, the suicide could not be attributed to the physical injury; and the death of the insane person was therefore a death by suicide, and not by accident.

An examination of a few cases out of the many which might be referred to as apparently supporting a different conclusion from that which we have reached will make more clear the distinction upon which we are insisting.

In *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212, language was used by the court indicating that an accidental strain of the muscles, resulting in death, would render the company liable for such death; but the policy seems to have contained no such limitation as is found in the present case, requiring the injury to be the result of accidental means. The court simply held in that case that the injury—that is, the result—was accidental.

In *Gale v. Mutual Aid & Acci. Asso.* 66 Hun, 600, 21 N. Y. Supp. 893, the question was also whether the injury, not the means, was accidental and visible.

In *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46, the question again was whether the death of the assured was the proximate result of an accidental injury.

In *Atlanta Acci. Asso. v. Alexander*, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, the court reached the conclusion that, taking all the facts together, the jury could properly infer that the act which preceded the injury was something unforeseen, unexpected, and unusual, and therefore that the injury resulted from such an act, and was therefore produced by external, violent, and accidental means, although the act itself was voluntary.

In *Thayer v. Standard Life & Acci. Ins. Co.* 68 N. H. 577, 41 Atl. 182, the question was whether the injury was visible, although it consisted of an internal strain.

In *Freeman v. Mercantile Mut. Acci.* 42 L.R.A. (N.S.)

*Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013, the death for which recovery was asked under an accident policy resulted from peritonitis, but this immediate cause of death was traced directly to a fall, and the court held that the death was due to accident, and not disease.

In *Isitt v. Railway Pass. Assur. Co.* L. R. 22 Q. B. Div. 504, 58 L. J. Q. B. N. S. 191, 60 L. T. N. S. 297, 37 Week. Rep. 477, there was the fact of an accidental fall, the immediate consequence of which was a cold, finally resulting in pneumonia, which caused death, and the court held that the death was the effect of "injury caused by accident;" the question being only as to the proximate connection between the accidental fall and the death.

We have not attempted to discuss all the cases cited by counsel, for an examination of those relied upon for appellant we find many of them distinguishable for reasons similar to those referred to in the cases which we have discussed. On a subject of such complexity, it is easy to quote the language used by courts in support of conclusions which those courts would not have reached under facts analogous to the facts in the case before us.

Finally, it is to be borne in mind that in this case there is no evidence whatever of any slipping or falling, or of any straining the muscles, other than the intentional strain put upon them in the voluntary and intentional act of bowling. Such a strain was not an accidental strain, and, if it produced an unintentional result and consequent injury, nevertheless the resulting injury, and not the means producing it, was accidental.

The judgment of the trial court is therefore affirmed.

Petition for rehearing denied.

#### UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

HENRIETTA C. WEBSTER, Plff. in Err.,  
v.  
CHICAGO, BURLINGTON, & QUINCY  
RAILROAD COMPANY.

(86 C. C. A. 125, 158 Fed. 769.)

**Railroad — hand car in highway — obstruction — liability.**

A hand car removed from the track by

*Note.* — *Liability of railroad company for frightening horses on highway by engine, car, etc., on or near crossing.*

Other cases on this subject indicated in the title may be found in the note to Nor-



railroad employees within the limits of the highway at a crossing, to permit a train to pass, is not an unlawful obstruction of the way, which will render the railroad company liable for injuries due to the frightening of a horse by it.

(November 27, 1907.)

**E**RROR to the Circuit Court of the United States for the Western District of Missouri to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Van Devanter and Adams, Circuit Judges, and Riner District Judge.

folk & W. R. Co. v. Gee, 3 L.R.A. (N.S.) 111.

The following notes are pertinent to this subject:

Liability of municipality for injuries caused by a horse becoming frightened at an object in the highway. *Bowes v. Boston*, 15 L.R.A. 365.

Liability for placing near highway object calculated to frighten horse. *Davis v. Pennsylvania R. Co.* 12 L.R.A. (N.S.) 1152.

Liability for discharge of steam near street or highway so as to frighten horses. *Ft. Wayne Cooperage Co. v. Page*, 23 L.R.A. (N. S.) 946.

Liability of railway company for frightening horse by escape of steam from engine on highway crossing. *Weller v. Lehigh Valley R. Co.* 24 L.R.A. (N.S.) 1202.

Liability of public service company for frightening horses by construction apparatus in street. *Simonds v. Maine Teleph. & Teleg. Co.* 28 L.R.A. (N.S.) 942.

Frightening horse on highway by locomotive, car, or train running parallel therewith. 33 L.R.A. (N.S.) 123.

Frightening of horse by street car. *Doster v. Charlotte Street R. Co.* 34 L.R.A. 481; and *Hoag v. South Dover Marble Co.* 21 L.R.A. (N.S.) 283.

Generally, a railroad company will be held liable for the frightening of an ordinarily gentle horse by objects calculated to frighten horses negligently placed on, or permitted to be placed and remain in, the highway, whereby injury results without contributory negligence. The objects to which this liability extends may be on the margin of the highway and within its limits, although they may not be within the traveled parts, but they must be of such a character as naturally calculated to frighten horses. Whether or not an object is such as to frighten a horse of ordinary gentleness is usually a question for the jury, to be determined by a consideration of its character, its situation, the amount of travel on the highway, and other circumstances.

Engine or car.

Where plaintiff's declaration charged the defendant with allowing its locomotive 42 L.R.A. (N.S.)

Messrs. W. J. Nelson, Beardsley, Gregory, & Kirshner and Harkless, Crysler, & Histed, for plaintiff in error:

Whether the leaving of the hand car in the public highway, under the circumstances shown in the case, was negligence, was a question of fact under all the surroundings for the jury to have determined.

*Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64; *Southern Indiana R. Co. v. Norman*, 165 Ind. 126, 74 N. E. 896; *Sherman, S. & S. R. Co. v. Bridges*, 16 Tex. Civ. App. 64, 40 S. W. 536; *Patterson Railway Acci. Laws*, p. 151, § 148; *Jones v. Housatonic R. Co.* 107 Mass. 261; *Huntoon v. Trumbull*, 2 McCrary, 314, 12 Fed. 844; *Topeka Water Co. v. Whiting*, 58 Kan. 639, 39 L.R.A. 90, 50 Pac. 877; *Cleg-*

tender to stand in a public highway, where, owing to its "size, shape, color, it was an object naturally calculated to frighten horses using the highway, which the defendant well knew," whence plaintiff's horse took fright, etc., it was held in *Butler v. Easton & A. R. Co.* 72 N. J. L. 27, 60 Atl. 218, that a verdict that established nothing as to the negligence so charged beyond the fact that the tender stood within the boundaries of the highway was inconclusive, and should be set aside.

Under a statute making it a misdemeanor for any officer or employee of a corporation in charge of a locomotive wilfully to obstruct therewith a highway crossing for more than five consecutive minutes, it is held in *Burns v. Delaware & H. Co.* 110 App. Div. 592, 96 N. Y. Supp. 509, that a railroad company is not liable where an engine, having stopped its train at a station to discharge passengers, extended some distance into the street, leaving sufficient room for the passage of an ordinary vehicle in front of it and a horse being being driven past such engine, in response to a flagman's signal, became frightened, ran into and injured a railroad employee,—such statute charging no duty upon the railroad company, but punishing train officials for a wilful violation thereof, and the engine's remaining in the street in violation of this statute not being negligence of the company as matter of law, but a fact which, with other circumstances, may be taken to show that the company was negligently occupying a public street.

And upon a later appeal of above case (116 App. Div. 111, 101 N. Y. Supp. 225), the location of the engine was held the negligent or wrongful act of the station company, for which the railroad company was not responsible, it appearing that the railroad company was using the tracks of the station company, which had full control of trains while at the station.

But where plaintiff sustained injury by his horse becoming frightened at an engine standing partly on a crossing, the court in *International & G. N. R. Co. v. Douglas*, 7 Tex. Civ. App. 554, 27 S. W. 793, affirming

horn v. Western R. Co. 134 Ala. 601, 60 L.R.A. 269, 33 So. 10; Missouri & K. Teleph. Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771; Clinton v. Howard, 42 Conn. 294; Wilson v. Spafford, 57 Hun, 589, 32 N. Y. S. R. 532, 10 N. Y. Supp. 649; Foshay v. Glen Haven, 25 Wis. 288, 3 Am. Rep. 73; McDonald v. Toledo Consol. Street R. Co. 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104; Bussian v. Milwaukee, L. S. & W. R. Co. 56 Wis. 325, 14 N. W. 452; Jones v. Snow, 56 Minn. 214, 57 N. W. 478; Schmid v. Humphrey, 48 Iowa, 652, 30 Am. Rep. 414; Cleveland, C. C. & I. R. Co. v. Wynant, 134 Ind. 687, 34 N. E. 569; Elliott, Roads & Streets, § 832; Cincinnati R. Co. v. Com. 80 Ky. 137; 8 Am. & Eng. Enc. Law, 2d ed. 423.

a judgment for plaintiff, held it improper to charge that "if there was room enough on said crossing for wagons to cross if the engine had not been there, and the same was reasonably safe in the absence of said engine, or if there was room to cross with said engine there, and plaintiff could safely have crossed if his team had not become frightened and shied, and the shying of his team threw them into a hole that they would not otherwise have gotten into, then he cannot recover," since the presence of the engine with its pilot upon the crossing was a fact for the jury to consider in determining the issues. It might have been that there would have been room to cross if the engine had not been there, and still it would not follow that plaintiff could not recover. The charge submitted an irrelevant hypothesis, and made plaintiff's right depend on its determination. Everything supposed in the charge might have existed, and yet defendant may have been guilty of the negligence charged against it.

But where a person attempted to cross in front of an engine standing partly across a road crossing leaving sufficient room for the wagon to pass, he was held in *Ft. Worth & D. C. R. Co. v. Taliaferro*, 4 Tex. App. Civ. Cas. (Willson) 545, 19 S. W. 432, guilty of contributory negligence precluding recovery for injury by his horse taking fright.

So, where plaintiff drove his horse safely over a crossing past an engine that had stopped near there, it was held in *Ft. Worth & D. C. R. Co. v. Burton*, 4 Tex. App. Civ. Cas. (Willson) 292, 15 S. W. 197, that he could not recover just for fright, neither he nor his horse being injured.

A railroad company has been held liable for injuries sustained by a horse becoming frightened at a car standing on or near a crossing, such a car being regarded as an obstruction and an object calculated to frighten horses (*Baltimore & O. S. W. R. Co. v. Faith*, 71 Ill. App. 59, affirmed in 175 Ill. 58, 51 N. E. 833); or a nuisance (*Skjegerud v. Minneapolis & St. L. R. Co.* 38 Minn. 56, 35 N. W. 472).

But where a railroad company maintains its crossing in reasonably safe condition for

Messrs. James E. Kelby and J. W. Deweese, with Messrs. O. H. Dean, W. D. McLeod, Hale Holden, and H. C. Timmonds, for defendant in error:

A public service corporation having rights in a highway may make temporary use of parts of the highway for purposes connected with the operation of its business.

District of Columbia v. Moulton, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840; Golden v. Chicago, R. I. & P. R. Co. 84 Mo. App. 59; Piollet v. Simmers, 106 Pa. 95, 51 Am. Rep. 496; Howard v. Union Freight R. Co. 156 Mass. 159, 30 N. E. 479; Nichols v. Athens, 66 Me. 402; Farrell v. Oldtown, 69 Me. 72; Rounds v. Stratford, 26 U. C. C. P. 11; Loberg v. Amherst, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048;

public travel, a freight car standing at the margin of the highway, at which a horse being driven along in the daylight takes fright, whereby the driver sustains injury, does not constitute a nuisance. *Hohman v. New York C. & H. R. R. Co.* 100 App. Div. 17, 90 N. Y. Supp. 882, affirmed in 184 N. Y. 591, 77 N. E. 1189.

Nor is a caboose standing about 3 feet on and over a crossing *per se* a nuisance; nor will the fact that it stood thus for thirty minutes justify a finding that the negligence of the company was the proximate cause of an injury caused by a horse not usually afraid of trains taking fright. *Atchison, T. & S. F. R. Co. v. Morris*, 64 Kan. 411, 67 Pac. 837.

But a person may recover from a railway company for injury caused by his horse taking fright at a box car negligently permitted to remain at a street crossing, although he urged his horse on after he saw that it had become frightened, it appearing that he did not know it to be dangerous to do so. *Ft. Worth & R. G. R. Co. v. Morris*, 45 Tex. Civ. App. 596, 101 S. W. 1038.

And, a person has been held not guilty of negligence as matter of law, in attempting to pass a box car standing partly on and across a street crossing, even after he saw his horse was shying and knew that there was danger in doing so. *Texas C. R. Co. v. Randall*, 51 Tex. Civ. App. 249, 113 S. W. 180.

Nor is a person injured by her team being frightened by a car negligently left in an unusual position—one end being off the track and in the road—precluded from recovery because she might have reached her destination by a different route, or because the road had never been established as a public road by the commissioners, nor by dedication or prescription, where it had become public by long-continued use, with the knowledge and consent of the company. *Pecos & N. T. R. Co. v. Bowman*, 34 Tex. Civ. App. 98, 78 S. W. 22.

But where plaintiff knew when he started for the crossing that cars were overturned by the roadside; that a neighbor's horse had taken fright at the cars that morning; that

Chicago, B. & Q. R. Co. v. Roberts, 3 Neb. (Unof.) 425, 91 N. W. 707; Lake Erie & W. R. Co. v. Juday, 19 Ind. App. 436, 49 N. E. 843.

Adams, Circuit Judge, delivered the opinion of the court:

The record discloses the following brief and undisputed facts: Plaintiff's horse was freighted by a hand car which the section foreman of defendant company had been using in the discharge of his duties, and which he had removed from the rails at a street crossing and temporarily allowed to stand within the limits of the highway, which was also defendant's right of way, while a train running over his section passed. The derailling of the hand car was

occasioned by the approach of a train, and no claim is made that it was derailed any too soon to avoid collision. Plaintiff was driving along the highway in the direction of the crossing, and reached it just after the hand car had been derailed and just before the train passed. As a result of her horse's fright, she was injured, and subsequently brought this suit in the court below for damages alleged to have been occasioned by defendant's negligence in leaving the hand car on the street and thereby exposing her to danger. It resulted in an instructed verdict in favor of defendant, and this writ of error is prosecuted by plaintiff.

The only question necessary for consideration is whether the circuit court erred

by crossing one of his own fields, he could have avoided the danger without inconvenience to himself, his negligence in attempting to pass the cars, trusting to his horses, precluded a recovery from the railroad company for injuries sustained because of his horses taking fright. Pittsburgh Southern R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580.

A railroad company is entitled to a reasonable time in which to remove an obstruction occasioned at or near a public road crossing. *Ibid.*

Where an old and gentle horse shied, striking the rear end of a train projecting into and obstructing a highway, thus leaving but 14 feet for vehicles, the company in Chicago & N. W. R. Co. v. Prescott, 23 L.R.A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237, was held liable for injuries caused to plaintiff thereby, the sudden shying of the horse not being the sole and proximate cause of the injury, but the obstruction directly contributing thereto.

And the court in affirming a judgment against the railroad company for personal injuries resulting from the fright of a team of horses at a box car alleged to have been negligently left partially across a public highway, held a complaint, in Cleveland. C. C. & I. R. Co. v. Wynant, 119 Ind. 539, 20 N. E. 730, not bad on a demurrer which failed to aver that the car was permitted to remain on the highway an unreasonable time.

But where the petition sought to allege that the piling of slag near the roadway, and the placing of a car near the crossing, were acts of negligence, a statement that the defendant was "also negligent in piling said slag and placing said car so near the dirt road at said public crossing, thereby causing said horse to become frightened and unmanageable, and causing the injuries to petitioner as herein set forth," without any allegation that the location and character of the slag and car were unnecessary or unusual, or of such a character as to be calculated to frighten horses traveling along the road, was subject to special demurrer on the ground that such allegation 42 L.R.A. (N.S.)

of negligence was insufficient, was a mere conclusion without any statement of fact to authorize it, and failed to show any negligence upon the part of the defendant. Louisville & N. R. Co. v. Barnwell 131 Ga. 791, 63 S. E. 501.

#### Hand car.

The court will not take judicial notice that a hand car is an object calculated to frighten horses, and a complaint in an action against a railroad company for injury because of a horse taking fright at such an object, which fails to make this averment, is defective. Louisville & N. R. Co. v. Van Zant, 158 Ala. 527, 48 So. 389; and see Gilbert v. Flint & P. M. R. Co. 51 Mich. 488, 47 Am. Rep. 592, 16 N. W. 868, and Myers v. Richmond & D. R. Co. 87 N. C. 345, mentioned in the note in 3 L.R.A. (N.S.) 111.

The company was held liable in Ohio & M. R. Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 64, where plaintiff was injured by his horse taking fright at a hand car placed within 10 feet of the center of a highway 45 feet in width, such car being an unlawful obstruction.

So, the company was held liable where a team of gentle and well-broken mules attached to a cultivator became frightened by a hand car placed by the company's servants in the highway near a crossing within 2 feet of the traveled way, whereby plaintiff was injured. Southern Indiana R. Co. v. Norman, 165 Ind. 126, 74 N. E. 896.

So, where a mule became frightened at a hand car negligently left within the traveled way of a farm crossing, the company was held liable for plaintiff's injuries, the complaint not being demurrable for failure to allege that the mule was one of ordinary gentleness, where the injury was charged to have been caused by the negligence of the defendant, the particulars of which were stated. Baltimore & O. S. W. R. Co. v. Slaughter, 167 Ind. 330, 7 L.R.A. (N.S.) 597, 119 Am. St. Rep. 503, 79 N. E. 186.

And where the replacing of a hand car upon the track at a private crossing by a

in directing the verdict. This depends upon whether there was any substantial evidence of negligence in the case. Plaintiff's counsel contend that the highway was for the use of the general public; that it was not a permissible place for conducting the operations of the railway company; that defendant unlawfully obstructed it by derailling the hand car and leaving it there while the train passed by, and is responsible for the natural consequences of its unlawful acts; among them, the frightening of horses of ordinary gentleness and the injury resulting therefrom. This contention involves

a consideration of the relative rights of a railroad company and the traveling public to the use of that part of the highway which intersects the right of way of the former.

An argument is made in favor of the plaintiff on the assumption that the rights of the railway company in cases like this are subordinate to the rights of the traveling public. Is this assumption correct? By the grant of a right of way to the railway company through the exercise of the right of eminent domain or otherwise, to lay its tracks and operate its road across an es-

section crew, together with the incidental noise and falling of tools from the car, frightened plaintiff's horse, whereby plaintiff was injured, the company was held guilty of negligence warranting a recovery. *Houston & T. C. R. Co. v. Beard*, 42 Tex. Civ. App. 427, 93 S. W. 532.

But a railroad company using tracks jointly with another company is not liable for the negligence of the other company's servants in leaving a car standing partly in the street, although with room enough for vehicles to pass, whereby plaintiff sustained injury because of his horse taking fright. *Jolly v. Missouri, K. & T. R. Co.* 38 Tex. Civ. App. 332, 85 S. W. 837.

#### Miscellaneous objects.

The rule is stated in *Louisville & N. R. Co. v. Armstrong*, 127 Ky. 367, 105 S. W. 473, that a railroad company is no more privileged than a natural person, to deposit or leave something on or near the public highway which is very unusual, and the obvious tendency of which is to frighten ordinarily gentle horses, especially where it is not necessary for the proper operation of the railroad.

But in the above case, where a person was injured by his team taking fright at the carcass of a horse killed by a passing train and thrown beside the highway near a crossing, the company was held not liable, in the absence of proof that it knew, or by the use of ordinary care would have known, of the animal's presence within such time as would reasonably have enabled it to remove it before the accident, and that appellee's injuries did not result from his own failure to use ordinary care.

So, where a person was killed by his team as a consequence of their taking fright at a cow killed by a train and deposited upon the approach to a public street railway crossing, the court in *Chicago & A. R. Co. v. Scranton*, 78 Ill. App. 230, upheld an instruction that, in determining whether the defendant failed to remove the body of the cow from the vicinity of its tracks in a reasonable time, it was proper to take into consideration the time when the accident occurred, and whether or not the defendant had notice of the fact that the body of the cow was deposited at the place mentioned, 42 L.R.A. (N.S.)

and all other facts and circumstances shown by the evidence in the case.

But in *Baxter v. Chicago, R. I. & P. R. Co.* 87 Iowa, 488, 54 N. W. 350, a railroad company whose train struck a steer was held liable to plaintiff for injuries caused by his team taking fright at the carcass, which had been deposited in the highway, near a crossing by a third person at the direction of the company's servants whose duty it was to clear the track of obstructions.

So, a railroad company was held liable in *Western R. Co. v. Cleghorn*, 143 Ala. 392, 39 So. 133, for personal injuries because of a mule of ordinary gentleness taking fright at a mail crane with a bag suspended therefrom near a crossing, it being no defense that the crane was erected at the instance of the United States government to be used in accordance with the custom to hang mail bags thereon only at the approach of fast train; nor was plaintiff guilty of contributory negligence in failing to stop, look, and listen before attempting to cross. The court proceeded upon the theory that a mail crane so situated was a defect breaching the requirement that railroad companies keep their tracks and the approaches to them at public road crossings in good repair.

So, in *Golden v. Chicago, R. I. & P. R. Co.* 84 Mo. App. 59, where a railroad company, in repairing a bridge over a crossing, left some old boards for about two weeks beside the highway near the traveled track, whereby plaintiff was injured because of his horse taking fright thereat, the company was held liable, such lumber being regarded as a nuisance.

And in *Illinois C. R. Co. v. Griffin*, 184 Ill. 9, 56 N. E. 337, affirming 84 Ill. App. 152, where plaintiff was injured by her horse taking fright at a pile of cinders so placed in the highway near a crossing as to be liable to frighten horses, leaving only 10 or 12 feet for travel, the company was held liable, although the cinders were placed there temporarily for ballasting.

And it was held not necessarily reckless conduct for an excellent horse woman, with a baby in her lap, to undertake to drive a three-year old filly over a railroad crossing when no train was approaching, the filly being gentle and well broken to harness. *Ibid.*

J. D. C.

tablished highway, the state has necessarily declared that the use of the highway for these purposes is a public use consistent with the other uses to which the highway is ordinarily subject in favor of the traveling public. Both the railway company and the public may use the highway for their respective and appropriate purposes. The traveling public, whether driving, riding, or afoot, may use it therefor and for all other necessarily incident purposes. The traveler is not a trespasser when crossing the railway tracks at a public crossing on the highway, but is exercising an undoubted personal right. So, too, the railway company, whether in propelling a train of cars or a hand car over its tracks on the highway, repairing its tracks or doing any other thing requisite and necessary for the proper conduct of its business at that place, is not a trespasser; but is exercising its lawful right. Instead of one having a right paramount to the other, the rights of each are of equal dignity as far as they go, and must be enjoyed subject to the embarrassment, if any, which the exercise by the other of his rights creates. Each is entitled to the use of the street for the legitimate purposes of its business, subject always to proper consideration for the concurrent rights of the other.

In *Piolet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496, the supreme court of Pennsylvania observed concerning the subject now under consideration: "There is a certain right of property owners, which we will discuss presently, to leave objects on or along a highway in front of their premises, temporarily, and for special purposes, and where that right exists, it is of equal grade, before the law, with the right of travelers to journey on the highway. . . . As we understand the law, there is an absolute right in a property owner to use a portion of the public highway for certain purposes for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the right of the traveling public."

In *Loberg v. Amherst*, 87 Wis. 634, 41 Am. St. Rep. 69, 58 N. W. 1048, which was an action for damages alleged to have accrued to the plaintiff by the fright of his horse occasioned by mortar boxes obstructing the street in front of a residence owned by the defendant, which he had been using for plastering his house, the supreme court of Wisconsin observed: "He [the owner] had a right to use temporarily a reasonable portion of the street for the deposit of the mortar boxes, etc., while necessarily used in plastering his house. This right is born of necessity and justified by it. . . . As fuel is necessary, a man may throw wood

into the street for the purpose of having it carried to his house, and it may lie there a reasonable time; and, because building is necessary, materials proper and adapted to that purpose may be placed in the street, provided it be done in the most convenient manner; and so, as to the repairing of a house, the public must submit to the inconvenience necessarily incident thereto, but, if prolonged for an unreasonable time, such use of the street becomes unlawful."

In *Golden v. Chicago, R. I. & P. R. Co.* 84 Mo. App. 59, the railway company was engaged in repairing a bridge over its tracks. Old boards had been taken out and piled on the side of the highway within a few feet of the traveled track. Plaintiff's horse driven on the highway toward the pile of lumber was frightened by it, and he was injured. The court said: "We recognize that a public highway or street is not exclusively for travel thereon; that they may be used temporarily for placing material and for other purposes connected with the adjoining property."

In *District of Columbia v. Moulton*, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840, a steam roller had been employed to keep streets in repair. The court said: "The use of an appliance such as a steam roller was a necessary means to a lawful end,—a means essential to the performance of a duty imposed by law. It must therefore follow that if, in the legitimate and proper use of such machine, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is *damnum absque injuria*."

Judge Dillon in his work on *Municipal Corporations*, 4th ed. vol. 2, § 730, lays down the general doctrine as follows: "It is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvement of adjoining lots by digging cellars, by buildings, etc.; this may occasion a reasonable necessity for using a part of the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations

of it. They can be justified when, and only so long as, they are reasonably necessary."

To this text, he cites many cases to which reference is called. See to the same effect *Jones v. Erie & W. V. R. Co.* 169 Pa. 333, 47 Am. St. Rep. 916, 32 Atl. 535; *Farrell v. Oldtown*, 69 Me. 72; *Nichols v. Athens*, 66 Me. 402; *Howard v. Union Freight R. Co.* 156 Mass. 159, 30 N. E. 479.

In view of the principles enunciated above, the question decisive of this case is whether the use of the highway by the section foreman, as and in the circumstances disclosed by the record, is one of the uses incidental to the enjoyment of the conceded right of the railway company to operate its tracks across the highway. If so, it was no invasion of the easement belonging to the general public, but only a limitation of it. Hand cars propelled on the tracks of a railroad company afford the usual, customary, and appropriate means for the locomotion of the section foreman in the discharge of his duty over his section of the road. He carries in them his tools and supplies for repairing the road, and they must of necessity be removed from the tracks whenever and wherever a train approaches them. It follows from these facts, in our opinion, that the right of lodgment of the hand car whenever occasion requires its removal is necessarily implied in the grant to operate a railroad, and is a necessary incident to the enjoyment of the grant. Such being the case, when that lodgment is reasonably required to be made, and is made, on the highway, it is not an unlawful obstruction, and does not *ipso facto* confer a right of action upon one whose horse is frightened by it. On the contrary, it is a consistent and permissible use of the highway for a time reasonably sufficient to enable the train to pass and the operator to restore the hand car to the tracks. The record makes it very clear that the hand car in question was not removed until common prudence demanded its removal. The train was in sight, and the highway, then just reached by the section foreman operating the hand car, presented a level and convenient place to derail it. Indeed, there is no evidence that any other place in the near proximity was a suitable or convenient for that purpose as it, and there is no evidence that the foreman did not exercise reasonable care in derailling it, provided he has a lawful right to do so at that time and place. The case of *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 391, 28 N. E. 64, relied on by plaintiff's counsel does not disclose that the hand car involved in that case was left on the

highway for any purpose incidental to the defendant's business. It is true the supreme court of Indiana said: "The right of using a highway for the storage of cars, or even as a place for the temporary deposit of cars, is not possessed by any railroad company." But it immediately added: "Possibly an emergency might arise excusing, or justifying the temporary use of a highway for such a purpose. . . . The act of the appellant in placing the hand car on the highway, was, in this instance unlawful, and calls for an explanation from the authors of the wrong. We find no satisfactory explanation nor any reasonable excuse in the facts exhibited by the answers to special interrogatories."

We cannot doubt that if the emergency which confronted the section foreman in this case had appeared to the supreme court of Indiana, it would have regarded it as an emergency which justified a reasonably brief obstruction of the street. In *Sherman, S. & S. R. Co. v. Bridges*, 16 Tex. Civ. App. 64, 40 S. W. 536, also relied on by plaintiff's counsel, there is no showing that the hand car was deposited in the highway in the line of business, or because of any pressing emergency. On the contrary, the language of the court excludes that possibility. It said: "The use of the track by the appellant in no way required that the hand car should be thus operated."

*Chicago, R. I. & P. R. Co. v. Williams*, 56 Kan. 333, 43 Pac. 246, is also a case which sanctions the obstruction of a highway by a railroad company for a necessary and reasonable purpose.

Without particularly referring to any of the other numerous cases which the industry of counsel has brought to our attention, it suffices to say that we find in none of them any doctrine which militates against that of the cases first cited by us when applied to facts of the kind disclosed by this record.

The vigorous contention of counsel that the case should have been submitted to the jury for its consideration and determination is clearly without merit. There was nothing for a jury to pass on. The controlling facts were undisputed, and a question of law only was presented, namely, whether on those facts a legal liability arose against the defendant for plaintiff's injury. The learned trial judge in the exercise of his undoubted function, and in the discharge of a duty properly belonging to him, held that no such liability arose out of the facts. In doing so, he committed no error and the judgment is accordingly affirmed.

## NORTH DAKOTA SUPREME COURT.

JOHN BRADLEY, Appt.,  
v.

D. EARLE, Resp't.

(22 N. D. 139, 132 N. W. 660.)

**Execution — exemption — pleading.**

1. Exemption privileges allowed by statute are to be liberally construed, and a debtor should not be deprived thereof through a technical following of statutes pertaining to pleading.

**Set-off — against exempt wages.**

2. Where a plaintiff brings an action for wages due from the defendant, and such wages are exempt to the plaintiff, the de-

Headnotes by MORGAN, Ch. J.

**Note. — Set-off and counterclaim against an exempt claim.**

This note does not cover the question of the right to garnish exempt property, or take such property on execution.

**Right of set-off against exempt claims generally.**

Upon the principle that exemption statutes are to be liberally construed, the courts, as a general rule, decline to allow a set-off against claims arising out of exempt property, and this is true notwithstanding the fact that there is no express provision protecting exempt property from the right of set-off.

Applying the rule that exemption statutes are to be liberally construed in the following cases, where the terms of the statute do not appear, the right of set-off was denied:

—where the defendant in an action to recover for the wrongful taking or detaining of exempt property sought to set off the debt on which the proceedings under which the property was wrongfully taken were based. *Beckman v. Manlove*, 18 Cal. 389; *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767; *Craddock v. Goodwin*, 54 Tex. 578; *Elder v. Frevert*, 18 Nev. 446, 5 Pac. 69; *Wilson v. McElroy*, 32 Pa. 82; *Wilson v. Manning*, — Tex. Civ. App., 35 S. W. 1079;

—where a sheriff claimed the right to apply money in his hands which had been realized under a judgment for the conversion of exempt property, to the satisfaction of an execution held by the officer against the person whose property had been converted. *Howard v. Tandy*, 79 Tex. 450, 15 S. W. 578;

—where an execution creditor was entitled to his judgment as an exemption, and the execution debtor sought to set off an execution which he in turn held against the creditor; and this result was reached although the latter was insolvent. *Lewis v. Gill*, 76 Mo. App. 504;

—where a judgment creditor, in garnish-

pendant cannot counterclaim a debt due from the plaintiff to him, although the counterclaim comes within the letter of the statute.

(September 13, 1911.)

**A** PPEAL by plaintiff from a judgment of the District Court for Towner County in defendant's favor in an action brought to recover wages alleged to be due plaintiff from defendant. Reversed.

The facts are stated in the opinion.

Mr. John E. Middaugh, Jr., and Messrs. Burke, Middaugh, & Cuthbert, for appellant:

The counterclaim statute should be liberally construed, and should not be construed so as to deprive a debtor of his exempt property.

ment proceedings against the tenant of the judgment debtor, sought to set his judgment off against the proceeds of exempt crops which had been wrongfully converted. *Staggs v. Piland*, 31 Tex. Civ. App. 245, 71 S. W. 762;

—where a purchaser of exempt personal property sold by the commissioner of the court for reinvestment, when sued by the commissioner for its value, set up a claim that he had against the owner of the exempt property. *Sirmans v. Sirmans*, 74 Ga. 541.

And in the following cases, upon the same principle that was applied in those preceding there was held to be no right of set-off:

—where a statute provided that certain property should be "exempt from execution," and a purchaser of exempt property that was sold in order that the proceeds might be used to purchase other exempt property, when sued for the price, attempted to set up as a defense a note that he held against the vendor. *Mulliken v. Winter*, 2 Duv. 256, 87 Am. Dec. 495;

—where by statute certain earnings were declared exempt from execution and attachment, and an employer purchased a claim against an employee, and sought to set it off against the latter in an action for work performed. *Banks v. Rodenbach*, 54 Iowa, 695, 7 N. W. 152;

—where the statute exempted property from execution and "final process," and the payee of a note, whose property did not exceed the amount allowed as an exemption, claimed his note as exempt against a note outstanding against him, which was pleaded as a set-off in an action brought by him to recover as payee. *Coffing v. Dungan*, 6 Ind. App. 386, 33 N. E. 815; *Smith v. Sills*, 126 Ind. 205, 25 N. E. 881;

—where a statute provided that executions between the same parties might be set off, and a judgment creditor claimed as exempt money realized upon execution, and his judgment debtor sought to set off against such sum an execution which he had acquired from a third person running against the judgment creditor. *State use of Coddling v. Finn*, 8 Mo. App. 261;

—where a statute provided that property

Crawford v. Carroll, 93 Tenn. 661, 26 L.R.A. 415, 42 Am. St. Rep. 943, 87 S. W. 1010; Kaiser v. Seaton, 62 Iowa, 463, 17 N. W. 664; Cullen v. Harris, 111 Mich. 20, 66 Am. St. Rep. 380, 69 N. W. 78; Butner v. Bowser, 104 Ind. 255, 3 N. E. 889; Freeman, Executions, § 235; Ellis v. Pratt City, 111 Ala. 629, 33 L.R.A. 264, 56 Am. St. Rep. 76, 20 So. 649; Duff v. Wells, 7 Heisk. 17; Reynolds v. Haines, 83 Iowa, 342, 13 L.R.A. 719, 32 Am. St. Rep. 311, 49 N. W. 851; Millington v. Laurer, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; Howard v. Tandy, 79 Tex. 450, 15 S. W. 578; Below v. Robbins, 76 Wis. 600, 8 L.R.A. 467, 20 Am. St. Rep. 89, 45 N. W. 416; Red River Valley Bank v. Freeman, 1 N. D. 196, 46 N. W. 36; Cleveland v. McCanna, 7 N. D.

455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908; Caldwell v. Ryan, 16 L.R.A. (N.S.) 501, and note, 210 Mo. 17, 124 Am. St. Rep. 717, 108 S. W. 533, 14 Ann. Cas. 314; Beckman v. Manlove, 18 Cal. 388; Collier v. Murphy, 90 Tenn. 300, 25 Am. St. Rep. 698, 18 S. E. 465; Collett v. Jones, 7 B. Mon. 586; Ex parte Hunt, 62 Ala. 1; Treat v. Wilson, 65 Kan. 729, 70 Pac. 893; Reynolds v. Haines, 83 Iowa, 342, 13 L.R.A. 719, 32 Am. St. Rep. 311, 49 N. W. 851; Bauer v. Teasdale, 25 Mo. App. 25; Draffin v. Smith, 63 Ark. 83, 37 S. W. 307; Atkinson v. Pittman, 47 Ark. 464, 2 S. W. 114; Dahl v. Auberle, 4 Pa. Super. Ct. 627; Moore v. Graham, 29 Tex. Civ. App. 235, 69 S. W. 200; Coppage v. Gregg, 1 Ind. App. 112, 27 N. E. 570; Tillotson v. Wolcott,

should be exempt from attachment or execution, or every other species of forced sale, and a defendant who was liable for exempt wages sought to set off a claim for board which was assigned to him by another before the suit for wages was begun, but after a controversy concerning the claim had arisen. *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, 23 S. W. 525.

So, where the exemption statute gives the head of a family the right to select, and hold exempt from execution, property to a certain amount, the defendant in an action instituted for a claim which the plaintiff, the head of a family, has elected to treat as his exempt property, cannot set off certain notes of the plaintiff which were assigned to him prior to the time that the plaintiff's cause of action accrued, notwithstanding another section of the statute provided that a defendant might set off any demand which he had against a plaintiff, if it was owned at the commencement of the action, since it was held that such provision must be construed with reference to the exemption statute. *Wagner v. J. H. North Furniture & Carpet Co.* 63 Mo. App. 206.

And in *Below v. Robbins*, 76 Wis. 600, 8 L.R.A. 467, 20 Am. St. Rep. 89, 45 N. W. 416, it was held that a judgment for the conversion of exempt property could not be discharged by the defendant paying that amount to the sheriff, to be applied on a judgment against the plaintiff for the payment of which the property was taken, although a statute provided that after the issuing of execution, any person indebted to the judgment debtor might pay to the sheriff the amount of his debt.

And in *Rookard v. Atlanta & C. Air Line R. Co.* 89 S. C. 371, 71 S. E. 992, where the Constitution provided that a certain amount of personal property should be "exempt from attachment, levy, and sale under any mesne or final process issued by any court to the head of any family residing in this state," it was held that no part of a judgment for costs recovered against an administrator who had instituted an action for the negligent killing of his intestate could be set off against the shares 42 L.R.A. (N.S.)

of heads of families in the judgment recovered by the administrator.

In *Lynn v. Stanley Creek Cotton Mills*, 130 N. C. 621, 41 S. E. 877, however, it was held that where the Constitution made personal property exempt "from sale under execution or other final process," the exemption was not available before judgment and it was held that a plaintiff in an action brought to recover for work and labor could not preclude the defendant in such action from availing himself of a counterclaim for a store account which had been assigned to him.

In *Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002, it was held that the fact that an heir was the head of a family, and had no other property than the distributive share to which he was entitled from his ancestor's estate, would not prevent the setting off of his indebtedness to the ancestor's estate, on the ground that his interest in such estate was exempt. The court said: "An heir's interest in an estate consists of his distributive or inherited share of the estate, less what he owes the estate; or, in other words, what he owes the estate is to be treated as so much of his interest in the estate already received by him, and therefore, in the distribution of the property, whether real or personal, he is entitled only to so much thereof as, plus what he has already received, will make his share equal to the share of the other heirs or distributees. Otherwise the heir would receive as much more than the other heirs received as the debt he owed the estate amounted to. It could not be tolerated that he should be allowed to thus diminish the shares of the other heirs who had received nothing from the estate."

Although a note may have been claimed as an exemption by a judgment debtor, still when he assigns it, it loses its quality of exemption and is subject to a counterclaim of judgments against the assignor owned by the maker of the note in question. *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189.

See also *Cleveland v. McCanna*; *Collier v. Murphy*, and *Millington v. Laurer*, set out by the court in *BRADLEY v. EARLE*.



48 N. Y. 188; Yates County Nat. Bank v. Carpenter, 119 N. Y. 554, 7 L.R.A. 557, 16 Am. St. Rep. 855, 23 N. E. 1108; People ex rel. Jones v. Feitner, 157 N. Y. 365, 51 N. E. 1002.

Mr. Fred E. Harris, for respondent:

A claim of exemption from execution has no place in the pleadings, and such a claim cannot defeat defendant's right to a judgment upon his counterclaim.

Caldwell v. Ryan, 210 Mo. 17, 16 L.R.A. (N.S.) 494, 124 Am. St. Rep. 717, 108 S. W. 533, 14 Ann. Cas. 314; Kepner v. Pierce, 3 Ohio C. D. 239; Elder v. Frevert, 18 Nev. 446, 5 Pac. 69; 18 Cyc. 1464; Lynn v. Stanley Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877.

Right to set off one judgment against another which is exempt, or is based on a wrongful taking of exempt property.

The early cases as to the right to set off one judgment against another which is based on a wrongful taking of exempt property are gathered in the note to Caldwell v. Ryan, 16 L.R.A. (N.S.) 494. A number of the early cases were fully set out in the dissenting opinion in that case, and were not therefore gone into in the note. These, however, are included in the present note in order that they may not be lost sight of.

As stated in the early note, the great weight of authority denies the right to set off one judgment against another which is founded upon a claim for exempt property or services, the ground assigned for this result being that the allowance of a set-off in such cases would defeat the intent of the exemption statutes.

In the following cases, where the terms of the statutes do not appear, the rule that exemption statutes are to be liberally construed was applied, and the right of set-off was denied:

—where the judgment creditor claimed his judgment as exempt, and the debtor sought to set off a judgment which he held against the creditor. Curlee v. Thomas, 74 N. C. 51; Higgins v. Dunkleberger, 23 Pa. Co. Ct. 291; Treat v. Wilson, 65 Kan. 729, 70 Pac. 893;

—where a plaintiff in an action for personal injuries claimed the amount recovered as exempt property, and the defendant sought to set off against the amount recovered a judgment obtained by him against the plaintiff in a subsequent adjustment of the cost of the suit. Bowen v. Holden, 95 Mo. App. 1, 75 S. W. 686;

—where a surety attempted to set off a judgment recovered by him against the creditor of his principal, against a judgment which such creditor had recovered against the principal and his surety, which the creditor claimed as his exempt property. Gieske v. Schrakamp, 8 Ohio S. & C. P. Dec. 610, 6 Ohio N. P. 299;

—where the surety referred to in the 42 L.R.A. (N.S.)

Morgan, Ch. J., delivered the opinion of the court:

The plaintiff brought an action in the justice court to recover the sum of \$117.17 for labor performed at defendant's request. The defendant in his answer admits that such labor was performed, and that the same is not paid for, but pleads a counterclaim in his favor arising out of the purchase by him before the commencement of this action of a promissory note made and executed by plaintiff to one McIlrath for the sum of \$194, on which there is now due more than sufficient to satisfy the plaintiff's claim. Demand is made for judgment against the plaintiff for the sum of \$6, besides the costs of this action.

Plaintiff filed a reply, in which he sets

preceding proposition attempted to effect the same set-off against the assignee of the creditor there referred to. Ibid.

And in the following cases, involving varying statutory provisions upon the principle that exemption statutes must be liberally construed, the right of set-off was denied:

—where certain property was declared exempt from levy and sale, and another provision of the statute authorized the court in which judgments were rendered to set off one against the other, and the defendant in an action of trover for exempt property sought to have the judgment against him reduced by setting off a judgment against the plaintiff. Ex parte Hunt, 62 Ala. 1;

—where it was provided that in an attachment suit the obligor might avail himself of any set-off or counterclaim he might have against the party to whose use the suit was brought, and the plaintiff in an action on an attachment bond claimed the judgment recovered as exempt, and the defendant attempted to set off against it a judgment held by him against the plaintiff. State use of Kendrick v. Hudson, 86 Mo. App. 501;

—where it was provided that judgments for the recovery of money might be set off against each other, and the Constitution exempted certain property against "process of court," and a judgment debtor sought to set off a judgment which he had purchased against the judgment creditor, against a judgment which the latter claimed as his exempt property. Atkinson v. Pittman, 47 Ark. 464, 2 S. W. 114.

In Duff v. Wells, 7 Heisk. 17, it was held that a judgment in replevin for damages for taking an exempt cow could not be defeated by setting off a judgment of defendant's against plaintiff, under the statute of Tennessee which allowed only such judgments to be set off as were founded upon matters *ex contractu*.

In Collett v. Jones, 7 B. Mon. 586, where a creditor took the exempt horse of his debtor upon execution, and the latter recovered a judgment against the former in

forth that the McIlrath note was purchased after its maturity, and that McIlrath was indebted to him in a sum far in excess of the amount of the note. In his reply, he further alleges that the debt due to him for labor, and the debt due from McIlrath, are exempt by law from seizure or sale on execution or attachment; and in the reply he further sets forth a schedule of all his

property, which shows that the debt due from the defendant is exempt from seizure or sale under process.

The district court, on motion, struck out the allegations of the reply setting forth the schedule of plaintiff's property, and the claim of exemption, and rendered judgment in defendant's favor for the sum of \$4. The appeal is from the judgment. Plaintiff in-

an action of trespass, it was held that the creditor had no right to set off his judgment against that of the debtor, although the latter was entirely insolvent. The court said: "To the argument that the statute exempted the horse, and not a judgment for his value or for taking him, and that it would be inequitable to allow an insolvent debtor to draw from his creditor the only means of satisfying the debt, it is a sufficient reply that but for the illegal act of the complainants, the subject to which the privilege of exemption attached would have been unchanged, and they should derive no advantage from their own wrong, and that, highly as the right of the creditor is regarded, it is, by the paramount authority of the legislature, expressly postponed to the right of the debtor and his family to the services of an only work beast, and cannot therefore be preferred by a court of equity, which would violate its own principles by protecting the creditor in an advantage wrongfully obtained against the superior, and, as we may assume, prior, equity of the debtor."

In *Serhant v. Haker*, 73 Ohio St. 250, 76 N. E. 943, however, where the statute regulating set-offs provided that "when cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other or by his death, but the two demands must be deemed compensated so far as they equal each other," and the exemption statute merely provided that a claimant might hold property of a certain value selected at any time before sale, exempt from levy and sale,—it was held that a judgment obtained by a creditor was subject to have a judgment held by the judgment debtor set off against it, notwithstanding the fact that the judgment creditor thus referred to was entitled, under the exemption statute, to hold exempt a sum equal to the demand against him. The court in this case said: "The language of this section is specific, and affords a rule, as we think, which clearly governs all cases where cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a set off could have been set up. That condition exists here without question. The imperative language which follows is that the two demands must be deemed compensated so far as they equal each other. This is the rule of the civil law which admitted a set-off in the name of compensation, the 42 L.R.A. (N.S.)

reciprocal acquittal of debts between two persons who are indebted the one to the other, or the extinction of debts of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another. In such situation, compensation takes place, and the respective debts are immediately extinguished by operation of law to the extent of their concurrence. *Waterman, Set-off*, §§ 12, 13. The philosophy of the rule is that the balance left after deducting the smaller from the greater is the real debt owing. The rule is logical, and does not seem to be inequitable. At all events, it is the *dictum* of the statute, and we think it is not the duty of the courts to overthrow it by finespun distinctions, or by an effort to apply deductions from other sections of the statutes which in terms have no relation to it. It isn't pretended that the language of any section relating to exemptions gives such right to exemption in a case like the present. Indeed the assumption that such a claim may be set off in the answer in a case pending finds no support in the sections relating to exemptions, the language being that the claimant may hold exempt from levy and sale real or personal property to be selected any time before sale. This provision would seem to imply that the question of exemption is not to be determined in advance of judgment; that is, the demand is to follow judgment, not precede it." And to the same effect is *Kepler v. Pierce*, 5 Ohio C. C. 488, 3 Ohio C. D. 239, affirmed in 52 Ohio St. 615, 44 N. E. 1143.

In *Mallory v. Norton*, 21 Barb. 424, it was held that where one brings an action to recover the value of exempt property wrongfully seized and sold on execution, and obtains a judgment which becomes a debt, such judgment is subject to have set off against it a judgment against the owner of such property which is held by the other party. It was held in this case that if the party whose property had been wrongfully taken wished to protect his exemption rights, he should have instituted an action in the nature of replevin for the delivery of his property, and had it restored.

And in *Temple v. Scott*, 3 Minn. 419, Gil. 306, it was held that a defendant in a judgment for the conversion of exempt property might have a judgment held by him against the plaintiff set off against plaintiff's judgment, since it was held that the plaintiff should have pursued the specific property, and not have sued for its value. J. T. W.

sists that it was error to strike out these allegations from the reply, and this is the only specification of error necessary to consider.

The appeal presents a question of the construction to be given the statute allowing counterclaims to be pleaded, and the statute allowing exemptions to debtors. The counterclaim statute is as follows:

Section 6859, Rev. Codes 1905:

"The answer of the defendant must contain:

"2. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."

Section 6860:

"The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they are such as have been heretofore denominated legal or equitable, or both."

The exemption statute is as follows: Section 7115: "Except as hereinafter provided, the property mentioned in this chapter is exempt to the head of a family as defined by chapter 41 of the Civil Code, from attachment or meane process, and from levy and sale upon execution, and from any other final process issued from any court."

Section 7116 specifies what the absolute exemptions shall be.

Section 7117 is as follows: "In addition to the property mentioned in the preceding section, the head of the family may, by himself or his agent, select from all other of his personal property not absolutely exempt, goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate \$1,000 in value, which is also exempt, and must be chosen and appraised as hereinafter provided."

The respondent contends that the counterclaim statute should be liberally construed, and full effect be given to its terms without regard to its effect upon the right to exemptions. The appellant contends for a liberal construction of the counterclaim statute, and that it should not be construed so as to deprive a debtor of his exempt property.

It is beyond dispute that if the counterclaim statute be given full effect, the plaintiff would be deprived of his exempt property as effectually as though taken by execution or attachment. In view of the well-

established principle in this and other states that exemption privileges allowed by the statute are to be liberally construed, we are satisfied that the contention of the appellant should be sustained. To permit the plaintiff's exemptions to be wrested from him by giving a technical construction to the counterclaim statute, in disregard of the exemption statute, would render its declarations wholly without effect, which we do not think was the legislative intent. Such a construction would result in wholly depriving a debtor of the benefit of the exemption statutes in many cases. If so construed, the principle of liberal construction would be set at naught.

Many courts, under similar enactments, have given effect to exemption statutes, regardless of the fact that the counterclaim and set-off statutes contain no exceptions or qualifying words. In *Cleveland v. McCanna*, 7 N. D. 455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908, this court sustained a claim for exemptions, although contrary to the strict letter of the set-off statute, and said: "It is true that the procedure under our exemption statute refers more particularly to seizures under attachment and executions, but that is because it is by means of those writs that property is usually seized. But it would be an exceedingly narrow view of the law that would deny exemptions where it was sought to take property by other means. This court is unqualifiedly committed to a liberal construction of exemption statutes."

In *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698, 16 S. W. 465, an action for wages, where the defendant purchased a judgment against the plaintiff and pleaded it as a set-off against the plaintiff's claim, the court said: "While the language used in the act of 1871 [Milliken & V. Code, § 2931], strictly construed, would protect such wages only from 'execution, attachment, or garnishment,' yet the whole spirit of the act is such that we think this claim was not subject to any manner of legal seizure. . . . To subject this claim for wages to a set-off of the kind here offered was to subject exempted wages to a species of legal seizure not admissible."

In *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533, an action for the value of services in painting two pictures of the defendant by one Merrill, the claim therefor having been assigned to the plaintiff, defendant pleading a judgment which had been assigned to him, the court said: "It will be noticed that the interpretation given to the statute is not in all cases the one which a literal following of its provisions would seem to require, but force and effect are sought to be given

to the obvious legislative intent. It is clear that the money due to Merrill could not have been appropriated under execution or attachment issued against his property. That is conceded, and is according to the letter of the statute. But the primary object of the statute is, not merely to protect the earnings of the debtor from seizure by means of the processes technically known as 'attachment' and 'execution,' but to preserve them, for the benefit of his family, against any appropriation for the payment of his debts not authorized by law, to which he does not consent. It was said in *Banks v. Rodenbach*, 54 Iowa, 695, 7 N. W. 152, that an employer cannot purchase claims against a laborer and set them off against his earnings." See also *Wm. Deering & Co. v. Ruffner*, 32 Neb. 845, 29 Am. St. Rep. 473, 49 N. W. 771; *Below v. Robbins*, 76 Wis. 600, 8 L.R.A. 467, 20 Am. St. Rep. 89; 45 N. W. 416; *Wilson v. McElroy*, 32 Pa. 82; *Thompson, Homestead & Exemption*, chap. 26, § 5; 18 Cyc. 1463, and cases cited.

We have carefully considered the opinions in *Caldwell v. Ryan*, 210 Mo. 17, 16 L.R.A.(N.S.) 494, 124 Am. St. Rep. 717, 108 S. W. 533, 14 Ann. Cas. 314, and *Lynn v. Stanly Creek Cotton Mills*, 130 N. C. 621, 41 S. E. 877, holding contrary to our decision herein, but we are satisfied that they are not in accord with the weight of authority or the better reason.

The judgment is reversed, and the cause is remanded for further proceedings.

All concur.

Petition for rehearing denied October 10, 1911.

#### KENTUCKY COURT OF APPEALS.

ROBERT BOYD, JR., Exr., etc., of Robert Boyd, Sr., Deceased, Appt.,  
v.

COMMONWEALTH OF KENTUCKY,  
By J. F. Hawn, Revenue Agent.

(149 Ky. 764, 149 S. W. 1022.)

#### Domicil — change — assessment of taxes.

Expressing an intention to acquire a residence in another state, securing a dwelling there, and leaving the state of domicil prior to the day for assessing taxes, does not effect a change of domicil so as to relieve the property from taxation at the for-

mer one, if the new domicil is not reached until after the tax day.

(October 10, 1912.)

**A**PPEAL by the executor from a judgment of the Circuit Court for Laurel County in favor of the Commonwealth in an action to compel the listing of property of Robert Boyd, Sr., deceased, for taxation. Affirmed.

The facts are stated in the opinion.

Mr. J. W. Alcorn, for appellant:

Defendant, having contracted for a fixed place of domicil in Texas before he left, abandoned his domicil in Laurel county, and having left Kentucky, with a fully formed intention and purpose to go to Texas, it became thereby, on his departure, constructively his domicil.

Cooley, Taxn. 3d ed. p. 641; *Munroe v. Douglas*, 5 Madd. Ch. 405; *Wharton, Confl. L.* § 58; *Cooley, Taxn.* 2d ed. p. 370.

Mr. E. H. Johnson, for the Commonwealth:

Defendant's mere intention to acquire a residence in another state was not sufficient to result in a change of his domicil, so as to relieve his property from taxation.

*Anthony v. Wade*, 1 Bush, 110; *Stirman v. Smith*, 10 Ky. L. Rep. 665, 10 S. W. 131; *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213; *Tipton v. Tipton*, 87 Ky. 243, 8 S. W. 440; 25 Am. & Eng. Enc. Law, 113; 5 Am. & Eng. Enc. Law, 861, 862; *Story, Confl. L.* p. 41, § 44; *Dacey, Confl. L.* pp. 104-115; 2 *Wait, Act. & Def.* pp. 627-629; 8 *Wait, Act. & Def.* pp. 581, 582; *Mitchell v. United States*, 21 Wall. 350, 22 L. ed. 584; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632; 14 Cyc. pp. 838, 852, 856.

*Lassing, J.*, delivered the opinion of the court:

Robert Boyd had been for many years a resident of Laurel county, Kentucky. On the 9th of September, 1903, he stated to his friends that he intended leaving Kentucky and making his home thereafter in Texas. In furtherance of his expressed intention, he left his home, went to Louisville, from there to St. Louis, where he arrived on the 11th of September, and from that point traveled in a leisurely way toward his destination, Bonham, Texas, which point he reached on the 24th of September. He remained in Texas until some time in the late fall or early winter, and, not being in good health, returned to Kentucky. He was registered as a legal voter of London, Laurel county, some time in October, 1904. His

**Note.**—The question whether a domicil is lost by abandonment without intention of returning, before acquiring a new one, is discussed in the note to *Barhydt v. Cross*, 40 L.R.A.(N.S.) 986  
42 L.R.A.(N.S.)

property was listed for taxation in the county of Laurel in the falls of 1904, 1905, and 1906, and he died in November, 1906. He frequently expressed an intention of returning to Bonham, Texas, though he never did so. He did not list his property for taxation in the fall of 1903, prior to going to Texas; and the state, through one of its revenue agents, sought to compel him to do so. In the litigation which followed, it appeared that he was the owner of personal property of the value of \$35,000 on September 15, 1903. The trial judge in the county court found, from the evidence, that he was not a resident of Bonham, Texas, but of Laurel county, Kentucky, and hence was answerable to the state for taxes upon this unlisted property. He appealed from the judgment of the county court; but before the case was tried in the circuit court he died. The litigation was continued against his executor, and upon final hearing the chancellor was of opinion that the findings in the county court were correct, and entered a judgment accordingly. The executor appeals.

Several questions are raised upon the method of procedure, etc.; but the real, and, in fact, the only, question of merit before us upon this appeal is: Was Robert Boyd, on September 15, 1903, the date upon which, under the statute then in force, personal property in this state was subject, to taxation, a resident of Laurel county, Kentucky? If he was, then it is conceded that his estate is liable for the taxes on the amount of personalty the court found he should be assessed with. If, upon the other hand, he was upon that date a resident of Bonham, Texas, the judgment should be reversed.

As stated, prior to September 9, 1903, he had expressed an intention of leaving Kentucky and making Texas his home. He had arranged with a relative there about lodging, etc., and in furtherance of that expressed intention left Kentucky on the 9th of September, but did not arrive at his destination in Texas until September 24th, or nine days after the date upon which the property should have been listed for taxation in Kentucky, if liable for taxation here. Upon the 15th of September, he had not reached the border of the state of Texas. So we are confronted with the naked question: Did his determination to make his home in Texas and his leaving Kentucky, for the purpose of going there, have the effect of giving him a domicile in that state before he actually reached it and settled there? If it did, then he was not, on the 15th of September, a resident of Laurel county; for no principle is better settled than that one cannot have two domicils at one and the same time. It is also true that

everyone must have, at all times, a legal residence somewhere.

The place of one's birth is his domicile of origin. During his minority, he is without power to change this, though it may be changed for him by his parent, guardian, or the person having legal custody of him. After his majority, he is free to change it, and when so changed the new domicile is termed "domicil of choice." One may have several homes, but can have only one legal residence. In this age of commercial and social activity, it is not unusual for one, whose circumstances in life permit, to live in the far south in the winter, in the north in the summer, and at some intermediate point during the other seasons. Thus he has three homes, only one of which can be his legal domicile; and this is not changed, but remains the same until he elects to surrender his legal domicile and adopt another in its stead. This intent to change one's domicile must, of course, in order to make it effectual, be executed; that is, he must take up an actual abode at the point selected as his domicile of choice. It is difficult, at times, to determine just where one's legal residence is. Expressions of intent are not alone sufficient; there must be some evidence supporting these declarations of intent. Usually questions of legal residence have arisen in cases where the party resides part of the time at one place and part of the time at another.

On the question of how a domicile or residence is acquired, the rulings of courts of last resort are not uniform; but the weight of authority is to the effect that, in order to acquire a domicile of choice, there must concur two things: First, an intention to change; and, second, the taking up of an actual abode at the place selected as a new domicile. While not directly involved, this question was inferentially decided in the case of *Tipton v. Tipton*, 87 Ky. 243, 8 S. W. 440. The court had under consideration the construction of § 423 of the Civil Code, which provides: "The plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce: . . . 1. A residence in this state for one year next before the commencement of the action."

It appears that appellant had abandoned his home in Madison county, left the state, and, during the greater part of six years, remained practically all of the time out of the state. The trial court was of opinion that this Code provision required that the plaintiff should be an actual resident of the state for one year before the commencement of the action, and dismissed the plaintiff's petition. The case was appealed to this court, and in the course of the opinion the court said: "There is a broad distinction between

a legal and actual residence. A legal residence (domicil) cannot, in the nature of things, coexist in the same person in two states or countries. He must have a legal residence somewhere. He cannot be a cosmopolitan. The succession to movable property, whether testamentary or in case of intestacy, except as regulated by statute, the jurisdiction of the probate of wills, the right to vote, the liability to poll tax and to military duty, and other things, all depend upon the party's legal residence or domicil. For these purposes he must have a legal residence. The law will, from facts and circumstances, fix a legal residence for him, unless he voluntarily fixes it himself. His legal residence consists of fact and intention; both must concur. And when his legal residence is once fixed it requires both fact and intention to change it."

In Dicey on the Conflict of Laws, at page 106, the author says: "The only principle which can be laid down as governing all questions of domicil is this: That where a party is alleged to have abandoned his domicil of origin, and to have acquired a new one, it is necessary to show that there was both the *factum* and the *animus*. There must be the act, and there must be the intention. A new domicil is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until, also, this intention has been carried out by actual residence there."

In 14 Cyc. 838, we find: "Domicil of choice is entirely a question of residence and intent, or, as it is usually put, the *factum* and the *animus*. Both must concur, in order that the domicil may be deemed established."

The character of residence and the time it is occupied are unimportant; but there must be an actual occupancy of the residence chosen for some time, however short, in order that the change of residence may become effective, 14 Cyc. 839.

In Ennis v. Smith, 14 How. 400, 14 L. ed. 472, the court had under consideration, among other things, the question of domicil of General Kosciusko, and in the course of the opinion said upon this point: "Kosciusko's domicil of origin was Lithuania, in Poland. The presumption of law is that it was retained, unless the change is proved; and the burden of proving it is upon him who alleges the changes. . . . But what amount of proof is necessary to change a domicil of origin into a prima facie domicil of choice? It is residence elsewhere, or where a person lives out of the domicil of origin. That repels the presumption of its continuance, and casts upon him who denies the domicil of choice the burden of disprov-

ing it. Where a person lives is taken prima facie to be his domicil until other facts establish the contrary. . . . It is difficult to lay down any rule under which every instance of residence could be brought which may make a domicil of choice. But there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or condition in which a person may be as to the domicil of his origin, or from the seat of his fortune, his family, and pursuits of life. . . . A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicil. The result is that the place of residence is prima facie the domicil, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place."

Applying the rule announced in the foregoing cases and texts to the facts in this case, Robert Boyd did not become a resident of Bonham, Texas, until he located there on September 24th. Not having acquired a residence there prior to that date, his legal residence necessarily remained in Laurel county, Kentucky, until that time; hence the property sought to be subjected to taxation was properly assessable for taxation in that county, and the trial judge correctly so held.

Judgment affirmed.

#### WASHINGTON SUPREME COURT. (Department No. 2.)

ELIZA A. PHILLIPS

v.

MATTIE A. THOMAS, Appt.

(— Wash. —, 127 Pac. 97.)

**Evidence — alienation of affections — representation of wealth.**

1. Evidence that one accused of alienating the affections of another's husband told him

**Note. — Excessive damages in action for alienation of affections or criminal conversation.**

Courts will seldom interfere with the finding of the jury in actions for criminal conversation or alienation of the affections of a spouse, for the reason that there is no

of her great wealth is not admissible in an action to recover damages for such alienation, if there is nothing to show that it was held out as an inducement to him to desert his wife.

**Same — evidence of wealth.**

2. Evidence of defendant's wealth is not admissible in an action to recover damages for alienation of the affection of plaintiff's husband.

**Instruction — to disregard evidence — correcting error.**

3. An instruction not to regard evidence of defendant's wealth in an action for damages for alienation of affections does not cure error in admitting it, if from the size of the verdict, it is evident that it was not obeyed.

**Damages — mitigation — alienation of affections.**

4. That plaintiff, in an action for alienation of her husband's affections, had been living separate from him, and that he had

paid such attention to other women as to indicate little affection for her, may be considered in mitigation of damages in an action for alienation of his affections.

**Same — amount — excessiveness.**

5. A verdict for \$35,000, reduced by the court to \$25,000, for alienation of the affections of a man fifty years old who had been living separate from his wife and paying such attention to other women as to indicate little affection for her is grossly excessive.

**New trial — alienation of affections — excessive verdict.**

6. A new trial will be awarded, rather than a reduction of the verdict, in case of an award for alienation of affections so excessive as to indicate such a prejudice on the part of the jury as to make it unjust to hold defendant bound by any of its findings.

(October 16, 1912.)

method of determining exactly the proper pecuniary compensation which should be awarded. Therefore unless it is apparent that the jury was influenced by prejudice and passion, its award will seldom be interfered with. *Puth v. Zimbleman*, 99 Iowa, 641, 68 N. W. 895; *Dorman v. Seebree*, 21 Ky. L. Rep. 634, 53 S. W. 809; *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255.

In accordance with this policy the courts have refused to set aside as excessive the following verdicts:

—\$17,500 for alienation by defendant of the affections of plaintiff's husband and causing him to abandon her. *Waldron v. Waldron*, 45 Fed. 315, reversed on other grounds in 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383;

—\$12,500 against the mother of plaintiff's husband for alienating his affections; the court saying that in such cases where the right of recovery is clear the courts will not disturb a verdict on the ground that it is too large or too small, unless it is grossly disproportionate to the rights of the parties. *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614;

—\$1,500 the court saying that while, considering the testimony as to plaintiff's character, he was not in a position to demand and receive so large an amount, nevertheless the verdict was not so large as to indicate such passion, prejudice, or partiality on the part of the jury as would justify setting it aside. *Croze v. Rutledge*, 81 Ill. 266;

—\$5,000 for the seduction and alienation of plaintiff's wife. *Harris v. Rupel*, 14 Ind. 209;

—\$2,500 for criminal conversation, defendant being plaintiff's family physician. *Clouser v. Clapper*, 59 Ind. 548;

—\$1,000 for criminal conversation, though the wife may have been somewhat easily seduced. *Wales v. Miner*, 89 Ind. 118;

—\$1,000, though plaintiff and wife may 42 L.R.A.(N.S.)

not have lived happily together, and she was not entirely above suspicion. *Puth v. Zimbleman*, supra;

—\$5,000 in an action against the husband's mother, it appearing that her conduct was a studied and deliberate attempt to belittle plaintiff, and alienate her husband, and bring about a separation. *Klein v. Klein*, 31 Ky. L. Rep. 28, 101 S. W. 382;

—\$2,333.33 in an action on the case for persuading and enticing plaintiff's wife to refuse him marital intercourse, the wrong to plaintiff being wilful and grievous. *Plourd v. Jarvis*, 99 Me. 161, 58 Atl. 774;

—\$15,000 against the husband's parents, it appearing that they wilfully and deliberately conspired to separate plaintiff and her husband. *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784;

—\$1,500 for alienation of a wife's affections by a stranger. *Korby v. Chesser*, 98 Minn. 509, 108 N. W. 520;

—\$2,000 against the parents of plaintiff's husband for alienation of his affections. *White v. White*, 101 Minn. 451, 112 N. W. 627;

—\$5,250 against a stranger having considerable property, the testimony showing a systematic and constant effort on his part to win the affections of plaintiff's wife and to cause her to abandon him. *Hartpence v. Rogers*, 143 Mo. 623, 45 S. W. 650;

—\$5,000.50 against the parents of plaintiff's husband for alienating his affections, there being nothing shown to justify defendants' conduct in separating plaintiff's husband from her. *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947;

—\$15,000, reduced to \$10,000 by the trial court, against a man of large means who alienated the affections of plaintiff's wife. *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912a, 938;

—\$3,000 in an action for criminal conversation with plaintiff's wife, even though the wife may have been immoral with other

**A**PPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for the alleged alienation of the affections of plaintiff's former husband. Reversed.

The facts are stated in the opinion.

Messrs. Robert F. Booth and A. J. Falknor for appellant.

Messrs. Reynolds, Ballinger, & Hutson for respondent.

Ellis, J., delivered the opinion of the court:

This is an action for the recovery of damages for the alleged alienation of the affections of the plaintiff's former husband. The jury returned a verdict against the defendant for \$35,000. The defendant moved seasonably for a new trial upon all of the statutory grounds, and the court, deeming the verdict excessive, overruled the motion upon the condition that the plaintiff would remit \$10,000 from the verdict. The plaintiff accepted this condition, and a formal judgment for \$25,000 was entered against the defendant, from which she has appealed.

There are many assignments of error, but we find it unnecessary to discuss any of them except those which we find well taken. Nor do we, in view of the fact that a new trial must be had, find it necessary, or even proper, to discuss the evidence further than as applicable to those assignments.

The respondent's son was permitted to

testify, over the appellant's objection, that he had on several occasions heard the appellant speak to the respondent's former husband of her great wealth, estimated at a million dollars or over, and that she had told him where it was located. There was no evidence that this great wealth was held out by the appellant as an inducement to respondent's husband to marry her, or to induce him to divorce the respondent. Nor was there any evidence tending to connect this evidence with other matters charged as causing the alienation. It did appear, however, that the respondent's former husband had business dealings with the appellant for some time prior to the alleged alienation, and that he, the appellant, and her son organized a business concern known as the "Thomas-Phillips Investment Company," which reasonably accounts for an innocent mention of her property. In the absence of evidence tending to show that the appellant in some manner held out her wealth as an inducement to respondent's former husband to desert the respondent, the evidence complained of was inadmissible, and its admission was highly prejudicial.

The court early committed itself to the view that the doctrine of exemplary or punitive damages is unsound in principle, and that such damages cannot be recovered except when expressly allowed by statute. We have steadily held that, in the absence of such statutory sanction, compensatory damages only can be recovered in any case.

men and was not seduced by defendant. *Scheffler v. Robinson*, 159 Mo. App. 527, 141 S. W. 485;

—\$3,000 for criminal conversation with plaintiff's wife, the amount not appearing to be the result of passion and prejudice. *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006;

—\$3,000 against the father, mother, and brother of plaintiff's husband for alienating his affections and causing him to abandon her. *Harvey v. Harvey*, 75 Neb. 557, 106 N. W. 660;

—\$1,750, against the sisters of plaintiff's husband; it appearing that they upbraided him for marrying plaintiff, treated her shamefully, and induced him to leave her and go to another state, furnishing him money to do so. *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804;

—\$6,000 for alienation of a wife's affections and improper relations with her by defendant. *Billings v. Albright*, 66 App. Div. 239, 73 N. Y. Supp. 22;

—\$7,500 against the parents of plaintiff's husband for alienating his affections. *Cochran v. Cochran*, 127 App. Div. 319, 111 N. Y. Supp. 588, reversed on other grounds in 196 N. Y. 86, 24 L.R.A. (N.S.) 160, 89 N. E. 470, 17 Ann. Cas. 782;

—\$10,000 for enticing and detaining and harboring plaintiff's wife, though a very

heavy verdict in view of the circumstances of the parties, and the court did not regard the proof of defendant's guilt as being very conclusive. *Scherpf v. Szadeczkzy*, 4 E. D. Smith, 110, 1 Abb. Pr. 366.

—\$3,000 for criminal conversation with plaintiff's wife, though plaintiff had reason to know and did suspect the improper relation and took no measures to prevent it, and though the judgment would take over half of defendant's property, there being no mitigating circumstances in his favor. *Smith v. Masten*, 15 Wend. 270;

—\$4,500 for alienating the affections of plaintiff's husband who was reasonably attentive to his wife and supported his family till defendant intervened. *Tillinghast v. Sawyer*. — R. I. —, 68 Atl. 478;

—\$5,000 for criminal conversation with plaintiff's wife, the court intimating that it would not set aside the verdict in such cases on the ground of excessive damages. *Torre v. Summers*, 2 Nott. & M'C. 287, 10 Am. Dec. 597;

—\$15,000 for seduction and alienation of plaintiff's wife, it appearing that the wife was a school-teacher, that defendant had been elected prosecuting attorney, and that till his interference the relation between plaintiff and his wife had been cordial and affectionate. *Speck v. Gray*, 14 Wash. 589, 45 Pac. 143;



Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. Rep. 842, 25 Pac. 1072; Atrops v. Costello, 8 Wash. 149, 35 Pac. 620; Woodhouse v. Powles, 43 Wash. 617, 8 L.R.A.(N.S.) 783, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54; Caldwell v. Northern P. R. Co. 56 Wash. 223, 105 Pac. 625; Baer v. Chambers, 67 Wash. 357, 121 Pac. 843.

The rule has also become established, by an almost universal trend of authority, that evidence of a defendant's pecuniary resources is inadmissible in all cases where compensatory damages only are recoverable. Such evidence is only admissible as bearing upon the amount of punitive or exemplary damages which may be awarded. 13 Cyc. 212; 4 Enc. Ev. 27; Western U. Teleg. Co. v. Cashman, 65 C. C. A. 607, 132 Fed. 805; Laidlaw v. Sage, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679, 690; Madigan v. Schaghticoke, 143 App. Div. 887, 128 N. Y. Supp. 800. In Baer v. Chambers, 67 Wash. 357, 121 Pac. 843, we said: "No decision has come to our attention holding such evidence admissible in states where the doctrine of punitive damages does not prevail. This court, in the early case of Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. Rep. 842, 25 Pac. 1072, repudiated the doctrine of punitive damages as unsound in principle. The views there expressed have been consistently adhered to ever since. Woodhouse v.

Powles, 43 Wash. 617, 8 L.R.A.(N.S.) 783, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54. This seems to remove the only basis upon which such evidence could be rendered admissible. It seems to us inconceivable that the amount of respondent's damages should be measured by the financial worth of appellant, when respondent has no right to punitive damages. We conclude that the admission of this testimony was such prejudicial error as entitles appellant to a new trial." The same rule prevails in actions for alienation of affections. "It was, no doubt, competent for either party to show plaintiff's occupation, and perhaps the social position of herself and husband, as bearing upon the value of her husband's consortium; but the wealth, rank, social position, or condition of defendant was wholly immaterial." Bailey v. Bailey, 94 Iowa, 598, 63 N. W. 343.

The respondent contends that the admission of this evidence was cured by an instruction of the court directing the jury to "disregard the wealth and resources of the respective parties" in arriving at a verdict. But, in view of the enormous verdict actually rendered, \$35,000 for the alienation of the affections of a man apparently near fifty years of age by a woman of fifty-six, we cannot say that the jury gave heed to the instruction and ignored her wealth in assessing the damages. The supreme court of Iowa, in an action of this same character and touching the admission of

—\$5,000 compensatory, and \$1,500 punitive, damages against the mother of plaintiff's husband and another jointly for alienating the husband's affections and inducing him to separate from plaintiff. White v. White, 140 Wis. 538, 133 Am. St. Rep. 1100, 122 N. W. 1051;

—£500 for criminal conversation with plaintiff's wife, though defendant was a clerk receiving only £50 a year, which was his whole substance. Wilford v. Berkeley, 1 Burr. 609;

—£5,000 for criminal conversation with plaintiff's wife, though the judges considered it more than should have been awarded. Duberley v. Gunning, 4 T. R. 651.

In the following cases, however, the verdicts indicated were set aside as being excessive under the peculiar circumstances involved:

—\$5,000, it appearing that plaintiff had knowledge of and consented to defendant's illicit relations with the wife. Peek v. Traylor, 17 Ky. L. Rep. 1312, 34 S. W. 705;

—\$5,000 against the wife's brother; there being no evidence that he ever advised his sister to leave plaintiff, and it appearing that the wife was apparently dissatisfied with plaintiff's financial circumstances. Bathke v. Krassin, 78 Minn. 272, 80 N. W. 950;

—\$30,000 against the mother of plaintiff's

husband for alienating his affections, the testimony showing that her property was worth about \$28,000. Sivley v. Sivley, 96 Miss. 137, 51 So. 457;

—\$2,000 for the alienation by another woman of the affections of plaintiff's husband, it appearing from the evidence that plaintiff had made no protest as to his relations with defendant and that she did not desire his conjugal society. Van Olinda v. Hall, 88 Hun, 452, 34 N. Y. Supp. 777;

—\$5,000, where the husband and wife had been separated for several years, for reasons not involving defendant, and the wife had obtained a divorce in another jurisdiction and married defendant, such marriage not being recognized as valid in the jurisdiction of the forum. C. v. D. 8 Ont. L. Rep. 308.

In Allen v. Forsythe, 160 Mo. App. 262, 142 S. W. 820, a judgment for \$6,000 against the relatives of plaintiff's wife for alienating her affections was reduced to \$4,000 because excessive.

And in Hendrick v. Biggar, 151 App. Div. 522, 136 N. Y. Supp. 306, an award of \$75,000, reduced to \$50,000 by the trial court for alienation of the affections of plaintiff's husband by another woman, was ordered reversed as excessive unless plaintiff submitted to a further reduction to \$30,000.

R. L. S.

evidence of the same kind where a similar instruction was given, has used language so pertinent to the situation here presented that we quote it: "It is contended by appellee, however, that, conceding the error, it was cured by an instruction given by the court in the charge to the jury. It is true that the court undertook, in the seventh paragraph of the charge, to limit the consideration of the evidence as to financial worth to the subject of the statement attributed to defendant, and to forbid consideration thereof in connection with the subject of damages. Now ordinarily we say that an error in the admission of evidence is cured by an instruction directing that such evidence be disregarded, or limiting the consideration thereof to the subject-matter to which alone it may have relation. But the rule is not one of universal application. An error may be of such serious character that an instruction will not cure it. This we have often said. *Martin v. Orndorff*, 22 Iowa, 505; *George v. Keokuk & D. M. R. Co.* 53 Iowa, 504, 5 N. W. 615; *Hall v. Chicago, R. I. & P. R. Co.* 84 Iowa, 311, 51 N. W. 150. Here, as we have seen, the evidence objected to was not competent for any purpose. Should we concede, however, that no serious harm could have followed had such evidence been considered only in the connection as directed by the court in its instruction, still, having regard to the probabilities, we are united in the conclusion that the jury did not observe the limitation prescribed." *Flinders v. Bailey*, 133 Iowa, 616, 111 N. W. 27, 28. The excessiveness of the verdict incontrovertibly shows that the jury was either influenced by the improper evidence or by improper motives of passion and prejudice. We cannot assume that it was not, at least in some degree, the former. The case of *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075, cited by respondent, is not apposite. There the defendant, an aunt of the plaintiff's husband, had said to him that he could never have a cent of her property as long as he lived with the plaintiff, and in that connection evidence as to the amount of her property was held admissible. The threat being made as an inducement, the amount of her wealth was material as showing the probable effectiveness of the threat. There was no such warrant for the admission of the evidence here.

Touching the amount of the verdict, we have been cited to no case of this character later than the English case of *Duberley v. Gunning*, 4 T. R. 656, decided in 1792, in which a verdict for as much as \$25,000 has been sustained. Nor have we been cited to any American case, save one, where a verdict in excess of \$15,000 has been upheld. *L.R.A. (N.S.)*

held. In *Speck v. Gray*, 14 Wash. 589, 45 Pac. 143, under circumstances of peculiar aggravation, this court sustained a verdict for that amount. From decisions of other courts we have been cited to but one case where a verdict exceeding that sum was sustained. In *Waldron v. Waldron* (C. C.) 45 Fed. 315, a verdict of \$17,500 was upheld; the court expressly charging that, if the defendant's action was found wanton and malicious, punitive damages might be awarded, which, as we have seen, is contrary to the rule in this state. In *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784, a verdict for \$15,000 was by a divided court upheld, the majority opinion stating that, though the damages were seemingly large, the conduct of the defendant appeared to have been wilful and malicious, which seems to indicate that the punitive idea to a degree influenced the decision. In *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, a verdict for \$12,500 was sustained under a statute allowing exemplary damages where the injury was attended by "fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings," the court holding that the jury was warranted in finding the defendant's conduct grossly unjustifiable.

The foregoing are the largest verdicts to which we have been cited as having been sustained by any court in a case of this kind, and in nearly all of them the punitive principle is distinctly recognized. We have been cited to no other decision sustaining a verdict in excess of \$6,000 in a case of this nature. The evidence before us shows that the respondent's former husband, a mining broker, had, some three years prior to the alleged alienation and divorce, discontinued his business in Spokane and opened an office in Seattle, and that he and the respondent, for reasons of convenience, had been living separately,—she in Spokane, he in Seattle,—for the greater part of those three years. The only reason she gave for this separation was that she could not sell her home in Spokane. There was also evidence tending to show conduct on his part with other women than appellant during this period, such as to indicate little affection for the respondent. These matters should have been considered in mitigation of damages. *Angell v. Reynolds*, 26 R. I. 160, 106 Am. St. Rep. 707, 58 Atl. 625. Under all of the circumstances disclosed by the record, we are constrained to hold that the verdict was so excessive as to raise a presumption of passion and prejudice, and that, even as reduced by the trial court, it was grossly excessive. While we have in many cases, where a verdict has been found excessive, permitted the plaintiff to remit a portion of

the recovery rather than grant a new trial unconditionally, we have in other cases, where the amount awarded was so excessive and unreasonable as to be unaccountable except upon the theory that the jury was influenced by passion, prejudice, or a spirit of vindictiveness, refused to deprive the defendant of a new trial upon the whole case. *Olson v. Northern P. R. Co.* 49 Wash. 626, 18 L.R.A. (N.S.) 209, 96 Pac. 150; *Caldwell v. Northern P. R. Co.* 56 Wash. 223, 105 Pac. 625. The courts have often expressed a reluctance to reduce even excessive verdicts in action for alienation of affections, because of the lack of any rational basis upon which to fix the proper amount. But the same reason does not apply to the granting of a new trial where the verdict is palpably unreasonable. The case before us calls for the latter course with peculiar emphasis. The verdict, even after a reduction of \$10,000 at the instance of the trial court, is still far in excess of that upheld in any modern case to which our attention has been called by either side, though in many of the jurisdictions from which the citations come punitive damages were recoverable. When we seek to analyze the frame of mind which would award \$35,000 upon the evidence presented, an inquiry naturally arises as to what extent the same extravagant mental state may have entered into the jury's deliberations throughout. Under these circumstances, as we said in the *Olson* Case: "It would be unjust to hold a litigant foreclosed by any of the findings." Moreover, as we have seen, the evidence as to appellant's great wealth was admitted, and could have had no other effect than to improperly augment the recovery, but to what extent we are unable to say.

The judgment is reversed, and the cause remanded for a new trial.

Mount, Ch. J., and Morris and Fullerton, JJ., concur.

#### KANSAS SUPREME COURT.

W. W. WALLACE et al., Appts.,

v.

R. E. CABLE et al.

(87 Kan. 835, 127 Pac. 5.)

#### Plat — defective acknowledgment — recognition — effect.

1. Where a city plat is recorded in apparent conformity with the statute, but is inoperative as to a part of the property included because the owner thereof does not join in the acknowledgment, the execution

of a deed by such owner, in which the tract conveyed is described by reference to the plat, there being nothing to show a purpose to disavow it, is such a recognition of its validity as will make it binding upon him.

#### Same — dedication — acceptance.

2. A complete dedication of the tracts designated on the plat as streets and alleys results from the execution and record of such a deed, irrespective of any acceptance on behalf of the public.

#### Same — unopened alley — title.

3. Notwithstanding an alley shown on such plat has never been used by the public, and has been occupied by an individual for more than fifteen years, the title remains in the public, and vests in the owners of the abutting lots upon the passage of an ordinance vacating it.

#### Same — provision for condemnation — effect.

4. The title to the property is not affected by the fact that one of the abutting owners had signed a petition asking that the alley be opened, and that an ordinance had been passed providing for the condemnation of land for that purpose.

#### Same — statute — county road — alley.

5. The statute declaring a county road vacated if it remains unopened for public use for seven years does not apply to a street or alley within the limits of a city.

(October 12, 1912.)

**A**PPEAL by plaintiffs from a judgment of the Court of Common Pleas for Wyandotte County in defendants' favor in an action to recover possession of certain land. Reversed.

The facts are stated in the opinion.

*Note. — Dedication: curing statutory defects in a map or plat by conveying with reference to it.*

This note is intended to be confined to cases which deal with the question whether, by conveying with reference to it, a defective statutory dedication may be made a good statutory dedication, as distinguished from a mere common-law dedication. In general, dedications provided for by statute are made by the filing of a map or plat by the owner, drawn and executed as provided by the statute.

It is laid down generally in the authorities that the difference between a statutory dedication and one at common law is that in the former case the fee passes, and in the latter simply an easement. But this rule is not universal, and depends, of course, upon the construction of the statute. See *Conner v. New Albany*, 1 Blatchf. 43; *Cox v. Louisville, N. A. & C. R. Co.* 48 Ind. 178.

And in *Thorndike v. Milwaukee Auditorium Co.* 143 Wis. 1, 126 N. W. 881, the court said: "By a long line of decisions in this state with reference to streets and roads, it has become the settled law of this

Messrs. L. W. Keplinger and C. W. Trickett, for appellants:

There was a statutory dedication by the owner of the alley.

McCall v. Davis, 56 Pa. 431, 94 Am. Dec. 92; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 373; Park Comrs. v. Taylor, 133 Iowa, 453, 108 N. W. 927.

The conveyance by owners who were not parties to the original dedication, made by reference to the original plat, made them parties to the original dedication.

Oregon City v. Oregon & C. R. Co. 44 Or. 165, 74 Pac. 924; Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236; Sweatman v. Bathrick, 17 S. D. 138, 95 N. W. 422; Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 262; Hall v. Breyfogle,

162 Ind. 494, 70 N. E. 883; Orrick v. Ft. Worth, — Tex. Civ. App. —, 32 S. W. 443.

No acceptance is necessary, even in case of a common-law dedication, where the claim is made by one who has received a conveyance which describes the land "as described" on a map which shows the ground conveyed to be in a street or alley.

Smith v. Beloit, 122 Wis. 396, 100 N. W. 883; Hamilton v. Chicago, B. & Q. R. Co. 124 Ill. 235, 15 N. E. 857; Rusk v. Berlin, 173 Ill. 634, 60 N. E. 1071; Jordan v. Chenoa, 166 Ill. 530, 47 N. E. 191; Latonia v. Latonia Agri. Assn. 139 Ky. 732, 109 S. W. 356; Myers v. Oceanside, 7 Cal. App. 87, 93 Pac. 686; Boise City v. Hon, 14 Idaho, 272, 94 Pac. 167; Christian v. Eugene, 49 Or. 170, 89 Pac. 420; Tyler v. Boyette, 43

state that in the case of a road or street, whether acquired by condemnation, conveyance, by common-law dedication or by statutory dedication, the city, town, or village takes only an easement for highway purposes, while the fee is held by the abutting landowner. This brings all roads and streets within an uniform rule; but whether the ruling was originally correct as regards statutory dedication by plat, under the statutes quoted, is doubtful. However this may be, the rule has been so often applied, and is of such long standing, that it has become a rule of property with reference to roads and streets, and cannot now be departed from. . . . This condition of the precedents in this state with reference to public squares under a statutory dedication leaves this court free to re-examine and construe that statute so far as the same relates to public squares. Upon the face of these statutes, it is very clear that, as soon as the statutory dedication took effect, Byron Kilbourn, or those claiming under him, parted with the title in fee to the municipality. When the municipality took the fee in trust for the public, this conveyance left no residue of title or interest in the dedicatory, or those claiming under him, by virtue of which they could claim any present interest in the dedicated land. So far as the case relates to public squares created by statutory dedication, Milwaukee v. Milwaukee & B. R. Co. 7 Wis. 85, is overruled."

It is the rule that to effect a statutory dedication requires at least a substantial compliance with the statute, but defective attempts at statutory dedications are frequently held to be good common-law dedications.

In Leadville v. Coronado Min. Co. 37 Colo. 234, 86 Pac. 1034, which is without the scope of this note, as it is not a case where reference had been made in deeds to the attempted statutory dedication, which was defective, the court said: "We think that it has been uniformly held that, to constitute a statutory dedication, the requirements of the statute must be complied with, and where this has not been done, the subsequent conduct of the donor, 42 L.R.A. (N.S.).

or of the city, cannot operate to make it such; and, although the intention to dedicate is clearly manifested, the dedication will amount to only a common-law dedication." And it was held in that case that only the easement passed, and not the fee.

In Seattle v. Hill, 23 Wash. 92, 62 Pac. 446, also a case without the scope of this note, the court said: "It is held by numerous authorities, and may be said to be an established principle of law, that 'an incomplete or defective statutory dedication may, when accepted by the public, or when rights have been acquired thereunder by third parties, operate as a common-law dedication.' 9 Am. & Eng. Enc. Law, 2d ed. 36. See also Elliott, Roads & Streets, p. 86; 2 Dill. Mun. Corp. 4th ed. § 628."

#### General rule.

There are numerous cases where the court, while holding insufficient the attempt to effect a statutory dedication by a plat to which conveyances refer, has held that no more than a common-law dedication was affected. Denver v. Clements, 3 Colo. 472 (plat filed by nonowner); Gosselin v. Chicago, 103 Ill. 623 (plat defective in that it was acknowledged by attorney in fact); Maywood Co. v. Maywood, 118 Ill. 61, 6 N. E. 866 (insufficient plat); Earll v. Chicago, 136 Ill. 277, 26 N. E. 370 (plat acknowledged by attorney in fact); Marsh v. Fairbury, 163 Ill. 401, 45 N. E. 236 (plat not acknowledged before proper officer); Rusk v. Berlin, 173 Ill. 634, 60 N. E. 1071 (plat acknowledged by attorney in fact); Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378 (insufficient plat); Thompson v. Maloney, 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236 (plat acknowledged by attorney in fact); Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088 (plat acknowledged by attorney in fact); Owen v. Brookport, 208 Ill. 35, 69 N. E. 952 (plat not acknowledged); Wilder v. Aurora, D. & R. Electric Transaction Co. 216 Ill. 493, 75 N. E. 194 (plat variously insufficient); Thomas v. Metz, 236 Ill. 86, 86 N. E. 184 (plat not acknowledged); Ruddiman v. Taylor, 95

lex. Civ. App. 573, 96 S. W. 935; Reed v. Birmingham, 92 Ala. 339, 9 So. 163.

Actual intent to dedicate is not necessary.

Kuck v. Wakefield, 58 Or. 549, 115 Pac. 428.

Messrs. John A. Hale, Richard J. Higgins, and A. J. Herrod for appellees.

Mason, J., delivered the opinion of the court:

The plaintiffs in ejectment maintain that the strip of ground in controversy at one time formed a part of an alley, upon the vacation of which it reverted to them as the owners of the abutting lots. The defendants assert that no such alley ever existed, in which case they have title by ad-

verse possession, and, as to a part of the strip, by deed as well. The former existence of the alley is the vital matter in dispute. The trial court decided against the plaintiffs, and they appeal.

In 1859 a plat of Wyandotte City (now Kansas City, Kansas) was filed in apparent conformity with the statute. It included however, a tract of land the owner of which (Lucy B. Armstrong) did not join in its acknowledgment or filing, and was therefore not bound or affected by it. It designated a portion of this tract as block 73, consisting of 54 lots, those numbered from 1 to 37 fronting north, and being separated by the alley in question from those numbered from 38 to 54, which fronted south. In 1909 a city ordinance was passed purporting to va-

Mich. 547, 55 N. W. 376 (plat variously defective); Mt. Clemens v. Mt. Clemens Sanitarium Co. 127 Mich. 115, 86 N. W. 537; Smith v. St. Paul, 72 Minn. 472, 75 N. W. 708; Heitz v. St. Louis, 110 Mo. 618, 19 S. W. 735 (plat not acknowledged); Kansas City Mill. Co. v. Riley, 133 Mo. 574, 34 S. W. 835 (plat filed by one not owning the property); Doyle v. Rolwing, 165 Mo. 231, 55 L.R.A. 332, 88 Am. St. Rep. 416, 65 S. W. 315 (the same defect); Pillsbury v. Alexander, 40 Neb. 242, 58 N. W. 859; Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 304; Deadwood v. Whittaker, 12 S. D. 515, 81 N. W. 908; Sweatman v. Bathrick, 17 S. D. 138, 95 N. W. 422.

See also, as recognizing the rule, Vermont v. Miller, 161 Ill. 210, 43 N. E. 975; Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. 448; Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Hurley v. Mississippi & R. River Boom Co. 34 Minn. 143, 24 N. W. 917; Otterville v. Bente, 240 Mo. 291, 144 S. W. 822; Fulton v. Mehrenfeld, 8 Ohio St. 440. See also Woodruff Place v. Raschig, 147 Ind. 517, 46 N. E. 990; Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883; Bennett v. Siebert, 10 Ind. App. 369, 35 N. E. 53, 37 N. E. 1071.

In an action for breach of covenant upon a sale of land, where the complaint charged a statutory dedication of the land sold, it was held error to admit in evidence a deed recognizing the plat, which was insufficient as a statutory dedication. Tilzie v. Ilaye, 8 Wash. 187, 35 Pac. 583.

In People v. Beaubien, 2 Dougl. (Mich.) 256, the court said: "The map appears to have been recorded in January, 1836. It does not appear to have been acknowledged as required by the act, and is accompanied with no certificate of acknowledgment. The subsequent references to it in deeds to individual purchasers of lots, and the acknowledgment of those deeds to the grantees named in them, cannot supply the defect, or operate as an acknowledgment of the map with the certificate signed and sealed, required by the statute. Those deeds,

with their references, may be very proper evidences as acts *in pais* to establish a dedication upon general rules of law, independent of the statute. And, though the jury do not find that the plat was placed upon record by the defendant, or by his express authority, yet the deeds show the act, by whomsoever done, to have been by him ratified and confirmed." But it was held that there had been here no common-law dedication. This case was approved in Gardiner v. Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

In Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. 448, the court said: "The object of the legislation, national and state, was to protect the rights of actual occupants, and it does so fully by extending to them the principles which have been so often applied for a like purpose when a proprietor of land has platted it into a town site, but not so as to effect a legal dedication, and sold land to individuals in accordance with the plat. As between individuals so purchasing and the proprietor, they are entitled to have the streets necessary or convenient for their use and enjoyment of the property purchased by them kept open for their own and the public's use."

In Mt. Clemens v. Mt. Clemens Sanitarium Co. 127 Mich. 115, 86 N. W. 537, which apart from the headnote is insufficiently reported, the headnote states: "Where land was platted by the owner, the plat recorded, and lots sold by him according thereto, and the plat was accepted by resolution of the village council, and a street shown thereon subsequently used by those having occasion to use it, such street became a public way by dedication *in pais* and acceptance, although the plat was not acknowledged in the manner required by the statute, and although the land (being a *cul-de-sac*) was for a time inclosed by the adjoining proprietors, and used for their own purposes."

In Heitz v. St. Louis, 110 Mo. 618, 19 S. W. 735, the court said: "Though the plat was unacknowledged, yet it was recorded, and the deeds which were made to

cate the alley. The plaintiffs own lots designated on the plat as 14, 15, 16, and 17, facing north, and the defendants the corresponding lots facing south, numbered 38, 39, 40, and 41. The strip in controversy is the north half of the area lying between these two tracts. The streets surrounding the block are thus named: On the north, Maria; on the east, Fifth; on the south, Everett; and on the west, Sixth.

In 1864 Lucy B. Armstrong, who still owned block 73, executed and acknowledged a warranty deed, which was at once recorded, conveying property described as follows: "Commencing at a point in the center of Fifth street, intersected by a line running through the center of Maria street, thence south to the center of Everett street, thence

west to the center of Sixth street, thence north to the center of Maria street, thence east to the beginning, meaning hereby to convey to the party of the second part block 73 in the city of Wyandotte, according to the plan of said city published by John H. Miller, made March 18, 1857, with half of the adjoining street, and it is hereby stipulated that these streets shall not be closed up except by mutual consent." We regard the execution of this instrument as an unequivocal recognition of the plat already filed, rendering it valid from that time, notwithstanding the original defect, at least as to all persons claiming under the deed. The fact that the deed described by metes and bounds the land conveyed, and included a part of the streets, does not make it any the

different purchasers recognized and referred to the plat thus made, and in the sales which occurred at public auction, and which were subsequently consummated by such deeds, full recognition was given to such streets and alleys as public thoroughfares. This must be regarded as a valid common-law dedication, for when an incomplete or defective statutory dedication is accepted by the public, or when rights are acquired under such dedication by third persons, such acquisitions will operate in favor of the public and of such acquirers respectively, and constitute a dedication of the nature just mentioned. 2 Dill. Mun. Corp. 4th ed. § 628."

In *Pillsbury v. Alexander*, 40 Neb. 242, 58 N. W. 859, the court said: "While the statute . . . requires that every such plat as this shall have thereon the certificate of the owners certifying that the plat has been made with their consent and in accordance with their desires, and shall be given the same as a deed, the failure of Arnold & Abbott to comply with these provisions of the statute did not make the platting of Arnold & Abbott's addition void; and though there has been no statutory dedication to the public by them of the streets marked upon said plat, still their platting this addition, filing the plat in the recorder's office, and leaving spaces for streets, and their sale and conveyance of part of the property in this addition described as lots and blocks of the addition, estop Arnold & Abbott and their heirs, grantees, and assigns from claiming any title whatever to any of the land laid out as streets in said addition; and such acts amounted to a common-law dedication of the land platted as streets to the public. *Gregory v. Lincoln*, 13 Neb. 352, 14 N. W. 423; *Weeping Water v. Reed*, 21 Neb. 261, 31 N. W. 797; *Ruddiman v. Taylor*, 95 Mich. 547, 55 N. W. 376."

In *Fulton v. Mehrenfeld*, 8 Ohio St. 440, the court said, after referring to a dedication at common-law: "It is apparent that there is no conflict between it and a statutory dedication. The latter is intended to operate by way of grant, not estoppel. The 42 L.R.A. (N.S.)

solemnities of a grant are required to its creation. It is to be acknowledged and recorded as a grant. And then the statute declares its effect as a grant by the words, 'when so made and recorded, it shall be a sufficient conveyance, vesting the fee in,' etc. Such being the object and effect of the statute, it is obvious that, in order to create a statutory dedication, the provisions of the statute in reference to an acknowledgment must be complied with, and that without such acknowledgment it is no more effective to pass the estate or interest specified than an acknowledged deed. We have been referred to the case of *Morris v. Bowers*, decided in 1834, by the supreme court on the circuit, *Wright (Ohio) 750*, which is supposed to be decisive of the case at bar, and in which Collet, Ch. J., says: "That though the acknowledgment is necessary to pass the fee, the plat, without such acknowledgment, if recorded, would vest the use of the streets in the public." The case may have been rightly decided, but the ground assumed by the learned judge is based, we conceive, upon a misapprehension of the objects and purposes of the statute. A defective plat may be a sufficient devotion of the ground to public uses on the part of the owner, and its acceptance by the public would constitute a common-law dedication, though for manifest reasons it is not a statutory dedication. So, too, the reference to the map or plat found in the subsequent deeds, through which the defendant traces his title, will not supply the want of such acknowledgment, so as to render it a statutory dedication on the part of Davies, and vest the fee or the use, by force of the statute, in the public." But it was held that here there had not been a common-law dedication.

— exception in Kansas.

In *WALLACE v. CABLE*, the reader will see that the court holds that, where an owner makes a deed referring to a plat which he has not executed, the absence of execution of the plat will be cured by the deed, and that the public will take title to

less a recognition of the plat; nor does the stipulation against closing the streets have any such effect. While the deed undertook to convey a part of the streets, it expressly recognized their existence, and thereby adopted the plat, for, except for it, there would have been no streets in the property conveyed. Such right as the grantor had in them would have passed with a grant of the block. The reference to them was an expression of what the law would imply. The stipulation that the streets should not be closed except by mutual consent was of the same character. The language of the deed suggests no doubt that the places so designated on the plat were actually streets. It is well settled that a landowner, by referring in a deed to a plat not previously bind-

ing upon him, because not executed in accordance with the statute, or because made by someone else without his authority, may become bound by it. *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. 392; *Giffen v. Olathe*, 44 Kan. 342, 24 Pac. 470; *Teedrick v. Kansas City*, 52 Kan. 404, 34 Pac. 972. Collections of cases on the subject are made in notes to these text statements: "Where the owner of real property lays out a town upon it, and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, or where he sells with reference to the map of a town or city, in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public, unless it appears either by express statement in

the streets and alleys, i. e., that the dedication was not merely one at common law, but a good statutory dedication.

This is in accord with the prior Kansas decisions.

In *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. 392, where an owner made a plat, but before recording it sold part of the land, and the grantee afterwards conveyed with reference to the plat, it was held that the grantee had recognized the plat and dedicated the land. It would seem that it would have been sufficient for the purposes of this case to have held that the grantee's act was simply a common-law dedication, but the court seems to have proceeded on the theory that he had adopted the plat the same as if he had originally executed it.

The *Brooks Case* was followed in *Teedrick v. Kansas City*, 52 Kan. 404, 34 Pac. 972, holding that after a grantor had conveyed by reference to a plat made by another, no subsequent act by him or his grantee could revoke that dedication.

So, in *Miami County Comrs. v. Wilgus*, 42 Kan. 457, 22 Pac. 615, where a town plat was never acknowledged, and conveyances were made referring to it, and the plat contained a square marked "Seminary Square," it was held that this belonged to the public for seminary purposes, the same as if the plat had been properly acknowledged.

In *Giffen v. Olathe*, 44 Kan. 342, 24 Pac. 470, where a plat of a town site had been filed, which was legally defective as not acknowledged by those laying out the town site, and a certain individual had received and given deeds with reference to the site, it was held that he could not question the dedication of streets by the plat. The case is obscure as to whether the court considered that a common-law or statutory dedication was effected, but it seems to treat the result, at least in part, as equivalent to a statutory dedication.

— deed of dedication, when curative.

In *Meacham v. Seattle*, 45 Wash. 380, 88 Pac. 628, where, after filing a defective plat and making deeds referring to it, the 42 L.R.A. (N.S.)

owner executed a deed of dedication in order to cure the defect in the plat, it was held that one purchasing under a deed from the owner, after the deed of dedication was executed, could not object that the original plat was not according to the statute.

And in *Finnegan v. St. Joseph*, 123 Mich. 330, 82 N. W. 51, where one made a plat and sold many of the lots, and later one of his grantees had the plat accepted by the city, and the original grantor thereafter made a deed conveying to the city land for an extension of a street shown on the plat, it was held that this showed a dedication of such street, and that the plat could not eject the city therefrom.

#### Curative statutes.

Some cases have arisen, where there have been conveyances referring to the plat, upon the effect of statutes designed to cure statutory defects in plats.

In *Sears v. Chicago*, 247 Ill. 204, 139 Am. St. Rep. 319, 93 N. E. 158, 20 Ann. Cas. 539, where, after conveyances had been made referring to a defective plat, a curative act was passed directing the validation of the plat, it was held that this could have no effect upon the title to the streets, of those who had bought prior to the curative act.

The same was held in *Farwell v. Chicago*, 247 Ill. 235, 93 N. E. 168.

In *Baker v. Johnston*, 21 Mich. 319, where a plat containing a space marked "Public Square" was filed, but not properly acknowledged under the statute, and the plat had sold lots described by reference to the plat, it was held that the plat was not cured by the curative statute, summarized by the court as follows: "The statute of 1850 consists of two sections, both of which profess to be retrospective. The 1st section in terms provides that, where proprietors have platted lands and caused the plat to be recorded without the proper acknowledgment, and have sold and conveyed lands by reference to the recorded plat, it shall have the same effect as if legally acknowledged and recorded. The 2d section provides that where a plat has been duly acknowledged, the

the conveyance or otherwise, that the mention of the street was solely for purposes of description, and not as a dedication thereof." 13 Cyc. 455. "While a mere survey of land by the owner into lots, defining streets, squares, etc., will not, without a sale, amount to a dedication, yet a sale of lots with reference to such plat, or describing lots as bounded by streets, will, as between the grantor and grantee, amount to an immediate and irrevocable dedication of the streets, binding upon both vendor and vendee. The rights of the grantee spring from and depend upon an implied covenant by the grantor that the lands designated as streets or ways will not be appropriated to any other use. To create this right in the grantee, it is not necessary that the plat or map should have been made by the grantor. The grantor may adopt a plat or map prepared by another. . . . In some jurisdictions, upon the principle that the map or plat is a unity, and that a purchaser of a lot buys on the implied condition and understanding that all the streets and ways shown thereon will be available for public use, and not merely the street upon which his property abuts, it is held that the purchaser of a lot acquires a right or easement in all the streets and alleys

record theretofore made shall be evidence, as against the makers, of the sufficient dedication, gift, and grant to the public of any portion thereof represented in such plat as a public square."

In *Parriott v. Hampton*, 134 Iowa, 157, 111 N. W. 440, where the certificate upon a plat did not show that it had been acknowledged precisely as required by the statute, and after the property had been sold by deed referring to the plat, an act was passed validating acknowledgments, the court, in holding that the statutory dedication was complete, said: "But when acknowledgment is effectual through a curative act prior to the acceptance of the streets, and there are no intervening equities, the title to the ground so set apart will thereupon vest in the town or city. . . . In this case the curative act went into effect in 1892, shortly after Kennedy had conveyed the platted ground to Gray. That conveyance distinctly recognized the plat by describing the several blocks therein, and Gray conveyed in the same way to Bailey in 1901. These parties, then, were not only advised of the existence of the plat, but recognized and adopted it in transferring the property. In these circumstances, it is manifest that the plat became effective upon the adoption of the curative act, for, though up to that time the attempt to plat had not been effective, the act healed the defect in the acknowledgment, and the plat was then acknowledged and recorded as required by law."

In *Weeping Water v. Reed*, 21 Neb. 261, 42 L.R.A. (N.S.)

shown on the plat or map, and can insist that all these streets and alleys shall be kept open and devoted to public use." 3 Dill. Mun. Corp. 5th ed. §§ 1083, 1084.

Upon principle we think what is called the unity doctrine is supported by the better reasoning. Where one who, under the statute, has the power by filing a plat to divide a tract into lots and blocks and streets and alleys, conveys a part of it by reference to such a plat made by another, he should be deemed to make the other's act his own, and to adopt the plat in its entirety, except where a contrary intention is affirmatively shown in the deed. It is true that in most of the cases in which the question has arisen of the adoption of a plat by the making of a deed with reference to it, the tract conveyed has been described as a lot or block, or as fronting upon a certain street, while the deed here under consideration used the middle of the streets as a boundary line. Upon principle this should make no difference, since the map was referred to as though it were valid, and nothing in the language used suggested an intention to disavow it. Moreover, the plaintiffs claim also under a deed made in 1873, in which a description by metes and bounds, covering the four lots, without any

31 N. W. 797, where parties had recognized a plat which was not in accordance with the statute, by conveying lots according to the plat, it was held that this cured the defect in the plat owing to the statute hereinafter quoted, and that the plat thus recognized was equivalent to a deed in fee simple under the general statutory dedication act. The court said: "It is claimed by defendant in error that such a construction of the section above quoted, as would hold it to cure the defect in the plat, would be a violation of both the Constitution of the United States and of this state, because it would have the effect of depriving the owner of his property without due process of law, and of taking private property for public use without compensation. To this we cannot give our assent. It cannot deprive Clinton of his property, for he claims no interest in the land in dispute. Neither can it affect his grantees, for they hold under him with direct reference to a lawful and valid plat." The curative statute read as follows: "None of the provisions of this chapter shall be construed to require replatting in any case where plats have been made and recorded in pursuance of any law heretofore in force; and all plats heretofore filed for record, and not subsequently vacated, are hereby declared valid, notwithstanding the irregularities and omissions in manner or form of acknowledgment or certificate; but the provisions of this section shall not affect any action or proceeding now pending."

B. B. B.



part of either street or alley, was followed by the words,—"intending thereby to convey lots 14, 15, 16, and 17 in block 73, as represented on a plan of said city drawn by J. H. Miller, on file in the records of the register's office of Wyandotte county, Kansas." The defendants' theory involves the contention that the grantor in this deed reserved to himself the title to the half of the street and alley on which these lots abutted. This cannot be sustained. The defendants suggest that the reference to lots and blocks in deeds made subsequent to 1867 was not a recognition of the plat, because in that year a special statute was enacted authorizing that manner of description. Laws 1867, chap. 170. That act does not affect the matter, for it was made to apply only "in all cases where the avenues, streets, and alleys have been or may hereafter be extended through said land, or where said Lucy B. Armstrong, or her heirs, executors, or administrators, shall hereafter convey the same or any part thereof according to said plan."

The alley in question was never in fact used as such, and the defendants occupied the tract in controversy for more than fifteen years. Whether the plaintiffs' rights were barred by this occupancy perhaps depends upon whether the recognition of the plat by the owner of the land resulted in an actual dedication to public use of the tracts designated as streets and alleys. If so, the right of the public could not be barred by adverse possession, or by the inaction of the city officers. *Eble v. State*, 77 Kan. 179, 127 Am. St. Rep. 412, 93 Pac. 803; *Gadahl v. Humboldt*, 87 Kan. 41, 123 Pac. 764, citing p. 43; *Osaage City v. Larkin*, 40 Kan. 206, 2 L.R.A. 56, 10 Am. St. Rep. 186, 19 Pac. 658, and *Giffen v. Olathe*, 44 Kan. 342, 24 Pac. 470. Some courts hold that a complete dedication results at once from the sale of lots with reference to a plat which is not in itself effective, because not fully executed in accordance with the statute; while others limit the effect to the creation of a private right in the grantee to insist that the places designated as streets shall be kept open for travel, and hold that an acceptance in behalf of the public is necessary to an actual dedication. 3 Dill. Mun. Corp. 5th ed. § 1090; 1 Elliott, Roads & Streets, 3d ed. § 124. In *Brooks v. Topeka*, 34 Kan. 277, 8 Pac. 392, there was an acceptance by the city, and the fact was naturally referred to as important, but it was not decided that there could have been no dedication without an acceptance by the public. The matter of acceptance or nonacceptance can be of practical importance only when the question is one of charging the city with the respon-

sibility for the condition of the tracts designated as streets and alleys. Under the circumstances of this case, we think it should be held that there was a complete dedication. The owner of the tract, by joining in the acknowledgment of the plat, could have vested title to the streets in the public, no acceptance being necessary. *Gadahl v. Humboldt*, 87 Kan. 41, 123 Pac. 764. When she executed and acknowledged a deed to a part of the tract, recognizing the plat as valid, she, in effect, executed and acknowledged the plat itself, and when this deed was filed with the register of deeds, the record was complete, and the situation was the same as though her acknowledgment had been attached to the plat. The filing of the deed supplemented the record of the plat and gave it validity for all purposes, vesting in the public the title to the streets and alleys. The strip in controversy was not assessed for taxation until the passage of the ordinance vacating the alley, and this exemption might be regarded as some recognition of its public character.

At one time the city authorities were obviously of the opinion that the alley did not exist, for two ordinances were passed for the condemnation of land for its opening. No further steps were taken, and these proceedings did not work an estoppel upon the city. One of the plaintiffs signed a petition to the council asking to have the alley "opened," but, as this may have meant merely that it be cleared of obstacles, the circumstance is not significant, even if otherwise it could have been important.

The defendants invoke the statutory provision (Gen. Stat. 1909, § 7312) declaring a county road vacated if it remains unopened for public use for seven years. We hold that statute not to apply to streets and alleys within a city.

The judgment is reversed and the cause remanded, with directions to render judgment for the plaintiffs.

#### NORTH CAROLINA SUPREME COURT.

AARON T. PENN, Appt.,

v.  
STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

(158 N. C. 29, 73 S. E. 99.)

Insurance — accident — hastening blindness.

Merely hastening through an accidental

Note.—The subject of previous diseased condition as affecting liability for death or injury from accident is covered in the note accompanying *Stanton v. Travelers' Ins. Co.* 34 L.R.A. (N.S.) 445.

fall the destruction of sight, which was inevitable, through cataract, is not, where both causes contribute to the result, within the operation of a policy insuring against bodily injuries effected directly and independently of all other causes through external, violent, and accidental means.

(December 23, 1911.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Rockingham County in defendant's favor in an action brought to recover the amount alleged to be due under an accident insurance policy. **Affirmed.**

The facts are stated in the opinion.

Messrs. **Morehead & Morehead and Sapp & Williams**, for appellant:

The fall from the car was the proximate cause of the loss of sight, and if this is true, then, notwithstanding plaintiff might have ultimately lost his sight from another cause, the defendant is liable under the terms of this policy, and the jury should have been so instructed.

**McCahill v. New York Transp. Co.** 201 N. Y. 221, — L.R.A.(N.S.) —, 94 N. E. 616, Ann. Cas. 1912 A, 961; **Aetna L. Ins. Co. v. Hicks**, 23 Tex. Civ. App. 74, 56 S. W. 87; **Manufacturers' Acci. Indemnity Co. v. Dorgan**, 22 L.R.A. 625, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 954; **Winspear v. Accident Ins. Co. L. R. 6 Q. B. Div. 42**, 43 L. T. N. S. 459, 29 Week. Rep. 116; **Meyer v. Fidelity & C. Co.** 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328; **Continental Casualty Co. v. Lloyd**, 165 Ind. 52, 73 N. E. 824; **McCarthy v. Traveler's Ins. Co.** 8 Biss. 362, Fed. Cas. No. 8,682; **Fetter v. Fidelity & C. Co.** 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; **Freeman v. Mercantile Mut. Acci. Asso.** 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013.

Messrs. **G. S. Bradshaw and Thomas H. Calvert**, for appellee:

When, at the time of an accident, there is an existing disease which, together with the accident, results in death, the accident cannot be considered as the "sole" cause, or the cause "independent of all other causes."

**Commercial Travelers' Mut. Acci. Asso. v. Fulton**, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; **White v. Standard Life & Acci. Ins. Co.** 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; **Maryland Casualty Co. v. Glass**, 29 Tex. Civ. App. 159, 67 S. W. 1062; **Ward v. Aetna L. Ins. Co.** 85 Neb. 471, 123 N. W. 456; **New Amsterdam Casualty Co. v. Shields**, 85 C. C. A. 122, 155 Fed. 54; **National Masonic Acci. Asso. v. Shryock**, 20 C. C. A. 3, 38 U. S. App. 658, 73 Fed. 774; **Binder v. National Masonic Acci. Asso.** 127 Iowa, 25, 102 N. W. 190; **Fetter v. Fi-**

**delity & C. Co.** 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; **Freeman v. Mercantile Mut. Acci. Asso.** 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; **Fishblate v. Fidelity & C. Co.** 140 N. C. 589, 53 S. E. 354.

**Walker, J.**, delivered the opinion of the court:

The defendant issued to the plaintiff an accident policy which insured him against "the irrecoverable and entire loss of one eye" in the sum of \$2,500, and the proviso that the insurance should only be "against bodily injuries effected, directly and independently of all other causes, through external, accidental, and violent means." Plaintiff alleged that he fell from a train, and was so injured that he lost the sight of one eye. There was evidence tending to cast some suspicion on his statement that he had accidentally fallen; but, in the view we take of the case, it is not necessary to further refer to it or make any comment upon it. There was also evidence tending to show that at the time of the fall he had a cataract on the eye that he alleges was injured which would have resulted eventually in destroying it, and the plaintiff introduced evidence to the contrary.

The case turns upon the construction of the language in the policy which we have quoted, and with reference to it and the evidence as to the cataract the court charged the jury as follows: "The court charges you that if you find that the plaintiff fell from the car and was thereby injured, and that this injury was soon thereafter followed by a loss of sight, and you further find that the condition of the plaintiff's eye at that time was such that, independent of that injury, he would ultimately have lost his sight, and that this injury, falling from the car, merely hastened the loss of his sight, in that event you will not find that the injury was caused directly and independently of all other causes through external, accidental, and violent means; but if you find from the evidence and by the greater weight of it that the plaintiff has suffered the entire loss of sight of his eye, that the loss of his sight is irrecoverable, that the loss was caused directly and independently of all other causes, through external, accidental, and violent means, your answer to the second issue will be 'Yes.' If you do not so find, your answer will be 'No.'" The plaintiff excepted to this instruction. There was a verdict for the defendant, and judgment having been entered thereon, the plaintiff appealed. If the instruction was a correct one, and we think it was, the rule for a new trial was properly discharged. When the terms of a policy are

free from uncertainty or ambiguity, they "should be understood in their plain, ordinary, and popular sense;" and it is only when "any provision, condition, or exception" is "uncertain or ambiguous in its meaning, or is capable of two constructions," that it "should receive that construction which is most favorable to the insured." 1 Cyc. pp. 243, 244; May, Ins. § 172. As long as parties who are capable of so doing shall be permitted to make their own contracts, it is the plain duty of the court to enforce them as they are written, unless fraud or public policy shall intervene. *Binder v. National Masonic Acci. Asso.* 127 Iowa, 25, 35, 102 N. W. 190. While the rule is thoroughly settled that policies of this and like character are to be construed liberally, and that ambiguous provisions, or those capable of two constructions, should be construed favorably to the insured, and most strongly against the insurer, plain, explicit language cannot be disregarded, nor an interpretation given the policy at variance with the clearly disclosed intent of the parties. Taking the policy, in the case at bar, by its four corners, it will admit of but one construction. *White v. Standard Life & Acci. Ins. Co.* 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83.

In *Carr v. Pacific Mut. L. Ins. Co.* 100 Mo. App. 602, 75 S. W. 180, the court said that the question of proximate and immediate cause is not raised under the conditions of a policy which in terms excludes disease or bodily infirmity, and which could have no more force than the general provision, "independent of all other causes." See also *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423. If the jury had found that the injury was caused by the sum of two causes,—that is, that the accident and the pre-existing cataract and diseased condition of the eye were together responsible for the subsequent blindness,—the plaintiff could not have recovered, as the injury must have resulted from the accident, "independent of all other causes." In *White v. Standard Life & Acci. Ins. Co.*, supra, the policy, in terms, had reference to injuries or death resulting "solely from such injuries as the proximate cause thereof," and provided that the insurance did not cover accident or death "resulting wholly or partly, directly or indirectly, from bodily or mental infirmity, or disorder, or disease in any form." In that case the court said: "Similar policies have been before both the state and Federal courts, and the consensus of judicial opinion is that, subject to the exceptions contained in the policy, if the injury be the proximate cause of death, the company is liable; but if an injury and an

existing bodily disease or infirmity concur and co-operate to that end, no liability exists. If, however, the injury be the cause of the infirmity or disease,—if the disease results and springs from the injury,—the company is liable, though both co-operate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of the injury, and, on the other hand, that class of cases where the disease was caused and brought about by the injury. And even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists. The rule of proximate cause, as applied to actions of negligence, cannot be applied in its full scope to contracts of this nature." See also *Maryland Casualty Co. v. Glass*, 29 Tex. Civ. App. 159, 67 S. W. 1062. *Ward v. Aetna L. Ins. Co.* 85 Neb. 471, 123 N. W. 456, was an action on a policy which permitted recovery only when the injury or death resulted from accidental means "independently of all other causes;" and the court said: "Plaintiff was not entitled to recover if death was caused by the sum of these two causes."

We may thus summarize another case: "It is conceded that the disease of appendicitis, with its consequences and complications, caused the death of the insured, but the real question of fact lies farther back, and is whether the fall against the dashboard, acting independently of any other cause, produced this disease. If the insured recovered from his former attacks of this disease, so that it no longer existed in his body, and there was only a susceptibility to have it in case a proper exciting cause should arise, and in this case the fall against the dashboard proved to be such exciting cause, the case would be one for recovery under the policy; but if, because of the former attacks, there was not merely a susceptibility to a further attack, but the actual disease itself existed, liable to be rendered active and virulent by an injury such as that suffered by the insured, in that event the active disease which resulted in death would not be regarded as the result of the fall alone, but as the joint result of the fall and the latent disease, and hence there could be no recovery under the policy." *New Amsterdam Casualty Co. v. Shields*, 85 C. C. A. 122, 155 Fed. 54. In still another important case a similar ruling was made: "If Shryock suffered such an accident, and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity. But, if he was affected with a disease or bodily infirmity which caused

his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor." *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774. The policy in that case contained a clause similar to the one we have quoted from the policy upon which this suit was brought.

In *Binder v. National Masonic Acci. Asso.* supra, the policy provided that it must appear that the death or disability "was purely accidental, and the direct result of an accident, and that the accident was the sole and only cause" of the said member's death or disability. The court said: "If it be true, as the jury might have found under the evidence, that the diseased condition of the arteries aggravated the effect of the accident, if there was one, and contributed to the disability occasioned thereby, then, under the express terms of the contract, there was no liability on the part of the association." If two causes, disease and accident, coexist and concur, though unequally, in causing a loss, it could not well be said that either the one or the other of them was the sole and independent cause. This, of course, would not be so if the accident itself was the cause of the disease. *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013, was an action on a policy containing a provision similar to the one in the policy upon which this suit was brought. Speaking to the question now under discussion, the court said: "The question as to whether peritonitis, if that caused his death, is to be deemed a disease within the meaning of this policy, . . . so [far] as to prevent a recovery, depends [upon] the question whether or not, before the time of the fall, and at the time of the fall, he had then the disease,—was then suffering with the disease. If he was, then, in the sense of the policy, although [the disease was] aggravated and made fatal by the fall, he cannot recover." See *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, supra.

There is some conflict in the authorities, 42 L.R.A. (N.S.)

but we believe that those best considered hold with the courts whose decisions we have cited. The charge of the court placed the vital issue fairly and squarely before the jury, and they have found the facts against the plaintiff, which means that he had a cataract at the time he fell, if he did fall, and that it united actively and efficiently with the fall in producing the unfortunate result. In some cases where the words "proximate cause" have been used in the policy to describe the causal connection between the accident and the resultant injury, some courts have held that the words thus employed to express the nature of the risk should be construed according to their common and accepted meaning as adopted and approved in law under like conditions and circumstances, and as thus interpreted they refer to the efficient cause from which the injury results, whether such cause produces the injury directly or through the medium of an intervening cause or agency, which it sets in motion, and which are then united by close causal relation to each other; and this rule was applied to a case in which it appeared that the insured sustained an accidental fall which caused an abrasion of the skin of his leg, with the result that blood poisoning set in and death ensued, and it was very correctly held that the evidence should be submitted to the jury to find whether the death resulted proximately and solely from the fall. And some, at least, of the cases cited by appellant's counsel, may be harmonized with our decision in this case by adverting to the distinction pointed out in those cases. *Cary v. Preferred Acci. Ins. Co.* 127 Wis. 67, 5 L.R.A. (N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484. No such words are to be found in this policy. The case we have just put was somewhat like the one cited by us from the Massachusetts court, and in the latter case it was held that, where the accident itself causes the disease which then unites with it in producing the injury, the insurer is liable, but not where the disease pre-existed and contributed proximately to the injury. If this distinction is kept clearly in view, many of the authorities which apparently conflict may be reconciled. In our case there is no question of proximate cause. The parties have solemnly contracted, the plaintiff to be protected and the defendant to insure him against loss, under well-defined conditions, and the contract must be construed, being unambiguous, as it is written, under the maxim of the law which prohibits us to make a contract for the parties, but allows us only to construe the contract which they have made (*in hæc federa non veni*).

The other exceptions do not suggest to us

any reversible error. A careful consideration of this case discloses nothing that should induce us to reverse the judgment.

No error.

A petition for rehearing having been granted, Walker, J., on November 7, 1912, handed down the following additional opinion (— N. C. —, 76 S. E. 262):

This is a petition to rehear this case, which was decided by us at fall term, 1911, and is reported in 158 N. C. 29, ante, 594, 73 S. E. 99, where the facts are stated. There is no new question in the case as now presented, but the learned counsel for the plaintiff think that we have misapprehended the true nature and meaning of the charge of Judge Adams, who presided at the trial, and that, if properly construed, it would deny a recovery in a case where there was a former malady and an accident, and the latter directly produced the injury as the efficient cause thereof, provided the malady itself would have resulted in the same injury, though at a later time. It is also said that certain expressions of the court in the opinion indicate that it was clearly not the intention so to decide. As to the latter suggestion, we agree with counsel, but we do not as to the former. What the court intended to decide, and did decide, was that there must have been a union of the two causes, so that they co-operated in producing the injury; and if the accident was the sole cause, or produced the result independent of all other causes, recovery could be had in such a case, and we are of the opinion now, as we were at the former hearing, that the judge so charged the jury. The instruction will not bear any other construction, as will appear from the following extract: "If you find from the evidence, and by the greater weight of it, that the plaintiff has suffered the entire loss of sight of his eye, that the loss of his sight is irrecoverable, that the loss was caused directly and independently of all other causes, through external, accidental, and violent means, your answer to the second issue will be, 'Yes.' If you do not so find, your answer will be 'No.'" The other part of the instruction merely informed the jury that if the accident did not cause the injury directly and independently of all other causes, but operated in connection with another cause, the case would be different, and the jury must have so understood it.

It must be remembered that we are construing a contract not of our making, and the terms of which we cannot alter, and not discussing the law of negligence and the doctrine of proximate cause. The plaintiff and defendant had the legal right to make any contract with each other, not un-

lawful in itself, both being at arm's length, and in the full possession and enjoyment of their mental faculties. We must decide the case, therefore, not by what we may think would have been a wiser and more discreet contract on the part of the plaintiff, if he could have procured such a one, but by what is written in the contract actually made by them. Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must therefore determine what they meant by what they have said,—what their contract is, and not what it should have been. We said as much in our former opinion. "As long as parties who are capable of so doing shall be permitted to make their own contracts, it is the plain duty of the court to enforce them as they are written, unless fraud or public policy shall intervene. *Binder v. National Masonic Acci. Asso.* 127 Iowa, 25, 35, 102 N. W. 190. While the rule is thoroughly settled that policies of this and like character are to be construed liberally, and that ambiguous provisions, or those capable of two constructions, should be construed favorably to the insured and most strongly against the insurer, plain, explicit language cannot be disregarded, nor an interpretation given the policy at variance with the clearly disclosed intent of the parties. Taking the policy in the case at bar by its four corners, it will admit of but one construction. *White v. Standard Life & Acci. Ins. Co.* 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83. In *Carr v. Pacific Mut. L. Ins. Co.* 100 Mo. App. 602, 75 S. W. 180, the court said that the question of proximate and immediate cause is not raised under the conditions of a policy which in terms excludes disease or bodily infirmity, and which could have no more force than the general provision, 'independent of all other causes.' See also *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423. If the jury had found that the injury was caused by the sum of two causes,—that is, that the accident and the pre-existing cataract and diseased condition of the eye were together responsible for the subsequent blindness,—the plaintiff could not have recovered, as the injury must have resulted from the accident, 'independent of all other causes.'" We did not before fail to consider in its full scope the language of the learned judge in charging the jury, and, after a more careful examination of his instructions, we do not think that in word or phrase he so narrowed the terms of the insurance contract as to prejudice the plaintiff's rights, but that he correctly stated the law which is applicable to the case.

There was a disputed question of fact

presented by the testimony, whether the plaintiff was suffering from a cataract on his eye at the time of the alleged fall, or whether the fall produced a cataract. In addition to the testimony recited in the brief for the petitioner, testimony by Dr. McGee was given as follows: "He complained of pain in his left eye and in the lower third thigh, right side. On examination of his eye, I found that he had an old cataract, and so told him. He had particles of dust around his eye. I put a little antiseptic solution on that. I found no evidence of traumatism or blow on the head, nor any inflammation. I found an old cataract, and told him it was from an old injury, that it was produced by some injury in the past. It is possible to have a blow on the eye or on the head that will cause a rupture of the lens, and cataract follows. I found no sign of an injury resulting from a fall from the train. It takes a cataract some time to form and develop from a traumatic injury. The cataract I saw had been forming for months." The petitioner, as we understand, concedes, both in the petition and in the brief filed in support of the petition, that the decision is right in holding that if the jury had found that the injury was caused by the sum of two causes,—that is, that the accident and pre-existing cataract and diseased condition of the eye were together responsible for the subsequent blindness, and united sensibly and efficiently in producing it,—the plaintiff could not have recovered, as the injury must have resulted from the accident, "independent of all other causes."

Reasoning from the authorities cited in the briefs filed by both parties in the appeal, and in the former opinion of the court, and the admittedly correct proposition above stated, it appears that under policy-contracts such as the one under consideration, three rules may be stated:

(1) When an accident caused a diseased condition which, together with the accident, resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.

(2) When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause.

(3) When at the time of the accident there was an existing disease, which, co-operating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes.

The petitioners rely on the case of *Fetter v. Fidelity & C. Co.* 174 Mo. 258, 61 L.R.A. 42 L.R.A. (N.S.)

459, 97 Am. St. Rep. 560, 73 S. W. 592. That was an action on a policy which insured the life of the plaintiff's father against bodily injuries sustained through accidental means, and the company promised to pay a certain sum if death should result from such injuries, independent of all other causes. It appeared that the deceased suffered a fall, producing a rupture of a kidney, from which rupture followed a hemorrhage, which caused his death. He submitted to an operation and died just less than thirty days from the day of his fall. An autopsy showed that one of the kidneys had been ruptured, and that the lower end of the kidney was cancerous. There was a judgment for the plaintiff, and the appellate court affirmed the judgment. Several doctors had been examined as experts, differing in their opinion on the question of fact whether a cancerous condition of the kidney existed before the fall, and with the fall had produced the rupture, or whether the fall itself had produced the rupture, and this had brought about, in that short time, the cancerous condition. The court held that on this conflict of testimony the jury had the right to find that the ruptured kidney caused the cancerous growth, and that the rupture of the kidney was caused by the fall "independent of all other causes," and said: "Under those facts and in the light of the scientific evidence, who can say with certainty that the blow which ruptured the kidney did not also cause the cancerous growth? . . . On the question of whether or not the blow caused the cancer, if the jury had found either way, the verdict would have had honest, intelligent, scientific testimony to support it." This part of the opinion in that case was sufficient to dispose of the appeal, and the further discussion of the ordinary rule of proximate cause was unnecessary to the decision of the case, and, we respectfully think, was erroneous as applied to a policy which permits recovery only when the injury or death results from the accident solely or independent of all other causes. The rule of proximate and remote causes, as understood in the law of negligence, cannot be justly or safely applied under a contractual stipulation that the injury or death must have "resulted from the accident, independently of all other causes," and when an issue of fact is presented, whether the person was suffering from a disease which had causal connection with the injury or death. As further evidence of the fact that a discussion of the doctrine of remote and proximate causation was not essentially involved in the case of *Fetter v. Fidelity & C. Co.* supra, and that what was decided in that case does not necessarily conflict with the charge of

the court in this case, we may well refer to two or three expressions of the court, which seem to place its decision upon the ground that the accidental fall against the table, while attempting to raise the upper window sash, was the real, efficient cause of the death, and all-sufficient. Judge Valliant said: "There is no question but that the fall of the insured against the table, striking his side heavily against its edge, was accidental, and that it produced the rupture of the kidney which caused the hemorrhage which caused his death. All the witnesses concur in that. . . . The undisputed evidence and conceded facts make out a prima facie case for the plaintiffs, and the defense that there was a remote predisposing cause of the death was given as full and fair consideration as the defendant was entitled to, and there is not sufficient in the evidence bearing on it to justify any impeachment of the verdict. The theory of the instructions given at the request of the plaintiffs is that, if the death of the insured resulted from the accidental rupture of his kidney, the plaintiffs were entitled to recover. These were supplemented by the modified instruction for defendant that the plaintiffs could not recover unless the 'accident was the sole and only direct cause of death.' Those instructions, taken together, put the case on the correct theory, and they include whatever there legitimately was in the defendant's theory of any other cause. There was really so little in the remote predisposing cause theory that the court would have been justified in ignoring it altogether." A discussion of proximate and remote causes can be pertinent only when it appears that there have been two or more causes, and when a judicial selection must be made as between the different causes, and a choice made of one as the proximate cause. In such a case two causes have operated together, and we are looking for the one which was the efficient, and therefore the legal, cause of the injury. This is entirely different from a case in which we are dealing with the condition of a policy, that the injury or death must have resulted from the accident "independently of all other causes." Though the court in *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013, recognized the application of some sort of a rule of proximate cause, it stated it in a qualified or limited manner, as follows: "Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause; and, in dealing with such cases, the maxim, *Causa proxima non remota spectatur*, is applied. But this does not mean that the cause or condition which

is nearest in time or space to the result is necessarily to be deemed the proximate cause." And then the court proceeded to affirm an instruction substantially like the one excepted to in this case, as is hereafter pointed out. In *White v. Standard Life & Acci. Ins. Co.* 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83, the court said that the rule of proximate cause, as applied to actions of negligence, cannot be applied in its full scope to contracts of this nature. The court in that case so clearly stated the accepted rule that we give its own language: "Similar policies have been before both the state and Federal courts, and the consensus of judicial opinion is that, subject to the exceptions contained in the policy, if the injury be the proximate cause of death, the company is liable; but, if an injury and an existing bodily disease or infirmity concur and co-operate to that end, no liability exists. If, however, the injury be the cause of the infirmity or disease,—if the disease results and springs from the injury,—the company is liable, though both co-operate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of the injury, and, on the other hand, that class of cases where the disease was caused and brought about by the injury. And even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists."

Coming, then, to a particular examination of the instruction objected to, it seems to fall naturally within the terms of the third rule above stated, "that when, at the time of the accident, there was an existing disease which, together with the accident, resulted in (that is, had causal connection with) the injury or death, the accident cannot be considered as the sole cause, or as the cause independent of all other causes." It should be understood that in the case of an accident resulting in injury or death, if there was an existing disease having also a causal connection therewith, it is not necessary that the disease should itself have been one which would ultimately have proved fatal, or that it should be of itself sufficient to have caused the injury or death; under the rule that, where the injury or death has been caused by the sum of two causes, it is sufficient to prevent a recovery on the policy if any ordinary disease, not itself necessarily fatal, should contribute with the accident to cause the death; that is, if, without the presence of the disease, the accident itself would not have been sufficient to have caused the injury or the death. And so

in this case it would have been sufficient to have shown a diseased condition of the eye, which, together with the alleged accident, resulted in blindness. It is not necessary in such a case to show that the disease of the eye was such that it would ultimately have resulted in blindness. In this view of the case, the plaintiff certainly has nothing to complain of in the instruction given. If the verdict and judgment had been for the plaintiff, the defendant might have had ground of complaint, in that the instruction virtually told the jury that the plaintiff could recover unless they should find that the blindness was caused by the combined effect of the alleged accident and such a disease of the eye as would ultimately have resulted in blindness, because both causes might have produced the blindness, without either being completely sufficient to that end. The instruction of the court must be read in view of the facts in the case and with the alternative proposition stated: "But if you find from the evidence and by the greater weight of it that the plaintiff has suffered the entire loss of sight of his eye, that the loss of his sight is irrecoverable, that the loss was caused directly and independently of all other causes, through external, accidental, and violent means, your answer to the second issue will be 'Yes.'" Not only is the instruction within the third rule above stated, upon reason, but there is authority (*Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013) clearly sustaining, against attack by the beneficiary under such a policy, an instruction substantially the same as the one objected to in the case at bar, and given upon facts practically similar to those appearing in this record. In the *Freeman* Case it was proved that the insured died of peritonitis localized in the region of the liver. There was evidence indicating that he had previously had peritonitis in the same part, and that the previous disease had produced effects which rendered him liable to a recurrence of it. The court approved the charge under review which instructed the jury: "The question as to whether or not peritonitis, if that caused his death, is to be deemed a disease, within the meaning of this policy, and the proximate cause of death within the meaning of this policy, so [far] as to prevent a recovery, depends [upon the] question whether or not, before the time of the fall and at the time of the fall, he had then the disease,—was then suffering with the disease. If he was, then in the sense of the policy, although aggravated and made fatal by the fall, he cannot recover." In the brief filed in support of the petition to re-

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on that theory of the case, because, if a cataract which existed prior to the fall, and notwithstanding the cataract the fall did cause the loss of his sight, and would have caused it if he had not a cataract, he would be entitled to recover."

For the purpose of the argument, it may be admitted that this states a correct proposition, and yet, if it does, it is merely an alternative theory that might have been submitted to the jury, and it does not follow that the instruction excepted to was erroneous. It is too late now to urge that the court should have instructed the jury on that theory of the case, because, if a correct one, a special instruction should have been asked. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225, and cases cited. The decision of this court, that injury or death caused by the sum of two causes, namely, accident and disease, is not covered by the policy, is sound, as we think. The instruction excepted to, when properly considered, is but one way of stating the rule, and is well within the rule, and on the facts testified to the jury had the right to find that the blindness was caused by the alleged accident combined with a disease which affected the eye at the time of the accident. It would be idle and useless to repeat what was said in our former opinion about this case and the rule which controls its decision. We then discussed the matter at great length, because of the importance of the principle involved, and cited numerous authorities, which we think sustain our view. Before taking final leave of the case, we will refer to *Fishblate v. Fidelity & C. Co.* 140 N. C. 593, 53 S. E. 356, cited by the petitioner (plaintiff) on this rehearing, in which an instruction substantially similar to the one under examination was given to the jury and was upheld by this court, Justice Hoke saying: "This charge might be held on the first issue." What was the first issue to which this reference was made? It was this: "Was the plaintiff's eye lost as a result directly and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means?" The same inquiry we have in the case at bar. It is true the learned judge added: "And is perhaps more favorable to the defendant on that issue than he could require." Still this does not neutralize or destroy what had previously been stated, and, besides, he cites with approval *Freeman v. Mercantile Mut. Acci. Asso.* supra, which we also cited in our former opinion, and which, it seems to us, is a direct authority in support of the instruction of Judge Adams. The latter did not intend to say that the mere existence of a previous malady at the time of the



accident would defeat recovery, if, by itself, it would ultimately have produced the injury, although it did not co-operate with the accident in causing it, but that if the two, accident and disease, acting together, were the producing causes of it, the plaintiff could not recover, as in that case the accident was not, within the terms of the policy, the direct and independent cause, but the injury was produced "by the sum of these two causes." *Ward v. Aetna L. Ins. Co.* 85 Neb. 471, 123 N. W. 456; *New Amsterdam Casualty Co. v. Shields*, 85 C. C. A. 122, 155 Fed. 54; *Cary v. Preferred Acci. Ins. Co.* 127 Wis. 67, 5 L.R.A. (N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484; *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *White v. Standard Life & Acci. Ins. Co.* 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; *Binder v. National Masonic Acci. Asso.* 127 Iowa, 25, 35, 102 N. W. 190; and 1 Cyc. 262, and note 64, where the doctrine is tersely stated and the cases bearing upon it are collected.

The judge's charge should be construed as one connected whole, and not in detached or isolated portions (*Kornegay v. Atlantic Coast Line R. Co.* 154 N. C. 392, 70 S. E. 731), and, when thus considered, the meaning of the court clearly appears, and we think the jury could not have been misled by the instruction.

Petition dismissed.

## OREGON SUPREME COURT.

STATE OF OREGON, Resp't.,

v.

J. THORBURN ROSS, Impleaded, etc.,  
Appt.

(55 Or. 450, 104 Pac. 596.)

### Banks — special deposit — state funds.

1. A special deposit is effected by the de-

*Note. — Meaning of phrase "convert to his own use" in criminal statutes.*

In *STATE v. ROSS*, where the statute provided that "if any person shall receive any money whatever for this state, . . . or shall have in his possession any money whatever belonging to such state, . . . and shall in any way convert to his own use any portion thereof, . . . such person shall be deemed guilty of larceny, . . .," it was held that the defendant, who, as the president and director of a trust company, permitted the state's money

livery to the depositary of checks, under provisions of a statute by which the legislature, which, under the Constitution, has no authority over the investment of the educational funds of the state, permits the state treasurer to designate a depositary for the collection of commercial paper received by him on account of such funds.

### Indictment — conversion of money — evidence — bank account.

2. An indictment against a bank officer for converting money of the state is *prima facie* supported by evidence that, although checks were deposited for collection, a part of which were against the collecting bank itself, the collections were treated as made, and the state credited on the books of the bank with their amount as cash, and that the funds in this account were those converted.

### Banking — conversion of funds.

3. A conversion occurs where a special deposit payable to the state treasurer is paid by the bank to other persons.

### Conversion — bank deposits — liability of officers.

4. The officers of a trust company whose acts result in the conversion of state funds on deposit with it are, where accessories are punishable as principals, indictable therefor, under a statute declaring one who, having state funds in his possession, shall convert them to his own use, to be guilty of larceny; and it is immaterial that under the statute the money could not have been deposited with them individually, since the funds were in their hands as officers of the bank.

### Same — acting for bank — effect.

5. That officers of a trust company wrongfully lending state funds to strangers act for the benefit of the company, and not for themselves, does not prevent their punishment, under a statute providing that anyone having possession of state funds who shall convert them to his own use shall be guilty of larceny.

### Same — permitting conversion.

6. Officers and directors of a trust company who permit a special deposit of state funds to become part of its general deposit, and to be paid out in the usual course of its business, are personally liable under a statute providing that one who, having possession of state funds, converts them to his own use, shall be guilty of larceny.

to be used as general funds for the purposes of the company, was guilty of larceny. "It is," says the court, wholly immaterial whether the person so converting did it for his own personal advantage or not."

But few cases have been found defining the meaning of the term "convert to his own use" when used in a criminal statute. This is due in part to the frequent coupling of this expression in penal statutes, with the phrase, "or to the use of another," and also to the frequent employment simply of the word "steal" in the statutes of larceny.

In *State v. Carmean*, 126 Iowa, 291, 106

**Evidence — violation of statute — intent — pending bill.**

7. As bearing upon the question of one's guilt for violation of a statute, evidence is admissible relating to his knowledge of the pendency of the bill, which ripened into the statute.

**Same — conversion — demand.**

8. In a prosecution of the officers of a trust company for larceny of state moneys in converting those deposited with the company to their own use by using them for its benefit, evidence is admissible of a demand upon the company for their return, since a demand on the company for which they are acting is sufficient to charge them.

**Conversion — demand — necessity.**

9. A demand is not necessary to charge officers of a trust company for converting state funds to their own use, if the evidence

shows that the funds were actually applied to an unlawful purpose.

**Same — giving security — effect.**

10. The giving of collateral security for state funds converted by the officers of a trust company with which they were deposited does not condone the offense of the conversion.

**Same — loan — loss — effect.**

11. That state funds held by a trust company as a special deposit were lost through the failure of another corporation to which they were lent is no defense to a prosecution against the officers of the trust company for conversion of the funds.

**Conversion — intent — necessity.**

12. Criminal intent is not an element of the offense under a statute making guilty of larceny one who, having possession of state funds, converts them to his own use.

Am. St. Rep. 352, 102 N. W. 97, where the defendant's conviction of embezzlement was reversed, he was the president of a corporation by which the money of the prosecutor was received, and which omitted to apply it to the use directed by the prosecutor. The statute provided: "If any officer, agent, clerk, or servant of any corporation or voluntary association, . . . embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle or convert to his own use, without the consent of his employer, master, or the owner of the money or property collected or received, any money or property of another, . . . which has come to his possession or under his care in any manner whatsoever, he is guilty of larceny." The court said: "Although this section in terms provides that any officer of a corporation receiving or collecting money for the use of or belonging to another, who embezzles or fraudulently converts it to his own use, is guilty of embezzlement, nevertheless the plain purpose of the statute is to provide, with reference to the officers of corporations, that they shall be criminally liable for the fraudulent conversion of the money or property of the corporation just as agents, clerks, or servants of a private person are liable for a like fraudulent conversion of the money or property of their employers, or as any person who receives money or property for the use of and belonging to another is criminally liable for fraudulent conversion to his own use of money or property thus intrusted to him." "It is not claimed that the money which defendant is charged to have embezzled was intrusted to him personally by Roemer & Miller, or came into his hands, nor that he had any personal knowledge of its receipt, nor that he made any direction as to its disposition, nor that he derived any personal benefit from its misappropriation. Indeed, it is fully conceded that, except as defendant may be chargeable with the general conduct of the business of the company, he is in no way liable, civilly or criminally, for the failure to apply this sum of \$385.50 to the payment of 42 L.R.A.(N.S.)

notes." The court said further: "In order that defendant shall be held liable for so planning and conducting the business of the company as to result in fraudulent misappropriation or conversion of the money of Roemer & Miller intrusted to the corporation, it must, we think, be charged and shown that such course of business was either in its essential characteristics illegal, and devised and carried on for the purpose of effecting a criminal result; or that, with the knowledge and under the direction of defendant, it was so carried on in a particular case as to effect such result."

In *State v. Lyons*, — Del. —, 80 Atl. 976, where the defense was a claim of ownership by the defendant, the court, in charging the jury, said: "The particular offense of which the prisoner stands indicted is known to the law as embezzlement as bailee, with reference to which the statutes of this state provide 'that if any person, being a bailee of money or other property the subject of larceny, shall embezzle or fraudulently convert the same to his own use, he shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished.' . . . The conversion or misappropriation by a bailee of property intrusted to him may be proven by direct evidence of the fact, or by proof of facts from which the conversion may be inferred. Any use to which the prisoner put the cow or calf of which he may have been bailee, that was inconsistent with the rights of the owner and with the nature and purpose of the bailment, is evidence of a conversion; but in order that it shall amount to a fraudulent conversion to the bailee's own use, it must be effected with the intent to defraud the owner."

Reference may be made here to *Milbrath v. State*, 138 Wis. 354, 131 Am. St. Rep. 1012, 120 N. W. 252, where the defendant and others were indicted for embezzlement of a certain sum of money, and the unlawful and fraudulent conversion thereof to their own use, the words of the statute being "embezzle, or fraudulently convert to his own use, or to the use of any other person except the owner thereof." The court,

**Appeal — prejudicial remarks of court.**

13. It is not reversible error for the court, in granting the request of the prosecuting attorney to cross-examine his own witness in a criminal case, because he was unwilling to state in the presence of the jury that he sees that he is unwilling.

**Criminal law — life imprisonment — cruel and unusual punishment.**

14. Requiring one who has embezzled over \$500,000 of state funds to pay a fine equal to the amount of the embezzlement, or suffer life imprisonment, is cruel and unusual punishment, within the prohibition of the Constitution, both as to the term of imprisonment and as to the fine, where accused has not the power to pay it presently, or secure the necessary funds by a lifetime of effort.

in affirming the conviction, said: "One may convert money of another to his own use by paying it out upon his private or personal debt. *Guenther v. State*, 137 Wis. 183, 118 N. W. 640. If this is true, he can convert the money to his own use by putting it into the treasury and mingling it with the funds of an insolvent corporation which is under his control and management, and of which he is a stockholder and officer in charge. The benefit he receives in the first case by discharge of his personal debt is equal to the whole amount of the money so paid. The benefit which he receives in the second case is not equal to the whole amount of the money so paid. But the extent to which defendant was benefited does not constitute the test. It is paid to his own use in either case. It is paid into that which is a mere instrumentality created by him under sanction of law, but as much under his control and as subservient to his will as the furniture of his office or the books of account in which he records his transactions. Under such circumstances there is no room for the legal fiction of separate corporate personality, or for distinction between the defendant's acts as officer of the corporation and his acts as an independent natural person."

In some of the Texas cases, questions have arisen as to the meaning of the phrase, "appropriate it to the use or benefit of the person taking," which occurs in the Texas statute of theft, viz.: "Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking it."

In *Wilson v. State*, 18 Tex. App. 270, 51 Am. Rep. 309, where the defendant was indicted for the burglarious breaking, in the nighttime, of a blacksmith's shop with a fraudulent intent to steal certain corporeal personal property contained in it, the evidence showed that the defendant and another person broke into the shop, took a brace, and then went into another store

**On Rehearing.****Indictment — embezzling state funds — sufficiency.**

15. An information against the officers of a trust company for embezzling state funds deposited with it is not insufficient in failing to allege that such company was an active depository of such funds under the provisions of the statute, or that it sustained an official relation to the state, if it alleges that the officers acting for the trust company had in their possession a certain sum which belonged to the state, and was part of its educational funds, deposited by the state for safe-keeping, to be returned by defendants to the state, which are the conditions prescribed by statute, such allegations being sufficient to determine the identity of the offense.

and broke open a safe therein, and stole money from it. Upon his appeal from a conviction of burglary, he contended that this did not show a theft of the brace, because the intention in taking it was not to appropriate it permanently, but only to use it temporarily in breaking into the safe of the third person, and that thereafter the defendant had left or abandoned it. And it was held that it was error not to leave it to the jury to say whether the taking of the brace was for a mere temporary use or for a permanent appropriation.

In *Stegall v. State*, 32 Tex. Crim. Rep. 100, 40 Am. St. Rep. 761, 22 S. W. 146, where the defendant was convicted of the theft of an animal, he claimed that the evidence did not support the conviction, because the animal was not taken for the purpose of defrauding the alleged owner, but to conceal a previous theft. The animal was in the possession of A, who bought it from a person who got it from the defendant, and the defendant, learning that the owner of the animal had discovered it, shot it and threw it into a well. The court, in sustaining the conviction, said: "To constitute theft, there must be not only the fraudulent taking, but also the intent to appropriate the property to the taker's use or benefit. There can be no question that the act done was for appellant's benefit, though it was taken with intention to destroy it, not only to prevent his detection, but the repayment of its value to" the person in whose possession it was when killed.

In *Lopez v. State*, 46 Tex. Crim. Rep. 473, 80 S. W. 1016, where the defendant took horses, branded them with the brand of his aunt, and put them among the horses at her ranch, where the defendant lived, the court said, in sustaining a conviction of theft: "Defendant's evidence shows an appropriation of the animals; even if it be conceded that it was not the purpose of appellant to appropriate the animals to his own use, but to divest the owner of his property, and place the ownership in his aunt, the result would be the same; it would equally be an appropriation by appellant." B. B. B.

**Statute — retroactive effect — pending informations.**

16. Pending informations are not affected by the adoption of a constitutional amendment providing that no person shall be charged with the commission of any crime except upon indictment found by the grand jury.

(King, J., dissents.)

(October 19, 1909.)

**A**PPEAL by defendant Ross from a judgment of the Circuit Court for Marion County convicting him of larceny of public money. Modified.

**Statement by Eakin, J.:**

This defendant, J. Thorburn Ross, is charged, by information, jointly with Geo. H. Hill, T. T. Burkhart, and John E. Aitchison, with the crime of larceny, committed in Multnomah county, Oregon, and upon change of venue the case was transferred to Marion county for trial. The substance of the charge is that on the 9th day of September, 1907, the Title Guarantee & Trust Company (hereafter referred to as the "trust company") was a corporation carrying on a banking business of which the defendants were directors, and J. T. Ross, president, Geo. H. Hill, vice president, T. T. Burkhart, treasurer; and that the defendants on that date, pretending to act for said trust company, had in their possession and control for safe-keeping, as officers and directors of the trust company, \$288,426.87 belonging to the state of Oregon, and being a part of the irreducible school fund, agricultural college fund, and the university fund (hereafter referred to as the "educational fund"); that defendants, well knowing that such money belonged to that fund, did then and there wilfully, unlawfully, and feloniously convert the same to their own use, which money, prior to that date, they, as officers and directors of the trust company, had received for the state for safe-keeping, from Geo. A. Steel as state treasurer.

The facts upon which the issues here arise are that the trust company, since the year 1904, has been engaged in banking, but not exclusively in such business; that it had also prepared abstracts of title, written title insurance, made mortgage loans, receiving compensation for such services as a broker; that it had sold real estate on commission, and performed other services for compensation; that on the 14th day of January, 1907, when Geo. A. Steel took the office of state treasurer, he had \$400,000 of the state's money on deposit, subject to his check, in various banks within the

state. Of this sum \$35,000 was deposited with the trust company. At that time there was no segregation of the funds of the treasurer, as between the educational and general funds, except on the books of the treasurer, and such banks had not been notified to which fund the deposits belonged. Thereafter Steel continued the account with the trust company in the name of "Geo. A. Steel, State Treasurer," and deposits were made and checks drawn against the same from time to time, until the 3d day of June, 1907, at which time the trust company had been designated by the treasurer as an active depository of the state, under the provision of § 6 of an act of the legislative assembly of the state of Oregon, adopted in the year 1907, providing for state depositories for state funds (Laws 1907, p. 248), at which time, evidently for the purpose of complying with the terms of such statute, Steel segregated the funds, and accordingly wrote to the trust company as follows:

State of Oregon, Treasury Department.

Salem, June 3, 1907.

The Title Guarantee and Trust Company,  
Portland, Oregon,  
Gentlemen:—

I inclose herewith for credit of Geo. A. Steel, State Treasurer, Educational, the following checks:

No. 319, Geo. A. Steel, State	
Treasurer, on you.....	\$272,449 02
No. 34, Geo. A. Steel, State	
Treasurer, on Ladd & Tilton	2,600 00

Total ..... \$275,049 02

Yours very truly,  
Geo. A. Steel, State Treasurer.

Thereupon, on the 5th day of June, 1907, an account was opened on the books of the trust company entitled, "Geo. A. Steel, Treasurer, Educational," the first item of which was the credit of the above amount, and thereafter, prior to November 6, 1907, the time of the appointment of the receiver for the trust company, many other credits were made in that account for checks sent by Steel for deposit therein, and on that day the balance to the credit of that account was \$288,426.87. The remittances were all made in checks and drafts, except as above mentioned, and, except as stated, there was no evidence of possession of the money by defendants, or that the checks had been collected or converted into cash by the trust company, or anyone. Until the 20th day of August, 1907, the trust company always had on hand cash exceeding the balance due from it on the educational account, but on the next day it was about \$300 less than such balance. This

deficiency increased thereafter until November 6, 1907, when the trust company's cash on hand lacked \$274,882.13 of being equal to the balance due on such account, and on that date all its cash was turned over to the receiver.

Defendant Ross testified that he did not convert to his own use any money whatever belonging to the educational fund of the state. When asked, "How much money did you get from the state of Oregon as deposited by the state treasurer with the trust company?" his answer was, "I never received any money from the state of Oregon." A written demand was made by Steel, as treasurer, on the trust company, for the amount of such account, on November 12, 1907, service of which was accepted for the trust company by defendant Ross, as president. Steel testified that he did the business with the bank, and had no business with defendants; that he might have corresponded with Ross; but thought not; may have talked with him about depositing these funds after the law took effect, but does not recollect. But the account was segregated, and he says he did have an arrangement or agreement with Burkhart, Ross, Aitchison, or Hill about the manner or arrangement by which these funds would be deposited in the bank, but did not think that Ross knew, at the time, any further than is disclosed by Steel's instructions at the office. He says he probably spoke to him, but does not remember any conversation. The principal dealings were with Ross or Burkhart. He further testifies that, pending the passage of the bill providing for depositaries before the legislature of 1907, he probably consulted with Ross about it, and sent him copies of the bill.

The trial resulted in a verdict against the defendant of guilty, and a finding by the jury that the amount of money converted was \$288,426.87. Thereafter defendant moved the court in arrest of judgment, on the ground that the information does not state facts sufficient to constitute a crime, and also a motion for a new trial for insufficiency of the evidence to justify the verdict, and errors of law accruing at the trial, which motions were denied. Thereupon judgment was rendered against defendant that he be imprisoned in the penitentiary of the state of Oregon for the term of five years; that he be adjudged to pay a fine in the sum of \$576,853.74; that he be imprisoned in the county jail of Multnomah county, Oregon, until such fine is paid, not exceeding 288,426 days; and that the state recover of and from the defendant its costs and disbursements. From this judgment defendant appeals.  
42 L.R.A. (N.S.)

Mr. William P. Lord, for appellant.

A special deposit is not an asset of an insolvent bank.

Bolles, Bkg. 443.

Title passes by a general deposit in bank. Story, Bailm. 84, 88; Shipman v. Bank of State, 12 L.R.A. 791, note.

The relation created is that of debtor and creditor, even where the bank knows that the funds deposited do not belong to the depositor, but are funds for which he is accountable as trustee.

5 Cyc. 514; Refan v. Union Trust Co. 134 Mich. 1, 95 N. W. 1006; Board of Education v. Union Trust Co. 136 Mich. 454, 99 N. W. 373; People v. Wadsworth, 63 Mich. 500, 30 N. W. 99; Essex County v. Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185; Citizens' Nat. Bank v. Alexander, 120 Pa. 476, 14 Atl. 402; Patterson v. Marine Nat. Bank, 130 Pa. 419, 17 Am. St. Rep. 778, 18 Atl. 632; Swartwout v. Mechanics' Bank, 5 Denio, 555; Shaw v. Bauman, 34 Ohio St. 25; McAfee v. Bland, 11 Ky. L. Rep. 1, 11 S. W. 439; Anderson v. Walker, — Tex. Civ. App. —, 49 S. W. 937; Fletcher v. Sharpe, 108 Ind. 276, 9 N. E. 142; Otis v. Gross, 96 Ill. 612, 36 Am. Rep. 157; National Bank v. Millard, 10 Wall. 152, 158, 19 L. ed. 897, 900.

Trustees are entitled to make general deposits in banks, of the trust funds committed to their care.

3 Pom. Eq. Jur. 1067; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554.

A general deposit of public funds made in good faith by the lawful custodian of them is neither a loan nor an investment of such funds. Provided no credit is extended for a fixed time, and the deposit is subject to check, the transaction is lawful and will be upheld.

Baker v. Williams & E. Bkg. Co. 42 Or. 213, 70 Pac. 711; State v. McFetridge, 84 Wis. 473, 20 L.R.A. 223, 54 N. W. 1, 998; Allibone v. Ames, 9 S. D. 74, 33 L.R.A. 585, 68 N. W. 165; Thompson v. Territory, 10 Okla. 409, 62 Pac. 355; State v. Hill, 47 Neb. 456, 66 N. W. 541; Farmers' & M. Bkg. Co. v. Red Cloud, 62 Neb. 442, 87 N. W. 175; Hunt v. Hopley, 120 Iowa, 695, 95 N. W. 205; Elliott v. Capital City State Bank, 128 Iowa, 275, 1 L.R.A. (N.S.) 1130, 111 Am. St. Rep. 198, 103 N. W. 777; Rhea v. Brewster, 130 Iowa, 729, 107 N. W. 940, 8 Ann. Cas. 389; Bardsley v. Sternberg, 18 Wash. 612, 52 Pac. 251, 524; Vansant v. State, 96 Md. 110, 53 Atl. 711; State use of Overton County v. Copeland, 96 Tenn. 206, 31 L.R.A. 844, 54 Am. St. Rep. 840, 34 S. W. 427; Comstock v. Gage, 91 Ill. 328; Meridian Nat. Bank v. Hauser, 145 Ind. 496, 42 N. E. 753; York County

v. Watson, 15 S. C. 1, 40 Am. Rep. 675; State v. Gramm, 7 Wyo. 329, 40 L.R.A. 690, 52 Pac. 533.

The state treasurer is not a bailee of the public funds. Especially is this true where, as in Oregon, the treasurer is responsible at all events for the safety of the funds.

State use of Wyandot County v. Harper, 6 Ohio St. 607, 67 Am. Dec. 363; Boggs v. State, 46 Tex. 10; Wilson v. Wichita County, 67 Tex. 647, 4 S. W. 67; Snapp v. Com. 82 Ky. 173, 6 Am. Crim. Rep. 183; Com. v. Godshaw, 92 Ky. 435, 17 S. W. 737; Thompson v. Township Sixteen, 30 Ill. 99; Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; Halbert v. State, 22 Ind. 125; Rock v. Stinger, 36 Ind. 346; Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Vansant v. State, 96 Md. 110, 53 Atl. 711; Colerain v. Bell, 9 Met. 499; Hancock v. Hazzard, 12 Cush. 112, 59 Am. Dec. 171; Egremont v. Benjamin, 125 Mass. 15.

Where money or goods are intrusted by one to another, with the right to mingle such money with other money, or such goods with other goods of the same kind, the obligation being to return an equivalent in kind, title passes from bailor to bailee, or from mutuant to mutuary.

Story, Bailm. 47, 283; 2 Kent, 589; Smith v. Clark, 21 Wend. 83, 34 Am. Dec. 213; Com. v. Stearns, 2 Met. 343; Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Lonergan v. Stewart, 55 Ill. 44; Bailey v. Bensley, 87 Ill. 556; Mulford v. People, 139 Ill. 593, 28 N. E. 1096; Butterfield v. Lathrop, 71 Pa. 225; Carpenter v. Griffin, 9 Paige, 310, 37 Am. Dec. 396; Hurd v. West, 7 Cow. 752; Bartlett v. Wheeler, 44 Barb. 162; Norton v. Woodruff, 2 N. Y. 153; Buffum v. Merry, 3 Mason, 478, Fed. Cas. No. 2,112; Austin v. Seligman, 21 Blatchf. 506, 18 Fed. 519; Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 110, 116, 24 L. ed. 973, 974.

Evidence of demand and refusal are admissible to prove conversion only when it has been first shown that the thing demanded was in the possession of the party on whom the demand was made at the time of the demand.

Knapp v. Winchester, 11 Vt. 351; Yale v. Saunders, 16 Vt. 243; Buck v. Ashley, 37 Vt. 475; Davis v. Buffum, 51 Me. 160; Robinson v. Hartridge, 13 Fla. 501; Hill v. Belasco, 17 Ill. App. 194; Gilmore v. Newton, 9 Allen, 171, 85 Am. Dec. 749; Kelsey v. Griswold, 6 Barb. 436; Hunt v. Kane, 40 Barb. 638; Spear v. Alexander, 2 Phila. 89; Davis v. Hurt, 114 Ala. 146, 21 So. 468; Ferrera v. Parke, 19 Or. 151, 23 Pac. 883; 2 Greenl. Ev. 644.

Proof of a demand for personal property, and a refusal to deliver the same, is evidence of conversion only where the refusal

amounts to a denial of demandant's right.

Buffington v. Clarke, 15 R. I. 437, 8 Atl. 247; Phillips v. Shackford, 21 R. I. 422, 44 Atl. 306; 2 Greenl. Ev. 644.

The sentence of this appellant to five years in the penitentiary, and thereafter to seven hundred and ninety years, two months, and sixteen days in the county jail, is a violation of the constitutional guaranties and requirements that cruel and unusual punishments shall not be inflicted, and that all penalties shall be proportioned to the offense.

State v. Miller, 75 N. C. 73; State v. Driver, 78 N. C. 423, 2 Am. Crim. Rep. 487; State ex rel. Garvey v. Whitaker, 48 La. Ann. 527, 35 L.R.A. 561, 19 So. 457; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546.

Messrs. Wallace McCamant and William M. Kaiser also for appellant.

Messrs. A. M. Crawford, Attorney General, George J. Cameron, and Martin L. Pipes, for the State:

The state treasurer has no authority to make a general deposit of the educational funds.

State v. Midland State Bank, 52 Neb. 1, 66 Am. St. Rep. 484, 71 N. W. 1011; Multnomah County v. Oregon Nat. Bank, 61 Fed. 912; State v. Thum, 6 Idaho, 323, 55 Pac. 858; Hubbard v. Alamo Irrigating & Mfg. Co. 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625; Merchants' Nat. Bank v. School Dist. 36 C. C. A. 432, 94 Fed. 705; Marx v. Parker, 9 Wash. 473, 43 Am. St. Rep. 849, 37 Pac. 675; Emigh v. Earling, 134 Wis. 565, 27 L.R.A.(N.S.) 243, 115 N. W. 128; Bromley v. Cleveland, C. C. & St. L. R. Co. 103 Wis. 562, 79 N. W. 741; Boone County Nat. Bank v. Latimer, 67 Fed. 27; San Diego County v. California Nat. Bank, 52 Fed. 59; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908; Kimmel v. Dickson, 5 S. D. 221, 25 L.R.A. 309, 49 Am. St. Rep. 869, 58 N. W. 561; Spokane County v. First Nat. Bank, 16 C. C. A. 81, 29 U. S. App. 707, 68 Fed. 979, 16 C. C. A. 85, 29 U. S. App. 713, 68 Fed. 982; Independent Dist. v. Beard, 83 Fed. 5; Page County v. Rose, 130 Iowa, 296, 5 L.R.A.(N.S.) 886, 106 N. W. 744, 8 Ann. Cas. 114.

The legislature cannot authorize such a deposit, and it has not done so.

Fleischner v. Chadwick, 5 Or. 152; State ex rel. First Nat. Bank v. Bartley, 39 Neb. 353, 23 L.R.A. 67, 58 N. W. 172.

The commingling of the educational funds with private funds of the bank or its officers does not divest the state of its title to the funds.

San Diego County v. California Nat. Bank, 52 Fed. 59; Hubbard v. Alamo Ir-

rigating & Mfg. Co. 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625; First Nat. Bank v. Hummel, 14 Colo. 259, 8 L.R.A. 788, 20 Am. St. Rep. 257, 23 Pac. 986; Sears v. Abrams, 10 Or. 499.

A crime committed by the officer of a corporation pretending to act in behalf of the corporation is the act of the individual; such act not being within the scope of his authority.

Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Story, Bailm., § 88; Breese v. United States, 45 C. C. A. 535, 106 Fed. 680; United States v. Harper, 33 Fed. 484.

If the educational funds were lawfully held by the bank for "safekeeping," the bank or its officers would be "persons" within the meaning of § 1807 of Bellinger & C. Anno. Codes & Statutes.

Thompson v. Territory, 10 Okla. 409, 62 Pac. 355.

The penalty prescribed for the violation of the statute upon which this conviction is based is not so severe as to be a cruel and unusual punishment prohibited by the Constitution.

O'Neil v. Vermont, 144 U. S. 331, 36 L. ed. 455, 12 Sup. Ct. Rep. 693; United States v. Bradford, 148 Fed. 413.

Eakin, J., delivered the opinion of the court:

1. The statute (Bellinger & C. Anno. Codes & Statutes) upon which this prosecution is based provides: "Sec. 1807. If any person shall receive any money whatever for this state, . . . or shall have in his possession any money whatever belonging to such state, . . . and shall in any way convert to his own use any portion thereof, . . . such person shall be deemed guilty of larceny. . . ."

The first question for consideration relates to the character of the deposits made by the state treasurer with the trust company, whether they were general or special, and this depends on the terms of the statute of 1907, under which the deposits were made (Laws 1907, p. 248), which took effect May 26, 1907. The portions of the act applicable here are as follows:

"Section 1. It shall be the duty of the state treasurer, on the first Monday in June of each year, to designate such banks and trust companies within this state as he may, under the provisions of this act, deem eligible to be made state depositaries, for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer."

"Sec. 3. The state treasurer shall deposit, and at all times keep on deposit, in national banks doing business in the state of Oregon, or other banks and trust com-

panies doing business within this state, as shall have been approved under the provisions of this act as herein provided, the amount of money in his hands belonging to the several funds in the state treasury, and any such bank or trust company may file with the state treasurer its application for the privilege of keeping on deposit such funds or some part thereof. All such deposits shall be subject to payment when demanded by the state treasurer on his check, and any bank receiving and holding any such deposit as aforesaid shall be required to pay and shall pay to the state, for the privilege of holding the same, interest at the rate prescribed by the state treasurer as hereinafter provided, which rate of interest shall be not less than 2 per cent per annum. . . ."

"Sec. 5. For the security of funds so deposited under the provisions of this act, the state treasurer shall require all such depositaries to deposit securities of the kind and character hereinafter described, or to give bonds for the payment of such deposits and the interest thereon. Said bonds, when given, shall run to the state of Oregon, and, together with the securities offered, are to be approved as to the legal form by the attorney general. . . . The bond provided for under this act shall be a surety company bond. . . . [Here follows the form of bond to be given by a surety company.]"

"Sec. 9. The word 'bonds,' wherever used in this act, shall be held to include bonds furnished by surety companies authorized and qualified to do business in this state. The word 'security' or 'securities' shall be construed to include United States bonds," etc.

"Sec. 16. The word 'funds' used in this act shall apply to all funds in the state treasury except the common school, agricultural college, and university funds. Nothing in this act shall be construed to deprive the State Land Board of the power to invest or dispose of the funds derived from the sale of public lands, as is now or may be provided by law."

Thus it will be seen that the educational funds are excepted from the provisions of §§ 1 to 5, inclusive. But §§ 6, 7, and 8 include the educational fund, and provide as follows:

"Sec. 6. The state treasurer may designate a bank or trust company in the city of Salem, or a bank or trust company in the city of Portland, as an active depositary for the collection of any drafts, checks, certificates of deposit, and coupons that may be received by him on account of any claim due the state.

"Sec. 7. The bank or trust company

designated as such active depository shall be required to give security to the state, to be approved by the state treasurer, for the prompt collection of all drafts, checks, certificates of deposit, or coupons that may be delivered to such active depository by the state treasurer for collection; also, for the safe-keeping and prompt payment on the state treasurer's order of the proceeds of all such collections; also for the payment of all drafts that may be issued to said state treasurer by such active depository.

"Sec. 8. The state treasurer, on receipt of any draft, check, or certificate of deposit, on account of state dues, may place the same in such active depository for collection, and it shall be the duty of such active depository to collect the same without delay, without charge for its services for such collection or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active depository shall be fixed by the state treasurer upon the best terms obtainable for the state."

Section 10 contains the following clause: "The state treasurer shall not be liable personally, or upon his official bond, for any moneys that may be lost by reason of the failure or insolvency of any bank which becomes a depository under this act."

The purpose of this statute is to secure to the state interest on state funds, and to provide depositories for state moneys. Of this act §§ 1 to 5, inclusive, relate to the creation of depositories and payment of interest on money deposited, and applies to all state funds other than educational funds, but has no application to them. Sections 6, 7, and 8 provide for active depositories, and apply equally to the general and educational funds. It is evidently not the purpose of these sections that the active depositories shall loan, or be required to pay interest on, funds deposited thereunder, as § 5 provides for the security that shall be taken from general depositories, and if the active depositories could loan funds deposited therein, under the provisions of §§ 6, 7, and 8, the effect would be to nullify the requirements of § 5 as to the character of the security to be given for the general deposits. The writer is unable to understand the purpose of the last clause of § 8, unless it is to give to the state the benefit of any deal that the treasurer might be able to make for compensation. But whatever the intention, it cannot change the meaning of these sections.

Thus it appears that deposits, if they may be called such, in the active depositories, as provided in § 6, are made for an entirely different purpose than those provided for in § 3, and are only for a special

purpose, namely, for the collection of the checks and drafts transmitted by the treasurer, the safe-keeping and prompt payment of the money upon the treasurer's order. For the security of funds of the general depositories, the state treasurer may require securities, such as United States, state, or municipal bonds, described in § 9, or a bond executed by a surety company, for which a form is prescribed and conditions specified. But as to the security that may be required of an active depository, no specification is made or bond provided for, or other requirement, except that it must be such United States, state, or municipal bonds, specified in § 9, as shall be approved by the treasurer, and conditioned for the prompt collection of checks and drafts, for the safe-keeping of the money collected, and prompt payment thereof, on the treasurer's order. These are very different conditions from those provided by § 5 for general depositories. It is not in the power of the legislature to make provision for a loan or use of educational funds. Section 5, art. 8, of the Constitution of Oregon, provides, that "the governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school and university lands, and for investment of funds arising therefrom." In the light of this constitutional provision, we can have no doubt as to the intention of the legislature in excluding educational funds from the operation of §§ 1 to 5 of the act of 1907. The active depositories hold the money only as collections, and therefore the deposits were special, the title to which did not pass to the bank. *Multnomah County v. Oregon Nat. Bank* (C. C.) 61 Fed. 912; *State v. Thum*, 6 Idaho, 323, 55 Pac. 858; *Sexton v. School Dist.* 9 Wash. 6, 36 Pac. 1052; *Merchants' Nat. Bank v. School Dist.* 36 C. C. A. 432, 94 Fed. 705.

Counsel for defendant cite *Baker v. Williams Bkg. Co.* 42 Or. 213, 70 Pac. 711, as decisive of the rights of the treasurer to make a general deposit of the educational fund, but the question involved here did not arise in that case, and could not as we are now controlled by the statute of 1907. The character of deposits must be determined by this statute. Section 11 makes it a felony for the treasurer to remove or deposit the state money except for lawful payments, "or for the purpose of depositing the same under the provisions of this act" in banks which shall have qualified as depositories, and this manner of deposit is exclusive. Both the treasurer and the trust company, in June, 1907, recognized and acted under this statute by creating the active depository and segregating the edu-



cational funds. Nebraska has a statute similar to §§ 1 to 5, inclusive, of this statute, but it does not except the educational funds, and in *State ex rel. First Nat. Bank v. Bartley*, 39 Neb. 353, 23 L.R.A. 67, 58 N. W. 172, under a constitutional provision similar to ours, it is held that a deposit by the state treasurer in such a depository is a loan, and that the statute is therefore void, in so far as it attempts to include educational funds. And in considering whether a deposit of the educational fund, under that law, might not be considered a deposit for safe-keeping, the court, referring to the contention of counsel for plaintiff to that effect, say: "This construction would be a reasonable and proper one, if the deposit contemplated by the statute was a special one, merely for safe-keeping, and that the same identical money should be returned. But this is not the kind of deposit the legislature meant." Our statute has gone further, and provided how the educational fund shall be deposited by excepting it from the general deposit authorized by §§ 1 to 5, and providing for the collection of checks and drafts, and the safe-keeping of money so collected, subject to the order of the treasurer. This statute constitutes a part of the terms and conditions of the appointment of the depositaries, and must be read into any arrangement made thereunder for deposits. *State ex rel. First Nat. Bank v. Bartley*, 39 Neb. 353, 23 L.R.A. 67, 72, 58 N. W. 172, *Merchants' Nat. Bank v. School Dist.* 36 C. C. A. 432, 94 Fed. 705, is very much in point upon this question, where it is said: "The bank had knowledge of the nature of the funds, and was chargeable with knowledge of the statute. . . . The bank undertook to receive the money as a trust fund for an express purpose, and for no other. It is immaterial that in the finding the deposit is designated a 'special deposit.' The true nature of the transaction is disclosed by the facts. The money was to be treated as the funds of the school district, and not as the funds of the bank, and, in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds." Also *State v. Thum*, 6 Idaho, 323, 55 Pac. 858, is in point. It is there provided by statute that a deposit in a bank of state money, otherwise than on special deposit, shall be punished by imprisonment. It is held that this is authority to the treasurer to make special deposits, and that upon such a deposit the bank had no authority to mingle or use the money so deposited.

2. Defendant further urges that the proof shows only a deposit and conversion of checks and drafts, and not money, as 42 L.R.A. (N.S.)

charged in the indictment, and that this is a variance. The bill of exception shows that the treasurer sent by mail to the trust company for collection checks and drafts. When these were paid by the banks on which they were drawn, the trust company thereby received the money for the credit of the treasurer, and it is immaterial how they were paid. There is no suggestion in the record that the trust company did not receive the money. On the contrary, upon the receipt of the check "No. 319, Geo. A. Steel, Treasurer, upon you, \$272,449.02," and check "No. 34, Geo. A. Steel, State Treasurer, on Ladd & Tilton, \$2,600," the trust company opened an account on its books, entitled "Geo. A. Steel, Treasurer, Educational," and credited that account with a deposit of those amounts,—\$285,049.02. This is an acknowledgment that it received from itself and from Ladd & Tilton that amount of money for that account upon those checks. And the same is true of every other credit made, and constitutes at least prima facie proof of the receipt of the money. In *State v. Neilon*, 43 Or. 168, 73 Pac. 321, defendant was prosecuted under this statute for the conversion of state money. The proof was that he received checks and drafts. Mr. Justice Bean, in the opinion, says: "It is true that the bill of exceptions recites that there is no evidence as to what was done by the defendant with the checks and drafts; but, in the absence of a showing to the contrary, the jury were justified in finding that they were by the defendant converted into money, on the presumption that the usual course of business was pursued. *Bellinger & C. Anno. Codes & Statutes*, § 788, subd. 26." *Morse, on Banks & Banking*, § 451, says: "A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of a check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account." This language is quoted with approval in *Bartley v. State*, 53 Neb. 310, 338, 73 N. W. 744, 752, in a case where a similar question arose; and in *Merchants' Nat. Bank v. School Dist.* supra, the fund was held to be a trust fund and a special deposit, the title to which remained in the school district, though the deposit was made by checks, and the money not paid over the counter or segregated at the time, but placed to the credit of the district on the books of the bank.

3. When the trust company placed to the credit of "Steel, Treasurer, Educational," the amount of a check, it thereby acknowledged that it had received the amount of the check in money, and this is at least

prima facie sufficient to establish the receipt of the money by the trust company. Having decided that the money in the hands of the trust company was a special deposit, and the money remained the property of the state of Oregon, and was paid out to other persons than the state treasurer, it follows that this was a conversion of the money.

4. It is contended, however, by defendant, that the proof does not substantiate the charge in the information that defendants were in the possession of the money of the state, but only that it was in possession of the trust company, and that the officers were not personally liable. But the language of the information is "that the defendants, on the 9th day of September, 1907, then and there pretending to act for and on behalf of the Title Guarantee & Trust Company, did then and there have in their possession and under their control, as officers and directors of said Title Guarantee & Trust Company, as aforesaid, \$288,426.87." The trust company is a corporation, an intangible thing, existing only in contemplation of law, a collection of individuals authorized to act as if they were one. The individuals are its component parts, and the existence of a corporation independently of its stockholders is a fiction. Its rights and duties are the rights and duties of the persons composing it. 1 Morawetz, Priv. Corp. § 1; 3 Thomp. Corp. § 4009; 7 Thomp. Corp. § 8140. Thompson says it has the capacity of acting by the collective vote or will of its component members. It can do no act not authorized by its stockholders or directors, and then only within its charter powers. Its head and hands are the head and hands of its directors and officers, and while it acts lawfully within its corporate powers, the natural and individual capacity and responsibility of its directors and its officers, as to all matters respecting the object of the incorporation, is totally extinct, and what is done is only by and for the corporation; the directors and officers are not individually liable for its acts. There may be acts for which the corporation will be held criminally liable, but not in any case in which intent is involved, or where the punishment is more than a fine, because other punishment cannot be enforced. However, if the officers and directors of a corporation join in a criminal act, as a corporate act, they are jointly liable with the corporation, if it is an act for which the corporation may be prosecuted; and if it is a felony, the directors and officers are individually liable. It is their criminal act, and not that of the corporation. 2 Morawetz, Priv. Corp. §§ 732, 733; People v. Clark (O. & T.) 8 42 L.R.A. (N.S.)

N. Y. Crim. Rep. 169, 179, 14 N. Y. Supp. 642; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735. In the latter case the officers were jointly indicted with the corporation for violation of a municipal ordinance, and the supreme court say: "All the defendants were properly convicted. The officers of the company, are jointly responsible for the business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted." To the same effect is State v. Great Works Mill. & Mfg. Co. 20 Me. 41, 37 Am. Dec. 38.

Defendant contends that § 1807, Bellinger & C. Anno. Codes & Statutes, is only intended to punish persons who are authorized by law to receive money for the state, or into whose hands it comes lawfully, and who convert it, and that Ross was not individually authorized to receive the money. Under the act of 1907 the trust company was made an active depository, and therefore authorized to receive it. This it could only do by the hands of its officers; and if it was a violation of the statute for the trust company to convert the money, it was equally so for anyone who did the act for it, or authorized it. The money came into the hands of these defendants as officers of the trust company, lawfully, by virtue of this statute, and they cannot be permitted to say that what they did in violation of the statute was not their act, and that therefore they are not responsible. If the acts were done in the name of the corporation by the defendants, then they were accessories, and aided and abetted, and are principals under Bellinger & C. Anno. Codes & Statutes, §§ 1324, 2153; 3 Thomp. Corp. § 4114; 4 Thomp. Corp. § 4996; 21 Am. & Eng. Enc. Law, 896; State v. Moran, 15 Or. 262, 14 Pac. 419; State v. Steeves, 29 Or. 85, 43 Pac. 947. Thompson on Corporations (vol. 3, § 4014) says: "It is the duty of the directors and other officers of a corporation to preserve its property as a trust fund of which they are the guardians, and to administer it for the purposes of the trust." And at § 4113 he says: "In a moral sense they are the custodians of the funds committed to their care by the stockholders and the depositors." These two sections are only discussing their civil responsibility, but they indicate their relation to the funds, and we conclude that the directors and officers of the bank who used, or authorized the use of, the money by the trust company, are guilty under this statute.

5. Counsel for defendant also urge that

the evidence does not tend to establish a conversion of the money by defendant to his own use, namely, that it is not sufficient to show that the funds were converted for the benefit of the trust company, but must have been to the personal advantage of defendant. We do not so understand the law of conversion. The statute uses the expression, "shall in any way convert to his own use any portion thereof." That is what we understand the term "conversion" to mean, when applied to a wrongful appropriation for which trover will lie, namely, assuming upon one's self the property and right to dispose of another's goods without authority. The cases of *Milla v. State*, 53 Neb. 263, 271, 73 N. W. 761, and *State v. Foust*, 114 N. C. 842, 19 S. E. 275, cited by defendant as making a distinction between conversion to one's own use and to the use of another, both intimate that the term quoted may not include a misappropriation. But the Nebraska statute includes both forms of expression "convert to his own use or to the use of another." Therefore it might be held that the legislature meant to limit the meaning of the former. But both of these cases are decided upon the term "embezzled," and not upon the expression "convert to his own use." The opinions in some civil cases, in defining what constitutes conversion, say that it is not necessary that the conversion be to the use of the converter. But the term "conversion," as used in law courts, means "conversion to one's own use." Johnson's *Universal Cyc.* says conversion in law has two meanings. "(2). In the law courts . . . conversion lies at the foundation of the common-law action of trover, which word is derived from the French word *trouver*,—to find. There is a legal fiction that the defendant found the plaintiff's property and converted it to his own use. The material part of the case is the conversion." 1 Chitty, Pleading, 146, says: "The action of trover or conversion was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use." Lord Mansfield says: "In form it (i. e., the trover) is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use." 1 Chitty, Pl. 146. In 3 Enc. Laws of England, 360, the same language is used in defining the origin and meaning of the term "conversion," namely, as conversion to one's own use, and the averment of "finding," being only a fiction, has been dropped, and the action is now known as "conversion."

We find no decision or text-book, nor is 42 L.R.A. (N.S.)

any cited by defendant, that attempts to define the meaning of the term "convert to his own use" when used in a criminal statute. Such conversion does not, in itself, constitute a crime. The definitions in the dictionaries and text-books relate to acts that constitute a conversion for which trover will lie. A conversion, in the ordinary sense of the word, may be accomplished by one lawfully in possession of goods of another, when the conversion is by authority and for the benefit of the owner, and this creates no liability. But when used in its legal sense, the conversion must be for one's own use. In *Baldwin v. Cole*, 6 Mod. 212, Lord Holt says: "What is a conversion but an assuming upon one's self the property and right of disposing of another's goods, and he that takes upon himself to detain another man's goods from him, without cause, takes upon himself the right of disposing of them." "An appropriation of, and dealing with, the property of another as if it were one's own, without right." Webster. Under the heading, "Appropriation to Converter's Use" (2 Words & Phrases, 1564), it is said: "Any distinct act of dominion, wrongfully exercised over one's property, in denial of his right or inconsistent with it, is a 'conversion,'"—citing many authorities. See 9 Bacon, Abr. 631. To the same effect is the definition given by Mr. Justice Lord in the opinion in *Budd v. Multnomah Street R. Co.* 12 Or. 271, 53 Am. Rep. 355, 7 Pac. 99, *Fowler v. Hollins* (1872) 41 L. J. Q. B. N. S. 277, is a leading English case on this subject, and the court, in the opinion, uses the word "convert" as the equivalent of "convert to his own use." See also a leading article in 13 Cent. L. J. 185, copied from *Solicitor's Journal*, London. *West Jersey R. Co. v. Trenton Car Works Co.* 32 N. J. L. 517. The term "convert to his own use" is not descriptive of crime, but is used in criminal statutes as a legal term with a definite meaning, well understood, and is equivalent to the legal term "conversion," and this is the "conversion to his own use" of our criminal statute, which declares that such a conversion of state money, by one who has received it for the state, shall constitute larceny.

We have six criminal statutes that make conversion of personal property of another "to one's own use" a crime; and if it be necessary for the state to prove that the conversion is for the personal advantage of the defendant, there would be a failure of justice in many cases. Every assuming by one person to dispose of the goods of another, without right, as if they were his own, is a conversion to one's own use. This is not extending the statute by inference or construction, but giving to the words the

technical meaning they bear in the law. *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184, makes the distinction between conversion to the use of the owner and to one's own use, and says: "Trover may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. . . . If the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion." We understand from these authorities, and many others we have examined, that, in relation to trover, the term "conversion" necessarily means conversion to one's own use, and is fully accomplished by any exercise of a dominion over a chattel without the authority of the owner, whereby the true owner is deprived of the enjoyment of his chattel. And it is wholly immaterial whether the person so converting did it for his own personal advantage or not. See also *State v. Omaha Nat. Bank*, 59 Neb. 483, 81 N. W. 319.

6. One other question remains. Does the evidence tend to show that Ross, as a director or president, participated in, or was a party to, the conversion? "Officers, directors, or agents of a corporation, participating in a violation of law in the conduct of the company's business, may be held criminally liable . . . therefor." 21 Am. & Eng. Enc. Law, 896. We think there can be no question of the correctness of this statement. It is equally true that an officer of a corporation is not criminally liable for the unlawful act of the corporation unless he participated in the wrongful act. In *Rex v. Hays*, 14 Ont. L. Rep. 201, 8 Ann. Cas. 380, it is said that, "in the absence of a statute to the contrary, an officer of a corporation cannot be punished criminally for the corporation's unlawful act or default, unless he participates therein as an aider, abettor, or accessory, even though the corporation's offense consists of the violation of a statute which imposes imprisonment as a penalty." There is a note to this case in 8 Ann. Cas. 383, in which the author says: "The question of the criminal liability of the officers of a corporation for its acts of nonfeasance . . . seems seldom to have arisen. The weight of modern authority . . . is apparently as laid down in the reported case, *viz.*, that an officer of a corporation is not liable for an offense committed by the corporation, except where he has in some way participated in the illegal act as an aider, abettor, or accessory,"—citing several cases to that effect. 3 *Thomp. Corp.* § 4114, citing *People v. Clark* (O. & 42 L.R.A. (N.S.)

T.) 8 N. Y. Crim. Rep. 169, 179, 14 N. Y. Supp. 642, is to the same effect. There is no evidence in this transcript tending to show that Ross actually paid out for the trust company any of its money, or expressly authorized anyone to do so. There is no doubt that if the money had been embezzled from the trust company, or applied in any way not intended by the company, or not for its benefit, by any subordinate, then Ross could not be held criminally liable, unless he participated in such diversion thereof, but that is not this case. The record tends to show that the money was in the general deposit funds of the trust company, and was paid out in the usual way in payment of legitimate claims against the trust company; that is, in the manner contemplated and intended by the company and those in direction of its affairs. The agents actually paying out the money had a right to understand that this was to be done, there being no segregation of the money or limitation on the use of it. The trust company could only become an active depository of this fund by authority of its officers and board of directors. When the money was received by the company as an active depository, and its directors and officers permitted the money to become a part of the general deposit of the company, without restriction thereon, with knowledge that in so doing the money would be applied to the trust company's general uses, this was general authority to subordinates to pay it out in the usual course of the business, and these officers and directors are liable therefor. The evidence tends to show that the disposition of the money by the trust company was with their knowledge, consent, and acquiescence, and they thereby participated in its diversion. To this effect is 4 *Thomp. Corp.* § 4996.

This disposes of the principal questions involved. There are some minor questions raised, namely:

7. Exceptions was taken to the admission of evidence relating to Ross's knowledge of the bill pending before the legislature of 1907, which authorized the appointment of depositaries. This evidence only tended to establish Ross's knowledge of the statute and its terms, and was not prejudicial.

8. Exception was taken to the admission in evidence of the demand made upon the trust company. This we think was competent and consistent with the charge in the information that defendants had the money in their control as officers and directors of the trust company, and a demand upon the trust company for which the defendants were acting was sufficient.

9. However, a demand, in case of conversion, is only necessary in case the con-

version is not otherwise made to appear. Here the conversion was disclosed by proof that the money was paid out on liabilities of the trust company.

10. The proof offered by defendant to show absence of criminal intent was immaterial as it only tended to show that, after the money was converted, the trust company gave the treasurer collateral security. Such security is contemplated in the act of 1907, and when given did not condone the wrongful act.

11. The proof of loss through failure of the Oregon Trust & Savings Bank was incompetent, as the money—being a special deposit—should not have been involved in the dealings between the trust company and its creditors.

12. Neither is criminal intent involved under this statute, as we have shown in defining a conversion. Such a conversion, when committed in violation of the terms of this statute (§ 1807), constitutes the offense, and no other intent need be shown.

13. Exception was also taken to remarks made by the district attorney and the judge, in presence of the jury, in permitting leading questions by the state to its own witness. When the district attorney was cautioned by the court not to cross-examine his own witness, he appealed to the court as follows: "I must invoke the rule in this case that the witness is an unwilling one,"—to which the court replied, "I see that the witness is unwilling." Certainly the district attorney had a right to make such an appeal to the court if the conduct of the witness justified it, and any form of ruling by the court allowing the attorney's question would have meant the same to the jury as the language used, and was not error.

14. Exception is also taken to the portion of the judgment that commits defendant to the county jail until the fine is paid, for the reason, that the same is cruel and unusual under the prohibition of the Constitution. Defendant was sentenced to five years in the penitentiary, to pay a fine of \$576,853.74 and to be imprisoned in the county jail one day for every \$2 of the fine, not exceeding 288,426 days. This is an unusually large fine, and the imprisonment is for life, for the nonpayment of the fine, and is a cruel and unusual punishment within the prohibition of the Constitution. *State v. Miller*, 75 N. C. 73; *State v. Driver*, 78 N. C. 423, 2 Am. Crim. Rep. 487; *Frese v. State*, 23 Fla. 267, 2 So. 1; *Re Yell*, 107 Mich. 228, 65 N. W. 97; *Southern Exp. Co. v. Com.* 92 Va. 59, 41 L.R.A. 436, 22 S. E. 809; *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 35 L.R.A. 561, 19 So. 457.

15. There can be no question that a sentence may be excessive, even though within 42 L.R.A. (N.S.)

the maximum of the statute, but if excessive, it is within the power of the appellate court to enforce this provision of the Bill of Rights, and avoid the judgment so far as it is excessive. *Mims v. State*, 26 Minn. 494, 5 N. W. 369; *Southern Exp. Co. v. Com.* 92 Va. 59, 41 L.R.A. 436, 22 S. E. 809; *Frese v. State*, 23 Fla. 267, 2 So. 1; *State v. Butman*, 15 La. Ann. 166. And the judgment and sentence of the lower court will be modified by reversing that part directing that "he be imprisoned in the county jail of Multnomah county, Oregon, until said fine is paid, not exceeding 288,426 days." In all other respects the judgment is affirmed.

A petition for rehearing having been granted, *Eaklin J.*, on February 15, 1910, handed down the following additional opinion (55 Or. 474, 106 Pac. 1022):

16. A petition for rehearing has been filed in this case by counsel for defendant, another by *Carey & Kerr*, on the ground that they are employed in cases involving some of the same questions, and another by *Joseph Simon* and twenty other leading members of the bar, solely as *amici curiæ*, on account of the public importance of the decision. The ground upon which the motion is based is error of this court in the application of the law to this case as disclosed in the opinion, and is principally a review of the questions discussed therein.

Counsel for defendant and *Carey & Kerr* insist that the act of 1907 (*Laws 1907*, p. 248) has no application to the educational fund, and that the treasurer has the right to make general deposits of that fund in any bank, as held in *Baker v. Williams Bkg. Co.* 42 Or. 223, 70 Pac. 711, independent of that act; while it is contended in the petition of *Joseph Simon et al.*, that by §§ 6, 7, and 8 of the late law a general deposit of that fund in the active depository is authorized. We have re-examined the questions involved with the aid of the briefs submitted with these applications, and adhere to our first views. Sections 1 to 5 make provision for deposits, clearly contemplating that the deposits shall be general, and requiring the treasurer to deposit all state funds, except the educational fund, in the general depositories. The collections made by the active depository upon checks and drafts for the general funds cannot be left there by the treasurer, but must be transferred to the general depositories. This obligation is as binding on him as that he shall not retain the money in his office. Instead of exempting the educational funds from the terms of the act, § 16 provides that the term "funds," as used in the act, shall not include the educational

funds, and that nothing in the act shall be construed to deprive the state land board of power over this fund, thus indicating that it is to be governed by the provisions of the act save where it is excepted therefrom, and §§ 6, 7 (and 8 seem to have special reference to the educational fund. The decision in *Baker v. Williams Bkg. Co.* supra, is not here questioned. No doubt the legislature had that decision in mind when it adopted the present law, seeking thereby to guard the educational fund by expressly excluding it from a general deposit. Section 6 is not uncertain as to what funds may be collected thereunder, when it says that it is for the collection of any drafts, checks, and certificates that may be received by the treasurer "on account of any claim due the state." Sections 3 and 4 fix the minimum rate of interest to be paid by the general depository, and provide that the rate agreed upon shall not be changed for a year, and shall be computed on daily balance and paid quarterly, and that the bank shall render an account the first of every month, showing daily balances. And the condition of the security given is that all of these things shall be done, while the security required under § 7 is conditioned only for the prompt collection, and safe-keeping, and the prompt payment on the treasurer's orders of the proceeds of such collections, and for the prompt payment of its own drafts. This does not include statements nor contemplate interest. The conclusion is unavoidable that this act only contemplates general deposits of funds other than the educational, and for which interest shall be paid. It was evidently the purpose of the legislature by these provisions to take the educational fund out of that custom or right of the treasurer to make general deposits as recognized in *Baker v. Williams Bkg. Co.* supra. The clause in § 8, to the effect that the compensation to be paid shall be fixed by the treasurer, does not require him to exact a compensation as a condition for the deposit, nor is such requirement made a condition upon which the bank shall be appointed an active depository. In the opinion we cited some cases holding that in case of a special deposit the money may not be mingled by the bank with its own funds, yet we did not intend to decide that question, deeming it unnecessary, since the conversion was proved independent of such commingling; but the fact that the bank does so mingle a special deposit cannot deprive the owner of his rights as such. *Woodhouse v. Crandall*, 197 Ill. 104, 54 L.R.A. 385, 64 N. E. 292. It is not held in the opinion that the trust company

or the defendants were officers of the state, but the act of 1907 authorizes their possession of state money for the state, and they come fully within the class of persons mentioned in § 1807, *Bellinger & C. Anno. Codes & Statutes*, which includes more than state or municipal officers, *viz.*, "any person who shall receive any money whatever for this state." When the treasurer deposits the money, as directed by the act of 1907, his personal liability therefor is terminated, although it is still subject to his disposal. The depository does not receive the money for him, but for the state; that is, by express direction of the law, and not at the option of the treasurer. The trust company and defendants did receive this money for the state by special authorization, and are as clearly within the very words of the statute as the treasurer would be.

17. Section 1806, *Bellinger & C. Anno. Codes & Statutes*, defining embezzlement, relates to the fraudulent conversion by an officer, agent, or clerk of a private person or incorporation, and does not apply to one in possession of public money, and § 1807 relates especially to public moneys that are misappropriated. This is not a case where some other officer converted the money, and defendant is held responsible for that act by reason of his relation to the bank. There is nothing in the record to disclose that any other officer wrongfully converted the money. The cashier or teller who paid out the money was not offender, unless he was aware of the source from which the money came and the capacity in which it was held. The wrongful act was done by the officers and directors who made the arrangement to receive the special deposit, and permitted it to be mingled with its general deposit without restriction upon its use. A depository is only created upon the bank's application in writing, accompanied by a sworn statement of the condition of the bank, which must be approved by the treasurer. This can only be consummated through the board of directors. It is a contract between the state and the bank, of which the statute is a part, to the effect, among other things, that the educational fund is a special deposit; and mingling it with its general funds without restriction is the wrongful act that resulted in the conversion. Judge Redfield in a note to the case of *United Soc. v. Underwood*, 13 Am. L. Reg. N. S. 211, in which he criticizes that decision, states the liability of the bank and its officers in case of a special deposit, and says: "But, as said in *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, it

would be a breach of trust for the bank or any of its officers to open a package left on special deposit, and whoever did or counseled such act would be responsible to the owner for such tort. And if done by an officer of the bank for its use and benefit, there can be no doubt the bank would be responsible.

. . . The books all show that such officers and servants are liable to the owner of such special deposits for their own wilful acts." Such acts, resulting in the diversion of the money, constitute the conversion.

18. Defendant now, for the first time, questions the sufficiency of the indictment, in that it does not allege that the trust company was an active depository or that it sustained any official relation to the state. The allegation is in effect that the defendants, acting for the trust company, did then and there have in their possession \$288,426.87 which belonged to the state of Oregon, and was part of the educational funds of the state, deposited for the state for safe-keeping, to be returned by defendants to the state of Oregon. The general rule is that, when the statute sets out what acts shall constitute the offense, it is generally sufficient in the indictment to charge the offense in the substantial words of the statute. This rule has its exception, which is that the elements of the crime, sufficient to inform the defendant of the charge he is called upon to answer, should be set out. As defined in *State v. Dougherty*, 4 Or. 205, the indictment is sufficient if it contains such specification of acts and descriptive circumstances as will, upon its face, fix and determine the identity of the offense, and enable the court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law. The indictment we think fully complies with this requirement. There is nothing left doubtful as to the particular acts constituting the offense. It states that the money was part of the educational fund of the state placed in defendant's possession for the state of safe-keeping, which shows a lawful possession and comes within the words of the statute. *State v. Lee*, 17 Or. 488, 21 Pac. 455; *State v. Ah Sam*, 14 Or. 347, 13 Pac. 303.

19. Defendant's counsel contend that the charge against defendant was made by information filed March 6, 1908, and not by indictment, and that by the amendment of § 18, art. 7, Const., at the June, 1908, election, it is provided that no person shall be charged in any circuit court with the commission of any crime except upon indictment. 42 L.R.A. (N.S.)

ment found by a grand jury; that such amendment operated to repeal §§ 1258 to 1264, which provide for trial upon information by the district attorney, and, there being no saving clause in the amendment to the Constitution, the appellate court is by the amendment divested of jurisdiction. This question was before this court in *State v. Ju Nun*, 53 Or. 1, 97 Pac. 96, 98 Pac. 513, in which it is held that the constitutional amendment is only prospective, and does not apply to pending cases, and we adhere to that view. If, as contended by defendant, the provisions of §§ 11 and 12 of the act of 1907 operate to repeal § 1807, *Bellinger & C. Anno. Codes & Statutes*, so far as there is a conflict as to the penalty, yet they only relate to acts of the treasurer, and not to the depository, and § 1807 is unaffected thereby so far as it relates to the offense charged in this information.

20. Counsel again call our attention to the excessiveness of the fine, *viz.*, \$576,-853.74, and upon further consideration we believe that the fine is excessive within the contemplation of the constitutional provision quoted in the opinion. The fine and the imprisonment for nonpayment thereof, adjudicated by the trial court, were within the terms of the statute and in compliance with its direct command, but we are of the opinion that, the fine being so great, it is apparently beyond the power of the defendant to pay it at this time, or even during a lifetime of effort, and is such a one as is inhibited by the Constitution.

The judgment of the lower court will be modified by reversing that part thereof adjudging that defendant pay a fine of \$576,-853.74, and that he be imprisoned in the county jail of Multnomah county, Oregon, until said fine is paid, not exceeding 288,-426 days. In all other respects the judgment is affirmed.

**King, J., dissenting:**

I concur in the holding by the majority respecting the unconstitutionality of the fine and jail sentence imposed; but, after a careful re-examination of the able briefs and argument therein, of the respective counsel, including those on petition for rehearing, I am unable to agree with the conclusion announced, respecting the other, and decisive, points presented. I accordingly record my dissent therefrom.

Appeal dismissed by the Supreme Court of the United States, for the want of jurisdiction, January 27, 1913, (227 U. S. 150, 57 L. ed. —, 33 Sup. Ct. Rep. 220).

## OKLAHOMA SUPREME COURT.

CITY OF SHAWNEE, Plff. in Err.,  
v.  
STATE PUBLISHING COMPANY et al.  
(33 Okla. 363, 125 Pac. 462.)

## Appeal — judge pro tempore — termination of authority.

Where no time has been fixed either by order of court or by notice given by the parties within the time for serving a case and suggesting amendments thereto for settling a case, the authority or term of a judge *pro tempore* ceases upon the expiration of the time fixed for suggesting amend-

Headnote by HAYES, J.

*Note. — Authority of judge pro tem. as to bills of exceptions and cases-made.*

- I. Whether certificate should be by regular or special judge, 616.
- II. Expiration of court term, vacation by special judge of bench, etc., as affecting his authority to sign, 619.
- III. Power upon rendition of judgment to allow time for preparing and filing bill of exceptions or case-made, 623.
- IV. Power to extend time given for preparing or filing bill of exceptions or case-made, 623.

Although some cases where "called-in" judges have been treated more or less as special judges have been included below, this note does not purport to treat exhaustively of the authority of judges as to bills of exceptions taken in cases by them tried outside of their regular territory.

*I. Whether certificate should be by regular or special judge.*

The obviously preponderating authority is with the proposition that, as between the regular and special judges connected with a given case, or with the tribunal where such case is tried, rulings to be complained of on review by bills of exceptions or cases-made should be carried up under certification by that judge—special or regular—who was trying the cause at the time and made the ruling to be complained of. His disqualification for special reasons so to certify, or legislation inharmonious with the rule suggested, may, of course, work an explainable exception to the rule, but the courts seem disinclined to permit many exceptions. The reason usually assigned for the rule is that the certification should be done by that judge who has a direct and first hand knowledge of the matter to be authenticated.

And so, where a special judge tries a case, certification of the bill of exceptions by the special judge is held valid. *Illinois C. R. Co. v. Bowles*; *Carper v. Cook*; *Shugart v. Miles*; and *Lerch v. Emmett*, *infra*; *McFar-* 42 L.R.A. (N.S.)

ments, and a case-made settled by him after that time is a nullity.

(July 23, 1912.)

**M**OTION to dismiss for irregularity of procedure a writ of error to the Superior Court for Pottawatomie County to review a judgment in plaintiff's favor in an action brought to recover damages for the refusal of the defendant city to give to plaintiff the publication of the charter which it alleged it was entitled to publish under a contract for the publication of all legal matters for the city. Dismissed.

The facts are stated in the opinion.

Messrs. E. E. Hood and W. M. Engart for plaintiff in error.

*land v. Benton* (superior court abstract) 10 Ky. L. Rep. 873; *McFarland v. Burton*, 89 Ky. 296, 12 S. W. 336; *Murray v. East End Improv. Co.*; *Holliday v. Mansker*; *State v. Bobbitt*; *State v. Gordon*; and *Bacon v. State*, *infra* (*q. v.* with reference to statutory language); *Missouri, K. & T. R. Co. v. Ft. Scott*, *infra* (*q. v.* in this connection); *Hill v. Territory*, 15 Okla. 212, 79 Pac. 757 (where appellee contested the sufficiency of the certificate, and not the authority of the judge to sign the same). See also *Atlantic Coast Line R. Co. v. Mallard*; *State v. Grant*; and *Nebraska Mfg. Co. v. Maxon*, *infra* (transcript on appeal).

And, consistently, where a special judge tries a case, certification of the bill of exceptions by the regular judge is held invalid. *Illinois C. R. Co. v. Bowles*, 71 Miss. 994, 16 So. 235; *Stewart v. Adam, M. & A. Co.* — Ind. —, 55 N. E. 760; *Cranor v. School Dist.* 18 Mo. App. 397; *Scott v. State*, 4 Okla. Crim. Rep. 657, 12 Pac. 763; *Watkins v. State*, 37 Ark. 370 (where accused, on being convicted before a special judge, elected in the absence of the regular judge, and allowed ninety days to file his bill of exceptions, has it signed during that period by the regular judge); *Cowall v. Althul*, 40 Ark. 172 (the bill being held a nullity where a special judge tried the case, and the losing defendant made a motion for a new trial while the special judge was on the bench, and the motion was disposed of by the regular judge after resuming the bench, who thereupon signed the bill of exceptions. The attempted bill apparently embodied only, or principally, proceedings had before the special judge. See *infra* further reference to this case); *Louisville Southern R. Co. v. Lewis*, 101 Ky. 296, 41 S. W. 3 (following *Hayden v. Ortkieiss*, *infra*, in its construction of the statute as to certification by bystanders).

An application of the principle to a third type of circumstances will make the bill bad where signed by the special judge, as where, in *Travellers' Ins. Co. v. Leeds*, 38 Ind. 444, a bill of exceptions was stricken from the record on appeal, where the cause had been tried before the regular judge below, motion



Mr. B. B. Blakeney, for defendants in error:

The order of December 29 is ineffectual. Springfield F. & M. Ins. Co. v. Gish, 23 Okla. 824, 102 Pac. 708; Casner v. Smith, 28 Okla. 303, 114 Pac. 255; Ellis v. Carr, 25 Okla. 874, 108 Pac. 1101.

The power of the judge *pro tem*, had expired when the case-made was settled and signed by him.

Barnes v. Lynch, 9 Okla. 11, 59 Pac. 995; Butler v. Scott, 68 Kan. 512, 75 Pac. 496; Burnett v. Davis, 27 Okla. 124, 111 Pac. 191; Columbia Mfg. Co. v. Stoddard Mfg. Co. 61 Kan. 640, 60 Pac. 320; Kansas & C. P. R. Co. v. Wright, 53 Kan. 272, 42 Am. St. Rep. 282, 36 Pac. 331; St. Louis & S. F. R. Co. v. Corser, 31 Kan. 705, 3 Pac.

for a new trial heard and overruled by a judge *pro tem*, and a period given within which to file the bill of exceptions, and the same signed within such period and in vacation, by the special judge.

And under a fourth type of circumstances, the same rule would make certification by the regular judge good; as where, in McGhee v. Reynolds, 117 Ala. 413, 23 So. 68, the regular judge tried the case to judgment and got sick, necessitating the appointment of a special judge, who completed and adjourned the term, and a bill of exceptions was held properly signed by the regular judge on the day of and presumably before adjournment.

"Reason, therefore, as well as the policy of the law, dictates that it [a bill of exceptions] should be certified by the judge who presided at the trial, or by someone who heard it." Hayden v. Ortkess, 83 Ky. 396. Here the regular judge who tried the cause overruled the motion for a new trial, and fixed a day in the succeeding term of court until and upon which a bill of exceptions might be tendered. At such succeeding term of court up to the day so fixed the regular judge was absent, and the special judge presiding on the day fixed refused to certify the bill when tendered, and merely spread it upon the order book. In answer to appellant's contention that he had done all in his power to get the bill signed, it seems to have been assumed (rather than contested and decided) that the special judge had no power under the circumstances to sign the bill when tendered. For the court construed the statutory permission to have the bill certified by bystanders if the judge who presided at the trial did not preside when a motion for a new trial "is" overruled, as providing the method for certification of the bill if the judge who presided at the trial does not preside when a motion for a new trial "has been" overruled, and held that, in the absence of the regular judge, appellant should have procured certification by bystanders.

And the case of Ex parte Nelson, 62 Ala. 376, as a whole, seems to sustain the proposition that since a bill of exceptions should

569; Logan v. Peterson, 64 Kan. 883, 67 Pac. 1131; Missouri P. R. Co. v. Preston, 63 Kan. 819, 66 Pac. 1050.

Hayes, J., delivered the opinion of the court:

This cause was tried in the court below before a judge *pro tempore*, who, on the 29th day of December, 1910, overruled a motion for a new trial and made and entered an order extending the time in which plaintiff in error could make and serve a case-made for a period of ninety days from said date. Two days thereafter the regular judge of the court also made an order extending the time for making and serving a case-made for a period of ninety days from said date. Each of said orders provided that defendant

be signed by the judge who presides at the trial, a special judge who takes the place of a regular judge on account of the incompetency of the latter to try the cause is the proper judge to sign a bill of exceptions taken in the cause by him so tried.

Again, the rule that the judge who tried the cause alone could sign the bill of exceptions was the reason for striking from the record on appeal a bill of exceptions taken in a county court in a cause held before a judge from another county, which bill of exceptions, instead of being presented for signature to such judge, within the time by him allowed, was presented to and signed by another judge, who, also, was not the regular judge of the court, but who happened at the time to be holding the court. Parker v. La Grange, 167 Ill. 623, 48 N. E. 1057.

Again, in application of the same principle, where the case was tried, instructions given, and the jury allowed to disperse under the presidency of the regular judge, who thereupon became sick, whereupon a special judge was appointed, under whose presidency there was argument, submission to the jury, judgment, and overrulings of motions for a new trial and in arrest, after which, during the term, a third judge was appointed regular judge in the place of the former regular judge, who, in the interim, had resigned, the bill of exceptions signed by the special judge after he had vacated the bench was held good *quoad* the matters which had arisen before him; but it was said that such as had arisen before the first regular judge should have been shown by a bill of exceptions, certified to be true, under the signature of such judge. Bullock v. Neal, 42 Ark. 278.

And the court in Cowall v. Althul, supra, said: "In the present case the correct practice was to cause a bill of exceptions to be signed by the special judge, embodying the evidence adduced, proceedings had, and exceptions reserved while he was on the bench. After the regular judge came on, a second bill of exceptions might have been signed to show what was done before him."

On the other hand, in Bement v. May, 135

in error should have ten days after service of the case-made in which to suggest amendments; the case-made to be settled and signed on five days' notice by either party. It is conceded by both parties to this proceeding that both of the orders extending the time within which to serve the case are valid, and that the time for such service under the second order expired on December 30, 1910. On December 21, 1910, the case was served by plaintiff in error upon defendant in error, and the time for suggesting amendments thereto expired on the 31st day of the same month. On the 29th day of December, 1910, a second order was granted by the regular judge, extending the time within which to serve a case-made. This order was made after the case had al-

ready been served. As it is admitted, and correctly so, we think, by both parties, that this order does not affect the question now under consideration, we shall not refer to it again. No notice fixing a time to settle the case was served by either party before the expiration of the time in which to suggest amendments; but thereafter, upon notice, the case was finally settled and signed by the judge *pro tempore* on the 18th day of January, 1911.

A motion to dismiss the proceeding in error in this court challenges the authority of the judge *pro tempore* to sign and settle the case at the time he did. It has been often determined in this court that only the judge before whom the cause was tried has authority to sign and settle the case. Upton

Ind. 664, 34 N. E. 327 (rehearing denied with affirming opinion in 135 Ind. 680, 35 N. E. 387), upon affidavit of bias and prejudice in the regular judge, he had appointed a special judge after having overruled a motion for a change of venue from the county. The special judge tried the cause, and, a motion for a new trial after judgment not being passed upon by him at that term of court, was by such special judge overruled at a succeeding term, whereupon he rendered judgment and gave time for filing exceptions. There came up on review two documents, the former containing the matters relating to the application for and refusal of a change of venue, and signed by the regular judge, the other containing other matters and signed by the special judge. Both were signed during the period allowed by the special judge. After holding that the signing of the document by the regular judge had been done at the proper time, and that it was otherwise properly brought up, it was held unavailable, on the ground that by the appointment of the special judge, the regular judge had been deprived of all subsequent jurisdiction over the case; and the court, apparently upon the theory that the exceptions in regard to refusal of change of venue should have been incorporated in the bill of exceptions, over the signature of the special judge, refused to consider as reviewable matter the refusal by the court below of the change of venue. The decision was based partly upon the line of Indiana decisions that "when a judge goes out of office, he cannot sign a bill of exceptions as to matters occurring before he went out of office," but such bill must be signed by his successor. (But see *Shugart v. Miles*, infra.)

The court in *Bement v. May*, however, placed its decision more directly upon the authority of *Lee v. Hills*, 66 Ind. 474. In that case appellant, for review of the action of the court *a quo* on a certain motion, had to rely solely upon what purported to be a bill of exceptions signed by the regular judge. The court (after deciding that the bill was invalid for failure to obtain special leave of the court beyond the term 42 L.R.A. (N.S.)

to reduce the same to writing) held the signing of the bill by the regular judge improper because, after the disposal of the motion sought to be reviewed, the appellant had obtained change of venue of the cause from the regular to the special judge on account of the alleged interest and bias of the former. The court said: "It seems to us that after this cause was so removed from before Judge Patterson, and after Judge Turman as judge of the court below, assumed jurisdiction of the case, Judge Turman alone was authorized by law to sign any bill of exceptions therein. Judge Patterson's connection with or authority in or over said cause was permanently dissolved."

Besides these Indiana cases, several others are either out of harmony with the principle set out above, or else dependent for their holdings upon considerations distinctive of the respective cases.

For instance, in *Rankin County Sav. Bank v. Johnson*, 56 Miss. 125, we have the following holding: "The objection to the bill of exceptions found in the record is twofold: first, that it was signed by the attorney who presided as special judge, instead of by the circuit judge. . . . It was settled . . . that § 536 required the bill of exceptions to be signed by the circuit judge; hence, the first ground of objection is well taken." (But see the later Mississippi case of *Illinois C. R. Co. v. Bowles*, infra, under "II.")

Statutory enactment that when any judge who hears a cause shall go "out of office" before signing the bill of exceptions, such bill shall be signed by the "succeeding or acting judge" of the court, has been held not confining in application to cases of death or resignation of a judge, but applies as well to the case of a judge's becoming ill, and thereby occasioning the election of a special judge to hold a term of court. So that, when the regular judge upon trying a case gives until any day of a succeeding term for appellant to file a bill of exceptions, and from sickness cannot appear to hold such term, the bill should be signed by the special judge elected in his stead to

v. American Trust Co. 31 Okla. 436, 122 Pac. 159; Oligschlager v. Grell, 13 Okla. 632, 75 Pac. 1131. This rule has been modified by a recent statute so that under certain contingencies the successor of the trial judge may settle the case; but the conditions upon which that authority vests in the succeeding judge do not exist in this case. The motion before us presents for the first time the question as to when the authority of a judge *pro tempore* to sign and settle a case exists. In Burnett v. Davis, 27 Okla. 124, 111 Pac. 191, the cause was tried before a regular judge, whose term of office was caused to expire by a change in the district which transferred the county in which the cause was pending from the district in which it was tried to another

district, and the case went off in this court on a motion to dismiss, because the term of the trial judge did not expire during the time for making and serving a case, nor pending the time fixed for settling and signing same. In that case it was held that the statute gives authority to the judge who tries a case to certify, sign, and settle the same after he is out of office only when his term of office shall have expired or expires during the time fixed for making, settling, or signing a case; and, if no time is fixed for settling and signing the same by order of the court, then during the time fixed for making and serving the case. The decision in Burnett v. Davis, *supra*, was based upon § 6075, Comp. Laws 1909 (§ 4742, Wilson's Rev. & Anno. Stat.)

hold the term. Hence, where the regular judge was strong enough to sign same, and did so, and it was filed as signed by the judge who presided at the trial, by order of the presiding special judge, and during that term of court, the bill was held a nullity. Ranney v. Hammond Packing Co. 132 Mo. App. 324, 110 S. W. 613.

In State ex rel. Sansone v. Wofford, 111 Mo. 526, 20 S. W. 326, relator had been convicted by a regular judge, who subsequently died before signing the bill of exceptions, and in his stead there had been appointed respondent (relator's counsel in the criminal trial); relator, contending that respondent was, by his connection with the cause as attorney therein, disqualified to sign the bill preserved, had applied to respondent for, and had been refused by him, the appointment of a special judge solely to certify the bill. The court held that respondent was so disqualified; and, after citing its decisions as showing the right of a special judge to sign bills of exceptions in, and in general dispose of, such cases as had come before him, and other decisions holding that a bill of exceptions could be signed only by the judge who had heard the trial, held that a statute providing for the election of a special judge to hear and try a cause in the event of the incompetency of the regular judge had been enacted to remedy the supposed defect in the law requiring certification by the judge who heard the trial; and that the statute entitled relator to peremptory mandamus directing the appointment desired.

And where the law was that whenever the judge of a circuit court should be unable, from sickness or any other cause, to discharge any duty to be performed in vacation or between terms, it should be the duty of any other circuit judge, upon application of any party, to perform such duties, and determine all such matters as might be submitted to him, and in such matters be substituted in all respects instead of the judge unable to act, the rule requiring first-hand knowledge of matters to be certified, or certification by the judge who tries the case, was held not to apply 42 L.R.A. (N.S.)

to justify a striking from the records of a bill of exceptions taken at a trial before the regular judge, and during the period given by him for preparation, signed by a judge of another circuit, it properly appearing that the first judge was unable from sickness to sign and settle the bill. Bowden v. Wilson, 21 Fla. 165. The court (after citing authorities to the proposition that the successor of an ex-judge should sign a bill of exceptions preserved at a trial before the ex-judge before the expiration of his office) said: "So far as the power is concerned, there is, in view of the statute, no argument against his acting, growing out of the nature of the functions to be performed, which does not hold equally good as against a successor to a judge who has resigned. . . . The sources of information available to one can be made available to the other. . . . What we decide here is the existence of the power. The circuit judge must be satisfied that the bill states the truth before signing it, and unless it does state the truth, he should not sign it. We do not underestimate the delicacy or difficulties. . . . Judges who try cases experience such difficulties."

## ***II. Expiration of court term, vacation by special judge of bench, etc., as affecting his authority to sign.***

In Lerch v. Emmett, 44 Ind. 331, under the principle that a special judge appointed to try a case has the same power over the case as the regular judge would have had if undisplaced, the exercise by a special judge appointed in place of a disqualified regular judge of the statutory power of regular judges to give time after the term in which to file a bill of exceptions, and the pursuant signing thereof by the special judge after the term, were held proper.

A special judge may properly sign a bill of exceptions, taken in a case before him tried, after the close of the term he was appointed to hold. Shugart v. Miles, 125 Ind. 445, 25 N. E. 551. (The court expressly refused to extend to the control of the question, so as to invalidate the signing, a

This court, following the Kansas cases, has several times determined that a judge *pro tempore* has no power, after he ceases to sit as a court in the trial of a cause, to extend the time for making and serving a case-made in an action tried before him; and that such extension can be granted only by the regular district judge, who is, in fact, in possession of the office. *Shawnee v. Farrell*, 22 Okla. 652, 98 Pac. 942; *Horner v. Goltry & Sons*, 23 Okla. 905, 101 Pac. 1111; *Casner v. Wooley*, 28 Okla. 424, 114 Pac. 700. The writer of this opinion, uncon- trolled by the former decisions of this court and of the supreme court of Kansas, from which state our statute of procedure has been adopted, is of the opinion that the sounder and more just rule, and the one

supported by the best reason, is that the power of a judge *pro tempore*, selected or appointed to try a cause in which the regular judge is disqualified, does not cease at the end of the trial, but that his power continues with sufficient authority in him to make any and all orders necessary for the final disposition of the cause, including any order that may be necessary for lodging the case in the appellate court; but, what- ever may be the personal views of the writ- er upon this question, the rule has been too long established in this jurisdiction to be disturbed now, and, in determining the ques- tion now before us, it must be done in view of the holdings of this court that the case- made must be settled by the judge *pro tem- pore* before whom it was tried, and yet his

line of its own decisions holding a judge unauthorized after the expiration of his term of office to sign bills of exceptions taken in cases before him tried before such ex- piration.)

And so, in *Bacon v. State*, 22 Fla. 46, where accused was convicted before a special judge appointed to hold a special term of court, and allowance of time was ordered for the filing of a bill of exceptions, and subsequently, within such time, and after the term of court, such special judge signed such bill, the attorney general's motion to strike the same from the records on ap- peal was denied, the court holding that, as to the signing of the bill, the special judge had not become *functus officio*.

And since his authority "continues until the case is finally disposed of," a bill of ex- ceptions signed in vacation by a special judge (selected by the parties to try a cause) within the time by him given for the filing of the bill is validly signed. *Hol- liday v. Mansker*, 44 Mo. App. 465.

A special judge commissioned according to law to hold a term of court in place of the disabled regular judge thereof, and not such regular judge, is the "judge of the court" within the contemplation of the law providing for the signing by the "judge of the court" of bills of exceptions *nunc pro tunc* within a designated length of time after court term. *Illinois C. R. Co. v. Bowles*, 71 Miss. 994, 16 So. 235.

But it would be different in the case of a member of the bar specially selected to try a case on account of the disqualification of the regular judge to try it, where the law governing his selection provides that no notice of it shall be taken or record entry thereof be made, but that the "records, minutes, and proceedings . . . be and appear in all respects, as if the cause had been heard and determined by the judge," it having been decided that signing a bill of exceptions is part of the proceedings. *Ibid.* (*Dictum*.)

A special judge chosen under the law pro- viding that he should, "during the time he shall act in pursuance of" being so chosen, have "the same powers and perform the 42 L.R.A.(N.S.)

same duties in all respects as the regularly elected judge, is a "court," within a codal provision that "the court may, in vacation, within thirty days after the adjournment of the term, make up and sign any excep- tions." So, a bill of exceptions taken in a case before such special judge, signed by him within thirty days after the adjourn- ment of the court, is not open to the objec- tion that his power to sign had ceased at the adjournment of the court. *Carper v. Cook*, 39 W. Va. 346, 19 S. E. 379.

A special judge who has fixed a day at the succeeding term of court for the prepa- ration of a bill of exceptions, but is not present at that term, may sign a bill at the next term of court under a statute pro- viding in effect that if the judge of said court does not preside at the succeeding term, the party offering the bill shall have until the next term of court to perfect and prepare the bill. *McFarland v. Burton*, 89 Ky. 294, 12 S. W. 336; *McFarland v. Benton* (superior court abstract) 10 Ky. L. Rep. 873.

In *Atlantic Coast Line R. Co. v. Mallard*, 53 Fla. 515, 43 So. 755, the case was tried below in the circuit before a judge of an- other circuit, sitting there under order of the governor that there be an exchange of circuits for two weeks between the judges of respective circuits. After verdict, on ac- count of the volume of testimony to be transcribed, the temporary judge ordered that the time of hearing the motion for a new trial be extended to include a fixed date, after the expiration of the two weeks he was assigned to hold court; and then ad- journed court. On the day by him so fixed, he overruled a motion and ordered an al- lowance of ninety days in which appellant might prepare and have signed his bill of exceptions. The bill was signed by such judge within such time by him allowed, the trial of the motion, allowance of time, and pursuant signing all being done within the territory of such judge's own circuit. The bill was held authenticated. One jus- tice, after expressly deciding that the judge's right so to settle after the expira- tion of the two weeks, under Florida law,

power for some purposes is ended when he ceases to sit as a judge in the trial of a cause. The only statutory provision authorizing an ex-judge to sign and settle a case-made is to be found in § 6075, Comp. Laws 1909, which in part provides: "And in all causes heretofore or hereafter tried, when the term of office of the trial judge shall have expired or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign, or settle the case in all respects as if his term had not expired."

In the last clause of § 9, art. 7, of the Constitution, it is provided: "In the event any judge shall be disqualified for any reason from trying any case in his district, the

parties to such case may agree upon a judge *pro tempore* to try the same; and if such parties cannot agree, at the request of either party, a judge *pro tempore* may be elected by the members of the bar of the district present at such term."

Sections 2 and 3 of the act of the legislature providing a method for the selection of a judge *pro tem.* (article 1, chap. 14, Sess. Laws 1909) reads in part as follows:

"In any case, civil or criminal, pending in any court of record in the state . . . the parties or their attorneys of record . . . may agree upon some member of the bar . . . to act as special judge to hear and decide and render judgment in the same manner and to the same effect as such

could not in any way have grown out of his temporary appointment by the governor, based his right so to do upon his capacity as judge of his own circuit, under the law referred to in Bowden v. Wilson supra. The three other justices, concurring, apparently based the validity of the bill as signed principally upon the authority of a circuit judge, under Florida law, to act under certain circumstances in matters having arisen outside of his own circuit. The case would therefore be of little value in this note except for the fact that Shugart v. Miles and Bacon v. State, supra, are cited with approval, and the decision to some extent rested upon those cases.

And it was said in Casner v. Wooley, infra (*q. v.* in this connection), that the judge *pro tem.* had power to sign and settle a case-made after he had "ceased to sit as a judge."

And see Lee v. Hills, 66 Ind. 474.

A judge from another circuit, called in on account of the sickness of the regular judge to hold a part of a term (according to the record), "until said court shall adjourn to court in course," has authority after adjournment, and within the time by him allowed, to sign a bill of exceptions taken by a defendant convicted before such called-in judge while so presiding. State v. Bobbitt, 215 Mo. 10, 114 S. W. 511.

In Nebraska Mfg. Co. v. Maxon, 23 Neb. 224, 36 N. W. 492, where a special deputy judge, appointed to try a cause, to try which the regular judge was incompetent by reason of his being attorney for a party therein, signed the transcript on appeal after he had surrendered the records and seal back to the regular judge, the reason assigned for the holding that he was the proper person to sign was that the disqualification of the regular judge went as much to the signing of the transcript as it did to the trying of the cause. The court said: "In such case the person so appointed does not, nor can he, take or hold exclusive possession of the probate office, records, or seal, but he will have access thereto as long and whenever it may be necessary for the full and complete purpose of such appointment." 42 L.R.A. (N.S.)

In Kansas, as pointed out in SHAWNEE v. STATE PUB. CO., there is a law providing that "in all causes heretofore or hereafter tried, when the term of office of the trial judge, shall have expired, or may hereafter expire, before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign, or settle the case in all respects as if his term had not expired." And in Missouri, K. & T. R. Co. v. Ft. Scott, 15 Kan. 435, it was held that a judge *pro tem.* had such a "term of office" as to be covered by the spirit of that law, so that even though his judicial life may be ended, he may and must sign the case-made in the case before him tried; and that he signs after the adjournment of the term of court, of itself makes no difference. In this case the special judge had simply given thirty days for the making and serving of the case-made; and it was held that the law added three days, to run from the expiration of the thirty, for suggesting amendments; that the case-made, signed after the expiration of the thirty, but before the expiration of the three, additional days, by the special judge, was signed by the proper judge and within the proper time. The court said: "That the judge before whom the case is tried is the proper officer to settle the record of the proceedings upon such trial is manifest."

But in Kansas and Oklahoma, although the expiration of the term of court does not extinguish the power of the judge *pro tem.* to settle and sign a case-made, it is to be noted that from the law above quoted has been developed the doctrine followed in SHAWNEE v. STATE PUB. CO., *q. v.*, in this connection. Columbia Mfg. Co. v. Stoddard Mfg. Co. 61 Kan. 640, 60 Pac. 320, overruling 8 Kan. App. 690, 57 Pac. 136; Missouri P. R. Co. v. Preston, 63 Kan. 819, 66 Pac. 1050 (rehearing of and affirming — Kan. —, 63 Pac. 444); Butler v. Scott, 68 Kan. 512, 75 Pac. 496 (*dictum*).

In the Stoddard and Preston Cases the determinative facts and the holding were substantially the same as in the SHAWNEE CASE; *i. e.*, the judge *pro tem.*, after overruling a motion for a new trial, allowed a

disqualified judge could have rendered but for his disqualification.

"If the cause be a civil one, and the parties or their attorneys of record do not agree, the clerk of the court in which the cause is pending shall hold an election for the selection of a special judge or judge *pro tempore* to try such causes."

Accurately speaking, a judge *pro tempore* has no term of office. He is selected for a definite purpose, to wit, to try a cause in which the regular judge is disqualified. The statute does not attempt to fix his term; nor does he take the term of office of the regular judge, who continues as the regular judge of the court, with full authority in all cases except the one in which he is disqualified. The judge *pro tempore* becomes clothed with all the power of the regular judge as to such cause, necessary for him to hear such cause and render judgment therein; and when the cause has been tried and judgment rendered, his powers cease, unless continued by some order of the court. Discussing the question here involved, the su-

stated period for making and serving the case-made, and a stated period to run, from the expiration thereof, for suggestion of amendments, the case to be settled upon a specified number of days' notice by either party. There was fixed no specified time for settlement, nor any time limit for the giving of a notice of settlement. Notice to settle was given after the expiration of the time for suggesting amendments, and pursuant settlement by the judge *pro tem.* was held unauthorized.

Although it has not been decided, the general tenor of this line of cases seems to indicate that had the notice to settle been given by a party before the expiration of the time for suggesting amendments, pursuant settlement, though done after the expiration of the time for suggesting amendments, would not on that account have been invalid.

In *Murray v. East End Improv. Co.* 22 Ky. L. Rep. 1477, 60 S. W. 648, the court overruled a motion to strike from the record a bill of exceptions taken before a special judge who was elected and presided at the trial of the cause in the absence of the regular judge, and by such special judge signed and ordered to be filed within the time by him given for such filing, and after the regular judge had resumed the bench, and upon a day upon which the latter was also holding court.

"The honorable special judge was mistaken in basing his opinion as to his incompetency to sign the bill of exceptions upon the ground that he had vacated the bench." *Bullock v. Neal*, 42 Ark. 278.

In *Nebraska Mfg. Co. v. Maxon*, 23 Neb. 224, 36 N. W. 492, there is *dictum* to the effect that a special deputy probate judge appointed to preside during the temporary absence of the judge, as distinguished from 42 L.R.A.(N.S.)

preme court of Kansas, in *Columbia Mfg. Co. v. Stoddard Mfg. Co.* 61 Kan. 640, 60 Pac. 320, after reviewing the case of *Kansas & C. P. R. Co. v. Wright*, 53 Kan. 272, 42 Am. St. Rep. 282, 36 Pac. 331, said: "The above case is, in effect, a holding that the term of office of a judge *pro tem.* is limited to such specific periods as he sets for the making and service of the case and the suggesting of amendments thereto, and the settlement of the case, and that, if within such term of office no time is fixed for the settlement of the case, such term cannot be prolonged by specifying an indeterminate period within which the parties may come before him for the settlement of the case, or, at least, that if the time for its settlement has been left indeterminate it must be determined by a notice given within the term, fixing a definite date for the settlement of the case."

And in *Missouri P. R. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050, the same court, in the fourth paragraph of the syllabus, held: "A judge *pro tem.*, upon overruling a mo-

one who might be appointed to act in a cause where the regular judge is disqualified to act, has an authority to act measured by the duration of the absence of the regular judge, and hence, upon the return of the regular judge, such special judge is not empowered to sign transcripts on appeal of the cases by him tried.

In *State v. Grant*, 124 Mo. App. 129, 100 S. W. 1113, a bill of exceptions signed by a judge called in from a sister circuit is of no avail where, during the interim between the adjournment of the court and the signing of the bill, his commission as circuit judge of his circuit has expired, inasmuch as his "authority and jurisdiction over the case existed only in virtue of his office" as circuit judge, and "not by the authority of his being called in to try the cause." The court expressed a personal inclination to hold the other way, but considered itself bound by the previous supreme court decision of *State v. Gordon*, *infra* (q. v. in this connection), thus holding that the court in that case based the result upon the re-election of the called-in judge, and that since the called-in judge in *State v. Grant* had not been re-elected, the bill as brought up was invalid.

"It has been held that, where a special judge is elected to preside at the trial of a particular case, his authority over that case continues until its final disposition in the circuit court; and, if time for filing a bill of exceptions be extended beyond the term at which the case is tried, the special judge may authenticate the bill. As to that particular case, he is the judge of the court for all purposes. . . . But the rule is different where the special judge is elected to hold a term or part of a term of court for the transaction of all of the business that may properly come before the court during that period. . . . When his

tion for a new trial and rendering final judgment, allowed a certain time for the making and service of a case-made for this court, fixed a time within which amendments were to be suggested, and ordered that it be settled upon ten days' notice by either party. Held, that the term of office of such judge expired after the last day fixed for suggesting amendments, and that a case-made settled and signed by him after that time will not be considered."

And in *Butler v. Scott*, 68 Kan. 512, 75 Pac. 496, it is said: "In cases tried before a judge *pro tem.* it is obvious that the contingency referred to cannot arise. The term of office of a judge *pro tem.*, where no time is fixed for settling a case, is held to be co-extensive with the time allowed for suggesting amendments, and therefore cannot expire before the time fixed for making the case."

The foregoing decisions of the Kansas court were made under a statute providing for the service and settling of a case-made, the same as exists in this state, and under

statutes relative to the selection of *pro tempore* judges very similar to the statutory and constitutional provisions of this state; and we adopt the rule of those cases and hold that, where no time has been fixed either by order of court or by notice given by the parties within the time for serving a case and suggesting amendments thereto for settling a case, the authority or term of a judge *pro tem.* ceases upon the expiration of the time fixed for suggesting amendments, and a case-made settled by him after that time is a nullity.

In the case at bar, no notice was given by either party fixing the time for settling the case before the expiration of the time within which to suggest amendments; and the case was not signed and settled by the judge *pro tem.* until after the expiration of said time.

It therefore follows that this proceeding in error should be dismissed.

Turner, Ch. J., and Williams, Kane, and Dunn, JJ., concur.

term ends he . . . ceases to be judge for any purpose, just as a regular judge becomes divested of all judicial powers and functions at the expiration of his term of office." *Berry Bros. v. Leslie*, 131 Mo. App. 236, 110 S. W. 685. And so, with this distinction as a basis, the court held a bill of exceptions taken in a case tried before a special judge elected to hold a part of a term on account of the inability of the regular judge, and signed by such special judge after court term, but within the "ten days after adjournment of said" term, allowed by order of the court, to be unauthenticated.

### III. Power upon rendition of judgment to allow time for preparing and filing bill of exceptions or case-made.

As can be noted incidentally from several of the propositions throughout this note, the power of a special judge upon rendering judgment to give a period in which to prepare a case-made or bill of exceptions, or to extend the statutory time for such preparation, seems to have been assumed rather than decided in most cases. There is probably no case where the right, as such, has been contested and by a court denied. It seems to follow as a matter of course from his function of completing the trial and rendering judgment. And in *McFarland v. Burton*, 89 Ky. 294, 12 S. W. 336, his right to exercise with regard to a case by him tried the statutory power of judges to fix a day at the succeeding term of court for the filing of the bill of exceptions was expressly said to be unquestionable.

And thus in the line of Oklahoma criminal cases (*infra* under "IV.") holding that after ceasing to sit as a court, he could not extend the time after once having fixed it, it seems to have been assumed that his pow-

er to fix such period was unquestionable. And the court expressly stated that he had such power in *Steen v. State*; *Raspberry v. State*; *Dobbs v. State*; *Johnson v. State*; and *Austin v. State*, *infra* (as well as the time for filing the petition in error and case-made in the criminal court of appeals within the statute).

### IV. Power to extend time given for preparing or filing bill of exceptions or case-made.

Upon the question, however, as to which judge is to extend the time originally given by rendition of judgment for the preparation of bills of exceptions or cases-made, the cases are few and inharmonious.

In *Hulme v. Dffenbacher*, 53 Kan. 181, 36 Pac. 60, a codal provision authorizing "the court or judge" to extend the time for making a case and the time within which the case might be served was held not to authorize a judge who has given time for making and signing a case-made, to extend that time by an order after the expiration of his term of office. As a part of the same codal section there followed the Kansas law discussed *supra* under "II." The court said: "The first part of the section gives authority to the court or judge to grant an extension of time. The last part gives authority to the judge who tried the case to sign and settle notwithstanding the fact that his term of office may have expired. The reason for granting this power to the individual who has ceased to be an officer is perfectly apparent. He has knowledge of what occurred at the trial, while his successor in office may know nothing about it. . . . Whether an order for extending the time for making and serving a case should be granted depends on circumstances arising after the

trial, and having no necessary connection with it." This case did not involve any judge *pro tem.*, but is the historical starting point of the line of Kansas and Oklahoma decisions denying to a judge *pro tem.* after he has vacated the bench the right to make an order extending the time by him given for the making and serving of a case-made.

"A judge *pro tem.* after his term of office has expired cannot extend the time for making and serving a case-made." Wallace v. Caldwell, 9 Kan. App. 538, 59 Pac. 379 (*dictum*).

And following Kansas, Oklahoma in the same fashion has construed a statutory provision that the "judge or court" may extend the time for making a case, etc. So that the appeal was dismissed in Shawnee v. Farrell, 22 Okla. 652, 98 Pac. 942, where the trial judge *pro tem.* gave time for the making and signing of the case-made, and then, prior to its expiration, ordered an extension and signed the case-made after the expiration of the first period, but before the expiration of the second.

And thus, cases-made have been held improperly brought up and hence of no avail to appellant because certified during such attempted, but invalid, extensions of time, made after vacation of the bench by the respective trial judges *pro tem.* Horner v. Goltry & Sons, 23 Okla. 905, 101 Pac. 1111; Casner v. Wooley, 28 Okla. 424, 114 Pac. 700; Raspberry v. State, 4 Okla. Crim. Rep. 613, 103 Pac. 865, 112 Pac. 759; Steen v. State, 5 Okla. Crim. Rep. 295, 114 Pac. 342; Dobbs v. State, 5 Okla. Crim. Rep. 475, 114 Pac. 378, rehearing denied in 5 Okla. Crim. Rep. 480, 115 Pac. 370; Austin v. State, 6 Okla. Crim. Rep. 177, 117 Pac. 1098; Howell v. State, 6 Okla. Crim. Rep. 627, 117 Pac. 723; Johnston v. State, 6 Okla. Crim. Rep. 354, 118 Pac. 674.

The express theory (equivalent in force to holding) of this line of decisions is that the regular judge (or else "such judge as may be then presiding in said district and is therefore the court," Dobbs v. State, *supra*) is the proper judge to order the extension under such circumstances. So the case of Whiteacre v. Nichols, 17 Okla. 387, 87 Pac. 865, held that where a judge *pro tem.* had tried a cause and given time for serving a case-made, the extension thereof by the regular judge at chambers or while on the bench was valid.

But, in Rawlins v. Timons, 80 Mo. App. 84, it was held, where a special judge had tried a cause and allowed time for filing a bill of exceptions, that an order extending the time was invalid because signed by the regular instead of the special judge, and that hence the bill signed by the special judge after the time by him originally allowed, but within the attempted extension thereof, was filed too late to be considered on appeal. The court remarked that had it affirmatively appeared from the record that the special judge had been elected, not because the regular judge was disqualified to try the cause, but for a cause that did 42 L.R.A. (N.S.)

not disqualify him, then either judge might have made the extension; but held that, in the absence of a presumption either way, the bill as brought up could not be considered.

In State v. Gordon, 196 Mo. 185, 95 S. W. 420, where, on account of alleged prejudice of the regular circuit judge, a judge from another circuit was called in to try the case, the validity of two successive extensions of time given by such latter judge for filing exceptions entered of record by direction of such judge was seemingly not questioned, for appellee relied upon the fact that such trial judge's office as circuit judge had expired after trying the cause, before his allowance of the original time for filing the bill. The allowance of time, extensions thereof, and pursuant signing by such judge, were all held valid, in view of his having been re-elected as his own successor.

In Martin v. Mercantile Town Mut. F. Ins. Co. 124 Mo. App. 221, 101 S. W. 672, a bill of exceptions taken in a trial before a judge *pro tem.* elected to hold a part of the term during the inability of the regular judge, and signed by such special judge within an extension made by order of the regular judge of the time originally allowed for filing, was held to be a failure. The court said: "Whether the regular or special judge had authority to extend the time for filing the bill of exceptions, and sign and allow said bill, the appeal must fail except as to the record proper. One of the extensions was allowed only by the regular judge. Hence, if the power was in the special judge, that extension was invalid. On the contrary, if the power was in the regular judge, the bill of exceptions, not having been signed by him, is invalid."

And in State v. Bobbitt, *supra*, the signing by the called-in judge was done after the expiration of the time by him originally granted for the purpose, but before the expiration of an extension of that time made by such called-in judge during vacation. The court expressly held that he did not exceed his jurisdiction in making the extension.

E. K. M.

#### WASHINGTON SUPREME COURT. (Department No. 1.)

NICK GLUCINA, by Guardian *ad Litem*,  
Respt.,  
v.

F. H. GOSS BRICK COMPANY, Appt.  
(63 Wash. 401, 115 Pac. 843.)

Master — injury to minor — misrepresentation of age — effect.

1. That a master employed a child which

*Note. — Liability of master for injury to minor servant who secures employment by misrepresenting his age.*

This note supplements those in 20 L.R.A. (N.S.) 500, and 25 L.R.A. (N.S.) 708.



the statute forbade him to employ because of its tender age, in good faith, and upon the express representation of the child's parent that it was over the prescribed age, will not absolve him from liability for injury to the child while it is at work, although the accident is of such a nature that had the child not been under age, assumption of risk or contributory negligence would have been available as a defense.

**Damages — amount — loss of hand.**

2. The appellate court will not interfere with an allowance of \$8,500 for the destruction of the right hand of a fourteen-year-old boy.

(June 1, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. F. S. Blattner, Fogg & Fogg, and Hudson, Holt, & Harmon, for appellant:

The child-labor statute is not violated unless the defendant knew, or in the exercise of reasonable care ought to have known, that the boy was under fourteen.

Generally as to whether employment of a minor in violation of the statute is negligence which will sustain an action by it for personal injuries, see the note in 7 L.R.A.(N.S.) 335.

The question whether one employing a child under the statutory age may rely upon contributory negligence or assumption of risk to defeat liability for personal injuries sustained by the latter is discussed in the notes in 12 L.R.A.(N.S.) 461, and 20 L.R.A.(N.S.) 876.

The fact that one falsely represented himself as of age for the purpose of obtaining employment does not estop him from showing, in an action for personal injuries, that he was young and inexperienced; but such fact is a circumstance to be considered by the jury in determining the degree of care the defendant was bound to exercise in warning and instructing him regarding his duties. *Wilks v. St. Louis & S. F. R. Co.* 159 Mo. App. 711, 141 S. W. 910, in which the court added that if the defendant believed the plaintiff was twenty-one years of age, it could not be said that it owed him the same duty to warn and instruct that would have devolved upon it if it had believed he was a minor or inexperienced.

Attention is also directed to *Lee v. Sterling Silk Mfg. Co.* 134 App. Div. 123, 118 N. Y. Supp. 852, holding merely that in an action against a master for injuries received by a minor who was employed in violation of statute, evidence that the latter misrepresented his age was admissible.

In *Hart v. New York C. & H. R. R. Co.* 42 L.R.A.(N.S.)

*Kirkham v. Wheeler-Osgood Co.* 39 Wash. 421, 81 Pac. 869, 4 Ann. Cas. 532; *Koester v. Rochester Candy Works*, 194 N. Y. 92, 19 L.R.A.(N.S.) 783, 87 N. E. 77, 16 Ann. Cas. 589; *Marino v. Lehmaier*, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 573.

A violation of the child-labor statute does not constitute negligence *per se*, involving a defendant in an absolute liability for all damages sustained, but is only evidence of negligence. *Ibid.*

The breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment. This does not preclude the defense of contributory negligence on the part of the plaintiff.

*Lee v. Sterling Silk Mfg. Co.* 115 App. Div. 539, 101 N. Y. Supp. 78; *Schmidt v. Bruen*, 56 Misc. 130, 106 N. Y. Supp. 443; *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Darsam v. Kohlmann*, 123 La. 164, 20 L.R.A.(N.S.) 881, 48 So. 781; *Evans v. American Iron & Tube Co.* 42 Fed. 519; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; *Koester v. Rochester Candy Works*, 194 N. Y. 92, 19 L.R.A.(N.S.) 783, 87 N. E. 77, 16 Ann. Cas. 589; 20 Am. & Eng. Enc. Law, 151; *Jacobson v.*

205 N. Y. 317, 98 N. E. 493, involving an action for the death of a servant caused by the explosion of a locomotive boiler due to the negligence of the engineer, the court held that the deceased's misrepresentation of his age in the contract of employment affected such contract in the sense that it made it voidable, but that it did not affect the relation of master and servant with respect to the former's obligation under the statute respecting the safety of persons serving it, and that therefore evidence as to such misrepresentation was properly excluded.

And in a *dictum* in *Norfolk & W. R. Co. v. Sollenberger*, 110 Va. 606, 66 S. E. 726, 857, involving the action for the killing of a railroad flagman while he was asleep on the track, the court said that if, after discovering the fact, the railroad company had failed to exercise due care to avoid injuring him, it would have been liable although he was a minor and induced the company to give him employment by misrepresenting his age.

Minors under statutory age of employment.

The Alabama supreme court takes the view that the right of a servant to maintain an action for injuries under the employers' liability act is not affected by the fact that he obtained employment by misrepresenting his age, except where his immaturity immediately contributes to the injury. *St. Louis & S. F. R. Co. v. Brantley*,

Merrill & R. Mill. Co. 107 Minn. 74, 22 L.R.A.(N.S.) 309, 119 N. W. 510; Kirkham v. Wheeler-Osgood Co. 39 Wash. 422, 81 Pac. 869, 4 Ann. Cas. 532.

The verdict of \$8,500 was very excessive and should be reduced.

Barclay v. Puget Sound Lumber Co. 48 Wash. 248, 16 L.R.A.(N.S.) 140, 93 Pac. 430; Olsen v. Tacoma Smelting Co. 50 Wash. 131, 96 Pac. 1036; Ball v. Peterman Mfg. Co. 47 Wash. 656, 92 Pac. 425; Kirby v. Wheeler-Osgood Co. 42 Wash. 610, 85 Pac. 62; Campbell v. Wheelihan-Weidauer Co. 45 Wash. 678, 89 Pac. 161.

Messrs. Govnor Teats, Huga Metzler, and Leo Teats, for respondent:

The employment of a child in a factory, mill, or workshop prohibited by law is the real, true, and proximate cause, and any other negligent act on the part of the employer is but an aggravation of that negligence.

Sharon v. Winnebago Furniture Mfg. Co. 141 Wis. 185, 124 N. W. 299; American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766; Strafford v. Republic Iron & Steel Co. 238 Ill. 371, 20 L.R.A.(N.S.) 876, 128 Am. St. Rep. 129, 87 N. E. 358; Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229; Hankins v.

Reimers, 86 Neb. 307, 125 N. W. 516; Lenahan v. Pittston Coal Min. Co. 218 Pa. 311, 12 L.R.A.(N.S.) 401, 120 Am. St. Rep. 885, 67 Atl. 642; Sullivan v. Hanover Cordage Co. 222 Pa. 40, 70 Atl. 909; Stehle v. Jaeger Automatic Mach. Co. 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; Ornamental Iron & Wire Co. v. Green, 108 Tenn. 161, 65 S. W. 399; Starnes v. Albion Mfg. Co. 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470; Leathers v. Blackwell Durham Tobacco Co. 144 N. C. 330, 9 L.R.A.(N.S.) 349, 57 S. E. 11; Frank Unnewehr Co. v. Standard Life & Acci. Ins. Co. 99 C. C. A. 490, 176 Fed. 16.

Messrs. Ralph Teats and Peter David also for respondent.

Mount, J., delivered the opinion of the court:

Action for personal injuries. The respondent, Nick Glucina, who was under the age of fourteen years, was employed by the appellant in a brick factory. He was employed to operate a hoisting machine. This machine consisted of a large wheel, called a "bull wheel," to the axle of which a drum was attached. A cable was wound upon the drum and was used in drawing cars filled with clay from a pit, along an inclined

168 Ala. 579, 53 So. 305, following Luper v. Atchison, T. & S. F. R. Co. 81 Kan. 585, 25 L.R.A.(N.S.) 707, 106 Pac. 284.

The doctrine of American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766, which is set out in the note in 20 L.R.A.(N.S.) 500, was adopted in Beauchamp v. Sturges & B. Mfg. Co. 250 Ill. 303, 95 N. E. 204, holding that the fact that the plaintiff misrepresented his age did not estop him from maintaining an action for injuries received in services in which he was employed in violation of the Illinois act of 1903, which provides that no child under the age of fourteen years shall be employed at certain gainful occupations.

And the West Virginia court takes the view that the fact that a minor servant misrepresented his age does not prevent him from recovering for injuries received in the employment, where he was employed in violation of a statute providing that no boy under fourteen years of age shall be permitted to do certain work, and in all cases of doubt the parents or guardians of such boy shall furnish affidavit of their ages. Norman v. Virginia-Pocahontas Coal Co. 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857, followed in Burke v. Big Sandy Coal & Coke Co. 68 W. Va. 421, 69 S. E. 993. In the first of the two cases, the court said that the inhibition was upon the employer, and not upon the employee, and that to escape liability he must either have procured the affidavit, or prove that the servant was of the required age. Apparently to the same effect is Blankenship 42 L.R.A.(N.S.)

v. Ethel Coal Co. 69 W. Va. 74, 70 S. E. 863.

While not involving misrepresentations as to age, Stenson v. J. H. Flick Constr. Co. 146 App. Div. 66, 130 N. Y. Supp. 555, is important in this connection, as it holds that in an action for the killing of a servant unlawfully employed under the statutory age, the burden was on the plaintiff to show that the defendant knew that the decedent was not of the statutory age, or that his appearance was such as to put the defendant upon inquiry with respect thereto; and that the mere fact that the decedent was three months under such age, without any evidence as to his appearance with respect to age, was not sufficient to take the case to jury and to permit it to draw the inference that the defendant knew, or should have known, that the boy was within the prohibitive age.

Attention is also directed to Darsam v. Kohlmann, 123 La. 164, 20 L.R.A.(N.S.) 880, 48 So. 781, in which, after holding that in the circumstances of the case the master was not liable for injury to a boy employed in violation of the statute, where the injuries were received while the boy was subjecting himself to an obvious risk the danger of which he was capable of appreciating,—the court added that *a fortiori*, this was true where the boy was employed in the belief, superinduced by his own representations and his appearance, and by the acquiescence of his family, that he was over the age prescribed by the statute.

L. A. W.

track, to about the point of the hoist. The bull wheel was operated by means of a friction pulley, which revolved upon the outer rim of the wheel. This friction pulley was located on the right-hand side of the bull wheel, about level with the axle thereof. On the opposite side of the bull wheel was a brake. This brake and friction pulley were so connected together that, by the use of a lever with its fulcrum near the friction pulley, the pulley would be drawn against the bull wheel, while the brake on the opposite side would be released, and *vice versa*. When the lever was raised to a vertical position, the friction wheel was released from the bull wheel, and the brake was applied. When the lever was placed in a horizontal position, the friction wheel was applied, and the brake was released. The friction wheel was in constant motion. The boy was employed to operate this lever. While in this employment, he caught his right hand either in the friction pulley or between the brake and the bull wheel. The result was the mangling of his hand so that it is of little use. This action was brought by his father, as guardian *ad litem*, to recover damages.

Two complaints were filed in the action. In the first complaint it was alleged that the injury occurred by the hand being caught in the friction pulley while the car was being drawn up the incline. In the next complaint, it was alleged that the injury occurred by the hand being caught between the brake and the bull wheel while the car was going down the incline. At the trial the boy testified, through an interpreter, that the injury occurred in the last-named way. No one except the boy saw the accident. The complaint, in addition to the fact that the boy was under fourteen years of age, alleged that the defendant neglected to warn the boy of the dangerous condition of the place, or to caution him as to such dangers and hazards, and also that the defendant had neglected to guard the dangerous places upon the machine. The defendant, for answer, denied the allegations of the complaint, and pleaded that the boy assumed the risk and was guilty of contributory negligence. The defendant also pleaded that the boy was employed at the urgent request of his father, who represented to the defendant that the boy was over the age of sixteen years and competent and able to do the work; that the defendant relied upon the representations made by the father and believed that the boy was, as he appeared to be, over the age of sixteen years; that the boy was employed solely by reason of the representations made and the appearance of the boy, and not otherwise. The trial court sustained a demurrer to the last-  
42 L.R.A. (N.S.)

named affirmative defense. During the trial of the case, the defendant offered to show that it had used care to ascertain the age of the boy, and had exercised good faith in giving the boy employment; and requested the court to instruct the jury to the effect that, if the defendant used care in order to determine the age of the boy, and had been informed by the boy's father that the boy was over fourteen years of age, and that, if the age and appearance of the boy were such as to lead the defendant to believe, and that if from these considerations the defendant did actually believe, that the boy was over the age of fourteen years at the time of the employment, then the defendant would not be guilty of a violation of the statute in employing the boy. The trial court denied this request and instructed the jury, in substance, that, if they found that the boy was under the age of fourteen years at the time of his employment or injury, and that he was employed to work in this mill or factory and was injured therein, the employment was unlawful; that the defendant assumed all the risk; that the defense of contributory negligence of the plaintiff was not available to the defendant; and that the representations made by the father as to the age of the boy were no defense to the action. The jury returned a verdict in favor of the plaintiff, for \$3,500. This appeal is prosecuted from the judgment entered upon the verdict.

The appellant argues that the court erred in sustaining the demurrer to the defense of good faith, and in instructing the jury to the effect that the good faith of the defendant in employing the boy was immaterial in the case. The statute makes it unlawful for any person to employ a male child under fourteen years of age in any factory, without the written permission thereto of a judge of the superior court of the county wherein such child may live. Laws 1909, p. 948, § 195 (Rem. & Bal. Code, § 2447). The same statute also makes it unlawful for any person, having the care, custody, or control of such child, to permit such employment. It is obvious that the legislature under its police power sought to protect the lives and limbs of children in shops and factories, by prohibiting such employment. In *Kirkham v. Wheeler-Osgood Co.* 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532, we said: "The manifest purpose of the act is to prohibit the employment of children in certain places, and the prohibition extends to all parties connected with the employment. The employment, as well as the hiring out, is forbidden. An employer who knowingly employs or keeps in his employ a minor within the prohibited age is guilty of a violation of the statute, and the

employment itself is illegal. In the case at bar the minor was employed without the intervention of either parent or guardian, and if we adopt the views of counsel the act punishes only the child himself, the very person whom it sought to protect." In that case, at that time we used the word "knowingly," and counsel now argues that, without such knowledge, there is no guilt. But we are of the opinion that the employer must know at his peril that the person employed is over the prohibited age. In that same case, we held that it was no defense that the child represented himself as being over fourteen years of age. And in *State v. Constatine*, 43 Wash. 102, 117 Am. St. Rep. 1043, 86 Pac. 384, which was a criminal prosecution for selling liquor to a minor, where the statute used the word "knowingly," we held that, if the bartender knew that the child was a minor, or had such information from his appearance or otherwise which would lead a prudent man to believe he was a minor, and if followed by inquiry must bring knowledge of that fact home to him, then the sale was made knowingly. See also *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037. In the statute now under consideration the word "knowingly" does not appear. It was used in *Kirkham v. Wheeler-Osgood Co.* supra, upon the assumption that knowledge followed from the fact that the child was actually under that age. We have no doubt that, if the father were suing for loss of services of the child, his representation that the child was sixteen years of age would estop him from saying otherwise at this time. But the fact that the father misled the appellant is no defense as against the child. Even if the appearance of the child indicated that he was over the age of fourteen years, that fact would not relieve the defendant, because the statute makes no such exception. It recites: "Every person who shall employ any male child under the age of fourteen years at any labor whatever, in or in connection with, any store, shop, factory, . . . shall be guilty of a misdemeanor."

In the case of *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766, which was a case similar to this, the supreme court of Illinois said: "These instructions were refused, and it is argued that the appellant was not liable unless it appeared that it had knowingly violated this statute. The dramshop act forbids the sale of intoxicating liquors to minors. This court has held, under that statute, that it is immaterial whether the dramshop keeper knew the purchaser to be a minor, and that it is no answer to say that the seller may be imposed upon and made to suffer the penalties of the law when he had no inten-

tion to violate its provisions. *McCutcheon v. People*, 69 Ill. 601, 1 Am. Crim. Rep. 471. The reasoning which led to that conclusion obtains here. Appellant was, by the statute, permitted to employ in its shops only persons above the age of fourteen years. It must ascertain, at its peril, that the persons it employs are members of the class of persons it may lawfully employ." To the same effect, also, is the case of *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229. In *Lenahan v. Pittston Coal Min. Co.* 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642, the supreme court of Pennsylvania said: "After full consideration, we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and, when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and, if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principle that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child so employed did not have the mature judgment, experience, and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation." See also *Green v. Western American Co.* 30 Wash. 87, 70 Pac. 310; *Hall v. West & S. Mill Co.* 39 Wash. 447, 81 Pac. 915, 4 Ann. Cas. 587. We are satisfied, therefore, that the court did not err in sustaining the plaintiff's demurrer to the affirmative answer, or in giving the instructions which were given, or refusing the instructions mentioned above which were requested by the appellant.

Appellant also argues that the judgment is excessive. The injury was a severe one. The boy has substantially lost his right hand. What there is left of it appears to be almost useless, if it is not an actual detriment to him. We are not convinced, therefore, that the judgment is so excessive that we should make a reduction in the face of the verdict and the refusal of the trial judge to interfere.

The judgment is therefore affirmed.

**Parker, Gose, and Fullerton, JJ., concur.**

A petition for rehearing denied.

NEW HAMPSHIRE SUPREME  
COURT.

JOHN SANFORD

v.

GEORGE BOSS et al.

(76 N. H. 476, 84 Atl. 936.)

**Easement — conveyance of paint shop  
— use of passageway for ladder rack.**

1. A conveyance by metes and bounds of lands customarily used as a paint shop, with knowledge that such use will continue, does not include a right to maintain a ladder rack on an adjoining passageway, although the grantor has for a long period maintained one there and its use in connection with the shop is convenient.

**Deed — construction — conveyance of easement.**

2. The right to maintain a ladder rack in a passageway adjoining a building on land conveyed by metes and bounds will not be held to have passed by the deed, where the deed was with reference to a plan, on which the rack was not shown, while a right of passage through the way is expressly mentioned.

(October 1, 1912.)

**EXCEPTIONS** by defendants to rulings of the Superior Court for Rockingham County made during the trial of an action brought to recover damages for trespass which resulted in a verdict for plaintiff. Overruled.

Charles H. Mendum, prior to 1905, owned a lot on the north side of a street in Portsmouth on which stood two buildings with a passageway between them. In March the westerly portion was conveyed by Mendum's administrator to the defendant Boss, by a deed describing the granted premises as follows: "A certain lot of land with the buildings thereon, situate on Daniel street in said Portsmouth, bounded and described as follows: Beginning on the north side of Daniel street at land of John J. Pickering estate and others, thence running northerly 24 feet; thence easterly 3 feet 6 inches; thence northerly by said Pickering estate 81 feet 8 inches, to land of National Mechanics' & Traders' Bank; thence easterly by said bank's land 21 feet and 1 inch, to other land of said C. H. Mendum estate; thence southerly by land of estate of C. H.

Mendum 27 feet 8 inches; thence westerly by said Mendum estate 5 $\frac{1}{2}$  feet; thence southerly by said Mendum estate 72 feet to Daniel street; thence westerly by Daniel street 27 feet 6 inches, to point begun at. Together with the use of a right of way on the easterly side of the lot herein conveyed, as it now exists, subject to projections on the buildings in the right of way as shown on plan made by L. K. Scruton, dated March 25, 1905." Later the remainder of the premises were conveyed by the administrator to plaintiff. For many years prior to the conveyance to defendant the buildings conveyed had been used as a paint shop. On the east side of the building nearest the street, in the passageway, was a ladder rack built of joists. It was nailed to the side of a building and had been used to store the ladders used by tenants of the paint shop in their business. The passageway was used for access to buildings in the rear of the paint shop and the easterly building on the street, and this use was somewhat impeded by the ladder rack.

Further facts appear in the opinion.

Messrs. Page, Bartlett, & Mitchell, for defendants:

The grant of a thing will include whatever the grantor had power to convey that is reasonably necessary to the enjoyment of the thing granted.

Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 398; United States v. Appleton, 1 Sumn. 492, Fed. Cas. No. 14,463; Brown v. Dickey, 106 Me. 97, 75 Atl. 382; Kirtledge v. Woods, 3 N. H. 503, 14 Am. Dec. 393; Cocheo Mfg. Co. v. Whittier, 10 N. H. 305; Winchester v. Hees, 35 N. H. 45; Dunklee v. Wilton R. Co. 24 N. H. 489; Coolidge v. Hager, 43 Vt. 9, 5 Am. Rep. 256; Sherman v. Williams, 113 Mass. 481, 18 Am. Rep. 522; Oliver v. Dickinson, 100 Mass. 114.

Mr. William E. Marvin also for defendants.

Messrs. Kelley & Hatch, for plaintiff:

A person cannot gain a title by prescription in his own land.

Stevens v. Dennett, 51 N. H. 324; Wells v. Parker, 74 N. H. 193, 66 Atl. 121; Wiggin v. Smith, 54 N. H. 213.

The ladder rack was not an easement which would pass without any words of description or any expressed intention of the grantor in his deed to the grantee.

Burns v. Gallagher, 62 Md. 462; Batchelder v. State Capital Bank, 66 N. H. 387, 22 Atl. 592; Wentworth v. Philpot, 60 N. H. 193; Smith v. Smith, 62 N. H. 429; Smith v. Blanpied, 62 N. H. 652.

The defendant's deed gives him no right or easement in the premises covered by the rack.

**Note.** — The general subject of the creation of easements by severance of a tract of land with an apparent benefit existing is considered in the note to Rollo v. Nelson, 26 L.R.A.(N.S.) 315. Closely allied to that subject is the question considered in the note to Miller v. Hoeschler, 8 L.R.A.(N.S.) 327, as to implication from necessity of easement other than right of way. 42 L.R.A.(N.S.)

*Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 428; *Brown v. Manter*, 21 N. H. 533, 53 Am. Dec. 223; *Manning v. Smith*, 6 Conn. 289; *Sumner v. Williams*, 8 Mass. 174, 5 Am. Dec. 83; *Swazey v. Brooks*, 34 Vt. 451; *Spaulding v. Abbot*, 55 N. H. 423; *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85.

**Parsons, Ch. J.**, delivered the opinion of the court:

The deed upon which the defendants claim does not convey to Boss a paint shop in terms, but describes a tract of land by metes and bounds which do not include the land on which the ladder rack stands. But the defendants claim a right to maintain the ladder rack because the maintenance of such a contrivance, upon the spot where this one is, is essential and reasonably necessary for the enjoyment of the premises conveyed. Counsel do not appear to differ as to the law. The defendants cite *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388; *Winchester v. Hees*, 35 N. H. 43; *Dunklee v. Wilton R. Co.* 24 N. H. 489; *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305; and *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346, to which may be added *Horne v. Hutchins*, 71 N. H. 117, 123, 124, 51 Atl. 645. The plaintiff does not controvert the rule of these authorities, but says that an easement cannot pass by implication merely upon the ground of convenience, citing *Batchelder v. State Capital Bank*, 66 N. H. 386, 22 Atl. 592; *Smith v. Blanpied*, 62 N. H. 652; *Smith v. Smith*, 62 N. H. 429; and *Wentworth v. Philpot*, 60 N. H. 193. This proposition the defendants do not deny, but claim that the conclusion of the trial court that the ladder rack was not indispensable, nor necessary to the enjoyment of the granted premises, but merely very convenient for one using them as a paint shop, is erroneous. Upon the authorities, therefore, as the parties have placed their case, the only question is whether the maintenance of a ladder rack in the passageway was essential and reasonably necessary to the enjoyment of the granted premises. If this question is one of fact (see *Winchester v. Hees*, 35 N. H. 43, 48), the defendants are concluded by the finding of the trial court, for there was some evidence in its support. But, assuming (without deciding) that the question is open here, no different result can be reached. Although the deed does not convey a paint shop in terms, it might be found from the fact of long use that the tract conveyed was sold to be used as a paint shop. A ladder rack is under-

stood to be a contrivance for storing ladders when not in use. If, for carrying on the work in a paint shop, ladders were necessary to such an extent that the work could not be carried on without them, so that they must be kept at hand ready for use in the shop when required, it might be found that some place on or adjoining the premises was essential to the use of the tract conveyed as a paint shop. It is common knowledge, however, that painters do not use ladders in connection with work done in a shop, but to enable them to do work outside and away from the shop,—to reach the elevated portions of other buildings. Ladders are necessary to the trade of a house painter, and consequently a place to store them when not in use may be essential. A building or shop in which to store supplies and to paint such objects as can conveniently be brought thereto may also be necessary. But, as the ladders are not used for the work in the shop, it is not necessary that they be stored in or near it. It may be more convenient to have all tools of the trade kept proximately in the same place, but it is not necessary. Local conditions might make some other location more convenient for the storage of the ladders. But it is plainly not essential nor reasonably necessary that all the tools of a house painter's trade be kept together; and, as ladders are not used in the proposed enjoyment of the premises conveyed, it cannot be said that their storage in or near the premises is necessary to the beneficial enjoyment thereof which the law presumes the grantor intended the grantee should have. *Horne v. Hutchins*, 71 N. H. 117, 124, 51 Atl. 645. It is not to be presumed that there is no other tract of land in Portsmouth upon which a ladder rack may be erected.

The case is very similar to *Cocheco Mfg. Co. v. Whittier*, cited by the defendants. There in a grant of certain lands and water privileges the defendant reserved to himself the right to draw from a pond on the premises so much water as might be necessary to full such quantity of cloth as he might have occasion for, and claimed that the reservation implied a right to build a mill on the tract to so use the water reserved. But, as it appeared that there were other lands adjoining upon which the mill might be erected and the water used, the reservation did not authorize the defendant grantor to erect a mill upon the tract conveyed, although he was not then an owner of the adjoining land. The court say: "It is not a matter of necessity, in order to the use of the water reserved, that he should oc-

copy the land granted, with a mill, although it may be a matter of convenience." The defendants can enjoy the use of the tract conveyed without storing their ladders in the adjoining passageway; hence there is no necessary implication of a right to so use the passage.

But the construction of this deed is not to be determined by the application of arbitrary rules, but by ascertaining the true meaning and real intention of the parties. *Dunklee v. Wilton R. Co.* 24 N. H. 489, 507. As expressed in later cases, the meaning of the parties is to be ascertained from all the competent evidence, which includes the circumstances under which the language was used as well as the words themselves. The entire tract had been owned by one Mendum for some years. There were buildings on each end, with a common passageway between them extending back from the street. The sale was by an administrator. The deed refers to a plan dated shortly before the deed. Comparison of the deed with the plan shows that it probably was written from the plan. The dimensions given of the tract conveyed embrace only the land under the westerly building. A right of way is given in the passageway, subject, however, to the encumbrance of two projecting hoods over doors in the easterly building, which did not, however, come to the ground, and would not, it would seem, have been a material obstruction of the right of passage conveyed. These hoods appear upon the plan. The ladder rack does not, although it obstructs the use of the way, and its maintenance has diminished the rental value of tenements in the easterly building. The absence of the rack from the plan has some tendency to show that it was regarded as a temporary structure. Its obstruction of the way and damaging effect upon the rental value of the easterly building are reasons why it might not have been thought wise to grant a right for its permanent maintenance. At any event, it seems clear that the deed was made to convey the premises as shown by the plan; and it seems probable that if any easement in the way, other than that specifically granted, had been intended should pass by the deed, specific enumeration would have been made in so carefully drawn a document. This must be so unless by mistake the ladder rack was omitted from the plan, and the mistake followed in drafting the deed. Advantage, however, cannot be taken of the mistake, if there was one, except in a proceeding to reform the deed.

Exceptions overruled.

All concur.

42 L.R.A. (N.S.)

## IOWA SUPREME COURT.

MAMIE CLARK

v.

IOWA STATE TRAVELING MEN'S  
ASSOCIATION, Appt.

(— Iowa, —, 135 N. W. 1114.)

**Insurance — mutual — assessment — prior losses.**

1. A member of a mutual insurance association cannot, in the absence of any express contract obligation, be required to pay assessments for losses which occurred prior to his membership.

**Same — by-law — effect.**

2. A by-law of a mutual insurance company authorizing the directors to order an assessment to raise funds for the purpose of carrying out the aims and objects of the association does not justify the assessment of a member for losses occurring before his membership.

**Same — emergency fund — amendment of constitution.**

3. A mutual insurance company whose constitution and by-laws do not provide for an emergency fund cannot justify assessments for the creation of such fund, without amending the constitution and by-laws in the manner pointed out in those instruments.

**Same — acquiescence of member — absence of knowledge.**

4. Payment by a member of a mutual benefit society, of assessments which are

*Note. — Accident insurance; liability for death by drowning.*

As to when death or injury may be deemed to have been caused by accidental means, though the voluntary act of insured was the primary cause thereof, see note to the *Fidelity & C. Co. v. Carroll*, 5 L.R.A. (N.S.) 657.

**Drowning as risk covered by terms of policy generally.**

Involuntary drowning is generally held to warrant a recovery under the terms of accident policies. Thus, such drowning has been held to satisfy the condition of the contract that death must be by accident (*Peele v. Provident Fund Soc.* 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *Macdonald v. Refuge Assur. Co.* 17 R. 955, cited in *Scots' Dig.* 1873-1904, p. 931); must result from "external violent and accidental means" (*Tucker v. Mutual Ben. Life Co.* 50 Hun, 50, 4 N. Y. Supp. 505, affirmed in 121 N. Y. 718, 24 N. E. 1102; *De Van v. Commercial Travelers' Mut. Acci. Asso.* 92 Hun, 256, 38 N. Y. Supp. 931, affirmed without opinion in 157 N. Y. 690, 51 N. E. 1090; *United States Mut. Acci. Asso. v. Hubbard*, 58 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, 43 L. T. N. S. 459, 29 Week. Rep. 116; *Wehle v. United States Mut.*

being diverted to the formation of an emergency fund, does not show acquiescence on his part in the creation of such fund, if he had no knowledge of the fact, and, under the constitution and by-laws, there was no authority to create such fund.

**Same — diversion of funds — effect.**

5. A member of a mutual benefit society cannot be declared in default for nonpayment of assessments, if he has paid in enough money to meet the assessments, but it had been wrongfully diverted to other purposes in excess of the authority of the society.

**Same — accident — voluntary act — effect.**

6. An accident insurance company cannot defeat liability for death by drown-

ing, on the ground that decedent entered a swimming pool where the death occurred, voluntarily, and therefore the accident was not the cause of the death independently of all other causes, within the provisions of the policy.

**Same — disease — fainting spell.**

7. A shock and fainting spell produced by entering into a swimming pool, which results in drowning, do not relieve an accident insurance company from liability on its policy for the death, on the theory that the death resulted partially or indirectly from "disease or bodily infirmity," within the meaning of an exemption clause in the policy.

(May 7, 1912.)

Acci. Asso. 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35); at least where the waves were 7 or 8 feet high (Tucker v. Mutual Ben. Life Co. 50 Hun, 50, 4 N. Y. Supp. 505, affirmed in 121 N. Y. 718, 24 N. E. 1102); must be "caused by some outward and external means" (Trew v. Railway Pass. Assur. 7 Jur. N. S. 878).

In the last case Cockburn, Ch. J., said: "It was said that, assuming the death of Hiorns to have taken place by drowning, then drowning is not one of the cases to which this policy is applicable; and Mr. Lush ingeniously put it that the sort of accident meant here was to be the result of some *vis major*,—'something from without' from which the death may ensue; though, unless the death occurred within three months, the policy would not apply. But his argument is that, when the cause of death would produce immediate death without any outward lesion, such is not a case within this policy, and therefore that a death in this way, by water, is not within the policy. Then, the case of a man who should meet his death by falling from the top of a high house would be excluded; or the case of a man falling overboard from a ship; or the case of a death from suffocation by fire; but manifestly the effect of such a construction would be to make a policy of this kind useless and nugatory. Now, we think this is a case of an accident where the policy of insurance in such a company ought to give protection to the insured and his representatives."

And drowning, although not accompanied by external marks, is covered by an accident policy insuring against personal injury leaving upon the body external marks, where drowning appears in the list of accidents insured against, and a separate provision limits the liability in the case of drowning to a certain percentage of the face of the policy in case of absence of proof of the drowning by an eyewitness thereto. Lewis v. Brotherhood Acci. Co. 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802.

Where, however, an accident policy contains a provision that it does not cover death resulting from drowning, no case for the jury is shown, where it appears from the evidence that the insured went down

with a vessel which collided with another and was seen no more, although it was also shown that other passengers near the insured at the time received bodily injuries when the vessel sank, from which some of them died, since, from such evidence, it could not be found that death resulted through external, violent, and accidental means, within the terms of the policy. Lewis v. Continental Casualty Co. 61 Wash. 154, 112 Pac. 91.

Where drowning results through insensibility or disease.

The insured's death has been held within the terms of accident policies where he is suddenly stricken with a disease or becomes unconscious, and is drowned in consequence of the attack.

Thus, where the insured was a young man and an expert swimmer, and, while bathing with another, called for help and disappeared before the other could reach him, and there was testimony that when found his arms and limbs were drawn up against his chest as though he had died from cramps, it was held that his death was due to "outward force and accidental means," within the meaning of an accident policy. Knickerbocker Casualty Ins. Co. v. Jordan (Ohio Dist. Ct.) 11 Ins. L. J. 415. The court said: "A person afflicted with epilepsy may, and they do, fall frequently in a spasm, but soon recover and apparently suffer no evil effects therefrom, but if by chance he is seized and falls from his horse or wagon into the water, and, taking water into the lungs through breathing, suffocation or asphyxia is produced and death follows therefrom, very properly we think the action of the water in cutting off or stopping respiration is an external force, and is the immediate cause of death, and not the spasm."

Now, whether Cheek was seized with a fit, or cramp in the arms or limbs, or both, does not clearly appear. In the light of these English cases it would make no difference, the immediate cause of death being drowning. The evidence in this case does not show that he came to his death other than by drowning. From the testimony it



**A**PPEAL by defendant from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to recover the amount alleged to be due on a mutual benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. Sullivan & Sullivan for appellant.

Messrs. Guthrie, Gamble, & Street and Bowen & Alberson, for appellee:

A membership cannot be forfeited for failure to pay an assessment made equally against members of a mutual association, if the association has previously exacted from the particular member in question any sum, whether more or less than the amount

of the assessment, or otherwise has in its possession any sum, which might have been, and therefore should have been, credited upon the assessment, to eliminate it or reduce it *pro tanto*.

*Benjamin v. Mutual Reserve Fund Life Assn.* 146 Cal. 34, 79 Pac. 517; *Younghoe v. Grain Shippers' Mut. F. Ins. Assn.* 126 Iowa, 374, 102 N. W. 137; *Hetzel v. Knights & Ladies, G. P.* 129 Iowa. 655, 100 N. W. 157; *Trotter v. Grand Lodge, I. L. H.* 132 Iowa, 513, 7 L.R.A.(N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; *Rambousek v. Mystic Toolers*, 133 Iowa, 375, 106 N. W. 947; *Wait v. Mystic Workers*, 140 Iowa, 648, 119 N. W. 72; *Covenant Mut. Ben.*

clearly appears that he was a healthy person; that he was an expert swimmer; that he had bathed there before; that unexpectedly he became disabled and was unable to swim, for he cried for help, turned toward the shore, and called for a plank to be shoved out to him, and not securing assistance he sank out of sight, and was found dead the next day beneath the water. The court below found as a fact from the evidence that his death was caused by accidental drowning, and we think correctly. When a person is found drowned, the presumption is that it was accidental. This is to say the presumption is against voluntary drowning or suicide."

And in *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945, it was held that drowning was the moving sole and proximate cause of death resulting from falling into the water, within the meaning of an accident policy, although the fall might have been due to disease. And in this case it was held that the jury might find that the unconsciousness during which the insured drowned was caused by a mere temporary inflection, where there was evidence that he was not suffering from disease, but was found drowned in shallow water.

In *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410, where a policy of life insurance provided for indemnity in case the insured sustained "personal injury caused by any accident," it was held that an instruction in effect that if an injury causing a wound on the insured's head was produced by an accident which did not cause his death, but did cause him to fall into the water, where he was drowned, his death was accidental, within the meaning of the policy.

And in *Reynolds v. Accident Ins. Co.* 22 L. T. N. S. 820, 18 Week. Rep. 1141, it was held that drowning while bathing in very shallow water, caused by sudden insensibility of unexplained cause, was a risk covered by an accident policy.

See also *Grand Legion, S. K. v. Korneman*, — Kan. App. —, 63 Pac. 294, under heading "Presumption that drowning was accidental." 42 L.R.A.(N.S.)

In *Tennant v. Travelers' Ins. Co.* 31 Fed. 322, denying recovery where insured met his death while in a plunge bath, the circumstances indicated that death resulted from an epileptic seizure superinduced by the heat of the water, and was not caused by drowning.

Recoveries have been allowed on accident policies in cases where the insured was drowned during an attack of disease or unconsciousness, notwithstanding the policies excepted death resulting from natural disease, etc.

Thus, in *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, it was held that drowning in a brook while in an epileptic fit was within the provisions of a policy insuring against injuries caused by "accidental, external, and visible means," although the policy also excluded liability in case of death "from natural disease or weakness or exhaustion consequent upon disease." The court in this case said: "It appears to be clear from the statement in this case, that the insured died from drowning in the waters of the brook whilst in an epileptic fit, and drowning has been decided to be an injury caused, in the words of this policy, 'by accidental, external, and visible means.' I am therefore of opinion that the injury from which he died was a risk covered by this policy, and the only question then remaining is whether the case is within the proviso which provides that the insurance 'shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease.' It is certainly not within the first part of this proviso, because the death was not so occasioned; neither does it appear to me that the cause of the death was within those latter words of the proviso. The death was not caused by any natural disease or weakness or exhaustion consequent upon disease, but by the accident of drowning. I am of opinion that those words in the proviso mean what they say, and that they point to an injury caused by natural disease, as if, for instance, in the present case, epilepsy had really been the cause of death. The death, however, did not arise from any such cause,

*Asso. v. Baldwin*, 49 Ill. App. 203; *Supreme Lodge, O. M. P. v. Meister*, 204 Ill. 527, 68 N. E. 454; *Knights Templars & M. Life Indemnity Co. v. Vail*, 206 Ill. 404, 68 N. E. 1103; *Elliot v. Grand Lodge, A. O. U. W.* 2 Kan. App. 430, 42 Pac. 1009; *Fraternai Aid Asso. v. Powers*, 67 Kan. 420, 73 Pac. 65; *Rogers v. Union Benev. Soc.* 111 Ky. 598, 55 L.R.A. 605, 64 S. W. 444; *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341; *Knight v. Supreme Ct. O. C. F.* 2 Silv. Sup. Ct. 453, 6 N. Y. Supp. 427; *Evarts v. United States Mut. Acci. Asso.* 40 N. Y. S. R. 878, 16 N. Y. Supp. 27; *Demings v. Supreme Lodge, K. P.* 20 App. Div. 622, 48 N. Y. Supp. 649; *Logsdon v. Supreme Lodge, F. U.* 34 Wash. 666, 76 Pac. 292.

and those words have no application to the case."

But it has been said that accidental death by drowning is caused indirectly by disease, within the meaning of an exception in an accident policy against death caused "directly or indirectly by disease," where the drowning results from a fall into the water, which was caused by disease. *Manufacturers' Acci. Indemnity Co. v. Dorgan*, supra. In this case, however, the insured, when unconscious, having fallen into the water and drowned, it was held that a fainting spell produced by indigestion or lack of proper food, which was a mere temporary disturbance or enfeeblement, was not a "disease and bodily infirmity," within the meaning of the policy.

A provision of the constitution of a benefit society reading, "and shall not die by his own hand, whether sane or insane," refers to intended self-destruction, and will not relieve the insurer where the insured was seized with an attack of epilepsy or vertigo so that his will power over his actions was taken away, and while in that condition fell into the water and was drowned. *Grand Legion, S. K. v. Korneman*, — Kan. App. —, 63 Pac. 202.

#### Exposure to "unnecessary danger."

Generally, as to voluntary exposure to unnecessary danger, within the meaning of insurance policy, see note to *Fidelity & C. Co. v. Chambers*, 40 L.R.A. 432, and supplemental notes accompanying; *Diddle v. Continental Casualty Co.* 22 L.R.A. (N.S.) 779, *Da Rin v. Casualty Co.* 27 L.R.A. (N.S.) 1164, and *Morse v. Commercial Travelers' Eastern Acci. Asso.* 40 L.R.A. (N.S.) 135.

Going out on the water in a boat after dark to fish is not in itself an exposure to unnecessary danger, which will preclude recovery upon an accident policy excluding liability in case of such exposure, which had been issued to one who was drowned through the upsetting of his boat, which collided with the limb of a tree partly submerged by water. *Collins v. Bankers' Acci.* 42 L.R.A. (N.S.)

*Members of a mutual association cannot* (in the absence of a statute authorizing it and a by-law adopted pursuant to statutory authority) be assessed for losses occurring prior to their membership; and any assessment paid for that purpose is an illegal exaction, and stands as a credit to the account of the member paying it.

*Newman v. Covenant Mut. Ins. Asso.* 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87; *Collins v. Bankers' Acci. Ins. Co.* 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Long Pond Mut. F. Ins. Co. v. Houghton*, 6 Gray, 77; *Swing v. H. C. Akeley Lumber Co.* 62 Minn. 169, 64 N. W. 97; *Detroit Mfrs. Mut. F. Ins. Co. v. Merrill*, 101 Mich. 393, 59 N. W. 661; *Great*

*Ins. Co.* 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778.

And where it is not shown that such person was aware of the dangerous character of the locality by reason of snags and protruding limbs of trees, the policy cannot be avoided upon the ground that he exposed himself to unnecessary danger. *Ibid.*

And where it was provided that the benefits of a certificate of a mutual benefit company shall not extend to "any voluntary exposure to any unnecessary danger," it was held that the insured, who was a farmer living on the shore of a lake, and who went to the rescue of the crew of a schooner which had been driven ashore near his home, did not expose himself to unnecessary danger in attempting to rescue the crew of the vessel. *Tucker v. Mutual Ben. Life Co.* 50 Hun, 50, 4 N. Y. Supp. 505, affirmed in 121 N. Y. 718, 24 N. E. 1102.

It has been held that the question of whether the insured, who was drowned while attempting to cross a ford, voluntarily exposed himself to unnecessary danger, within the meaning of an accident policy, is for the jury, where it appears that he was a traveling salesman whose duty called him to cross the ford in question, with the surroundings of which he had been acquainted for a number of years, and that the opinions of men living in the locality, which were given in response to the insured's inquiry as to the danger of attempting to cross, were at variance, and that the insured, after reaching the ford and observing it, decided that there was no danger in attempting to cross, but that, owing to the conveyance becoming stuck in the middle of the stream, he was accidentally drowned. *United States Mut. Acci. Asso. v. Hubbell*, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544.

There can be no recovery under a policy providing that no indemnity shall be paid for any injury resulting from voluntary exposure to unnecessary danger, where the insured, who was on a canoe trip, went out upon a large lake in a canoe while a strong increasing wind was blowing, after

Falls Mut. F. Ins. Co. v. Harvey, 45 N. H. 292; People's F. Ins. Co. v. Hartshorne, 90 Pa. 465; Greenhow v. Buck, 5 Munf. 263.

The cause of Clark's death was an accidental cause.

Hopkinson v. Knapp & S. Co. 92 Iowa, 330, 60 N. W. 653; Chicago, R. I. & P. R. Co. v. Wood, 66 Kan. 613, 72 Pac. 215; Waters-Pierce Oil Co. v. Deselms, 18 Okla. 108, 89 Pac. 212; Choctaw, O. & G. R. Co. v. McDade, 50 C. C. A. 591, 112 Fed. 888; Hotchkiss Mt. Min. & Reduction Co. v. Bruner, 42 Colo. 305, 94 Pac. 331; Bradbury v. South Norwalk, 80 Conn. 298, 68 Atl. 321; Hyde v. Mendel, 75 Conn. 140, 52 Atl. 744; Southern R. Co. v. Webb, 116 Ga. 152, 59 L.R.A. 109, 42 S. E. 395; Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 690;

he had been advised by guides and those whose experience and occupation rendered them capable of judging the danger, that it was not safe to go upon the lake, and when no other canoes were out because it was deemed dangerous. *Morse v. Commercial Travelers' Eastern Acci. Asso.* — Mass. —, 40 L.R.A.(N.S.) 135, 98 N. E. 599.

In *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945, where a recovery upon an accident policy issued to one who was drowned was allowed, it was held that the words "voluntary exposure," "unnecessary danger," "hazardous adventure," within the meaning of the policy, did not include such exposure as was incident to the ordinary habits and customs of life, but referred to something beyond the ordinary, such as wanton or gross carelessness.

Where an accident policy provides that the insurer shall not be liable for death or injury resulting from voluntary exposure to unnecessary danger or perilous ventures, an answer filed by the insurer in an action upon the policy of one who was drowned, which states that at the time he met his death he was engaged in seining in a river which was very swift and full of sudden step-offs or holes, and swirls and eddies, and that he suddenly came to one of these step-offs or holes, and to a swirl or eddie, and stepping into said hole, swirl, or eddie, where the water was very deep, and, being unable to swim or keep his head above the water, he was drowned, but which does not allege knowledge on the part of the insured of the existence of the danger or peril, and that he willingly encountered it, is insufficient on demurrer. *Conboy v. Railway Officials & E. Acci. Asso.* 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363.

#### Presumption that drowning was accidental.

Where the facts surrounding a drowning do not appear, the courts are in accord that the presumption is that the drowning was accidental and that the insured did not commit suicide.  
42 L.R.A.(N.S.)

*Powell v. Southern R. Co.* 125 N. C. 372, 34 S. E. 530; *Kern v. Snider*, 76 C. C. A. 201, 145 Fed. 327; *Duerst v. St. Louis Stamping Co.* 163 Mo. 608, 63 S. W. 827; *Settle v. St. Louis & S. F. R. Co.* 127 Mo. 336, 48 Am. St. Rep. 633, 30 S. W. 125; *Dunlap v. Chicago, R. I. & P. R. Co.* 145 Mo. App. 215, 129 S. W. 262.

It would have been accidental, even if he had died directly from the shock of the water.

*United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; *Richards v. Travelers' Ins. Co.* 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *Southard v. Railway Pass.*

Thus, in *Knickerbocker Casualty Ins. Co. v. Jordan* (Ohio Dist. Ct.) 11 Ins. L. J. 475, it was held that when a person is found drowned, the presumption is that it was an accidental drowning, rather than a voluntary drowning or suicide.

And in *Konrad v. Union Casualty & S. Co.* 49 La. Ann. 636, 21 So. 721, where there was no direct proof of the cause of insured's death, but the indications were that he was drowned, it was held that such evidence did not sustain the defense that he committed suicide.

And it has been held that the jury are justified in finding that the insured was accidentally drowned, where it appears that he was heavily insured and was insolvent, and that, on the afternoon on which he made his will, he rented a boat and started to row across the river, and was seen to fall into the water; that he attempted to swim towards his boat and cried out for assistance, and that shortly afterwards his body was recovered floating in the water with the face downward, it appearing that all the circumstances were consistent with accidental drowning except the mere fact that the body did not sink. *Burnham v. Interstate Casualty Co.* 117 Mich. 142, 75 N. W. 445. The court in this case said: "The learned counsel for the defendant insist that the facts deducible from the above testimony are consistent with three theories of the cause of death, and therefore prove no one of them. These theories are apoplexy, sudden seizure, and suicide. We cannot agree in this conclusion. The testimony does not establish facts to overcome the presumption. Where death may be attributable to suicide, murder, accident, or negligence, the presumption of law is against suicide and murder. . . .

It is true that the bodies of persons who die from drowning usually sink, but there are occasional circumstances under which they do not sink, and there was evidence in this case tending to show the presence of those circumstances. There was no autopsy, but there is no evidence tending to show that Mr. Winans was subject to any fits or sudden seizures. All the circum-

Assur. Co. 34 Conn. 574, Fed. Cas. No. 13,182; Patterson v. Ocean Acci. & Guarantee Corp. 25 App. D. C. 46; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939; Supreme Council, O. C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818; United States Mut. Acci. Asso. v. Hubbell, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544; Reynolds v. Equitable Acci. Asso. 59 Hun, 13, 1 N. Y. Supp. 738; North American Life & Acci. Ins. Co. v. Burroughs, 60 Pa. 43, 8 Am. Rep. 212; Accident Ins. Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; Union Casualty & Surety Co. v. Harroll, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080; American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191; Per-vangher v. Union Casualty & Surety Co. 85 Miss. 31, 37 So. 461; Lovelace v. Travelers' Protective Asso. 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877; Rodcy v. Travelers' Ins. Co. 3 N. M. 543, 9 Pac. 248; Horsfall v. Pacific Mut. L. Ins. Co. 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; Western Commercial Travelers' Asso. v. Smith, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; Miller v. Fidelity & C. Co. 97 Fed. 836.

stances are consistent with accidental drowning, except the mere fact that the body did not sink. If, however, it be assumed that some sudden seizure caused him to fall into the water, or came upon him after he had fallen into the water, it would not follow that death was not caused by drowning."

And where there was evidence that on the day upon which the insured was last seen alive, several persons saw him rowing a boat on a lake, and he inquired as to the best fishing grounds, and his boat was found on the lake with his coat and hat and bait cans in it on the afternoon of the same day, and his body was recovered from the lake about fifteen days later, it was held that it must be inferred that his death was caused by external violence and accidental means. *Konrad v. Union Casualty & S. Co. supra.*

Where the insurer seeks to avoid liability on the ground that the insured committed suicide, it has the burden of establishing such fact by a preponderance of the evidence; and there is sufficient evidence to warrant the jury's finding that the insured's drowning was not intentional, but occurred while he was suffering from an attack of epilepsy or vertigo, where it shows that he was on good terms with his family, and upon the afternoon of his drowning he left home in good spirits; that he walked in a staggering manner towards the river, and walked into water not exceeding 3 feet in depth, and staggered, circled around and fell; although there is also evidence that at the time he had no coat or vest on, and had left his hat on the shore, and made no outcry or struggle, and what appears to be a memorandum addressed to the members of his family, saying good by, was found in the vest pocket. *Grand Legion, S. K. v. Korneman*, — Kan. App. —, 63 Pac. 294, the court said: "If the deceased came to his death by accidental drowning, although it may have resulted from his immediate act, such death cannot be termed death by his own hand, unless the act which resulted in his death was done on purpose, with the intention that it should result in death. It cannot be said that death is the natural re-

sult of walking into water 2 or 3 feet deep. Of course, if the deceased purposely walked in the water (that is, with the purpose of drowning himself), and intentionally threw himself in the stream for the purpose of producing death, there could be no recovery in this case. However, if he went into the water 2 or 3 feet deep for any other purpose, and while there fell from an attack of epilepsy, vertigo, or from accident (that is, not on purpose), and death resulted therefrom, the society would be liable. Such a death could not be said to be death by his own hand. There was evidence to support the finding of the jury."

And in *Travelers' Ins. Co. v. Rosch*, 23 Ohio C. C. 491, where insured was seen on a certain night while the steamship on which he was a passenger was in mid-ocean, and he had never been seen after, although a search was made for him, it was held that the jury was justified in finding that he died of drowning on the night on which he was last seen, and that such drowning was the result of an accident, the presumption in a case of such a disappearance being against suicide, and in favor of his having accidentally fallen overboard.

So the facts that the insured went to a lake to bathe, that his wearing apparel was found near by, that there were foot-prints in the sand leading to the water, and that the bottom at that point was dangerous, are circumstances which tend to prove death by drowning, and the jury may legitimately infer death by drowning therefrom. *Supreme Council, C. B. L. v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105.

And there is sufficient evidence to warrant the leaving of the question as to whether the insured met his death by drowning to the jury, where it appears that he went into the sea for pleasure and health, and that there was no ground for supposing that he committed suicide, that his clothes were found at the place of bathing, but his body was not recovered until sometime afterwards at some distance from the point where he went to bathe, but not at such a distance that it might not have been carried there by the action of the waves and the winds. *Trew v. Railway Pass.*

Sherwin, J., delivered the opinion of the court:

The plaintiff is the widow and beneficiary of Hay Clark, who died on the 6th day of September, 1908, the holder of a benefit certificate issued by the defendant association on the 2d day of February, 1895. The defense is that Clark was not a member at the time of his death, because of the fact that he had not paid assessment No. 75, ordered by the board of directors on the 6th day of June, 1908, and which was payable, in any event, before the 1st day of August, 1908. It is conceded that this assessment of \$2 was not paid; but appellee contends that Clark was nevertheless a

member in good standing at the time of his death, because of the several reasons which we shall later discuss.

The defendant is a purely mutual association under the statute and its charter and by-laws. Its articles of incorporation provide that its business "shall be the collection of funds from its members by fixed membership fees, dues, and equal assessments upon each member, to be used for the mutual benefit and protection of its members, their families, heirs, and beneficiaries." And further: "The directors shall have full charge of all funds of the association, and shall have authority to make such assessments as may be necessary to carry out

Assur. Co. 9 Week. Rep. 671, 30 L. J. Exch. N. S. 317, 6 Hurlst. & N. 839, 4 L. T. N. S. 833, 7 Jur. N. S. 878.

And where there is evidence that the insured, who was drowned, was found in a canal at the foot of a street near the termination of sidewalk running up to the margin of the canal, and near where there had previously been a bridge, and there is further evidence that he had been seen about 2 o'clock on the morning at or near a hotel in the vicinity of a canal, into which the beneficiary claimed he had accidentally fallen, it was held that the question of whether insured had committed suicide was for the jury. *De Van v. Commercial Travelers' Mut. Acci. Asso.* 92 Hun, 256, 36 N. Y. Supp. 931, affirmed without opinion in 157 N. Y. 690, 51 N. E. 1090.

And where it appears that on the day the insured disappeared he was in a sound condition, mentally and physically, and was prosperous in business and happy in his domestic relations, and that sometime afterwards his body was found in the river without any marks of violence upon it, the jury would be justified in finding that he came to his death by accidental drowning, and the case is therefore properly submitted to the jury. *Couadeau v. American Acci. Co.* 95 Ky. 280, 25 S. W. 6.

And in this case, where one of the defenses was that the insured came to his death while under the influence of intoxicating liquor, and that this barred a recovery under the terms of the policy, the fact that the defendant's testimony was to the effect that the insured was last seen in an intoxicated condition near the river where he was drowned does not authorize the court to give peremptory instruction for the defendant, but the case should be submitted to the jury. *Ibid.*

#### Miscellaneous.

Where the insured, a farmer, went to the relief of a vessel which went ashore near his home, and was drowned through the capsizing of his boat, it was held that the insured was not employed in "wrecking," within the meaning of the contract of insurance. *Tucker v. Mutual Ben. Life* 42 L.R.A. (N.S.)

*Co. 50 Hun, 50, 4 N. Y. Supp. 505, affirmed in 121 N. Y. 718, 24 N. E. 1102.*

Where an accident policy requires that, in order to recover the full amount of the policy in case of drowning, the facts and circumstances must be established by the testimony of an actual eyewitness, the facts are sufficiently established within the meaning of the provision, where witnesses testified to having seen the deceased in a cranky canoe, with a companion, within three or four minutes of the time of the accident, and to having, a few minutes later, seen the overturned canoe and evidence of its having recently capsized, although such witnesses did not see the craft overturn. *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1, 17 L.R.A. (N.S.) 714, 79 N. E. 802.

In an action upon an accident insurance policy, where it is claimed that the insured met death by drowning, it is proper to show that the place where he went to bathe was a dangerous one, and this fact may be made to appear by showing that other persons had been drowned at or near there. *Supreme Council C. B. L. v. Boyle, supra.*

A physician may, in an action upon an accident policy, give an opinion that the condition of the lungs of the insured, who was found dead in shallow water, was what it would have been if he had fallen and been stunned in the water. *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945.

The question whether or not a person could have rolled from a certain place where he was sitting, to that where he was found drowned in a stream, is not one on which an opinion of a witness can be given. *Ibid.*

Where an accident policy exempts the insurer from liability for injuries or death while engaged in any unlawful or vicious act, and the statute of the state in which the insured was drowned, while seining, forbids seining in streams where the water is above tidewater, an answer of the insurer which does not allege that the point where the insured was seining at the time he was drowned was above tide water is subject to demurrer. *Conboy v. Railway Officials & E. Acci. Asso.* 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363. J. T. W.

the aims and objects of this association." Article 5, § 4, of the by-laws, provides as follows: "The board of directors may order an assessment of not to exceed the sum of \$2 at any one time upon each member, for the purpose of raising funds, when necessary in the course of the business of the association and for the purpose of carrying out its aims and objects. The amount in the treasury of the association shall not be reduced below the sum of \$5,500, unless it is to pay benefits or indemnities prior to making and collecting the assessments therefor, and whenever, by such payment, the funds therein are reduced below said sum, said directors shall then make an assessment as herein provided." And § 5 of article 5 provides that, "upon the death of a member in good standing, the board of directors may make an assessment on each member in good standing in the sum of two dollars (\$2), of which assessment the secretary shall forthwith notify each member." It will be noticed that under this section an assessment for a death benefit can only be made after the death has occurred.

At the annual meeting of the association in December, 1897, the following resolution was duly adopted: "Resolved, that it is the sense of this annual meeting that the present is a very favorable time to commence the accumulation of an emergency fund of \$100,000, to be made up (as fast as convenient) out of the annual dues, as they may be paid from year to year. This fund should be put out upon interest, but at all times subject to the acts of the president and board of directors, when, in their judgment, an emergency has arisen, or when disturbing it will avoid the necessity of making more than four assessments in any year." And following its adoption the annual dues of the members were diverted to the emergency fund so provided for, and at the time of Clark's death there was \$169,000 in said fund. The association had long followed the rule of making but four assessments of \$2 each per year, and had on several occasions drawn from the emergency fund to meet its liabilities; and at one time it transferred from the general fund to the emergency fund \$15,000. At the time Clark became a member, there were liabilities on benefit certificates, aggregating over \$34,000, which were afterwards paid from funds to which Clark contributed by paying assessments levied therefor. Appellee contends that Clark was not in default for failure to pay the last assessment, because he had before that time overpaid all valid demands, and was entitled to credit on the last assessment for such overpayment. It is claimed that he had overpaid "by contributing to the payment of

losses incurred before his membership, and for which he was not liable," "by contributing to a wholly illegal emergency fund," "by contributing to an excess in the emergency fund, even if it was valid to the amount contemplated by its terms," and "because moneys which he had contributed on assessments were diverted into the emergency fund without authority to use any funds received by assessments on that account, even if the emergency fund itself was valid." Appellee further says that the assessment was unnecessary, because there were available funds on hand in excess of any ascertained requirements, and that Clark was not bound to pay it. There are two or three sufficient reasons for holding that there was no loss of membership because of the nonpayment of the last assessment.

In a purely mutual association, such as this is, a member cannot be assessed for, or be compelled to pay, losses that occurred prior to his membership, unless he has agreed to do so; and there is nothing in the record before us which suggests that Clark contracted to become thus liable. *Hetzel v. Knights & Ladies*, G. P. 129 Iowa, 655, 106 N. W. 157; *Newman v. Covenant Mut. Ins. Asso.* 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87; *Collins v. Bankers' Acci. Ins. Co.* 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778.

The provision in § 4 of article 5 of the by-laws does not, in our judgment, necessarily indicate that the board may assess new members for past losses. The declared mutual purpose of the association would negative such intent; and if there is ambiguity in the by-law in question, it must be construed strictly against the association, to prevent a forfeiture.

We shall not determine whether an emergency fund may be legally provided by a mutual association of this kind. For, however that may be, it is very clear that the defendant's action, in attempting to provide for such fund, was illegal. The constitution and by-laws provided what funds should be raised, and how the dues and assessments should be used; and if, under the statute, the association had the power to provide an emergency fund, it could only be done by amendment to the charter or by-laws, adopted in the manner pointed out therein. An amendment to the constitution requires "two-thirds vote of the members in good standing present," after the proposal has been on file with the secretary "ninety days prior to the meeting." The requirement for amending the by-laws is as follows: "These by-laws may be revised or amended at any regular meeting of the association by two-thirds vote of the members

present: Provided, that any proposed revision or amendment thereto be filed in writing with the board of directors not less than thirty days prior to said meeting, such proposed amendment to be mailed immediately thereafter to each member in good standing." There was no pretense of complying with either of these provisions of the constitution and by-laws; and nothing further than the adoption of the resolution was ever done to authorize the creation of the emergency fund.

Appellant, says, however, that Clark acquiesced in the action of the association relative to the fund, because he had notice of the adoption of the resolution and made no protest. But this is begging the question on the record in this case. Clark may have received a copy of the resolution and notice of its adoption, as claimed by appellant; but there is absolutely no evidence tending to show that he had knowledge of the existence of the fund, or that the annual dues paid by him had been diverted thereto. He was charged with notice of the provisions of the charter and by-laws, and knew that such fund could not be legally created without amendment thereto. The resolution was in the form of a recommendation merely; and Clark had the right to assume that no further action relative thereto would be taken without proper amendment to the by-laws. True he paid his dues and assessments thereafter; but he is not shown to have had knowledge that any of the money so paid was being placed in this fund. On the contrary, he had the right to believe that his payments were being applied in strict accordance with the laws of the state and the association. There can be no acquiescence without full knowledge; nor will the doctrine be applied in aid of a forfeiture where an illegal exaction has been made.

The emergency fund having been illegally created, the association had no right to divert any of Clark's payments thereto, either in the annual dues paid by him, or by transferring to such fund the \$15,000 from the general fund to which Clark had contributed. Furthermore, had the emergency fund of \$100,000 been legally created, the defendant would have had no right to use Clark's money to help swell the fund to \$169,000. His money could only be legally used for the purposes designated by the laws of the association. He was not bound to contribute to a fund in excess of that authorized; and the use of his money for such purpose would have been illegal in any event.

Where an association of this kind has exacted and received from a member more money than it was entitled to, it is held as 42 L.R.A. (N.S.)

a credit to be applied on future assessments; and, where such credit exists, the membership cannot be forfeited for a failure to pay an assessment. *Younghoe v. Grain Shippers' Mut. F. Ins. Asso.* 126 Iowa, 374, 102 N. W. 137; *Hetzl v. Knights & Ladies, G. P. supra*; *Trotter v. Grand Lodge, I. L. H.* 132 Iowa, 513, 7 L.R.A. (N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; *Rambousek v. Mystic Toolers,* 133 Iowa, 375, 106 N. W. 947; *Wait v. Mystic Workers,* 140 Iowa, 648, 119 N. W. 72. For the reasons above stated, there could be no forfeiture of Clark's membership, and we need not discuss other points relied upon by the appellee. We hold that he was a member in good standing at the time of his death.

The appellant's by-laws provide that, "whenever a member, in good standing, through external, violent, and accidental means, receives bodily injuries which shall, independently of all other causes, result in death," it shall be liable, and that no liability shall exist where death results, wholly or partially, directly or indirectly, from disease, bodily or mental infirmity, or from intoxication. The facts surrounding the death of Clark were as follows: On the Sunday of his death, Mr. Clark was in Kansas City, Missouri, with his son, who was then about fifteen years of age. They had breakfast after 9 o'clock in the morning, and dinner at a little after 1 o'clock. Soon after dinner, the two went to the Elks's lodge room, and in a few minutes after reaching there they both went to the pool for a bath. Clark had been in the water a few minutes, and was walking towards his son, when he made a slight jump forward, made a few faint motions with his hands, and sank. He was taken from the pool five or ten minutes later, dead. An autopsy showed him to have been in perfect health in life, and the opinion of several medical experts was that the cold water had produced a shock from which Clark's system did not react; that his vitality was thereby reduced and a fainting spell brought on, which caused him to sink; and that he was drowned. While the appellant earnestly insists that the evidence is insufficient to sustain a finding that Clark was drowned, we think otherwise. The testimony of the physicians, based largely on the autopsy, it is true, together with the testimony of the eyewitnesses, was ample to take the case to the jury on that question. *Hopkinson v. Knapp & S. Co.* 92 Iowa, 328, 60 N. W. 653; *Chicago, R. I. & P. R. Co. v. Wood,* 66 Kan. 613, 72 Pac. 215; *Bradbury v. South Norwalk,* 80 Conn. 298, 68 Atl. 321; *Dunlap v. Chicago, R. I.*

& P. R. Co. 145 Mo. App. 215, 129 S. W. 282.

The burden rested on the plaintiff to prove that Clark's death was the result of accidental means, and appellant contends that this burden has not been met; and, further, that the cause of death established was not within the terms of the policy, because it was not shown to be independently of all other causes, and because it was a death resulting, wholly or partially, directly or indirectly, from "disease, bodily or mental infirmity." These contentions may be discussed together. We do not understand that the appellant is claiming that drowning may not, under certain circumstances, be accidental; and, as we have already said, the evidence is sufficient to sustain the finding that he was, in fact, drowned. If we get the right idea of appellant's claim at this point, it is that Clark's voluntary act in entering the water was one of the causes of his death, or a contributing cause thereof. The position is unsound. Followed to its final result, it would mean that no man can recover on an accident policy containing a similar provision, if he received an injury while voluntarily engaged in any physical movement. Such a construction of the appellant's law would cause alarm among its 31,000 members, and surprise even the makers of the law, if the provision was ever intended to furnish indemnity for the money paid to the association. *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574, Fed. Cas. No. 13,182; *Atlanta Acci. Asso. v. Alexander*, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939; *United States Mut. Acci. Asso. v. Hubbell*, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544. *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683, furnishes no support for appellant's contention. There the deceased voluntarily took a rank poison. The facts distinguish this case from the *Feder Case*, 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252. The clause in question undoubtedly means that an accident must be the immediate and final producing cause of death. Analogous to this is the provision relative to "disease, bodily and mental infirmity." This can only apply where the disease is a co-operating ultimate cause of the injury. In this case, there is no evidence of disease or infirmity, other than the shock produced by the water and the fainting spell, and it falls squarely within the rule announced in *Meyer v. Fidelity & C. Co.* 96 Iowa, 378, 42 L.R.A. (N.S.)

59 Am. St. Rep. 374, 65 N. W. 328, and is not within the rule in *Binder v. National Masonic Acci. Asso.* 127 Iowa, 25, 102 N. W. 190, and other like cases.

Complaint is made of two instructions given and of the refusal to submit some of the appellant's requests. We think there is no just cause for complaint. The sixth instruction was in line with the *Meyer Case*; and the instruction relative to intoxication was not prejudicial to the appellant. So far as the requests were pertinent, they were embodied in the instructions given. The judgment should be, and it is, affirmed.

Petition for rehearing denied.

#### UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

NEW YORK & LONG BRANCH STEAM-BOAT COMPANY, Charterer of the Steamboat Little Silver, etc., Appt.,

v.

BORREA JOHNSON et al.

(115 C. C. A. 540, 195 Fed. 740.)

**Admiralty — jurisdiction — injury to wife — suit by husband.**

Admiralty has jurisdiction of a suit by a man to recover damages for loss to him

**Note. — Right to sue in admiralty for damages resulting from injury to another.**

No authority has been found which involves the precise question raised in *NEW YORK & L. B. S. B. Co. v. JOHNSON*. Numerous cases have been decided both in this country and England on the right to sue in admiralty for the death of a person; it being held that independently of statute, no action can be maintained under the general maritime law for wrongfully causing the death of another upon the high seas, this being of course but an adaptation of the doctrine of the common and civil law that a personal action perishes with the person. This was partially changed by the enactment of Lord Campbell's Act giving a civil remedy to one whose death was caused by the wrongful act of another. The admiralty court, adopting the view that this statute was not merely a survival statute, but granted a new right of action wholly unknown in previous law, invoked the same and entertained actions in *personam* based upon negligence resulting in death. See in this connection *The Bernina*, L. R. 13 App. Cas. 1, which affirms L. R. 12 Prob. Div. 58, which reverses L. R. 11 Prob. Div. 31.

As said in 1 Cyc. 844, in this country a right of action for wrongfully causing the death of another has been created by stat-



because of the injury to his wife by a collision between two vessels upon one of which she was a passenger.

(March 27, 1912.)

**A**PPEAL by petitioner from a decree of the District Court of the United States for the District of New Jersey awarding damages to claimants for personal injuries and expenses in a petition in admiralty for limitation of liability under the vessel owners' liability act. Affirmed.

The facts are stated in the opinion.

Argued before Gray and Buffington, Circuit Judges, and Young, District Judge.

Messrs. McDermott & Enright, for appellant:

No recovery can be had by the husband

ute in nearly all of the states of the Union; and within the territory covered by such statute, the admiralty courts take jurisdiction of such causes *in personam*, and where the local law creates a lien therefor a libel *in rem* will lie against the vessel. But of course the state statutes have no extraterritorial effect, and therefore they afford no ground upon which admiralty courts can take jurisdiction for actions for wrongfully causing death upon the high seas, and the same is held not to be actionable under the general maritime law.

But, as before stated, these cases do not turn upon the test involved in the JOHNSON CASE as to whether the relative or personal representative of the deceased person, not bearing any legal relation to the ship or its owner, may maintain an action, but are rather addressed merely to the adaptation of the common and civil law rules that a personal action dies with the person. This statement applies to the *Sea Gull*, Chase, Dec. 145, Fed. Cas. No. 12,578, and the *Highland Light*, Chase, Dec. 150, Fed. Cas. No. 6,477, cited in *NEW YORK & L. B. S. B. Co. v. JOHNSON*, *Savage v. New York, N. & H. S. S. Co.* 107 C. C. A. 648, 185 Fed. 778, also cited therein involved an action by the husband for injuries to the wife, which was held to fail because the wife's libel in her own behalf failed; and the court therefore found it unnecessary to determine whether admiralty will take jurisdiction of such a libel by the husband.

Such cases, therefore, have no bearing upon the contention advanced in the JOHNSON CASE. In one decision, however, involving an action for death, the court made a distinction between the question of the survival of an action for personal injury in favor of the personal representative of the person injured in case of the latter's death, and an action by the survivors of a person killed, not to recover for any injury to or suffering by the decedent, but to recover the damages suffered by the plaintiffs themselves as a result of the decedent's death. This case is *The Onoko*, 42 L.R.A. (N.S.)

for damages of the character claimed by him.

*Ex parte Phenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; *Savage v. New York, N. & H. S. S. Co.* 107 C. C. A. 648, 185 Fed. 778.

Messrs. Eberhard & Stites for appellees.

Buffington, Circuit Judge, delivered the opinion of the court:

On October 19, 1909, Mrs. Borrea Johnson, a passenger on the steamboat *Little Silver*, en route from New York to Long Branch, was injured in a collision between that vessel and a barge towed by the tug-

47 C. C. A. 111, 107 Fed. 984, involving the Illinois and Wisconsin death statutes, giving an action in behalf of the next of kin of a deceased to recover damages sustained by them by reason of the death, and the watercraft statutes of those states, making a vessel liable for all damages arising from injuries done "to persons or property by such ship, boat, or vessel," and holding that a libel *in rem* could not be maintained against the boat for the death. After pointing out that the Illinois and Wisconsin statutes give the action to the survivors for the pecuniary damage resulting to them from such death, and not for any injury done to the decedent, the court proceeds to say: "It is also to be said that the water-craft law contemplates a lien for direct injuries done by the inanimate thing negligently navigated, and would not seem to comprehend such injury as is contemplated by the act granting a right of action for a death. The injury for which a lien is given is a direct injury by the negligently navigated craft to person or property. By reason of the faulty navigation and consequent collision, no injury was done to the person of the libellant, or to the persons of those he represents. Nor was injury done to his or their property. They had no property right in the person of the deceased. The right of action arose only upon and because of his death. The recovery is allowed as compensation for the supposed support and education which they would have received had he survived. This right of action, arising only upon death, cannot, within the meaning of the water-craft law, be property which could be injured by an inanimate thing negligently navigated." This quoted statement so far as it may be regarded as bearing upon it, conforms with the contention unsuccessfully advanced in the JOHNSON CASE.

For discussion of a considerable number of the cases involving the right to maintain an action for death under the general maritime law, or to enforce the death statute in the admiralty court, attention is directed to the case of *The General Foy*, 175 Fed. 590.

L. A. W.

boat Slatington. For alleged negligence in causing such injury, Mrs. Johnson brought suit in the supreme court of New Jersey against the New York & Long Branch Steamboat Company, the charterers of the Little Silver. Hans Johnson also brought a similar suit for the injury sustained by him through said injury to his wife, the said Borrea Johnson. Thereafter the charterer filed a libel in admiralty in the district court of the district of New Jersey for limitation of liability, under Rev. Stat. §§ 4281 to 4289, U. S. Comp. Stat. 1901, pp. 2942 to 2945, and the acts supplementary thereto and amendatory thereof. The libel recited the suits of Hans and Borrea Johnson, and prayed, *inter alia*, that a monition issue to compel them to prove their claims before a commissioner. Thereupon the Johnsons appeared and filed their answer to the libel, claiming damages to them, respectively, by reason of the negligence of the Little Silver in causing the injury to Borrea Johnson. The case was then proceeded in, so that the court granted the petitioner's prayer for limitation of liability, and decreed Borrea \$4,000 damages and Hans \$1,147, which latter sum included \$447 for expenses of illness, etc. From a decree so ordering, the charterer appealed to this court.

The appeal raises three questions: First. Was the Little Silver negligent? Second. Were the amounts decreed excessive? And third. Was Hans Johnson's claim recoverable in admiralty? As to the first and second questions, it will be seen, by reference to the opinion of the court below, that its conclusions as to the negligence of the Little Silver's pilot are abundantly sustained. That pilot was familiar with the upset tide created by the meeting of the waters from the East and North rivers, and knew the shifting character of the eddy caused thereby. Ignoring the fact that the speed of the Slatington and her barges might be somewhat impeded by such eddy, and apparently making no allowance therefore, he attempted to cut too close under the tug's stern, when he had plenty of room to avoid it, and as a result he struck the Slatington's barge well forward of its stern. As said by the court below: "He either grossly miscalculated, or, as is more likely, took a chance."

As to the amounts of the award, we are of opinion there was evidence of injury to warrant decrees for the amounts allowed. In the nature of things, the fixation of damages may take a very considerable range, and the sums allowed are well within the ranges of the different conclusions that different minds might reach on such testimony. To no one of the members of this court 42 L.R.A. (N.S.)

has it seemed that there was any undue allowance made by the judge in the conclusion he reached only after a painstaking and thorough discussion of the proofs in his opinion.

It remains to discuss the third question; namely, whether the husband's claim was recoverable in admiralty. In that regard it might be sufficient to say that he was not a suitor in admiralty, but that, having brought his suit in a jurisdiction in which he could unquestionably maintain it (*American S. B. Co. v. Chase*, 16 Wall. 523, 21 L. ed. 369), he was prevented from pursuing his remedy there by the appellant's libel, and forced (*Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; *Richardson v. Harmon*, 222 U. S. 90, 56 L. ed. 110, 32 Sup. Ct. Rep. 27) to come into admiralty as a necessary party to the statutory proceeding to limit liability.

But, without basing our conclusion on that consideration, we are clear that Johnson's claim was recoverable in admiralty. The injury to Mrs. Johnson was a maritime tort, and clearly warranted maritime relief. *The New World v. King*, 16 How. 469, 14 L. ed. 1019; *Mendell v. The Martin White, Hoffm. Ops.* 450, Fed. Cas. No. 9,419. The tort, then, being wholly maritime, why does not such tort constitute a maritime cause of action to everyone who was injured thereby? The relations of husband and wife and parent and child are not maritime relations; but such relations, or the implied contracts or rights growing out of such relations, do not constitute the real ground of action, when a husband, wife, parent, or child invoke admiralty relief for injury sustained by a maritime tort. In such cases the maritime tort is the real thing contested, and therefore such contest should be made under maritime rules, process, and law. The thing in action is not the relationship, but the tort. The relationship is a mere step or incident to support the action. It is true that in *Savage v. New York, N. & H. S. S. Co.* 107 C. C. A. 648, 185 Fed. 778, the lower court in its opinion said: "No instance of what is in substance an action *per quod consortium amisit* has been shown in the admiralty."

To this we cannot agree, for in *The Sea Gull, Chase*, Dec. 145, Fed. Cas. No. 12,578 (to which the Supreme Court referred in *American S. B. Co. v. Chase*, supra), it was held that "a husband can recover, in a proceeding *in rem* against the vessel which caused the death of his wife, for the injury suffered by him thereby."

The same doctrine was restated by the chief justice later in *The Highland Light, Chase*, Dec. 150, Fed. Cas. No. 6,477, where

it was said: "Indeed, the jurisdiction for marine torts in admiralty may be said to be coextensive with the subject. It depends on the locality of the wrong, not upon its extent, character, or the relations of the persons injured."

That such right exists in the husband is but carrying to its logical conclusion the reasoning of Mr. Justice Story in *Plummer v. Webb*, 4 Mason, 380, Fed. Cas. No. 11,233, where it was held that a father may maintain a suit in the admiralty for a tortious abduction of his minor son on a voyage on the high seas, in the nature of an action *per quod servitium amisit*.

The decree of the court below is therefore affirmed.

### KENTUCKY COURT OF APPEALS.

COUNTY BOARD OF EDUCATION, Appt.,  
v.

JOHN H. HENSLEY.

(147 Ky. 441, 144 S. W. 63.)

#### Infancy — right to rescind deed — fraudulent concealment.

An infant who in personal appearance, family surroundings, and business activities appears to be of age, will not be permitted to rescind a sale of his land for a reasonable price under the representation that he was of age, the trade being fairly made and the grantee parting with the consideration without notice of the infancy.

(March 8, 1912.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Harlan county in plaintiff's favor in an action brought to cancel a deed and recover possession of the property. Reversed.

The facts are stated in the opinion.

#### Note. — Estoppel by misrepresentation as to age to plead infancy.

This is a continuation of notes to *Lowery v. Cate*, 57 L.R.A. 684; *Commander v. Brazile*, 9 L.R.A.(N.S.) 1117; *Tobin v. Spann*, 16 L.R.A.(N.S.) 672; and *Putnal v. Walker*, 36 L.R.A.(N.S.) 33.

Subsequently to these notes it was held in *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, that one who, while an infant, entered into contract for instruction with a correspondence school, was not, after attaining majority, estopped to plead infancy in an action on the contract because of having misrepresented, with no intent to defraud, that he was of age, in the subscription paper. "The doctrine of estoppel," said the court, "is rarely if ever applied to infants. The action is on contract, not in tort. There is no sug- 42 L.R.A.(N.S.)

Messrs. G. A. Eversole and George R. Pope for appellant.

Mr. H. C. Clay for appellee.

Miller J., delivered the opinion of the court:

On July 9, 1907, the trustees of common school district No. 1, in Harlan county, the predecessor of the appellant, bought three and one-half town lots in Mt. Pleasant or Harlan town from the appellee, John H. Hensley, for school purposes. The agreed purchase price was \$400 in cash, but there being a vendor's lien upon this and other property for \$300, that amount of the purchase money was appropriated to the discharge of the lien, which was released by the vendor on the same day. On September 12, 1910, Hensley brought this suit for the purpose of canceling his former deed, and to recover the property, upon the ground that he was an infant when he made the conveyance on July 9, 1907. Hensley alleged that he was born on December 10, 1886; and, if that be true, he did not reach his majority until December 10, 1907, which was five months after he executed the deed. Appellant presented these defenses: (1) It denied that Hensley was an infant when he made the deed. (2) It charged that he was over twenty-one years of age, or that he falsely represented himself to be over twenty-one years of age at the time he executed the deed. (3) That he stood by and saw appellant build a school-house upon the lot at a cost of \$500 without objection or protest, and that he is thereby estopped from now relying upon his infancy. The chancellor granted the relief prayed, directed the cancelation of Hensley's deed to the school trustees, and a restoration of the property; and from that judgment the defendant prosecutes this appeal.

Hensley's father and mother have been

gestion of false representation or fraud in the complaint or stipulation, except that the latter sets forth that the defendant signed the subscription paper which stated his age was twenty-one years. No other representation was made. While an infant is liable for his torts, the action must rest solely on the wrong committed by him. The complaint in this action rests wholly on the written contract which is set forth at length; and the fact that the contract contains the statement as to age, with neither allegation nor proof that it was made with intent to defraud, does not 'fix the character of the action as *ex delicto*.' . . . It is well settled in this state that in an action upon a contract made by an infant, he is not estopped from pleading his infancy by any representation as to his age made by him to induce another person to contract with him." J. D. C.

dead for many years. Upon the question of his infancy the weight of the proof is with Hensley; indeed, the only specific testimony upon that point was by his grandfather and an uncle by marriage, who established the date of Hensley's birth as December 10, 1886. There is no direct testimony contradicting them. It appears, however, that Hensley was a married man, with two children, and from all appearances was more than twenty-one years of age. Furthermore, he had been engaged in business upon his own account for several years, trading in real estate and live stock. He had sold his farm which he inherited from his father, and bought the town lots now in controversy and other lots from Grant Smith on April 6, 1907, about three months before he made the conveyance to the school board. In 1906 and 1907, the sheriff of the county had collected a poll tax from appellee. He says he had probably voted in political conventions, though never in a primary election. All of these facts were well and generally known in the community. When Turner Howard, the school trustee who made the purchase from Hensley, asked Hensley if there was anything that would prevent him from making a good deed to the lot, Hensley answered that there was nothing except a part of the purchase price which constituted a lien on the lot, whereupon Howard said the trustees would pay that and have the lien released. Hensley claims that he paid the money himself, and that it was not paid by the school board. This, however, is immaterial, since it is evident that the purchase by the school trustees and the release by Howard were contemporaneous transactions, and that \$300 of the trustees' purchase money was used in the discharge of the lien.

While there may be some conflict upon the question in other jurisdictions, it is well settled in this state that where an infant has conveyed land for a reasonable price, representing at the time that he was of age, and has thereby induced the grantee to part with the consideration, the trade being fairly made, and the grantee having no notice that the grantor was under age, the infant will be bound by his deed. And the rule denying relief to the infant is not restricted in its operation to his misrepresentations. It applies equally to his fraudulent concealments.

In *Schmitheimer v. Eiseman*, 7 Bush, 300, this court said: "Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor *femes covert* are privileged to practise frauds upon innocent persons. 1 Story, Eq. p. 385; *Davis v. Tingle*, 8 B. Mon. 543; *Simrall v. Jacob*, 14 B. Mon. 42 L.R.A.(N.S.)

513." In the late case of *Asher v. Bennett*, 143 Ky. 363, 136 S. W. 880, this court, in speaking of the foregoing rule, said: "The rule is simply an application of the equitable doctrine that he who misleads another by his solemn assertion of a fact will not be allowed to assert the contrary to the prejudice of the person whom he has thus misled, and so perpetrate a fraud upon him. It will not be applied where the grantee knows that the grantor is an infant, or where, from his appearance, situation, or other circumstances, as a reasonably prudent man, he should know it. It will only be applied when necessary to protect the grantee from what would otherwise be a fraud." *Bailey v. Barnberger*, 11 B. Mon. 113; *Ingram v. Ison*, 26 Ky. L. Rep. 48, 80 S. W. 787; *Harris v. Ronk*, 32 Ky. L. Rep. 966, 107 S. W. 341; *Pace v. Cawood*, 33 Ky. L. Rep. 592, 110 S. W. 414; *Edgar v. Gertison*, — Ky. —, 112 S. W. 831; *Sackett v. Asher*, — Ky. —, 22 L.R.A.(N.S.) 453, 112 S. W. 833; *Phillips v. Williams*, — Ky. —, 114 S. W. 1191, and *Asher v. Bennett*, 143 Ky. 362, 136 S. W. 879, are to the same effect. From these cases, the rule in this state, in so far as it is applicable to the facts of this case, may be stated as follows: When one deals with an infant, knowing him to be an infant, the latter is not estopped from relying upon his infancy in avoidance of the contract; but when an infant, by reason of his personal appearance, family surroundings, and business activities, coupled with a misrepresentation or fraudulent concealment, leads one who deals with him, in good faith, and not knowing that he is an infant, to believe that he is of age, he will be estopped from maintaining an action to avoid his executed contract. When he comes into equity seeking relief, he must come with clean hands. The privilege of infancy is a shield for the protection of the infant, and not a weapon of attack; nor is it to be used as a means of defrauding others.

The school trustees did not know that Hensley was a minor; and, on the other hand, Hensley contends that he did not represent to them that he was of age. We are of opinion, however, that the answer made to Howard, wherein Hensley stated that there was no reason against his making a good title to the property except the purchase-money lien, was, in effect, a representation that he was not disqualified by infancy or otherwise from making a good title. It was an intentional concealment of the truth, when it was his duty to speak. Hensley knew that he was not then of age, and good faith required that he should have answered the question, not only truthfully, but fully, and in the sense and scope he

knew it had been asked. This he failed to do, and, in so failing, brought himself squarely within the rule above laid down. He is estopped from now showing that the facts were different from what he then represented them to be.

The judgment is reversed, with instructions to dismiss the petition.

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**OKLAHOMA SUPREME COURT.**  
(Division No. 2.)

**ST. LOUIS & SAN FRANCISCO RAIL-  
ROAD COMPANY, Plff. in Err.,  
v.  
FRANK H. MAYNE.**

(— Okla. —, 127 Pac. 474.)

**Master and servant — simple tool — augur bit.**

An augur bit, the cutting points of which have become shortened and dull from use and frequent sharpening, is an ordinary simple tool, with the use and condition of which a servant of experience has as much or greater knowledge than the master, and where a servant, with twelve years' experience as a carpenter, is injured while boring a hole with such tool, and the only negligence relied on or attempted to be proven is such defect, of dull and worn condition, it not being claimed that it broke, it was otherwise out of repair, *held*, that the evidence fails to show a violation by the master of any duty owing to the servant, and that the judgment is therefore not supported by evidence.

(October 23, 1912.)

**E**RROR to the District Court for Choctaw County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, for plaintiff in error:

The furnishing of a dull bit did not render the defendant liable to the plaintiff; it constituted no negligence or omission of duty on the part of the defendant.

Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Thorn v. New York City Ice Co. 46 Hun, 497; Meador v. Lake Shore & M.

**Headnote by BREWER, C.**

**Note.**—As to liability of master for injury from defect in simple tool, see notes to Vanderpool v. Partridge, 13 L.R.A. (N.S.) 668; Sheridan v. Gorham Mfg. Co. 13 L.R.A. (N.S.) 687; and Parker v. W. C. Wood Lumber Co. 40 L.R.A. (N.S.) 832. 42 L.R.A. (N.S.)

S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721; Koschman v. Ash, 98 Minn. 312, 116 Am. St. Rep. 373, 108 N. W. 514; 26 Cyc. 1210.

The alleged injury sustained by the plaintiff was not the proximate result of the dullness of the bit.

Home Oil & Gas Co. v. Dabney, 79 Kan. 820, 102 Pac. 488; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Powers v. New York, L. E. & W. R. Co. 98 N. Y. 274; Powers v. Thayer Lumber Co. 92 Mich. 533, 52 N. W. 937; Young v. Burlington Wire Mattress Co. 79 Iowa, 415, 44 N. W. 693; Conley v. American Exp. Co. 87 Me. 352, 32 Atl. 965.

Messrs. R. L. Evans and T. A. Johnson, for defendant in error:

If an employee discovers that appliances or tools furnished him by the employer are defective, and informs the employer of such defect, and, relying upon the employer's assurance that the defect will be remedied, continues in the service of his employer, he will be entitled to recover.

Neeley v. Southwestern Cotton Seed Oil Co. 13 Okla. 357, 64 L.R.A. 145, 75 Pac. 537; Boyd v. Portland General Electric Co. 40 Or. 126, 57 L.R.A. 619, 66 Pac. 576; Shawnee Light & Power Co. v. Sears, 21 Okla. 17, 95 Pac. 449.

Brewer, C., delivered the opinion of the court:

This suit was filed by Frank H. Mayne in the district court of Choctaw county against the St. Louis & San Francisco Railway Company on October 8, 1909, for the recovery of damages for personal injuries alleged to have been caused by the negligence of the railroad company in providing plaintiff with a defective tool with which to work.

It appears that plaintiff was a carpenter by occupation, having had some twelve years' experience in such trade; that he had worked for defendant about three years and in the repair shops at Hugo for more than a year; that on the day of the injury plaintiff undertook to bore an inch hole through a piece of timber 2 inches thick, 10 inches wide, and 25 inches long, with a hand-boring machine belonging to defendant and found there in the shop. The only negligence claimed, shown, or attempted to be shown is that the auger bit which worked in this hand-boring machine was dull and the cutting edge of the bit considerably worn down from having been sharpened with a file. It is not claimed that the machine or the bit were otherwise out of repair. It is shown that the machine is a simple contrivance, no

more complicated in its mechanism than the ordinary brace and bit. While using it upon the day in question plaintiff lay a heavy piece of timber upon two wooden saw horses 23 inches high. Upon this piece of timber he placed the smaller piece which he was working upon. On top of that he put the boring machine, sitting astride it, and clamping it with his legs. In operating the machine, holding to its wooden handles, he pulled with force in turning it, which caused it to move under him and he toppled over and fell, striking his side against a door knob in close proximity to where he was working. Plaintiff recovered a judgment of \$500, to review which this proceeding in error was instituted.

At the conclusion of plaintiff's evidence defendant demurred thereto, which being overruled, it offered its testimony, and at the close of all the evidence asked the court to give the jury a peremptory instruction in its favor. The refusal of the court to so charge the jury is the serious question presented here. This involves the doctrines of negligence and inspection as applied to a master furnishing the ordinary simple tools used in common labor to his servant. On this question Judge Bailey in his work on Personal Injuries (1 Bailey, Personal Injuries, 2d ed. § 100), under subtitle of "Ordinary Tools," says: "The question as to how far, if at all, the duty of the master extends to furnishing and inspecting ordinary tools, such as hammers, ladders, etc., is the subject of considerable conflict in the decisions, and reference should also be made to the subdivision on inspection. There is also much diversity of opinion as to what shall be considered as an ordinary tool or implement. It has been held that a statute rendering the master liable for defective 'machinery' is not extended to a case of injury to an employee arising from the use of ordinary tools such as a hammer. It was stated: 'We cannot hold, for in our opinion it is not the law, that an employer is liable to a servant when he furnishes him was an ax, a wagon, a saw, a hammer, or any other tool which appears to be first class, and which subsequently, by some latent defect, breaks and injures the servant. If such were the law, every farmer, contractor, or other employer would be liable to his employee when he furnished him tools, and they broke and injured him on account of some latent defects which could not be ascertained by the exercise of ordinary care.' In reference to the general rule, it was said: 'It is one of a just and salutary character, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those

engaged in ordinary labor which only requires the use of implements with which they are entirely familiar.' . . . Generally speaking, in the case of simple tools, no liability rests upon the master for the ordinary perils resulting from their use, nor for those latent and ordinary defects or weaknesses which by reason of the common usual character of the appliance are presumed to be known by all men alike; but such exemption is based on the condition that the defect and peril are such that no superiority of knowledge of the master over the employee exists or can be presumed." And in 3 Elliott on Railroads, 2d ed. § 1278a, under title "Simple Tools," we extract the following: "Many authorities are cited, and the rule is thus stated in a recent case: 'When the appliances or machinery furnished employees are at all complicated in character or construction, the employer is charged with the duty of making such reasonable inspection as is necessary to detect defects. But the master is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments.'" In the case of Martin v. Highland Park Mfg. Co. 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876, where the servant was injured by a piece flying from the face of a hammer which he was at the time using in driving an iron key or bolt into a shaft where the bolt was too large, this rule was applied and the master held not liable, and in the course of the opinion the court say: "Surely, it cannot be seriously contended that every employer is responsible for injuries occurring from improperly tempered axes, hoes, scythes, trace chains, lap links, bridle bits, etc., the imperfections of which could not be known till used, or for defective whiffle-trees, ax helves, hoe helves, hand spikes, plow lines, and such like (the defects of which would be first discovered by the party using them), unless the employer is shown to have had knowledge of such defects. If such be the rules of law, then the contentment of the farmer must give place to anxiety and dread lest injury, resulting to a servant from a splintered hoe helve or hand spike, defective bridle bit, whiffle-tree or plow line, *et id simile*, may at any time occur, and sweep from him his farm and belongings in compensation of the damages done. To the same experience would the contractor expect to be subjected, should a defective nail, while being driven by one of his carpenters, break and do injury, to which doctrine we cannot subscribe." And in the case of Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936, which was a case of injury resulting from the use of a "backing hammer" the face of

which had become chipped and out of repair, the court in applying the doctrine of simple and ordinary tools quotes with approval the following from Meador v. Lake Shore & M. S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721: "In an action for a personal injury occasioned by a defective ladder used by a watchman in lighting and extinguishing lamps at street crossings, the court said: 'The fact that he notified the master of the defect and asked for another implement, and the master promised to furnish it, in such a case does not render the master responsible if an accident occurs. A rule imposing liability under such circumstances would be far-reaching in its consequences, and would extend the rule of *respondent superior* to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employees engaged in work where machinery and materials are used of which they have little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff in the case at bar was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to, as applied to the use of complicated machinery. . . . No contrivance could be simpler in its construction than this 5-foot ladder,—not even a hoe, an ax, or a spade. Appellant had at least equal knowledge with the company, as to the nature and condition of the ladder.' The following additional cases apply the doctrine where the tool was a ladder: Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Cahill v. Hilton, 106 N. Y. 512, 518, 13 N. E. 339; Meador v. Lake Shore & M. S. R. Co. 138 Ind. 290, 46 Am. St. Rep. 384, 37 N. E. 721. However, the question of whether a ladder is a simple tool and comes within the rule applied to such depends on the length, construction, purposes for which, and the situation in which, it is to be used.

The rule has been applied in "hammer" cases in Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936; Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497 (a snap hammer); Dompier v. Lewis, 131 Mich. 144, 91 N. W. 152; Lynn v. Glucose Sugar Ref. Co. 128 Iowa, 501, 104 N. W. 577; Golden v. Ellis, 104 Me. 177, 71 Atl. 649; Koschman v. Ash, 98 Minn. 312, 116 Am. St. Rep. 373, 108 N. W. 514. In the case of Morris v. Eastern R. Co. 88 Minn. 112, 92 N. W. 535, it was stated that the rule that the master does not owe his servant the duty of inspecting small tools, such as hammers, wrenches, saws, augers, planes, etc., applies only to defects arising 42 L.R.A. (N.S.)

from use, etc. The case of Miller v. Erie R. Co. 21 App. Div. 45, 47 N. Y. Supp. 285, was a case where the tool was a push pole by which an engine on one track was used to move a car on an adjoining track. In Gulf, C. & S. F. R. Co. v. Larkin, 98 Tex. 225, 1 L.R.A. (N.S.) 944, 82 S. W. 1026, a defective globe on a lantern was involved. In O'Brien v. Missouri, K. & T. R. Co. 36 Tex. Civ. App. 528, 82 S. W. 319, a defective wrench was the tool complained of. In Lehman v. Chicago, St. P. M. & O. R. Co. 140 Wis. 497, 122 N. W. 1059, the syllabus is: "An implement having a wooden handle about 3 feet long, inserted in an iron cross-head, having a hammer face on one and a pick point on the other end, is a 'simple tool,' which the master need not inspect." In Potter v. Chicago, R. I. & P. R. Co. 46 Iowa, 399, a pole or stick used as a temporary axle was held to be an ordinary tool. In Gillaspie v. United Iron Works Co. 76 Kan. 70, 90 Pac. 760, a set or snap used to receive blows of a sledge in riveting eye-beams was considered and treated as an ordinary or simple tool, although the specific reason of the ground for the decision that the master was not liable for an injury to an employee from a sliver flying from the tool was that the danger was as apparent and within the comprehension of the employee as the master. In the case of Nelson-Bethel Clothing Co. v. Pitts, 131 Ky. 65, 23 L.R.A. (N.S.) 1013, 114 S. W. 331, it was held that an ordinary sewing-machine belt, consisting of several parts fastened with hooks, is not a dangerous instrumentality, the use of which by the master will render him liable to his servant for injuries. In Garnett v. Phoenix Bridge Co. (C. C.) 98 Fed. 192, where a wrench used by an employee in screwing a nut on a bolt broke from the strain, causing the employee to fall from an elevated position, it was held that of itself was not negligence. The wrench was not a dangerous tool, and injury resulting from its breaking could not reasonably have been anticipated. See also Georgia R. & Bkg. Co. v. Nelms, 83 Ga. 70, 20 Am. St. Rep. 308, 9 S. E. 1049; Garragan v. Fall River Iron Works Co. 158 Mass. 596, 33 N. E. 652; Jenney Electric Light & P. Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Georgia P. R. Co. v. Brooks, 84 Ala. 138, 4 So. 289. It is to be borne in mind that in the case at bar the hand machine was in perfect condition, except as to the bit itself, which was worn and dull. Nothing broke, nothing failed to work. The dullness of the bit merely caused it to work tighter in the wood, causing an expenditure of more strength by the workman. In exerting the necessary force the workman fell off the timbers, striking against the knob of a

door standing ajar against the wall of the building. The plaintiff admits that he apprehended no such accident. Could it be said that such a result from boring a hole with a dull auger could have been within the bounds of the master's contemplation? Such a result as ought to have been anticipated and provided against? We cannot think so. And this leads us to conclude that there was no evidence in the case tending to show a violation of any duty the master owed to the servant, and therefore the case should be reversed.

Per Curlam:  
Adopted in whole.

### NEBRASKA SUPREME COURT.

MARY K. OSGOOD, Appt.,  
v.

MORTY SHEA.

(86 Neb. 729, 126 N. W. 310.)

**Landlord and tenant — parol lease — validity.**

1. By § 5, chap. 32, Comp. Stat. 1909, commonly called the "statute of frauds,"

Headnotes by BARNES, J.

**Note.—Nature of tenancy created by entry under lease void under statute of frauds.**

This note is confined strictly to the scope indicated in the title, the general question of the effect at law of an entry under a lease void under the statute of frauds being treated in the note to Brodner v. Swirsky, post, 654.

As to whether or not entry under a parol agreement for a lease constitutes part performance, see the note to Weed v. Lindsay, 20 L.R.A. 33. And the general question of taking possession of real property as part performance, to satisfy the statute of frauds, is treated in the note to Roberts v. Templeton, 3 L.R.A.(N.S.) 790. As to effect of making improvements under oral lease void under the statute of frauds, see the note to Watkins v. Balch, 3 L.R.A.(N.S.) 852.

The true rule seems to be that a parol lease void under the statute of frauds creates, in the first instance, an estate at will, strictly so called, which becomes, under the rule of convertibility, a tenancy from month to month or from year to year, by entry and payment of rent, or other circumstances indicating that such is the intent of the parties. In a few jurisdictions, however, the question has been expressly regulated by statute, but such statutes in most cases merely declare the law as above stated.

Primarily, either by express statutory 42 L.R.A.(N.S.)

a parol lease of real estate for three years is valid for one year only, and is void as to the remainder of the term. Where no equitable considerations have intervened, it may be terminated by either party at the end of the year, by giving notice of his intention to do so within that period.

**Same — possession — part performance.**

2. Possession by the tenant for the first year of the term, in the absence of equitable considerations, is not such part performance as will avoid the provisions of the statute.

(May 5, 1910.)

**A** PPEAL by plaintiff from a judgment of the District Court for Johnson County in defendant's favor in an action of forcible entry and detainer. Reversed.

The facts are stated in the opinion.

Messrs. Tibbets & Anderson, for appellant:

If a contract may be in any way severed so that a part of it will be held valid and the remainder invalid, a part performance of the valid part will not sustain the invalid part. If the performance can be referred to or based on anything else than the invalid part of the contract, it will not avail to take such invalid part of contract out of the statute.

regulation or by judicial construction, the tenant is merely one at will, but administration of the rights of the parties under such a holding worked such injustice, especially in regard to agricultural lands, that the courts from very early times have by implication converted the tenancy into one from year to year (in some instances from month to month), whenever the circumstances pointed to the fact that the parties intended the tenancy to be one for a year or more, as, for example, the payment of an annual rental, or by occupation with the landlord's consent for over a year, etc. In such case the holding is not strictly one under the void lease, but rather under one created by implication of law, but in most instances the terms of the void agreement control the occupancy under the implied tenancy, with the exception of the duration of the term.

Practically the only diversity of conclusion arises over the question as to what circumstances sufficiently indicate that a tenancy from year to year may be implied, but the real conflict is slight, since in most instances where the decisions are seemingly conflicting different elements were involved.

**Primary nature of occupancy—in general.**

The general rule, in the absence of express statute, is that a tenant who enters under a void lease is in the first instance a general tenant at will, and that the incidents of such an estate attach. McLeran



Schields v. Horbach, 49 Neb. 262, 68 N. W. 524; Lewis v. North, 62 Neb. 552, 87 N. W. 312; Steger v. Kosch, 77 Neb. 147, 108 N. W. 165, 110 N. W. 983; Kofoid v. Lincoln Implement & Transfer Co. 80 Neb. 634, 114 N. W. 937; Spalding v. Conzelman, 30 Mo. 182; Mahana v. Blunt, 20 Iowa, 142; Schneider v. Curran, 19 Ohio C. C. 224, 10 Ohio C. D. 239; Crawford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103, 8 Mor. Min. Rep. 541; Armstrong v. Kattenhorn, 11 Ohio, 265.

In Nebraska an oral lease for more than one year is valid as to the part within the year, and void as to the excess.

Friedhoff v. Smith, 13 Neb. 5, 12 N. W. 820.

The plea of partial performance is avail-

v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Goodwin v. Perkins, 134 Cal. 564, 66 Pac. 793; Carteri v. Roberts, 140 Cal. 104, 73 Pac. 818; Price v. Thompson, 4 Ga. App. 46, 60 S. E. 800; Packard v. Cleveland, C. C. & St. L. R. Co. 46 Ill. App. 244; Woodstrum v. Freeman, 159 Ill. App. 340; Dunne v. Trustees of Schools, 39 Ill. 578; Hauser v. Romer, 4 Ky. L. Rep. 815; Wessells v. Rodifer, 30 Ky. L. Rep. 51, 97 S. W. 341; Smith v. Hornback, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; Bailey v. Ward, 32 La. Ann. 839; Danforth v. Cushing, 77 Me. 182; Howard v. Merriam, 5 Cush. 563; Kelly v. Waite, 12 Met. 300; Hooton v. Holt, 139 Mass. 54, 29 N. E. 221; Huyser v. Chase, 13 Mich. 98; Goodwin v. Clover, 91 Minn. 438, 103 Am. St. Rep. 517, 98 N. W. 322; Leavitt v. Leavitt, 47 N. H. 329; Felch v. Harriman, 64 N. H. 472, 13 Atl. 418; Fink v. Standard Bread Co. 61 Misc. 626, 113 N. Y. Supp. 1036; Israelson v. Wollenberg, 63 Misc. 293, 116 N. Y. Supp. 626; Talomo v. Spitzmiller, 120 N. Y. 37, 8 L.R.A. 221, 17 Am. St. Rep. 607, 23 N. E. 980; Carey v. Richards, 2 Ohio Dec. Reprint, 630; 'M'Dowell v. Simpson, 3 Watts, 129, 27 Am. Dec. 338; Thurber v. Dwyer, 10 R. I. 355; Blanchard v. Bowers, 67 Vt. 403, 31 Atl. 848; Arbenz v. Exley, 52 W. Va. 476, 61 L.R.A. 957, 44 S. E. 149.

But it has been said that a tenant holding under a void lease has no title of tenancy, but holds strictly at the will of the landlord. Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Singer Mfg. Co. v. Sayre, 75 Ala. 270. But in connection with the latter cases, see Crawford v. Jones, 54 Ala. 459, wherein it was said that, "though a contract of renting is void under the statute of frauds as a lease, if the tenant enters and occupies under it, the relation of landlord and tenant is thereby created. The tenant owes to the landlord the fealty, and the landlord owes to the tenant the duty, which are the inseparable incidents of a lease executed in the manner the statute of frauds prescribes. The landlord may by distress, or other legal remedies, collect his rent, and the tenant may retain

able to the defendant only in equity, and cannot be raised as a defense in an action at law in a forcible entry and detention suit.

Bartlett v. Bartlett, 103 Mich. 293, 61 N. W. 500; Lipp v. Hunt, 25 Neb. 91, 41 N. W. 143.

Messrs. Daniel F. Osgood and S. P. Davidson also for appellant.

Messrs. Jay C. Moore and Hugh La Master for appellee.

Barnes, J., delivered the opinion of the court:

Action for the alleged forcible detention of real estate. On the trial in the district court the defendant had the verdict and judgment, and the plaintiff has appealed. The pleadings consisted of a petition in

the possession against any known process of law."

Under statute.

In many jurisdictions the statutes expressly make a holding under a void lease one at will. Hayes v. Atlanta, 1 Ga. App. 257, 57 S. E. 1087; Gay v. Peake, 5 Ga. App. 583, 63 S. E. 650; Cody v. Quarterman, 12 Ga. 386; Western U. Teleg. Co. v. Fain, 52 Ga. 18; Weed v. Lindsay, 88 Ga. 692, 20 L.R.A. 33, 15 S. E. 836; Nicholes v. Swift, 118 Ga. 922, 45 S. E. 708; Abbott v. Padrosa, 136 Ga. 278, 71 S. E. 419; Withers v. Larrabee, 48 Me. 570; Thomas v. Sanford S. S. Co. 71 Me. 548; Ellis v. Paige, 1 Pick. 43; Hingham v. Sprague, 15 Pick. 102; Currier v. Barker, 2 Gray, 224; Sprague v. Quinn, 108 Mass. 553; Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544; Hoover v. Pacific Oil Co. 41 Mo. App. 317; Gerhart Realty Co. v. Weiter, 108 Mo. App. 248, 83 S. W. 278; Womach v. Jenkins, 128 Mo. App. 408, 107 S. W. 423; Kerr v. Clark, 19 Mo. 132; Ridgley v. Stillwell, 28 Mo. 400; Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228; Leavitt v. Leavitt, 47 N. H. 329; Tuttle v. Langley, 68 N. H. 464, 39 Atl. 488; Pfeiffer v. Peters, 80 N. J. L. 661, 77 Atl. 1076; People ex rel. Kline v. Rickert, 8 Cow. 226; Loran's Estate, 10 Pa. Co. Ct. 554; Walter v. Transue, 17 Pa. Super. Ct. 94, on subsequent appeal, 22 Pa. Super. Ct. 617; Stover v. Cadwallader, 2 Pennyp. 117 (lease for term of over three years); Clark v. Smith, 25 Pa. 137; Dunn v. Rothermel, 112 Pa. 272, 3 Atl. 800 (when term over three years); Jennings v. McComb, 112 Pa. 518, 4 Atl. 812 (lease exceeding three years); Couch v. Burke, 2 Hill, L. 534; Hellams v. Patton, 44 S. C. 454, 22 S. E. 608; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79; Silsby v. Allen, 43 Vt. 172; Amsden v. Atwood, 68 Vt. 322, 35 Atl. 311; Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11. And by the English statute (29 Car. II. chap. 3, § 1) all parol leases for over three years were declared to have the effect of tenancies at will only. Goodtitle ex dem. Gal-

the usual form, and the answer was not guilty. It appears, without dispute, that the defendant took possession of an 80-acre tract of land situated in Johnson county, Nebraska, owned by the plaintiff, under a verbal lease, for the period of three years. Plaintiff claims that by the terms of the lease it was provided that, if she should sell the farm, the defendant would vacate and surrender possession at the end of the then current year. Both the plaintiff and her husband testified positively that the lease was verbal, and was for a period of three years; that it contained the conditions that, in case she should sell the land, she could terminate the lease, and the defendant agreed thereby to vacate the premises at the end of the then current year. Of course,

defendant's plea of not guilty put that matter in issue, but his testimony upon that point was evasive and unsatisfactory. It appears beyond question that plaintiff made a bona fide sale of the land during the first year of the term, and notified the defendant of that fact, and at the same time demanded possession at the end of that year and as soon as he could remove his crops; that defendant went into possession in October, 1906, and was notified of the sale of the farm on or about the 1st of September, 1907; that he removed his crops about December 1st of that year; and that on December 16, 1907, the plaintiff served him with a written notice to quit on or before January 1, 1908. Defendant re-

laway v. Herbert, 4 T. R. 677; Clayton v. Blakey, 8 T. R. 3, 4 Revised Rep. 575; De Medina v. Polson, Holt, N. P. 47; Gibboney v. Gibboney, 36 U. C. Q. B. 236. And under statutes making all parol leases unenforceable, entry under such a lease has been held to make the tenancy one at will. Larkin v. Avery, 23 Conn. 304; Corbett v. Cochrane, 67 Conn. 570, 35 Atl. 509.

But in Indiana the statutes make an occupancy under a parol lease which is void or voidable a tenancy from year to year. Railsback v. Walke, 81 Ind. 409; Nash v. Berkmeir, 83 Ind. 536.

And at one time in England it was expressly provided by statute (7 & 8 Vict. chap. 76, § 4) that no lease unless by deed should be valid as a lease, but should take effect as an agreement to execute a lease, and that possession under such an agreement might, from payment of rent or other circumstances, be considered to be a tenancy from year to year (see Doe ex dem. Davenish v. Moffatt, 15 Q. B. 257, 19 L. J. Q. B. N. S. 438, 14 Jur. 935; Arden v. Sullivan, 14 Q. B. 832, 14 Jur. 712, 19 L. J. Q. B. N. S. 268, and Treas v. Savage, 4 El. & Bl. 36, 18 Jur. 680, 2 C. L. R. 1315, 23 L. J. Q. B. N. S. 339, 2 Week. Rep. 564); but this statute was repealed by 8 & 9 Vict. chap. 106, and § 3 of that act, which provides merely that a lease required by law to be in writing shall be void at law unless by deed, substituted therefor. But it seems that this act does not affect cases falling within § 2 of the statute of frauds, which excepts parol leases for not over three years (see Wood v. Beard, 46 L. J. Q. B. N. S. 100, L. R. 2 Exch. Div. 30, 35 L. T. N. S. 866), it being held that entry and payment of yearly rent under a lease for more than three years, which was void because not by deed, rendered the tenancy one from year to year (Lee v. Smith, 9 Exch. 662, 2 C. L. R. 1079, 23 L. J. Exch. N. S. 108, 2 Week. Rep. 377; Arden v. Sullivan, supra).

In Ohio it is provided by statute that parol leases not exceeding three years, "if accompanied by possession," are valid. Dominick v. Kane, 4 Ohio N. P. N. S. 583, 42 L.R.A. (N.S.)

17 Ohio S. & C. P. Dec. 353, holding that there were two essentials to the validity of a parol lease for one year, namely, the oral agreement and the taking of possession.

In Missouri the English rule that the tenancy is converted into one from year to year is modified by statute, it being provided that in cities, towns, and villages where rent is paid by the month for stores, shops, houses, tenements, and other buildings, the tenancy shall be from month to month, thus making parol leases valid, with the exception that they operate as leases from month to month. Wilgus v. Lewis, 8 Mo. App. 336; Vegely v. Robinson, 20 Mo. App. 199; Lehman v. Nolting, 56 Mo. App. 549; Pacific Exp. Co. v. Tyler Office Fixture Co. 72 Mo. App. 151; Squire v. Ferd Heim Brewing Co. 90 Mo. App. 462; Gerhart Realty Co. v. Weiter, 108 Mo. App. 248, 83 S. W. 278; Adams v. Bonnefon, 124 Mo. App. 457, 101 S. W. 693; Sessinghaus v. Knoche, 137 Mo. App. 323, 118 S. W. 104; Haumueller v. Ackermann, 150 Mo. App. 141, 130 S. W. 91; Winters v. Cherry, 78 Mo. 344; Withnell v. Petzold, 104 Mo. 409, 16 S. W. 205 (park with buildings thereon, situated in a city, and neither leased nor used for agricultural purposes); McFarland Real Estate Co. v. Joseph Gerardi Hotel Co. 202 Mo. 597, 100 S. W. 577. And in Washington, under the statutes, an oral lease becomes, by delivery of possession, a tenancy from month to month, or from period to period for which the rent is made payable by the terms of the agreement (Richards v. Redelsheimer, 36 Wash. 325, 78 Pac. 934; Oregon & W. R. Co. v. Vulcan Iron Works, 57 Wash. 372, 106 Pac. 1120), although by an earlier statute tenancies from year to year were expressly abolished, except where they were created by express written contract (see Richards v. Redelsheimer, supra,—but that this statute has been changed, see Watkins v. Balch, infra.) Under such statutes entry constitutes such part performance as will take the case out of the statute, and make the tenancy one from month to month if the rent is payable

fused to vacate, and thereupon this action was commenced. It also appears that after receiving notice of the sale, and after plaintiff requested him to vacate the premises, all of which occurred about September 1st, as above stated, defendant commenced to sow some wheat upon part of the land, but the plaintiff immediately commanded him to desist.

At the close of the evidence, plaintiff requested the court to instruct the jury that the lease in question was void under the statute of frauds, and that she was entitled to recover possession of the premises at the termination of the first year; it being contended that the lease was good for one year only. This request was denied, and, upon the theory that possession for the first year

took the agreement out of the statute of frauds, the court instructed the jury, upon his own motion, as follows: Instruction No. 2: "It is admitted by both parties that a lease of said premises was made by the plaintiff to the defendant, and that defendant entered into possession of said premises under said lease, and farmed the same. The difference between the parties arises over the question as to whether the lease was to be for three years, with the privilege on the part of the plaintiff to sell the premises at any time during the lease, and the defendant in such case to give possession at the end of the year as soon as the crops were moved from said land, as claimed by the plaintiff; or whether the lease was for three years absolutely, without any condition of

monthly (*Browder v. Phinney*, 37 Wash. 70, 79 Pac. 598; *Mades v. Howaldt*, 40 Wash. 450, 90 Pac. 588; *Oregon & W. R. Co. v. Vulcan Iron Works*, 57 Wash. 372, 106 Pac. 1120), or, where for a term of years with a yearly rental, one from year to year (*Watkins v. Balch*, 41 Wash. 310, 3 L.R.A.(N.S.) 852, 83 Pac. 321. And see *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039).

In some jurisdictions it is expressly provided by statute that a parol lease shall give a right of possession for twelve months, unless it is stipulated to be for a shorter term. *Teft v. Hinchman*, 76 Mich. 672, 43 N. W. 680; *Hillhouse v. Jennings*, 60 S. C. 392, 38 N. E. 596; *Re Schwartzman*, 167 Fed. 399, in which South Carolina Civ. Code 1902, § 2416, is construed. And under statutes which provide that no demise except by deed or lease under seal shall be effectual for a longer term than one year, occupancy renders the agreement effectual as a demise for one year, and, if continued thereafter, it becomes in effect a parol demise from year to year during the holding. *Stewart v. Apel*, 4 Houst. (Del.) 314; *Stewart v. Apel*, 5 Houst. (Del.) 189. So, under a statute which, after declaring that all parol leases shall have the force and effect of estates at will only, proceeds to provide that they shall not in law be deemed or taken to have any other or greater effect or force than leases not exceeding the term of one year, parol leases for a term longer than one year have been held good for one year. *Brockway v. Thomas*, 36 Ark. 518. And under statutes providing that every parol lease for a longer period than one year shall be void, it has been held that entry under such a lease renders the lease valid for one year, it being said that in such case it is only the excess over one year that is void. *Donovan v. Maloney*, — Del. —, 84 Atl. 1032; *Friedhoff v. Smith*, 13 Neb. 5, 12 N. W. 820; *OSGOOD v. SHEA*; *Hillhouse v. Jennings*, 60 S. C. 392, 38 S. E. 596; *Duke v. Harper*, 6 Yerg. 280, 27 Am. Dec. 462; *Shepherd v. Cummings*, 1 Coldw. 354; *Hammond v. Dean*, 8 Baxt. 193. But it was intimated in 42 L.R.A.(N.S.)

*Thomas v. Nelson*, 69 N. Y. 118, that a lease under such a statute would not be valid even for the first year, and expressly so held in *Talamo v. Spitzmiller*, 120 N. Y. 37, 8 L.R.A. 221, 17 Am. St. Rep. 607, 23 N. E. 980. And in the following cases, wherein the statute involved makes verbal leases for over three years void, it was held that verbal leases for over three years are not valid even for the first three years: *Carey v. Richards*, 2 Ohio Dec. Reprint, 630; *Whiting v. Pittsburgh Opera House Co.* 88 Pa. 100.

#### Nature of occupancy under rule of convertibility.

The English rule is that a void lease makes a lessee a tenant at will in the first instance (29 Car. 2, chap. 3, § 1), but that entry, occupancy, and payment of rent converts the estate into one from year to year. *Berrey v. Lindley*, 3 Mann. & G. 498, 4 Scott, N. R. 61, 11 L. J. C. P. N. S. 27, 5 Jur. 1061; *Braythwaite v. Hitchcock*, 10 Mees. & W. 494, 6 Jur. 976, 2 Dowl. N. S. 444, 12 L. J. Exch. N. S. 38; *Doe ex dem. Downe v. Thompson*, 9 Q. B. 1044, 11 Jur. 1007; *Bennett v. Ireland*, 28 L. J. Q. B. N. S. 48, El. Bl. & El. 326, 4 Jur. N. S. 1104; *Roe ex dem. Bree v. Lees*, 2 W. Bl. 1171; *Clayton v. Blakey*, 8 T. R. 3, 4 Revised Rep. 575; *Sauvage v. Dupuis*, 3 Taunt. 410; *Doe ex dem. Martin v. Watts*, 7 T. R. 83, 2 Esp. 501; *Doe ex dem. Westmoreland v. Smith*, 1 Mann. & R. 137, 6 L. J. K. B. 44; *Richardson v. Gifford*, 1 Ad. & El. 52, 3 Nev. & M. 325, 3 L. J. K. B. N. S. 122; *Martin v. Smith*, 43 L. J. Exch. N. S. 42, L. R. 9 Exch. 50, 30 L. T. N. S. 268, 22 Week. Rep. 336; *Mann v. Lovejoy*, *Ryan & M.* 355; *Sanders v. Karnell*, 1 Fost. & F. 356. And in many instances the American courts, in construing statutes which expressly declare the holding under a parol lease to be one at will, have applied generally that part of the English rule which converts, by implication, estates at will into estates from year to year, the courts probably proceeding upon the assumption that when by statute a tenancy is made one at

sale, as claimed by the defendant." Instruction No. 4: "If, on the other hand, you find from the evidence that the lease was for three years absolutely, without any provision for sale by plaintiff during said lease, or that plaintiff never notified defendant that she had sold said land and wanted possession thereof, then your verdict should be that the defendant is not guilty." Error is assigned for the giving of these instructions. It was apparently the opinion of the trial court that this case should be ruled by *Dewey v. Payne*, 19 Neb. 540, 26 N. W. 248. In this we think the district court was mistaken. That was an action for the recovery of rent where there was a verbal assignment of a written lease for a period of more than one year. It appears that the defendant took possession under

the parol assignment, and held it from the 12th day of October until the 9th day of March in the following year, when he vacated and refused to pay rent for the remainder of the year, and it was held that he was liable for the rent whether he occupied the premises or not, because he had entered into possession under his agreement to pay rent, and had continued such possession beyond the expiration of the first year, and that thereafter he was not in a position to question the validity of his agreement. It has been frequently held that a parol lease of real estate for several years is only valid for one year. *Friedhoff v. Smith*, 13 Neb. 5, 12 N. W. 820. The part performance in the case at bar can only be referred to or based upon the term of one year. In other words, the performance was wholly and en-

will, it is left with all the common-law incidents of such estates, among which is convertibility into an estate from year to year or from month to month. *Larkin v. Avery*, 23 Conn. 304; *Corbett v. Cochran*, 67 Conn. 570, 35 Atl. 509; *Boardman Realty Co. v. Carlin*, 82 Conn. 413, 74 Atl. 682; *Cody v. Quarterman*, 12 Ga. 386; *Leavitt v. Leavitt*, 47 N. H. 329; *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488; *Drake v. Newton*, 23 N. J. L. 111; *Pfeiffer v. Peters*, 80 N. J. L. 661, 77 Atl. 1076; *Schuyler v. Leggett*, 2 Cow. 660; *People ex rel. Kline v. Rickert*, 8 Cow. 226; *Loran's Estate*, 10 Pa. Co. Ct. 554; *Walter v. Transue*, 17 Pa. Super. Ct. 94, on subsequent appeal 22 Pa. Super. Ct. 617; *Hellams v. Patton*, 44 S. C. 454, 22 S. E. 608. And the following cases announce generally that the renting is from year to year where entry was made and possession held under a void parol lease: *Phelps v. Nave*, 5 Ky. L. Rep. 932; *Taggard v. Roosevelt*, 8 How. Pr. 141, 2 E. D. Smith, 100.

In England it has been intimated that the rule is that a tenancy from year to year is created in all the cases where the facts are not so inconsistent with an estate of that nature as to rebut the presumption that such an estate is created. See *Arden v. Sullivan*, 14 Q. B. 832, 14 Jur. 712, 19 L. J. Q. B. N. S. 268. But in the great majority of the cases, especially in America, the courts have been more specific with respect to what circumstances will justify a holding that the tenancy is one from year to year. Thus, the rule of convertibility has been held especially applicable where the renting is by the year or for a term of years, and it appears that such was the intention of the parties. *Hoover v. Pacific Oil Co.* 41 Mo. App. 317; *Delaney v. Flanagan*, 41 Mo. App. 651; *Hosli v. Yokel*, 58 Mo. App. 169; *Tiefenbrun v. Tiefenbrun*, 65 Mo. App. 253; *Davies v. Baldwin*, 66 Mo. App. 577; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212; *Nichols v. Hicklin*, 127 Mo. App. 672, 106 S. W. 1109; *Womach v. Jenkins*, 128 Mo. App. 408, 107 S. W. 423; *Jenkins v. Womach*, 143 Mo. 42 L.R.A. (N.S.)

App. 410, 128 S. W. 530; *Pollmann v. Schaper*, 158 Mo. App. 615, 138 S. W. 898; *Winter v. Spradling*, 163 Mo. App. 77, 145 S. W. 834; *Kerr v. Clark*, 19 Mo. 132; *Goodfellow v. Noble*, 25 Mo. 60; *Ridgley v. Stillwell*, 28 Mo. 400; *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116; *Hammon v. Douglas*, 50 Mo. 434; *Cunningham v. Roush*, 157 Mo. 336, 57 S. W. 769. And the same has been held true where the tenant entered under a lease for a term of years and paid an annual rental, which was received and accepted as such. *Lockwood v. Lockwood*, 22 Conn. 425; *Griswold v. Branford*, 80 Conn. 453, 68 Atl. 987; *Williams v. Apothecaries' Hall Co.* 80 Conn. 503, 69 Atl. 12; *Boardman Realty Co. v. Carlin*, 82 Conn. 413, 74 Atl. 682; *Falek v. Barlow*, 110 Md. 159, 72 Atl. 678, 17 Ann. Cas. 538; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124; *Coan v. Mole*, 39 Mich. 454; *Huntington v. Parkhurst*, 87 Mich. 38, 24 Am. St. Rep. 146, 49 N. W. 597; *Steketee v. Pratt*, 122 Mich. 80, 80 N. W. 989; *Humphrey Hardware Co. v. Herrick*, 5 Neb. (Unof.) 524, 99 N. W. 233; *Karsch v. Kalabza*, 141 App. Div. 305, 128 N. Y. Supp. 1027 (rent paid in monthly instalments); *Lounsbery v. Snyder*, 31 N. Y. 514; *Gretton v. Smith*, 33 N. Y. 245 (*dictum*); *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567, affirming 6 Hun, 562; *Laughran v. Smith*, 75 N. Y. 205, affirming 11 Hun, 311 (holding that a tenancy is not made one from month to month by reason of the fact that the rent is paid in monthly instalments); *Blumenthal v. Bloomingdale*, 100 N. Y. 558, 3 N. E. 292; *Coudert v. Cohn*, 118 N. Y. 309, 7 L.R.A. 69, 16 Am. St. Rep. 761, 23 N. E. 298, affirming *Fougere v. Cohn*, 43 Hun, 454; *Carey v. Richards*, 2 Ohio Dec. Reprint, 630; *Moore v. Beasley*, 3 Ohio, 294; *Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344; *Walter v. Transue*, 22 Pa. Super. Ct. 617; *Dumn v. Rothermel*, 112 Pa. 272, 3 Atl. 800; *Silsby v. Allen*, 43 Vt. 172 (where the court said that the duration of possession did not enter into the question, but that the test was the entry and stipulation for and payment of

tirely within the first year, and for which there was a valid lease. The law distinctly and clearly declares such a lease valid for the first year of the term, and void as to any excess of time. Therefore defendant's possession, as shown by the record in this case, cannot in any way relate to, or avail him with reference to, the remaining two years of the lease, which was clearly void. The defendant went into possession of the premises under the three-years oral lease, in the fore part of October, 1906; and plaintiff within one year of that time, and about the 1st of September, 1907, informed him that he must surrender the possession of the premises at the end of that year. Therefore defendant's entry upon the second year of the lease was without the consent of, and against the express objection of, the plain-

tiff. In other words, the oral lease for the last two years was revoked and rescinded by the landlord while the tenant was still holding under a valid lease for one year, and before any part of the remaining two years had been entered upon. We are therefore of opinion that the plaintiff could refuse to be bound by the invalid portion of the lease, and the court erred in giving the instructions above quoted.

Several other questions are discussed in the plaintiff's brief, but for the error above mentioned she is entitled to a reversal of the plaintiff's brief, but for the error above sider them.

For the foregoing reasons, the judgment of the District Court is reversed, and the cause is remanded for further proceedings.

an annual rental); *Arbenz v. Exley*, 52 W. Va. 476, 61 L.R.A. 957, 44 S. E. 149; *Koplit v. Gustavus*, 48 Wis. 48, 3 N. W. 754 (tenant in possession over one year); *Lyman v. Snarr*, 10 U. C. C. P. 462; *Caverhill v. Orvis*, 12 U. C. C. P. 392. And it has been held that entry and possession under a void parol leasing for a term of years make the tenancy one from year to year, where the entire rent has been paid in advance. *Brant v. Vincent*, 100 Mich. 426, 59 N. W. 169. And entry and payment of rent under a verbal lease for more than one year, which is within the statute of frauds, have been held to operate to create a tenancy from year to year. *Craske v. Christian Union Pub. Co.* 17 Hun, 319; *Williams v. Ackerman*, 8 Or. 405; *Taylor v. Young*, 6 L. J. K. B. N. S. 141. And entry and possession from year to year, and payment of semi-annual rent, have been held to extend the tenancy into one from year to year. *Barlow v. Wainwright*, 22 Vt. 88, 52 Am. Dec. 79. And entry under a parol lease for a term of years, which provided for an annual rental, was held in *Gibboney v. Gibboney*, 36 U. C. Q. B. 236, to convert the tenancy into one from year to year, although no rent had been paid. So entry and continuance in possession beyond a year, under a lease void under the statute of frauds, were held to render the tenancy one from year to year, in the following cases: *Strong v. Crosby*, 21 Conn. 398; *Hauser v. Romer*, 4 Ky. L. Rep. 815; *Smith v. Hornback*, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; *Schneider v. Lord*, 62 Mich. 141, 28 N. W. 773; *Dorr v. Barney*, 12 Hun, 259; *Hartnett v. Korscherak*, 59 Misc. 457, 110 N. Y. Supp. 986; *Rosenblat v. Perkins*, 18 Or. 156, 6 L.R.A. 257, 22 Pac. 598 (rental was monthly, but term year to year held to include tenancies from month to month); *M'Dowell v. Simpson*, 3 Watts, 129, 27 Am. Dec. 338; *Magaw v. Cannon*, 3 Watts, 139; *Matthews v. Hipp*, 66 S. C. 162, 44 S. E. 577; *Sheperd v. Cummings*, 1 Coldw. 354; *Hammond v. Dean*, 8 Baxt. 193; *Rogers v. Wheaton*, 88 Tenn. 666, 13 S. W. 689; *Amisden v. Atwood*, 68 42 L.R.A. (N.S.)

Vt. 322, 35 Atl. 311; *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11; *Knight v. Benett*, 3 Bing. 361, 11 J. B. Moore, 227, 4 L. J. C. P. 95, 28 Revised Rep. 640. And entry and possession for several years, payment of rent, and the making of valuable improvements, were held to convert the tenancy into one from year to year, in *Morgan v. Williams*, 30 Pa. Super. Ct. 580. But a tenancy from year to year has been held not to be implied where the actual occupancy under the void lease was for less than a year. *Prial v. Entwistle*, 10 Daly, 398; *Talamo v. Spitzmiller*, 120 N. Y. 37, 8 L.R.A. 221, 17 Am. St. Rep. 607, 23 N. E. 980 (occupancy for less than one year and no rent paid).

And it has been held that occupancy and payment of rent under a parol lease for an indefinite term constructively render the tenancy one from year to year. *Garrett v. Clark*, 5 Or. 464; *Clark v. Smith*, 25 Pa. 137; *Thurber v. Dwyer*, 10 R. I. 355; *Hall v. Wadsworth*, 28 Vt. 410; *Brewing v. Berryman*, 15 N. B. 115; *Sheldon v. Sheldon*, 22 U. C. Q. B. 621. And the same rule has been applied where the entry was made under verbal permission to hold on condition that the entrant pay the taxes on the demised and certain other property, there being no definite term referred to in the agreement, it being said that the relation under such an arrangement was that of landlord and tenant, and that the taxes agreed to be paid must be considered as an annual rental. *Davis v. McKinnon*, 31 U. C. Q. B. 564. But one occupying under a void parol lease for an indefinite term was held merely a tenant at will, in *Barrett v. Cox*, 112 Mich. 220, 70 N. W. 446, there being neither a reservation of annual rent nor rent payable at any stated interval.

But the Georgia supreme court in *Western U. Teleg. Co. v. Fain*, 52 Ga. 18, refused to recognize the rule that a tenancy at will is by implication of law converted into one from year to year. And in the following cases, it was held generally that one occupying under void lease was not a tenant from year to year: *Secor v. Pestana*,

37 Ill. 525; *Knecht v. Mitchell*, 67 Ill. 86 (contract fully performed on both sides).

And it has been held that mere entry without payment of rent will not convert a tenancy at will into one from year to year. *Weed v. Lindsay*, 88 Ga. 686, 20 L.R.A. 33, 15 S. E. 836. And in England it has been held that there must be payment of rent, it being said that until such time the tenancy is merely one at will. *Mann v. Lovejoy*, Ryan & M. 355; *Coatesworth v. Johnson*, 54 L. T. N. S. 520, 55 L. J. Q. B. N. S. 220. But payment of rent has not always been regarded as an essential, it being held in *Gibboney v. Gibboney*, 36 U. C. Q. B. 236, that a yearly holding may arise from other causes, and that it is possible to have a tenancy from year to year created, although there has been no payment of rent applicable to a yearly holding.

So it has been held that the holding under a void lease for twenty-one months, for a lump rental divided into arbitrary instalments, did not become a tenancy from year to year by holding over and paying rent after the expiration of the first year, but was a tenancy at will, the court saying that, since an annual rental was not reserved, the holding by occupancy did not become under the common law a tenancy from year to year. *McIntosh v. Hodges*, 110 Mich. 319, 68 N. W. 158, 70 N. W. 550. And in *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615, it was held that a tenancy at will will not ripen into a tenancy from year to year, where it lacks the essential element of an annual rent. And in England it has been held, although generally no reference is made to such a qualification of the rule, that the rent must be paid with reference to a yearly holding. *Braythwayte v. Hitchcock*, 10 Mees. & W. 494, 6 Jur. 976, 2 Dowl. N. S. 444, 12 L. J. Exch. N. S. 38; *Coatesworth v. Johnson*, supra.

In a number of cases where the agreement called for a monthly rental as distinguished from a yearly rental, the tenancy at will has been held to be converted into a tenancy from month to month. Thus, occupation and payment of rent for a time under a void parol agreement, which provided for the payment of rent monthly, have been held to constitute the lessee a tenant from month to month. *Field v. Herrick*, 14 Ill. App. 181; *Donohue v. Chicago Bank Note Co.* 37 Ill. App. 552; *Blake v. Kurrus*, 41 Ill. App. 562, wherein it appeared that the rental was by the year, but the court relied upon and followed *Creighton v. Sanders*, infra; *Sebastian v. Hill*, 51 Ill. App. 272; *Sigmund v. Newspaper Co.* 82 Ill. App. 178; *Mollitor v. C. M. Thom Van Co.* 118 Ill. App. 293; *Warner v. Hale*, 65 Ill. 395; *Creighton v. Sanders*, 89 Ill. 543; *Brownell v. Welch*, 91 Ill. 523; *Marr v. Ray*, 151 Ill. 340, 26 L.R.A. 799, 37 N. E. 1029, affirming 50 Ill. App. 415; *Johnson v. Albertson*, 51 Minn. 333, 53 N. W. 642; *Geiger v. Braun*, 6 Daly, 506; *Gilfoyle v. Cahill*, 18 Misc. 68, 41 N. Y. Supp. 29 (total occupation of less duration than one year); *Lawrence v. Hasbrouck*, 21 Misc. 42 L.R.A. (N.S.)

39, 46 N. Y. Supp. 868 (lessee in possession less than a year); *Julian v. Berardini*, 49 Misc. 119, 96 N. Y. Supp. 1064, wherein it was said: "To determine that question [the nature of the tenancy], reference has generally been made to the specification of the rent as contemplated by the void agreement. Where that agreement provided for a yearly rental, although to be paid in monthly instalments, it has been inferred that the new agreement was for a yearly tenancy, especially when the tenant has held for one year and part of another.

Where, on the other hand, the proposed void lease provided for a monthly rental, the inference has obtained that the new letting was by the month;" *Fink v. Standard Bread Co.* 61 Misc. 626, 113 N. Y. Supp. 1036; *Bent v. Renken*, 86 N. Y. Supp. 110; *Anderson v. Prindle*, 23 Wend. 616, affirming 19 Wend. 391; *People ex rel. Botsford v. Darling*, 47 N. Y. 666; *Hollis v. Burns*, 100 Pa. 206, 45 Am. Rep. 379; *Utah Loan & T. Co. v. Garbutt*, 6 Utah, 342, 23 Pac. 758.

And where the rent is paid monthly, and not merely as instalments of a yearly rental, it has been held that, although at its inception it was one at will, it is converted into one from month to month. *Israelson v. Wollenberg*, 63 Misc. 293, 116 N. Y. Supp. 626. And where it is clearly evidenced, as by receipts expressly so stating, etc., that the parties intended the tenancy to be one from month to month, it will be so held, although the tenant has been in possession over a year. *Schloss v. Huber*, 21 Misc. 28, 46 N. Y. Supp. 921.

But it has been expressly held that the fact that the rent is paid monthly does not make the tenancy one from month to month. *Scully v. Murray*, 34 Mo. 420, 86 Am. Dec. 116.

G. J. C.

## CONNECTICUT SUPREME COURT OF ERRORS.

KAUFMAN BRODNER

v.

ISAAC SWIRSKY, Plff. in Err.

(86 Conn. 32, 84 Atl. 104.)

Landlord and tenant — parol lease — commencement in future.

1. A parol lease for a year made in May, to begin the following November, is void under the statute of frauds as not to be performed within one year.

*Note.* — Effect at law of entry under lease void under statute of frauds.

As to nature of tenancy created by entry under lease void under the statute of frauds, see note to *Osgood v. Shea*, ante, 648.

The question under consideration in the present note not only arises in various ways, but has been treated from several view points. In the first place, there is

Same — entry — effect.

2. Entry under a parol lease void under the statute of frauds confers no rights under the lease.

Appeal — error to justices' court — right of plaintiff.

3. The right of a plaintiff in summary process to recover possession of property from a tenant, to a writ of error to the justices' judgment under a general statute, is not affected by another statute giving defendant a right to such writ, which allows him a certain time to procure the writ during which the execution shall be stayed.

(July 26, 1912.)

**E**RROR to the Court of Common Pleas for New Haven County to review a judgment reversing a judgment of a Justice of

the question whether or not entry, either alone or in connection with other elements, constitutes such part performance as will at law take the case out of the statute of frauds, but in this connection it should be remembered that the part performance herein referred to does not mean part performance sufficient in equity to take the case out of the statute of frauds, but part performance sufficient to remove the bar of the statute at law. Then there are many cases which do not discuss the question of part performance, but, after determining the nature of the tenancy created by the entry, etc., work out the rights of the parties as affected by the nature of the tenancy under which they are considered as holding, as affected by the terms of the lease under which the entry was made.

In the first class of cases above referred to, there is a great diversity of opinion, the decisions ranging from those which hold that there is no part performance at law, to those which hold that entry is such part performance as will entitle the defendant to defend his possession against the landlord for the full term. In the second class of cases before noted, the decisions are fairly uniform, being to the effect that when the tenancy is regarded as one either at will, or from month to month or from year to year, the rules with respect to such tenancies, except as hereinafter noted, govern, and that consequently the tenant is in lawful possession, and can defend or bring an action at law with reference to his occupancy at any time before he is lawfully dispossessed, under the rules governing such tenancies.

Other phases of the question have been discussed by the courts, but they will be hereinafter referred to.

#### Part performance at law.

As to whether or not entry under a parol agreement for a lease constitutes part performance in equity, see the note to *Weed v. Lindsay*, 20 L.R.A. 33. And the general question of taking possession of 42 L.R.A. (N.S.)

the Peace in defendant's favor in a summary process proceeding to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. Robert C. Stoddard for plaintiff in error.

Mr. C. S. Hamilton, for defendant in error:

The pretended verbal agreement being void, and no action of the parties bringing it within the exceptions of the statute, it was useless as a defense, and constituted no defense to the action of summary process in this case, and could not be set up as a defense.

*Simons v. New Britain Trust Co.* 80 Conn. 263, 67 Atl. 883, 11 Ann. Cas. 477.

A pretended part performance of the

real property as part performance, to satisfy the statute of frauds, is treated in the note to *Roberts v. Templeton*, 3 L.R.A. (N.S.) 790. As to effect of making improvements under oral lease void under the statute of frauds, see the note to *Watkins v. Balch*, 3 L.R.A. (N.S.) 852.

As before stated, some courts adhere to the rule that part performance does not, at law, take the case out of the operation of the statute, so as to prevent the landlord maintaining an action of forcible detainer. *Wheeler v. Frankenthal & Bro.* 78 Ill. 124; *Creighton v. Sanders*, 89 Ill. 543; *Winter v. Spradling*, 163 Mo. App. 77, 145 S. W. 834; *Carey v. Richards*, 2 Ohio Dec. Reprint, 630. And in the following cases, it was stated broadly that the doctrine of part performance can have no application at law to contracts void or voidable under the statute of frauds, under any circumstances. *Wheeler v. Frankenthal & Bro.* supra; *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495, 2 N. E. 325; *Carey v. Richards*, supra.

So it has been said that at law a parol lease will not be taken out of the statute of frauds unless fully performed, and that mere entry and occupancy will not make such a contract binding. *Wessells v. Rodifer*, 30 Ky. L. Rep. 51, 97 S. W. 341; *Spota v. Hayes*, 36 Misc. 532, 73 N. Y. Supp. 959. But where the contract has been fully performed, with the exception of the duty of the landlord to allow the tenant to remain in possession for the balance of the term, it has been held that the contract was not within the statute. *Winters v. Cherry*, 78 Mo. 344. And it has been held that the complete performance of a verbal contract by one contracting party, as by putting the lessee in possession and allowing him to remain, precludes the other from pleading the statute. *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Moore v. Beasley*, 3 Ohio, 294.

And the taking of possession by a lessee under a parol lease, of a portion of the demised premises, and the payment of rent therefor, were held not to amount to such part performance as will entitle the lessee

agreement by the defendant against the will of the plaintiff could not avail the defendant, nor could it avail the defendant even if the pretended part performance had been by acquiescence of the plaintiff.

*Comes v. Lamson*, 16 Conn. 245; *Morris v. Peckham*, 51 Conn. 133.

**Thayer, J.**, delivered the opinion of the court:

The complaint in summary process alleged these facts: The defendant entered into the possession of the leased premises on the 1st day of November, 1906, under a written lease from the estate of one Smith, deceased, for the term of five years from that date. In April, 1911, the widow and heirs of Smith conveyed the premises to the plain-

tiff, and the lease was duly assigned to him. On the 4th day of October, 1911, the plaintiff gave the defendant the statutory notice that he was to quit possession of the premises on or before November 1, 1911. On November 1, 1911, the lease expired by lapse of time; but the defendant neglected to quit possession of the premises, and continued to hold possession of the same until the complaint was issued on November 13, 1911.

These facts were, for the most part, admitted by the first defense, and those not so admitted were, upon the trial, admitted or proved, as appears by the bill of exceptions.

A second defense read as follows: "(1) On or about the — day of May, 1911, the plaintiff leased to the defendant for the

to maintain an action against the lessor for breach of contract in failing to put the lessee in possession of the balance of the orally demised premises, in the following cases: *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581; *Winter v. Spradling*, 163 Mo. App. 77, 145 S. W. 834.

And occupancy and payment of rent under a void parol lease does not constitute such part performance as will entitle the tenant successfully to defend an action of ejectment (*Railsback v. Walke*, 81 Ind. 409); nor do possession and part payment of the rent under a parol lease within the statute of frauds constitute part performance sufficient to take the case out of the statute, and permit the occupant to defend a summary action by the landlord for possession (*Simons v. New Britain Trust Co.* 80 Conn. 263, 67 Atl. 883, 11 Ann. Cas. 477; *Burden v. Knight*, 82 Iowa, 584, 48 N. W. 985).

Nor do entry under a void lease and the making of improvements constitute a defense at law to an action of unlawful detainer. *Brockway v. Thomas*, 36 Ark. 518; *Poole v. Johnson*, 31 Ky. L. Rep. 168, 101 S. W. 955. So it has been said that occupation under a parol lease and the making of improvements do not confer any right, usufruct, or use, but that the tenant so holding may be ejected at any time. *Bailey v. Ward*, 32 La. Ann. 839.

And entry and possession under a parol lease for such a length of time as the statute declares the lease to be valid were held not to constitute such part performance as will avoid the statute as to the balance of the term as agreed upon, so as to entitle the tenant to defend an action of forcible detainer brought after the expiration of the valid term, in *Osgood v. Shea*, ante, 648.

But void parol leases are sometimes held validated at law by part performance, especially where such part performance becomes substantially a purchase of an interest in real estate. Thus, in *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565, it was held under the above rule that a void parol lease for six years, where the lessee took

possession under the lease, continued in possession for over five years, cultivated the ground and made improvements, by virtue of the part performance, was validated as to the full term of the lease, so that the landlord could not maintain forcible detainer before the expiration of the six years.

And it has been held that entry and the making of improvements according to the terms of a void parol lease constituted such part performance as took the case out of the statute of frauds, and entitled the tenant to recover damages for breach of the contract by the landlord. *Steel v. Payne*, 42 Ga. 207. And under a parol lease whereby the tenant is to hold for a specified term, or until he is reimbursed for improvements, the landlord cannot claim, at the end of the first year, that the tenancy is one at will and summarily oust the tenant, occupancy and the making of improvements for which the landlord has not paid the tenant being held to constitute such part performance as to take the case out of the statute, and permit the tenant to defeat an action to dispossess the tenant as holding over. *Petty v. Kennon*, 49 Ga. 468. And it has been held that when a tenant, with the consent of the landlord and in pursuance of a void parol agreement, takes possession of property and expends time, labor, and money in improving it for his purposes, and is afterwards ousted by the landlord, the case is taken out of the statute of frauds to such an extent that the ousted tenant may recover such damages as will compensate him for what he expended in reliance upon the parol agreement. *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608. And a tenant who enters under a void contract, and makes improvements pursuant to the contract, upon termination of the tenancy and ouster of the tenant by the landlord, may recover the improvements or their value. *Goodwin v. Perkins*, 134 Cal. 564, 66 Pac. 793. In fact, there seems to be no question but that the tenant has a resisting equity for any outlay or valuable improvements made while in possession under the parol lease, when the landlord attempts to regain possession.



term of one year, commencing with the date of the expiration of the lease referred to in paragraph 1 of the plaintiff's complaint, the premises referred to in the plaintiff's complaint, for the monthly rent of \$70. (2) The defendant, who was in possession of said premises at the date of the expiration of said lease above referred to, continued in possession of said premises under said oral lease referred to in paragraph 1 of this defense, and has remained in possession thereof from that time until the present, under and by virtue of said lease. (3) The defendant is now occupying said premises by virtue of his right under said lease for one year, and said lease is now in full force and effect, and does not expire until the \_\_\_\_\_ day of \_\_\_\_\_, 1912."

To this defense there was a demurrer, substantially upon the ground that the lease attempted to be set up in avoidance was in violation of the statute of frauds, because not to be performed within one year from the making thereof. The demurrer was overruled, the plaintiff filed a reply, and, upon a trial to a jury in the justice court, the defendant had a verdict.

The court of common pleas treated the demurrer to the writ of error as equivalent to a plea of nothing erroneous, and rendered judgment for the plaintiff in error, upon the ground that the demurrer to the second defense was improperly overruled. As the same question which was thus decided is raised in all the other assignments of error which have been argued before us, it will

Poole v. Johnson, *supra*; Adams v. Bonnefon, 124 Mo. App. 457, 101 S. W. 693.

And under the rule that the statute of frauds does not render a parol lease for more than one year void, but only withholds the right to enforce the making of a lease for a longer term than one year, it has been held that a tenant who has entered into possession under such a lease cannot be "turned out by any process known to the law," but may enjoy the lease during the term. *Gudgell v. Duvall*, 4 J. J. Marsh. 229; *Roberts v. Tennell*, 3 T. B. Mon. 247; *Morehead v. Watkyns*, 5 B. Mon. 228; *Union Bkg. Co. v. Gittings*, 45 Md. 181.

So, under a statute avoiding verbal agreements for the sale of lands, or any interest therein, except "leases, for a term longer than one year, unless the purchase money or a portion thereof be paid and the purchaser be put in possession of the land," it has been held that placing a lessee in possession under a verbal lease, accompanied by payment of rent, rescues the case from the statute of frauds. *Shakespeare v. Alba*, 76 Ala. 351; *Martin v. Blanchett*, 77 Ala. 288; *Dahm v. Barlow*, 93 Ala. 120, 9 So. 598; *Trammell v. Craddock*, 100 Ala. 266, 13 So. 911; *Eubank v. May & T. Hardware Co.* 105 Ala. 629, 17 So. 109; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 19 So. 318; *Howard v. Jones*, 123 Ala. 488, 26 So. 129; *Elliott v. Bankston*, 159 Ala. 462, 49 So. 76.

And in Ohio some of the courts have gone so far as to hold that entry under a void parol lease constitutes such part performance as to take the case out of the statute, and permit the tenant to defend a suit for dispossession during the term. *Dennis v. Hanson*, 12 Ohio C. C. 445, 5 Ohio C. D. 465, holding that the landlord could not evict a tenant who had entered under a parol lease for five years, and had paid the stipulated rent, by a proceeding in forcible entry and detainer; *Clark v. Cincinnati*, 1 Ohio Dec. Reprint, 10, holding that entry and the making of improvements under a parol lease are such part performance as takes the case out of the statute, and permits the tenant to recover for such

improvements as against the landlord, who had been paid therefor by the city upon the destruction thereof; *Moore v. Beasley*, 3 Ohio, 294, wherein the court made the *obiter* statement that "part performance may take a case out of the statute [statute of frauds], and that delivery of possession on a parol lease is sufficient for that purpose;" *Grant v. Ramsey*, 7 Ohio St. 157, holding that taking possession under a parol lease and payment of rent according to its terms constitute part performance at law, and take the case out of the statute. But in connection with the foregoing Ohio cases, see *Carey v. Richards*, 2 Ohio Dec. Reprint, 630, wherein, in holding that a tenant in possession under a verbal lease cannot defend an action of forcible detainer upon the ground that part performance, such as entry and payment of rent, makes it valid, the court said that the Ohio courts had fallen into the error of giving effect at law to verbal leases upon the ground of part performance, and that the practice probably grew up from confusing the doctrine that notice must be given in order to evict at law where it is held that a periodical tenancy has arisen, with the doctrine of part performance as sufficient at law.

Rights where special tenancy is created.

There seems to be no question but that one who has entered under a parol lease, and has become, either by express statutory regulation or by judicial construction, a tenant from year to year or from month to month, or at will, is entitled in most cases to his full legal rights and remedies as such a tenant until lawfully dispossessed by the landlord. This rule, however, does not necessarily obtain in all cases, for the reason that, although the holding is under a tenancy implied from the circumstances rather than under the void lease, the terms of the latter, with the exception of duration of term, govern the holding under the implied tenancy, from which it follows that the rights and remedies ordinarily incident to the implied tenancy would not attach

not be necessary to consider each of those assignments separately.

As the parol lease set up in the answer was not to be performed within one year from the making thereof, it was void as contravening the statute of frauds. If the defendant entered under this void lease, his tenancy is not one created by the lease; but it may be one which the law will imply. *Corbett v. Cochrane*, 67 Conn. 570, 577, 35 Atl. 509; *Griswold v. Branford*, 80 Conn. 453, 455, 68 Atl. 987. In such case, whether he can hold against the plaintiff is not determined by the parol lease. The facts may be such that the law will imply a tenancy for a year. But that is a different thing from the tenancy which he alleges by virtue of a parol lease. Had facts showing such a tenancy been alleged, quite likely the answer would have withstood a demurrer, and evidence of the parol agreement might have

been admissible in support of those facts. The defense filed shows only a possession under a void lease, which is no defense to the summary process proceeding. The court of common pleas correctly held that there was error in overruling the demurrer thereto.

A motion was made by the defendant to dismiss the writ of error, upon the ground that a plaintiff in summary process has no right to sue out a writ of error from an erroneous judgment of a justice of the peace in such cases. Section 1087 of the General Statutes, as amended by chapter 104 of the Public Acts of 1907, p. 657, provides that when a defendant procures a writ of error in an action of summary process, he shall give a sufficient bond to the adverse party to answer for all rents that may accrue during the pendency of the writ of error;

where the applicable terms of the void lease warrant the enforcement of a different right or remedy.

Thus, it has been held that, where the tenancy created is from year to year, it can be terminated only by the giving of the statutory notice, unless the tenant has occupied for the full term, and that until the giving of such notice and the expiration of the statutory period, the landlord can neither maintain an action to recover damages occasioned by the continued occupancy (*Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124), nor replevin (*Coan v. Mole*, 39 Mich. 454), nor ejectment (*Cunningham v. Roush*, 157 Mo. 336, 57 S. W. 769; *M'Dowell v. Simpson*, 3 Watts, 129, 27 Am. Dec. 338; *Magaw v. Cannon*, 3 Watts, 139; *Doe ex dem. Rigge v. Bell*, 5 T. R. 471, 2 Revised Rep. 642; *Doe ex dem. Martin v. Watts*, 7 T. R. 83, 2 Esp. 501, 4 Revised Rep. 387; *Caverhill v. Orvis*, 12 U. C. C. P. 392; *Davis v. McKinnon*, 31 U. C. Q. B. 564), nor a summary proceeding to oust (*Schneider v. Lord*, 62 Mich. 141, 28 N. W. 773; *Brant v. Vincent*, 100 Mich. 426, 59 N. W. 169; *Morgan v. Williams*, 39 Pa. Super. Ct. 580), nor forcible entry and detainer (*Hosli v. Yokel*, 58 Mo. App. 169; *Davies v. Baldwin*, 66 Mo. App. 577; *Carey v. Richards*, 2 Ohio Dec. Reprint, 630; *Rosenblat v. Perkins*, 18 Or. 156, 6 L.R.A. 257, 22 Pac. 598), nor unlawful detainer (*Tiefenbrun v. Tiefenbrun*, 65 Mo. App. 253; *Butts v. Fox*, 96 Mo. App. 437, 70 S. W. 515; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212). But where a tenant becomes one from year to year, by entry or payment of rent, under a void lease which contains various covenants and conditions, under the rule that the terms of the contract are binding except as to duration of term, the landlord may bring an ejectment for breach of a condition without giving notice. *Sheldon v. Sheldon*, 22 U. C. Q. B. 621.

And where the tenancy created is from year to year, the tenant may maintain an action against the landlord to recover damages

for the conversion of the crops raised before termination of the tenancy by a proper notice (*Garrett v. Clark*, 5 Or. 464); and indemnity for the reasonable expenditures which the tenant has made (*Walter v. Transue*, 17 Pa. Super. Ct. 94); and for wrongful eviction (*Walter v. Transue*, supra); and for trespass or other wrongful interference with his possession by the landlord (*Jenkins v. Womach*, 143 Mo. App. 410, 128 S. W. 530; *Blumenthal v. Bloomingdale*, 100 N. Y. 558, 3 N. E. 282; *Silaby v. Allen*, 43 Vt. 172; *Gibboney v. Gibboney*, 36 U. C. Q. B. 236).

And the same rule as regards the giving of notice applies where the tenancy is from month to month. *Field v. Herrick*, 14 Ill. App. 181; *Haumueller v. Ackermann*, 150 Mo. App. 141, 130 S. W. 91, holding that the landlord cannot maintain unlawful detainer; *McFarland Real Estate Co. v. Joseph Gerardi Hotel Co.* 202 Mo. 597, 100 S. W. 577, holding that the landlord could not maintain unlawful detainer without having given notice as required by statute; *Bent v. Renken*, 86 N. Y. Supp. 110, holding that the landlord could not maintain dispossession proceedings; *Anderson v. Prindle*, 23 Wend. 616, affirming 19 Wend. 391, holding that summary proceedings for possession could not be maintained by the landlord; *People ex rel. Botsford v. Darling*, 47 N. Y. 666, holding that the landlord could not maintain summary proceedings for possession; *Utah Loan & T. Co. v. Garbutt*, 6 Utah, 342, 23 Pac. 758, holding that unlawful detainer would not lie at the suit of the landlord.

And where a tenant enters under a void parol lease, and the tenancy is construed as one at will, he cannot be dispossessed until notice to quit has been given and the period specified by the law of the jurisdiction as that which tenants at will are entitled to has expired. *Huyser v. Chase*, 13 Mich. 98. So, it was held in *Carteri v. Roberts*, 140 Cal. 164, 73 Pac. 818, that since entry under a void lease makes the entrant a tenant at will, which tenancy can be terminat-

that he shall have forty-eight hours (Sundays not included) after judgment for filing his bill of exceptions and procuring a writ of error; and that execution shall be stayed during that time, if it appears to the justice that the writ is not procured for delay. This statute makes no reference to a writ of error by the plaintiff.

This act was originally passed in 1852. The summary process statute had then been long in existence. So, also, had a statute, now General Statutes, § 817, permitting writs of error from justices of the peace by either party harmed by an erroneous judgment. Under the statute last named, writs of error had been allowed in summary process actions. See *Du Bouchet v. Wharton*, 12 Conn. 533. The right of a plaintiff to a writ of error under this statute is not affected by the one first referred to, relating to the rights of the defendant.

That statute, by staying execution for forty-eight hours, prevents the defendant's dis-possession until he has time to have a bill of exceptions allowed and procure a writ of error. After the writ has been served, it effects a stay during its pendency. There is nothing in this act that necessarily conflicts with § 817 of the General Statutes. Whether the defendant, if he fails to procure his writ of error within the forty-eight hours, may not procure it later, and within the three years allowed in other cases, it is not necessary for us to decide. It cannot have been the intention by this statute to deprive the plaintiff of his previously existing right to a writ of error in this class of cases in which no appeal is allowed.

There is no error.

The other Judges concur.

ed only by thirty days' notice, the entry is peaceable, which prevents the landlord maintaining forcible detainer, unlawful entry being a necessary element of the cause of action. And it has been held that since one who has entered into possession under a void lease becomes a tenant at will, whose tenancy can be terminated only in the manner prescribed by statute, the tenant may sue the landlord for wrongful removal of a crop raised by him, he being lawfully in possession. *Goodwin v. Clover*, 91 Minn. 438, 103 Am. St. Rep. 517, 98 N. W. 322. So it has been held that a tenant occupying under a parol lease may, as tenant at will, maintain trover against his landlord for apples removed by him from the premises, and that the landlord cannot interpose the statute of frauds as a defense. *Felch v. Harriman*, 64 N. H. 472, 13 Atl. 418. And in *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488, the same rule was applied where hay was removed by the landlord.

And where, under the statute, the entrant becomes a tenant for a year, he may maintain an action for trespass on the demised premises during that time. *Hillhouse v. Jennings*, 60 S. C. 392, 38 S. E. 596.

But under a statute providing that a parol lease, unless for a shorter period, shall be valid as a lease for one year, no notice to evict is necessary at the expiration of the year, and the tenant may be summarily ousted. *Teft v. Hinchman*, 76 Mich. 672, 43 N. W. 680; *Ryan v. Mills*, 129 Mich. 170, 88 N. W. 392. And where the demised premises are occupied for the full term, no notice is necessary. *Butts v. Fox*, 96 Mo. App. 437, 70 S. W. 515; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212; *Doe ex dem. Davenish v. Moffatt*, 15 Q. B. 257, 19 L. J. Q. B. N. S. 438, 14 Jur. 935; *Tress v. Savage*, 4 El. & Bl. 36, 18 Jur. 680, 23 L. J. Q. B. N. S. 339, 2 Week. Rep. 564, 2 C. L. R. 1315; *Magee v. Gil-mour*, 17 Ont. Rep. 620.

In *Miles v. Janvrin*, 200 Mass. 514, 86 42 L.R.A. (N.S.)

N. E. 785, it was held that where possession is taken under an oral agreement which is within the statute, and the entrant is accepted as tenant, and a tenancy is created (nature not stated), the tenant may recover damages for personal injuries resulting from the landlord's failure to repair in accordance with the contract.

And see *Brubaker v. Poage*, 1 T. B. Mon. 123, wherein it was held that entry under a void parol lease creates a tenancy on which a right of forcible detainer might operate for a holding over, and that such would be its operation, however void the lease might be, between the lessor and lessee with regard to the obligation of the former to let the latter remain in possession.

#### Miscellaneous.

In Washington it has been held that a voidable parol lease under which the lessee has taken possession with the consent of the landlord will not be terminated during the term at the instance of the landlord, where such course would be inequitable. *Northcraft v. Blumauer*, 53 Wash. 241, 132 Am. St. Rep. 1071, 101 Pac. 871, holding that the landlord cannot maintain an ejectment during the term. And in *Koschnitzky v. Hammond Lumber Co.* 57 Wash. 320, 106 Pac. 900, it was held that a lessee cannot be ejected during the term, upon the ground that the lease does not conform to the statute of frauds, where the possession was taken under the lease and the entire rent paid in advance.

And entry under a void lease and enjoyment of the advantages thereof have been held to estop the tenant's denying its validity. *Price v. Thompson*, 4 Ga. App. 46, 60 S. E. 800; *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938; *Equitable Life Assur. Soc. v. Schum*, 40 Misc. 657, 83 N. Y. Supp. 161; *Dockery v. Thorne*, — Tex. Civ. App. —, 135 S. W. 593. And the tenant cannot, upon destruction of the premises, recover back advance rent, upon the ground that

the lease is void under the statute of frauds, where the agreement has been fully executed by the landlord by allowing the tenant to enter the demised premises and remain in undisputed possession thereof. *Staubs v. Protzman*, 84 Ill. App. 434.

An entry under a lease which is within the statute of frauds makes the entrant a tenant so as to estop his questioning the landlord's title (*Crawford v. Jones*, 54 Ala. 459; *Cody v. Quarterman*, 12 Ga. 386; *Christopher v. National Brewery Co.* 72 Mo. App. 121; *Dobbs v. Atlas Elevator Co.* 25 S. D. 177, 126 N. W. 250), with the exception that he may show a bona fide eviction under a paramount title, or that the title of the landlord pending the occupancy was extinguished (*Crawford v. Jones*, supra).

And in *Boyce v. Graham*, 91 Ind. 420, it was held that a third person who had wrongfully excluded a tenant from a part of the demised premises could not set up the statute of frauds when sued by the injured tenant, it being said that the parties to the lease alone can avail themselves of the statute of frauds.

And possession under a voidable lease entitles the tenant to sue and recover for the wrongful destruction by a third party of the crops and improvements which the tenant had agreed to keep up. *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812.

But where a tenant holding under a parol lease for years is by statute made a tenant at will, it has been held that he may recover damages for injury to the demised premises by acts for which the eminent domain statute requires compensation to be made. *Sheehan v. Fall River*, 187 Mass. 356, 73 N. E. 544.

As to compensation recoverable by the landlord for the use of premises where the lease is invalid under the statute of frauds, see the note to *Marr v. Ray*, 26 L.R.A. 799.

G. J. C.

## KENTUCKY COURT OF APPEALS.

H. E. ROSE et al., Appts.,

v.

M. B. MONARCH.

(150 Ky. 129, 150 S. W. 56.)

**Continuance — defendant permanently ill.**

1. A further continuance should not be

**Note. — Continuance because of illness of a party.**

The illness of a party which prevents his attendance at the trial is generally considered ground for a continuance, where it appears that his presence is indispensably necessary and there is hope for an early recovery to health. And in criminal prosecutions it is generally held that illness of an accused which may prevent him from

granted because of the illness of a non-resident defendant having knowledge of the facts necessary to the defense, so that he will not be able to attend the trial or give his deposition, if the case has been continued for a year on that ground and there is nothing to show that he will ever be any better.

**Witness — husband — action on wife's contract.**

2. A man who sells property as agent for his wife is a competent witness in an action to enforce a provision in the contract requiring the purchaser to redeem bonds given in part payment therefor.

**Contract — purchase of bonds — rescission — dissatisfaction.**

3. One having a right to return bonds given for property, and receive cash for them, if he is dissatisfied with them, sufficiently shows his dissatisfaction by tendering the bonds and demanding the cash.

**Appeal — inadmissible evidence — non-prejudicial error.**

4. The admission in evidence of an insufficiently proved letter is not prejudicial error if it throws no particular light on the real question in issue.

(October 22, 1912.)

**A** PPEAL by defendants from a judgment of the Circuit Court for Daviess County in plaintiff's favor in an action brought to enforce a provision in a contract for the redemption of bonds given in part payment for property. Affirmed.

The facts are stated in the opinion.

Messrs. Sweeney, Ellis, & Sweeney for appellants.

Messrs. Miller & Todd, with Mr. J. R. Hays, for appellee:

The court did not abuse its discretion in refusing longer to continue the case.

*Townsend v. Rhea*, 18 Ky. L. Rep. 901, 38 S. W. 865.

Clay, C., delivered the opinion of the court:

On November 1, 1902, appellee, M. B. Monarch, and appellants, H. E. Rose and Nellie B. Rose, entered into the following agreement: "This agreement witnesses that Mrs. M. B. Monarch hereby sells to Nellie B. Rose, the goods as per list of even date

properly presenting his defense or rendering the assistance to counsel that he otherwise would do furnishes a reasonable ground for a continuance.

A motion for a continuance because of the illness of a party is, however, addressed to the sound discretion of the trial court,—a discretion with which the appellate court will not interfere, unless it appears that it was abused to such extent that prejudice or injury results. 9 Cyc. 97, 208; Campbell

for three San Miguel Plantation Company's bonds and \$265.85. Nellie B. and H. E. Rose agree to take said bonds back of Mrs. Monarch at the end of two years from this date at \$900 less 15 per cent if Mrs. Monarch is dissatisfied with said bonds. Said Nellie B. Rose and H. E. Rose agree also to pay said Mrs. M. B. Monarch at least 15 per cent per annum on said bonds during said two years computed on \$900 for the three bonds, said dividends to be paid on August 1st, of each year, and if more than 15 per cent per annum is paid by said company on their bonds, then Mrs. M. B. Monarch is to receive the same rate of dividends as is paid to the other bondholders."

Alleging that at the end of said two years she became dissatisfied with said bonds and tendered them back to Nellie B. Rose and H.

E. Rose and demanded of them that they pay her said sum of \$900, appellee brought this action to recover the sum of \$900, with interest thereon from November 1, 1904, until paid. In paragraph 2 it was alleged that on May 3, 1909, appellants, Nellie B. Rose and H. E. Rose, conveyed all of the real estate which they owned in Daviess county to Nora Bevier, the mother of Nellie B. Rose; that this conveyance was without consideration, and made for the fraudulent purpose of defeating appellee in the collection of her debt; and that said conveyance was void. In paragraph 3 it was charged that on August 7, 1909, appellants, acting in the name of the said Nora Bevier, sold and conveyed the same property to A. Oberst; that there was then due from A. Oberst to appellants the sum of \$312.50. In this paragraph

v. White, 77 Ala. 397; Spann v. Torbert, 130 Ala. 541, 30 So. 389; Rucker v. State, 77 Ark. 23, 90 S. W. 151; Goddard v. State, 78 Ark. 226, 95 S. W. 476; Barnes v. Barnes, 95 Cal. 171, 16 L.R.A. 660, 30 Pac. 298; Lynch v. Superior Ct. 150 Cal. 123, 88 Pac. 708; Elliott v. Field, 21 Colo. 378, 41 Pac. 504; Allen v. Chase, 81 Conn. 474, 71 Atl. 307; Hopkins v. State, 52 Fla. 39, 42 So. 52; Steadman v. Simmons, 39 Ga. 591; Mitchell v. Mitchell, 40 Ga. 11; Fletcher v. Collins, 111 Ga. 253, 36 S. E. 646; Rawlins v. State, 124 Ga. 31, 52 S. E. 1; Carter v. Pitts, 125 Ga. 792, 54 S. E. 695; Pate v. Tait, 72 Ind. 450; Fisse v. Katzentine, 93 Ind. 490; Post v. Cecil, 11 Ind. App. 362, 39 N. E. 222; State v. Wilson, 124 Iowa, 264, 99 N. W. 1060; Harlow v. Warren, 38 Kan. 480, 17 Pac. 159; Beard v. Mackey, 51 Kan. 131, 32 Pac. 921; State v. Rogers, 56 Kan. 362, 43 Pac. 256, 10 Am. Crim. Rep. 140; McClurg v. Igleheart, 17 Ky. L. Rep. 913, 33 S. W. 80; Harrod v. Hutchinson, 32 Ky. L. Rep. 3, 105 S. W. 365; State v. Ward, 14 La. Ann. 684; State v. George, 37 La. Ann. 786; Lipscomb v. State, 76 Miss. 223, 25 So. 158; Smith v. Smith, 132 Mo. 681, 34 S. W. 471; Hurek v. St. Louis Exposition & Music Hall Asso. 28 Mo. App. 629; J. H. Rottman Distilling Co. v. Van Frank, 88 Mo. App. 50; State v. Armstrong, 140 Mo. App. 719, 127 S. W. 93; Schaffer v. Schaffer, 24 N. Y. S. R. 645, 5 N. Y. Supp. 544; McMahon v. Norick, 12 Okla. 125, 69 Pac. 1047; State v. Silvius, 22 R. I. 322, 47 Atl. 888; Westfield v. Westfield, 19 S. C. 85; Saaestad v. Okeson, 16 S. D. 377, 92 N. W. 1072; Jarnagin v. Atkinson, 4 Humph. 470; Douglass v. Blakemore, 12 Heisk. 564; Streight v. State, — Tex. Crim. Rep. —, 138 S. W. 742; Madden v. State, — Tenn. —, 67 S. W. 74; Trevelyan v. Lofft, 83 Va. 141, 1 S. E. 901; Massucco v. Tomassi, 78 Vt. 188, 62 Atl. 57; Puget Sound Machinery Depot v. Brown Alaska Co. 42 Wash. 681, 85 Pac. 671; Schamper v. Ullrich, 131 Wis. 524, 111 N. W. 691; Goldsby v. United States, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; Clement v. United States, 79 42 L.R.A. (N.S.)

C. C. A. 243, 149 Fed. 305; Youtsey v. United States, 38 C. C. A. 567, 97 Fed. 937; Nones v. Edsall, 1 Wall. Jr. 189, Fed. Cas. No. 10,290.

A refusal of the law court to continue a cause is no ground for equitable intervention. Campbell v. White, 77 Ala. 397.

Nor will the writ of mandamus issue to reverse the action of the court in denying a continuance upon the ground that the party was prevented from attending the trial of the cause. Lynch v. Superior Ct. 150 Cal. 123, 88 Pac. 708.

In Rawlins v. State, 124 Ga. 31, 52 S. E. 1, it was said that in motions for the continuance of criminal cases upon the ground of the physical condition of the accused, the trial judge may consider the testimony produced, as well as the condition of the accused as it appears to him. To the same effect are Rowland v. State, 125 Ga. 792, 54 S. E. 694; Carter v. Pitts, 125 Ga. 792, 54 S. E. 695; Goddard v. State, 78 Ark. 226, 95 S. W. 476.

In Lipscomb v. State, 76 Miss. 223, 25 So. 158, it was said that "of necessity such applications, based upon the physical or mental condition of the party indicted for crime, must, even more largely than ordinary applications for postponement of trials, rest in the discretion of the trial judge. He has the person of the accused before him, and the very appearance of the party may be considered by him in reaching a just conclusion. Were this otherwise the guilty would be afforded opportunity to defeat a trial by feigning sickness."

It has been held that the action of the trial judge in retiring to the residence of the plaintiff with the officers of the court and the attorneys of plaintiff and defendant to have plaintiff's testimony taken there in his presence, upon the presentation of a motion for continuance on the ground that plaintiff was physically unable to appear in court and give testimony, presented no ground for interference by the appellate court, since the judge in whose presence the testimony was taken was best able to determine whether or not plaintiff was in

it is also charged that appellants were preparing to leave the state of Kentucky; that they had no property in this state subject to execution, and not enough to satisfy appellee's demand; that they had sold all of their real estate, and were about to sell or convey or otherwise dispose of their personal property with the fraudulent intent to cheat, hinder, and delay appellee and their other creditors; and that the collection of appellee's debt would be endangered by the delay necessary to obtain a judgment and return of no property found. The petition, in addition to asking judgment against appellants for \$900, with interest from November 1, 1904, asks that the deed from appellants to Nora Bevier be set aside, and prays for a general order of attachment against

the property of appellants. An attachment was issued on certain property belonging to appellants, and the property released upon the execution of a forthcoming bond in the sum of \$1,200. By answer the appellants admitted the execution of the writing in question, but denied that the bonds were worthless, or that appellee became dissatisfied with them, and demanded the cash therefor at the end of two years. The allegations with reference to the fraudulent transactions, as well as the grounds upon which the attachment was sought, were denied. In addition, appellants pleaded that appellee did not tender the bonds and demand the cash therefor until the year 1906; that, had she tendered the bonds at the end of two years, appellants could have pro-

a proper mental condition to testify. *Humphrey v. Humphrey*, 3 Neb. (Unof.) 467, 91 N. W. 856.

In *State v. Baker*, 146 Iowa, 612, 125 N. W. 659, it was held that where the evidence presented in support of a motion for a continuance conflicts with that offered in resisting the motion to such an extent as to present an issue of fact as to the physical condition of the party, the finding of the trial court thereon will not be interfered with by the appellate court.

In *Barker v. Marietta Guano Co.* 112 Ga. 305, 37 S. E. 379, it is held that absence of a party for providential cause is not a ground for a continuance of the case under the Civil Code, § 5131, unless counsel states that he cannot go safely to trial without the presence of his client.

In *Mathews v. Willoughby*, 85 Ga. 289, 11 S. E. 620, it was said that it was not necessary for counsel to state his client's presence was necessary, but merely that he could not safely go to trial; that the court knew of no rule which required counsel to state why it was necessary that his client should be present.

It is not cause for continuing the trial of an action upon a note, at the instance of the sureties, that the principal is absent for providential cause, when the proceeding is against them alone, judgment having already been rendered against the principal, notwithstanding counsel for the sureties state that they cannot go safely to trial without such principal. *Lumpkin v. Calhoun*, 101 Ga. 226, 28 S. E. 622.

In *Rucker v. State*, 77 Ark. 23, 90 S. W. 151, it was held that defendant in a prosecution for seduction could not urge as a ground for a continuance the fact that the prosecuting witness was subject to nervous malady causing hysterics, and had recently recovered from such attack, her physical condition and the character of cross-examination of defendant's counsel would be such as to excite the sympathy of the jury and to prejudice them against him.

When refusal not an abuse of discretion.

Under the following circumstances the ac- 42 L.R.A. (N.S.)

tion of the trial court in refusing a continuance because of the illness of a party has been held not such an abuse of discretion as to warrant a reversal of the judgment:

—where there was conflicting evidence as to absent party's physical condition and ability to attend trial. *Fletcher v. Collins*, 111 Ga. 253, 36 S. E. 646; *McClurg v. Igleheart*, 17 Ky. L. Rep. 913, 33 S. W. 80; *Schamper v. Ullrich*, 131 Wis. 524, 111 N. W. 691;

—slight illness of accused in criminal case. *Barrow v. State*, 121 Ga. 187, 48 S. E. 950; *Madden v. State*, — Tenn. —, 67 S. W. 74;

—where defendant in divorce, a nonresident actress, was shown to be traveling in the East with an opera company. *Barnes v. Barnes*, 95 Cal. 171, 16 L.R.A. 660, 30 Pac. 298 (three judges dissent);

—where there was nothing in the showing to indicate any special necessity for defendant's presence, and it was known for some time that he would be unable to attend the trial, and it did not appear that his deposition might not have been taken. *Saastad v. Okeson*, 16 S. D. 377, 92 N. W. 1072;

—where plaintiff must have known at the commencement of the suit that the testimony of the coplaintiff would be desired on the trial, and should have procured the taking of his deposition; it appearing that he was in an advanced stage of consumption and there was nothing to suggest that his condition had at any time improved since then. *Worshman v. McLeod*, — Miss. —, 11 So. 107;

—where it did not appear that defendant's presence was necessary, and there was no answer or denial of the material averments of the plaintiff's petition. *Queirolo v. Queirolo*, 129 Cal. 686, 62 Pac. 315;

—where it did not appear that party's presence was absolutely necessary, and there was no showing of diligence under the circumstances. *Trevelyan v. Loftt*, 83 Va. 141, 1 S. E. 901;

—where no competent evidence showing illness of defendant was offered. *Gainsley v. Gainsley*, — Cal. —, 44 Pac. 456;

tected themselves by disposing of the bonds, as they were then good, but that, by reason of appellee's failure to surrender said bonds at the expiration of two years, she thereby became the owner and holder thereof; that appellants were thereafter under no obligation to accept or receive the bonds. A trial before a jury resulted in a verdict and judgment in favor of appellee for \$746, with interest from November 1, 1904. From that judgment this appeal is prosecuted.

The first ground urged for a reversal is that the court erred in refusing appellants a continuance. It appears that the pleadings were completed at the January term, 1910. At this same term appellee's motion to transfer the action to the common-law docket for a trial of the issues of fact before

a jury was sustained. On September 6, 1910, the case was set for trial on September 17, 1910. Thereupon appellants filed the affidavit of a Chicago physician to the effect that he was in attendance upon H. E. Rose, and that H. E. Rose was not able to attend court, and would not be for the next thirty days; that said Rose was suffering from diabetes mellitus; and that he was physically unable to stand a trip to Owensboro, and, if in Owensboro, could not attend or be present at the trial of the action. It appears that the case was continued without objection, as the next order shows that on March 10, 1911, appellee, by her attorney, moved the court to set the action for trial. On March 13, 1911, the affidavit of Dr. Orin Kemper Thomson, another Chicago

—it not appearing that the presence of one of the defendants who had been accidentally wounded was necessary, although he was the chief business man, and the co-defendant was old and infirm. *Owens v. Tinsley*, 21 Mo. 423;

—where the character of defendant's illness was not disclosed, and no effort was made to have a physician certify to his illness, or to have his deposition taken, although he said he had been ill for three months and lived continuously in the city since the suit was commenced. *Smith v. Smith*, 132 Mo. 681; 34 S. W. 471;

—where the attending physician declined to say that any hurtful results would attend upon or follow the party's appearance in court. *Solomon v. State*, 71 Miss. 567, 14 So. 461;

—where physicians appointed to examine accused reported to the court that he was physically able to proceed with the trial. *Tilmeyer v. State*, — Tex. Crim. Rep., 136 S. W. 1060;

—where nine of the eleven physicians appointed by the court to examine accused on trial for murder reported on oath to the court that accused was physically able to endure a trial, and mentally able to advise with his attorneys and conduct his defense, and to testify in his own behalf, though two of the eleven dissented and agreed with accused and his attending physician that he was physically unable to undergo a trial, and mentally unfit to intelligently give his evidence or to protect his interest should a trial be had. *Lipscomb v. State*, supra;

—where the nature or probable duration of defendant's illness was not shown, and plaintiff consented that statements contained in defendant's affidavit in support of his motion might be used on the trial as defendant's testimony. *Pate v. Tait*, 72 Ind. 450;

—where defendant in a prosecution for larceny had not entirely recovered from the effects of malarial fever at the time of the trial, but was in attendance, and his testimony showed that he had the full possession of his faculties. *Hopkins v. State*, 52 Fla. 39, 42 So. 52;

—when the motion was based upon the 42 L.R.A. (N.S.)

fact that the prisoner was a confirmed epileptic, and his counsel and medical advisers apprehend that the excitement and strain of a prolonged trial might induce another epileptic attack, but did not show any present inability to attend the trial, and promised no hope that any future trial would be attended by any less risk to the health and life of the accused. *Youtsey v. United States*, 38 C. C. A. 562, 97 Fed. 937;

—where it did not appear that accused would be better able to go to trial at a subsequent term, and there was evidence that he might be actually worse as the result of being confined in jail for an offense not bailable as a matter of right. *Quattlebaum v. State*, 119 Ga. 433, 46 S. E. 677;

—where, although the certificates of two physicians stated that defendant's nervous system was very bad and that in their opinion they did not believe him in fit physical condition to go to trial at that time, the trial judge was satisfied that defendant's own appearance and manner and manifest physical condition seemed to contradict the certificates, and the result showed that he was strong enough to stand the ordeal of the trial. *State v. Lee*, 58 S. C. 335, 36 S. E. 706;

—where physicians appointed by the court, in a prosecution for murder, upon presentation of the motion, stated that accused was suffering from the effects of alcohol,—that there was a nervous derangement,—and it appeared that the case was not called until after the time indicated by the physicians; and counsel admitted that their client had not grown worse, and that they had nothing further to offer in support of the motion; and the trial judge certified that he was satisfied from all that occurred in court that accused was in a proper condition to proceed with the trial. *Malone v. State*, 49 Ga. 210.

No abuse of discretion is shown in denying a continuance upon motion, supported by affidavits of physicians and others, tending to show that accused, an aged bank president, was in a feeble and weak condition and unable to endure the strain attendant upon a protracted trial, and his

physician, containing substantially the same facts set out in the affidavit of the other Chicago physician, above referred to, was filed, accompanied by a motion to continue the case. This motion was sustained, and the case continued. On March 22, 1911, appellants were ruled to prepare the action for trial at the next September term of court. When the September term arrived, the case was assigned for trial on September 12, 1911. When called for trial, appellants filed the affidavits of their attorney, J. J. Sweeney, and their physician, Dr. Orin Kemper Thomson. Mr. Sweeney's affidavit states that appellant, H. E. Rose, is suffering from diabetes mellitus, and is unable to stand a trip to Owensboro, and his condition has been such that since the last February term

of court he could not attend court, or even give his deposition in Chicago; that Nellie B. Rose is the wife of H. E. Rose, and is at home attending her husband, and cannot leave him. The affidavit further states that all the facts of the case are in the personal knowledge of H. E. Rose, and, if he were present, he would testify substantially as alleged in appellants' answer. Dr. Thomson's affidavit states that H. E. Rose was suffering from diabetes mellitus, and was physically unable to stand a trip to Owensboro, and, if in Owensboro, could not attend or be present at the trial of the action, and that, in his judgment, he would not be able to attend court for the next thirty days; furthermore, that H. E. Rose's condition

own affidavit to the same effect, and also to the effect that he was unable, by reason of his infirm condition, to make the requisite preparation for his trial, where a counter affidavit was filed by the prosecuting attorney, tending to show that the witnesses upon whom the government relied for evidence in the case were also all aged and infirm and for that reason uncertain to attend court at its next term, and the court was not satisfied that accused would be in any better condition at the next term, but ordered that the trial proceed, with assurances that it would be conducted so as to obviate any severe strain, by having short sessions the length of the trial and ordered a postponement for a week after the government closed its evidence and before the accused was required to proceed. *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

There was no abuse of discretion in refusing a continuance on account of the absence of one of the defendants, who went abroad for a temporary stay because of ill health, and who was a material witness in the case, without whose testimony defendants could not establish certain facts in the case, where it appeared that defendants agreed to submit the case to the court without a jury upon five days' notice by either party, since it was negligent for him to go away without arrangements for a postponement of the trial until his return, or without leaving his testimony behind him in the form of a deposition. *Schlesinger v. Nunan*, 26 Ill. App. 525.

The court said in the above case that "where the absent witness is the party himself, very different rules obtain from those which govern cases where the witness is one who is in no way interested in the suit, and whose attendance can be compelled only by the ordinary process of subpoena. A party who is a material witness in his own behalf must have his testimony ready for use at the trial, unless prevented from so doing by some obstacle which by the exercise of reasonable diligence he cannot overcome, and the obstacle should not be one which he has created by his own voluntary  
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act. If he allows considerations of business or pleasure, or even regard for his own health, to call him away at a time when his suit is liable to be called for trial, and he thereby loses the benefit of his own testimony, he must, ordinarily, suffer the consequences."

There was no error in refusing defendant a continuance upon the affidavits of members of his family and of his attorney to the effect that he had not sufficient physical strength to go through the trial with safety to his health, and that his mental condition was such as to make him unable to prepare his defense, where the judge had the accused before him and was able to observe his physical condition, and, as the only defense was insanity, there was no reason for a continuance because of his mental condition. *Hardwick v. Com.* 7 Ky. L. Rep. 363.

There was no abuse of discretion in refusing a continuance in a prosecution for arson on account of the physical condition of accused, who was about seven months advanced in pregnancy and was very excitable, notwithstanding her counsel thought she could not safely go to trial for that reason. *Harvey v. State*, 67 Ga. 639.

No abuse of discretion is shown in denying a motion for a continuance in a prosecution for murder, where the only evidence in support of the motion was the affidavit of the physician, which tended to show that defendant was suffering great bodily pain from the effects of a gun shot, and was in no fit condition for a trial, but the court found that defendant walked some 14 miles after receiving the wound; that he had no fever at the time the case was called, and was physically and mentally able to undergo the ordeal of the trial, and his testimony, as it appeared from the record, seemed very full and clear. *Goddard v. State*, 78 Ark. 226, 95 S. W. 476.

In *Edwards v. Nichols*, 3 Day, 16, Fed. Cas. No. 4,296, the court refused a continuance, saying that there was no reason for a continuance where the party was not a competent witness.

And under the following circumstances



was such that he could not attend and give his deposition even in Chicago.

Here, then, we have one continuance by consent at the September term, 1910, on account of the illness of H. E. Rose, another continuance granted by the court at the March term, 1911, on account of the same illness, and a motion for a continuance at the September term, 1911, because of the same illness, but a refusal on the part of the court to grant such continuance. If, then, appellants were entitled to a continuance at the September term, 1911, because of the same condition, resulting from the same disease, they, for a like reason, would be entitled to a continuance at the next term, and so on until H. E. Rose died. It appears from the affidavits of the physicians

that H. E. Rose is a nonresident, and is suffering from a permanent disease. There is in the affidavits filed at the September term, 1911, no allegation that H. E. Rose would probably recover, or that, if the case was continued, he would be able at any time in the future either to attend the trial in Owensboro, or to give his deposition. While courts are, and ought to be, very indulgent in the matter of granting a continuance because of the illness of parties, and their consequent inability to be present at the trial or to give their depositions, yet, where there has been one continuance by consent on account of sickness, and another continuance by the court for the same sickness, and the parties are ruled to prepare their case and be ready for trial at the next term

the action of the trial court in refusing a further continuance because of the illness of a party has been held not such an abuse of discretion as to warrant a reversal of the judgment:

—where parties deposition might have been taken. *Puget Sound Machinery Depot v. Brown Alaska Co.* 42 Wash. 681, 85 Pac. 671; *Bond v. National Exch. Bank*, — Tex. Civ. App. —, 53 S. W. 71; *Handley v. Merchants' & F. Bank*, 10 Ga. App. 383, 73 S. E. 413; *Smith v. Cunningham*, 9 Phila. 96;

—where it did not appear that he was not sufficiently strong to answer interrogatories properly propounded to him. *Seagraves v. Powell Co.* 136 Ga. 877, 72 S. E. 349;

—where the cause had been continued because of the party's illness, upon the stipulation that no further request for a postponement on that ground should be made. *Rubens v. Mead*, — Cal. —, 53 Pac. 432; *Allen v. Chase*, 81 Conn. 474, 71 Atl. 367;

—where the court had allowed two continuances because of complainant's ill health, and consequent inability to prepare for trial, and had on the second application, given notice that complainant must be ready to proceed at the time set for the hearing. *Mitchell v. Mitchell*, 40 Ga. 11;

—where the case had been pending more than two years, and had been continued on various dilatory motions of defendant, and it did not appear that defendant's presence was necessary. *Black v. Webber*, 1 Neb. (Unof.) 408, 96 N. W. 606;

—where it appeared that at least three of the previous continuances had been predicated upon the party's absence on account of illness. *Stanford v. New England Mortg. Secur. Co.* 110 Ga. 274, 34 S. E. 600;

—where there had been several postponements of the trial at the party's instance. *Townsend v. Rhea*, 18 Ky. L. Rep. 901, 38 S. W. 865; and second continuance was denied in *Spann v. Torbert*, 130 Ala. 541, 30 So. 389.

When refusal an abuse of discretion.

On the other hand, under the following circumstances the action of the trial judge 42 L.R.A. (N.S.)

in refusing a continuance because of the illness of a party had been held to be such an abuse of discretion as to warrant an interference by the appellate court:

—where the defendant was the only competent witness that could give testimony in his own behalf, notwithstanding the fact that a former continuance had been granted upon the same ground and defendant's illness was the result of dissipation; it appearing, however, that defendant's illness was the result of long-continued use of alcohol, and was so far off in time as to preclude the idea that it was done with any view of affecting the trial. *Harrod v. Hutchinson*, 32 Ky. L. Rep. 3, 105 S. W. 365;

—where, in a prosecution for a misdemeanor in which presence of accused was not imperative and he was unable to attend on account of illness, but showed in his motion for a continuance that he was the only material witness to testify in denial of the alleged offense. *Corbin v. State*, 99 Miss. 486, 55 So. 43;

—where it appeared that defendant's presence and testimony were necessary and material and his deposition could not then be taken. *Garfield Nat. Bank v. Colwell*, 28 N. Y. S. R. 723, 8 N. Y. Supp. 380;

—where motion for the accused showed, without contradiction, that he was too ill to be present at the trial or to manage his defense, notwithstanding the suggestion of the prosecution that accused did not desire to go on the stand as a witness in his own behalf; since he had a right to be present and to confront the witnesses against him, to hear their testimony, and to aid his counsel in the management of his defense. *Ehrlich v. Com.* 131 Ky. 680, 115 S. W. 797;

—where it appeared appellant had been confined in a lunatic asylum without opportunity of consulting with his counsel, and mentally incapable to properly prepare his case for trial, and, during the brief interval between his release from the asylum and the beginning of the trial, his counsel was so constantly engaged in the trial of other cases as to render it impossible to give the case the attention it deserved, or

of court, no continuance should be granted on account of the same sickness of the same party, rendering him unable to attend the trial or give his deposition, unless it be made to appear in the affidavit that there is a reasonable probability of the party's recovery, and of his being able either to attend the trial, or give his deposition within a reasonable time. If the rule were otherwise, no party could ever get a trial in a case against one who was suffering from a permanent disease, and whose condition was gradually growing worse; thus placing upon the one that is well the whole burden of the other's sickness, and jeopardizing his property rights for an unreasonable length

of time. Upon the facts of this case we conclude that the court did not abuse its discretion in refusing a continuance.

Richard Monarch was a competent witness for his wife. She did not testify. The action was one that might have been brought by her if she had been unmarried, and in such a case the Code expressly provides that either, but not both, of them may testify. Civil Code, § 806. He was also a competent witness on the ground of agency. The original contract was signed by him for his wife, and there can be no doubt from his testimony that he was attending to the matter for his wife. It appears from his testimony that he delivered the bonds in question

properly prepare it for trial. *Smedley v. Com.* 138 Ky. 1, 127 S. W. 485, 129 S. W. 547;

—where party was a material witness, and his deposition could not be taken, and it appeared that a delay of a few weeks would probably have resulted in his being able to attend court or to give his deposition. *Deacon v. Rasch*, 40 Ind. App. 77, 81 N. E. 84; *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976;

—where accused had been injured pending the trial by an armed mob, and there was some doubt about his ability to properly conduct his defense. *Sacra v. Com.* 123 Ky. 678, 96 S. W. 858;

—where plaintiff's presence was necessary, and the attorney did not know the names of the witnesses nor the details of the case. *Jaffe v. Lilienthal*, 101 Cal. 175, 35 Pac. 636. The court said: "It seldom happens that a trial can be properly had in the absence of the plaintiff, even where he is disqualified as a witness, especially where it is to be tried upon oral testimony. With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal;"

—where appellant was an aged man, past seventy, and his application showed that he had exercised diligence in the preparation of his defense; that he was a very material witness, and intended to be present and make a defense, but was suddenly taken ill, threatened with pneumonia, which rendered it extremely dangerous for a man of his years to undertake the journey from his home in such condition, and where the refusal practically prevented him from making any defense. *J. H. Rottman Distilling Co. v. Van Frank*, 88 Mo. App. 50;

—where plaintiff's attorney showed that she was not only a material witness, but that her presence was necessary for the purpose of aiding her attorney in a proper presentation of the cause, notwithstanding the offer of defendant that plaintiff's affidavit, setting out the testimony, may be

treated as her deposition. *McMahan v. Norick*, 12 Okla. 125, 69 Pac. 1047;

—where the defendant, a material witness, was suddenly taken ill while temporarily out of the state on a business trip, since under the circumstances the failure to have depositions taken was not negligent. *Low, H. & G. Water Co. v. Hickson*, 32 Tex. Civ. App. 457, 74 S. W. 781;

—sudden illness of sole defendant, who was an important witness. *Post v. Cecil*, 11 Ind. App. 362, 39 N. E. 222;

—where the party was a material witness. *Douglass v. Blakemore*, 12 Heisk. 564;

—where accused in a criminal case was too ill to follow the proceedings or be of assistance to counsel. *Streight v. State*, — Tex. Crim. Rep. —, 138 S. W. 742;

—where it appears the party is unable to attend, and counsel states that he cannot safely go to trial in the absence of his client. *Connell v. Sharpe*, 32 Ga. 443; *Mathews v. Willoughby*, 85 Ga. 289, 11 S. E. 620; *Morse v. Lowe*, 111 Ga. 274, 36 S. E. 688; *Martin v. Nichols*, 121 Ga. 506, 49 S. E. 613.

And in *M'Alexander v. Hairston*, 10 Leigh, 486; and *Irish Industrial Exposition & Amusement Co. v. Sheridan*, 121 App. Div. 922, 106 N. Y. Supp. 392, it was held error to refuse a continuance because of the illness and inability of a party to be in attendance.

In *Re Townsend*, 122 Iowa, 246, 97 N. W. 1108, it was held in a proceeding to contest the validity of a will alleged to have been procured by undue influence, that a denial of the motion for a continuance because of the absence of one of the defendants, who was the widow of the testator and a material witness, was reversible error, notwithstanding the fact that she appeared after the case had been on trial for several days and was examined as a witness in the case.

The court said that the subsequent appearance "did not negative the presumed prejudice resulting from the error overruling the motion for a continuance;" that "her counsel were entitled to her presence, counsel, and advice during the entire trial. The evidence discloses that she knew more about

to Mr. Slack. The latter testified that on November 1, 1904, he tendered the bonds to appellants and demanded the cash. Whether or not he did tender the bonds at that time was the real issue in the case. If he did tender the bonds and demand the cash, this was sufficient evidence of dissatisfaction with the bonds.

There appears in the record a letter purporting to have been written by appellant H. E. Rose. It is doubtful if there was sufficient proof of the genuineness of this letter to justify its introduction in evidence. The letter, however, is not important, and throws no particular light upon the real question in issue. For this reason, we conclude that its introduction was not preju-

dicial to the substantial rights of appellants.

Judgment affirmed.

A petition for rehearing having been filed, Hobson, Ch. J., on December 3, 1912, handed down the following response (151 Ky. 9, 151 S. W. 19):

The facts of the case of Hallis v. Watson were materially different from the facts of this case. The circuit court has a discretion in ruling on motions for continuance, and we cannot say his discretion was abused here.

Petition overruled.

the real issues than anyone else, and, while she may have been incompetent as a witness to testify to many of these matters, there was the more need for her advice and counsel during the trial."

In *Michelson v. Spies*, 83 Hun, 509, 32 N. Y. Supp. 17, it was held that a physician's affidavit to the effect that a serious operation prevented defendant's presence at the trial and testifying, supplemented by that of his counsel that defendant was a material witness and the sole witness to a certain transaction, relied upon as a part of the defense, furnished a legal excuse entitling the defendant to an adjournment, where none of the statements contained in the affidavits were controverted by the plaintiff, and it did not appear that he would have been in any way injured by the delay.

And in *Hollis v. Watson*, 28 Ky. L. Rep. 550, 89 S. W. 548, the supreme court reversed the order refusing a continuance, upon the ground that the party was confined to his room by illness and unable to attend the court, notwithstanding the case had been upon the docket for about four years and had been continued a number of times for the appellant. The court said: "Whatever may have been the grounds of previous continuances, appellant was entitled to be present at the trial of his case, if possible, and was not responsible for the misfortune which had overtaken him which prevented his attendance."

So, the action of the trial judge in setting aside an order for a continuance, which was granted on account of defendant's illness while she was residing in another state, and setting the case down to be tried four days thereafter, upon plaintiff's evidence which consisted of telegrams received from neighbors of defendant tending to show that she was not too ill to attend court, was error where it appeared that her counsel did not know her present address, and some of the witnesses in her behalf resided at distant places. *McDonald v. McDonald*, 115 Mo. App. 617, 92 S. W. 351.

Intoxication.

In *Charles v. People's Ins. Co.* 3 Colo. 42 L.R.A. (N.S.)

419, it was said it is not commendable practice to continue a cause because of the plaintiff's intoxication.

But where the party's illness is the result of long-continued use of alcohol, and is so far off in time as to preclude the idea that he became intoxicated with any view of affecting the trial, and where, as the result of the dissipation, the party is really physically ill, his sickness will be treated as being involuntary, and as such furnish a ground for continuance. *Harrod v. Hutchinson*, 32 Ky. L. Rep. 3, 105 S. W. 365.

In *Branch v. State*, 35 Tex. Crim. Rep. 304, 33 S. W. 356, it was held that the granting or refusal of a continuance in a criminal case on account of defendant's infirmity of mind brought on by the use of intoxicating liquors, combined with other causes, was entirely within the discretion of the trial judge. The court said, however: "If a party is drunk when placed on trial, and that matter is called to the attention of the court promptly, as soon as it is discovered, it would unquestionably be the duty of the court to postpone the case until such time as he should be in a fit condition to proceed with the trial, placing him in custody, if necessary, to get him sober."

And in *State v. Ellvin*, 51 Kan. 784, 33 Pac. 547, the supreme court refused to interfere with the action of the trial court in denying a motion for a continuance in a prosecution for a misdemeanor, upon the ground of defendant's inability to attend court because of the effects of excessive use of intoxicating liquors voluntarily taken by him during the course of the trial, where an adjournment was taken for half a day, but defendant was still unable to attend.

• Insanity.

As to postponement because of insanity after commission of a criminal act, and as to procedure generally in such cases, see note to *Baughn v. State*, 38 L.R.A. 577.

It has been held that where defendant becomes insane pending proceedings for divorce, the cause will be continued as long as there is hope of defendant's regaining reason. *Stratford v. Stratford*, 92 N. C.

297; *Mordaunt v. Mordaunt*, L. R. 2 Prob. & Div. 103.

**Inability to attend trial because of illness in party's family.**

Illness in the family, which prevents a party from attending the trial of the cause, has been held to be a sufficient ground for granting a continuance of the cause. *Rose v. Stuyvesant*, 8 Johns. 426; *Langdon-Creasy Co. v. Rouse*, 139 Ky. 647, 72 S. W. 1113, Ann. Cas. 1912 B, 292; *Skinner v. Bryce*, 75 N. C. 287; *Matthews v. Bates*, 93 Ga. 317, 20 S. E. 320; *Ritchey v. Pendley*, — Ga. App. —, 75 S. E. 841; *Peebles v. Ralls*, 1 Litt. (Ky.) 25, wherein the court said that, in deciding on the diligence necessary to be observed by suiters, we should not altogether lose sight of the sympathies of our nature, and require a father or husband to abandon his child or wife, at the moment of apprehended death, for the purpose of attending the trial of a pecuniary contest.

In *Langdon-Creasy Co. v. Rouse*, 139 Ky. 647, 72 S. W. 1113, Ann. Cas. 1912 B, 292, it was held that the action of the trial judge, in denying a motion for a continuance upon the ground that the president of the defendant corporation, who was a material witness, was unable to attend because of the serious illness of his mother, and in directing that the affidavit which recited his proposed testimony be read as the deposition of the witness, was ground for a new trial. The supreme court said: "We think it is apparent that the presence of appellant before the jury to explain these facts would have been very much more effectual than the mere affidavit of his attorney. And it seems to us that the dying condition of his mother was a good cause for his nonattendance at the trial."

In *Hathcock v. McGouirk*, 119 Ga. 973, 47 S. E. 563, it was said that no abuse of discretion was shown in denying a continuance because of the illness of the party's brother, where the court assured him that, should he receive information that his brother's condition demanded his presence, the case would be suspended.

In *Jarnagin v. Atkinson*, 4 Humph. 470, a continuance was refused upon attorney's affidavit that he had received a letter from the defendant which stated that he was unable to attend the trial at that time because of the recent death of one of his children and the illness of another member of his family, that he believed the statements in the letter were true, and that his presence was necessary in the trial of the case. On appeal the supreme court did not think the refusal such an abuse of discretion as to require a reversal.

The refusal to grant a continuance in a prosecution for murder on account of the illness of the wife of accused, which, it was alleged, so disquieted accused as to disqualify him from properly presenting his de-

fense, cannot be considered an abuse of discretion, where the motion does not disclose the character of the wife's illness or that her condition was serious, and in the absence of a showing that the result of the trial might have been different had the wife not been ill. *Watkins v. Com.*, 149 Ky. 26, 147 S. W. 947.

**Sufficiency of showing on presentation of motion for continuance.**

In *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927, it was said that "the court had power to continue the trial for 'good cause,' but the 'good cause' must be legally established, properly authenticated. It was the duty of the court to decide, upon the cause shown, as to its sufficiency, and also whether it was legally established as a fact."

In *Mason v. Anderson*, 3 T. B. Mon. 293, it was said that in passing upon the sufficiency of an affidavit for a continuance, "no presumption favorable to the applicant is to be indulged. The facts upon which he intends to rest his application must be within his knowledge, and it is not to be supposed that in his affidavit he would omit anything favorable to himself, and which might in truth be stated; it is more natural to presume that he would make the best of his case, and state everything calculated to effect a continuance. The statements contained in such an affidavit should, therefore, be construed most strongly against the applicant."

An affidavit for a continuance on account of a party's sudden illness and inability to be present at the trial, which alleged that he was the principal defendant in the action and an important witness therein, and that it could not be properly tried in his absence, is insufficient in failing to show that he had any defense to the action, the facts to which he would testify if present, or that it was necessary that he should be personally present at the trial in order that he might advise and confer with his counsel during the progress of the trial. *Fiasse v. Katzentine*, 93 Ind. 490.

It was held in *Beard v. Mackey*, 51 Kan. 131, 32 Pac. 921, that the appellate court cannot say there was an abuse of discretion in denying a continuance, where the affidavit does not state that defendant had a bona fide defense to make, nor that he was a witness to any material fact, or possessed of any knowledge which was not shared by his counsel, it appearing that there had been a previous trial, though counsel's affidavit stated that no defense could be made without the personal attendance of his client.

An affidavit for a continuance made by a party some days before the trial, that he apprehended, owing to ill health, he could not attend, without showing that he might not have attended the trial without endangering his health, is insufficient. *Mason v. Anderson*, supra.

An affidavit for a continuance because of illness of a party should show that the party's presence is necessary. *Black v. Webber*, 1 Neb. (Unof.) 468, 96 N. W. 606; *Townsend v. Rhea*, 18 Ky. L. Rep. 901, 38 S. W. 865; *Paulucci v. Verity*, 1 Kan. App. 121, 40 Pac. 927; *Jones v. Little*, 2 Dall. 182, 1 L. ed. 340; *Schnell v. Rothbath*, 71 Ill. 83.

An affidavit for a continuance, supported by an unsworn certificate of a physician, has been held to be an insufficient showing. *Wick v. Weber*, 64 Ill. 167; *Waarich v. Winter*, 33 Ill. App. 36; *Harlow v. Warren*, 38 Kan. 480, 17 Pac. 159; *Schnell v. Rothbath*, 71 Ill. 83.

So, an unsworn statement of the party that he was ill and unable to attend is an insufficient showing to support a motion for a continuance. *Vowells v. Com.* 84 Ky. 52; *Westfield v. Westfield*, 19 S. C. 85; *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062; *O'Barr v. Alexander*, 37 Ga. 195; *McElveen Commission Co. v. Jackson*, 94 Ga. 549, 20 S. E. 428 (telegram from party to his counsel); *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927 (unverified letter received by the judge, stating sudden illness of defendant, and where no showing was made for the absence of counsel); *McGrath v. Tallent*, 7 Utah, 256, 26 Pac. 574 (oral statement of counsel).

A physician's certificate as to illness of a party on a certain day, which contained no statement which could inform the court as to the duration of the movant's illness, or from which the court could absolutely infer that the movant's ailment would continue until the day upon which the trial was to be held, is an insufficient showing to support a motion for a continuance. *Cavender v. Atkins*, 2 Ga. App. 173, 58 S. E. 332.

In *Garfield Nat. Bank v. Colwell*, 28 N. Y. S. R. 723, 8 N. Y. Supp. 380, it was held that counsel's affidavit in support of a motion for a continuance presented a sufficient showing where it alleged that he had seen defendant, that he was dangerously ill and unable to transact any business, that the illness had affected defendant's mind so that his deposition could not be taken, and that his testimony was necessary and material in support of his defense, and could not be supplied by any other person.

#### Practice before justice of the peace.

It has been held that the same rule is applicable to practice before a justice of the peace: *Locke v. Leonard Silk Co.* 37 Mich. 479 (which reversed the judgment because of the error of the justice in refusing a continuance upon a showing that defendant was too ill to attend the trial or attend to any business, and could not on that day, in safety to himself, leave his room); *Rose v. Stuyvesant*, 8 Johns. 426 (holding error for refusal of justice to continue because of defendant's inability to attend on account of serious illness of his child). A. L. R. 42 L.R.A. (N.S.)

#### ILLINOIS SUPREME COURT.

##### WHITE WALNUT COAL COMPANY

v.

##### CRESCENT COAL & MINING COMPANY, Plff. in Certiorari.

(254 Ill. 368, 98 N. E. 669.)

**Damages — breach of contract to purchase — resale — market.**

1. Resale for the purpose of fixing damages for breach of a contract to purchase the products of a mine need not be made in the market where delivery was to be made under the original contract.

**Sale — breach — right to resell — unproduced commodity.**

2. That a commodity which one has refused to accept and pay for according to contract has not been produced at the time of repudiation does not affect the right of the vendor to produce and resell it at the risk of the purchaser.

**Appeal — contradictory instructions — error.**

3. A contradictory and meaningless instruction upon the measure of damages does not require reversal, if it is apparent that the jury, in assessing the damages, followed a correct instruction.

(Cartwright, Hand, and Dunn, JJ., dissent.)

(April 18, 1912.)

*Note. — Resale to fix damage for refusal of purchaser to accept goods.*

I. Introductory, 670.

II. As affected by question whether contract is executed or executory, 671.

III. Resale as election of remedy.

a. In general, 672.

b. Effect of election, 673.

c. What constitutes election, 673.

IV. Relation between the parties created by election to resell.

a. In general, 674.

b. As affecting right of vendor to purchase, 675.

V. Necessity and effect of giving purchaser notice of resale or of intention to resell, as affecting right of action.

a. Distinction between notice of resale and notice of intention to resell, 677.

b. Notice of resale.

1. In general, 677.

2. The Indiana rule, 679.

c. Notice of intention to resell, 679.

d. As concluding purchaser by price received, 680.

e. As affecting time and place of sale, 681.

VI. Form and sufficiency of notice, 681.

**C**ERTIORARI to the Branch Appellate Court, First District, to review a judgment affirming a judgment of the Circuit Court for Cook County in plaintiff's favor in an action brought to recover damages for the alleged violation of a contract to purchase coal. Affirmed.

The facts are stated in the opinion.

Messrs. Ullmann, Hoag & Davidson and Guerin, Gallagher, & Barrett for plaintiff in certiorari.

Messrs. Tenney, Coffeen, Harding, & Sherman for defendant in certiorari.

Vickers, J., delivered the opinion of the court:

The White Walnut Coal Company is a corporation engaged in mining and selling

coal; its mines and place of business being located at Pinckneyville, Perry county, Illinois. The Crescent Coal & Mining Company is a corporation engaged in buying and selling coal, located in Chicago, Cook county, Illinois. On May 4, 1905, the following contract was entered into between said companies:

"This contract, made by and between the Crescent Coal & Mining Company, of Chicago, Illinois, party of the first part, and the White Walnut Coal Company, of Pinckneyville, Illinois, party of the second part, witnesseth: The party of the second part hereby agrees to load at its Pinckneyville mines a minimum of five thousand (5,000) and maximum of seven thousand (7,000) tons per month, until April 1, 1906, of standard

#### VII. Manner of resale.

- a. Exercise of good faith, etc., 682.
- b. Character of resale.
  1. In general, 682.
  2. Whether at public or private sale, 683.

#### VIII. Time of resale.

- a. Necessity of diligence, 683.
- b. Illustrative cases, 685.
- c. Whether computed from notice of breach or date for delivery, 685.

#### IX. Place of resale.

- a. Place of delivery, 685.
- b. Place of contract, 686.
- c. Nearest available market, 686.
- d. Distant market, 687.

#### X. Conclusiveness of resale as to vendor's damages.

- a. In general, 687.
- b. Where resale is according to statute or Code, 689.
- c. As affected by place of resale, 689.

#### XI. Evidence—burden of proof, 690.

#### XII. Questions for jury, 691.

#### XIII. Miscellaneous questions of practice, 691.

#### I. Introductory.

The right of the seller upon breach of an executory contract, to maintain an action for the contract price, is treated in the notes in 26 L.R.A. (N.S.) 248 and 17 L.R.A. (N.S.) 808. As to the right of the seller to reclaim goods as against the assignee for creditors or trustee in bankruptcy of buyer, who procured them by false representations, see note in 17 L.R.A. (N.S.) 1032. As to the effect of refusal to execute purchase money notes to give vendor an immediate right of action, see note in 12 L.R.A. (N.S.) 180.

The present note is confined to questions relating to the resale of personal property by the vendor where the purchaser has wrongfully refused to receive it, and excludes sales of real estate and also judicial sales. Neither is it intended to cover the question of right to resell. This question will be found discussed in a note in 52 42 L.R.A. (N.S.)

L.R.A. 249. It may be stated as a general rule, well settled by American authorities, that the right of resale exists in the vendor where the purchaser wrongfully refuses to receive the subject-matter of the sale, and this without reference to the character of the property whether perishable or not. In England, while the right to resell clearly exists as to perishable property, the right is not so clear as to other personal property. As stated, it is not the purpose of this note to discuss this question or the question of when the right exists. It is assumed, for the purposes of the questions to be discussed, that the right does exist, the questions being the election of this remedy by the purchaser, the manner of its exercise, as well as the time and place of the resale, and also the effect of resale.

In considering these questions, it may be stated that much difficulty has frequently been met in construing the decisions of the courts. Thus, in considering the question of necessity of notice of resale or intention to resell, it is not entirely clear in many instances whether a case, in asserting the necessity of notice, or in denying the necessity of notice, considers the question with reference to its effect upon the vendor's right to maintain an action for damages for the breach of the contract, or its effect upon his right to rely upon the amount received from the resale as conclusive upon the purchaser as to the amount of his damages. And difficulty is also met in determining whether cases affirming or denying the conclusiveness of the amount received from a resale upon the vendor's damage are stating a general rule to be generally applied, or whether the rule stated is intended by the court to be limited to the particular case. Thus, in many cases asserting that the result of a resale, if properly conducted, etc., is conclusive upon the purchaser, there was no evidence of unfairness in the sale, either as to its manner, time, or place, and no evidence that the amount received did not represent the actual market value of the property at that time. Such a case, although asserting a general rule, is, of course, doubtful authority as applied to cases

screenings, containing nut, pea, and slack as per sample shipped for test, and deliver the same to the party of the first part, f. o. b. cars Illinois Central tracks at Chicago, for one dollar and thirty-two and one-half cents (\$1.32½) per ton of 2,000 pounds, with the understanding that if there is any reduction in the freight rate, there will be a corresponding reduction in the price. The party of the first part hereby agrees to accept the coal as above stated, and to pay for the same on the 20th of each month following shipments, mine weights to govern settlement. It is further agreed and understood that the second party will not be required to furnish the said coal in case of strikes, breakdowns, or other causes beyond its control.

where there is a material difference between the market value of the property at the time of the breach of the contract and the amount received from a resale, and especially where this difference may be the result of delay in the resale, or of the manner or place of it. And a general statement in a case of the latter character, that the amount received from a resale is evidentiary merely, and makes a question for the jury, gives but little, if any, support to any general rule which might thus limit the effect of a resale where the purchaser offered no evidence to impeach it, either as to the manner, fairness, place, or price received.

## ***II. As affected by question whether contract is executed or executory.***

In a few jurisdictions the question of resale to fix damages for the purchaser's refusal to accept the purchased property has been affected by the question whether the contract was executory or executed. In general, however, the use by the court of these terms as descriptive of different classes of contracts is so far from uniform as to render it impracticable to make any distinction between executory and executed contracts as regards the question under consideration. For the purposes of this question, we may regard as in a sense executory all contracts herein involved, since the purchaser has not accepted the goods, although it may be that title thereto has passed under the contract of sale. Of course, if the possession has passed to the purchaser as well as the title, even though it is subsequently surrendered, this question would not usually arise. *Healy v. Utly*, 1 Cow. 345.

But it has been held that, although the jury might find that there was a sale and delivery and actual receipt of the goods by the purchaser, yet if, after the completed sale and before the goods were removed, they were placed in the custody of the vendor, the latter had such a lien upon the goods for the purchase price as to entitle 42 L.R.A. (N.S.)

"Signed in duplicate this 4th day of May, 1905."

The White Walnut Coal Company brought an action of assumpsit against the Crescent Coal & Mining Company, in the circuit court of Cook county, to recover damages for an alleged violation of said contract, resulting from the refusal of the Crescent Coal & Mining Company to receive and pay for a portion of the screenings which the plaintiff was ready and willing to deliver under said contract. A jury trial resulted in a verdict, upon which judgment was afterwards rendered, in favor of the plaintiff below, for \$10,638.90. The judgment having been affirmed by the branch appellate court for the first district, the record has

him to resell the same for failure of the purchaser to make payment in accordance with his contract. *Urbansky v. Kutinsky*, 86 Conn. 22, 84 Atl. 317.

So far as concerns the question under consideration, it has been held that upon a valid sale of specific chattels, when nothing remains to be done by the vendor except to deliver the property, whether conditioned upon payment or not, the right of property passes to the purchaser, at whose risk it is retained by the vendor; but the same consequence as to title results from a valid tender upon an executory contract, and in either case, upon refusal of the purchaser to receive the property, the vendor has his election of remedies. *Hayden v. Demets*, 53 N. Y. 426.

The right to resell the property upon a refusal of the purchaser to accept it is based upon the theory that the title to the property, by the contract and tender and the assent of the vendor, is vested in the buyer. *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190. But the purchaser does not become the absolute owner of the property by the act of the vendor in thus seeking to establish the amount of his loss. *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271. And the remedy of resale is available even in a case where the goods are shipped to be paid for on delivery, and the payment of a draft for the purchase price is a condition precedent to the delivery of the goods by the carrier to the purchaser. *McCord v. Laidley*, 87 Ga. 221, 13 S. E. 509.

The question whether the rule under consideration applies to both executory and executed contracts is discussed at length in *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797. The court there regarded the term "executed" contract of sale as meaning a contract under which the title to the subject-matter had passed to the purchaser, and an executory contract of sale as indicating a contract under which the title had not passed. Under either form of contract the court said that the vendor might resort to the remedy of resale for the purpose of fixing his damages for the re-

been brought to this court for further review by writ of certiorari.

The facts, in brief, are that defendant in error shipped 27,700 tons of screenings to plaintiff in error between the making of said contract and October 27, 1905, 17,910 tons of which were accepted, and 9,790 tons rejected on the alleged ground that the screenings were not up to sample. On October 27, 1905, plaintiff in error wrote defendant in error as follows: "Since you are evidently not disposed to give us merchantable screenings, such as the sample cars upon which we made our contract, we have decided to, and hereby notify you that we have, rescinded your contract for failure to comply with same, and that we shall hold you for all damages sustained by us by

reason of such default upon your part, and you may govern yourselves accordingly." On November 3d defendant in error replied to said letter as follows: "Yours of October 27 received. We must decline to accept your order rescinding our contract, and we most emphatically dispute your right to do so, for the reason that there is no occasion for the same by any act of ours. We have had the coal shipped to you carefully inspected, and we know that it is standard, and the same as sample submitted. However, as you refuse to accept my screenings under this contract, it, of course, would be idle for us to go through the form of shipping the cars to you simply to have them rejected. We shall, accordingly, dispose of the coal at the best price we can get in

refusal of the purchaser to receive the property sold.

In Indiana a distinction is made between the right of a vendor to resell where the purchase is by executory contract and where by executed contract, so far as concerns his right to rely upon the amount from the resale as a basis for estimating his damages. And as to executory contracts, it is said that the amount received from the resale does not represent the amount of the vendor's damages; that he can recover only the difference between the contract price and the market price at the place of delivery, but that, where the purchase is by executed contract, if the vendor resell because of default of the purchaser, the measure of his damages for breach of the contract is the difference between the contract price and the amount realized from the resale, if fairly and honestly conducted. *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861; *Wallace v. Coons*, — Ind. App. —, 95 N. E. 132.

### III. Resale as election of remedy.

#### a. In general.

In a note in 17 L.R.A. (N.S.) 808 (which is supplemented by a note in 26 L.R.A. (N.S.) 248), discussing the right of the vendor to sue for the purchase price on breach of an executory contract of purchase, the question is discussed at length as to when a contract is properly termed "executory" and when "executed." Although that question may be of importance in suits for the purchase price where the purchaser repudiates and thus breaches the contract prior to tender by the seller, it is not of any material importance where a tender has in fact been made prior to repudiation. Under such circumstances, although the cases do not draw this distinction, it matters not whether the particular contract is denominated executory or executed. If the possession of the property still remains in the vendor, he has an election of remedies open for him to pursue. Only one of these, however, is material to the question under consideration. According to this remedy, he 42 L.R.A. (N.S.)

may regard the contract of sale as breached by the purchaser's refusal to accept the property, and resell it on account of the latter.

U. S.—*Hughes v. United States*, 4 Ct. Cl. 64.

Fed.—*Habeler v. Rogers*, 65 C. C. A. 281, 131 Fed. 43; *Kinkead v. Lynch*, 132 Fed. 692; *Hayes v. Nashville*, 26 C. C. A. 59, 47 U. S. App. 713, 80 Fed. 641.

Ariz.—*Slaughter v. Marlow*, 3 Ariz. 429, 31 Pac. 547.

Colo.—*Magnes v. Sioux City Nursery & Seed Co.* 14 Colo. App. 219, 59 Pac. 879.

Del.—*Darby v. Hall*, 3 Penn. (Del.) 25, 50 Atl. 64.

Ga.—*Mendel v. Miller*, 126 Ga. 834, 7 L.R.A. (N.S.) 1184, 56 S. E. 88; *Maddox v. Washburn-Crosby Mill Co.* 135 Ga. 539, 69 S. E. 821; *Brooke v. Robson*, 3 Ga. App. 136, 59 S. E. 323.

Ill.—*Bagley v. Findlay*, 82 Ill. 524; *Olson v. Wabash Coal Co.* 126 Ill. App. 253; *Pittsburgh & I. Coal Co. v. Hostler Coal & Coke Co.* 147 Ill. App. 387.

Iowa—*Redhead Bros. v. Wyoming Cattle Invest. Co.* 126 Iowa, 410, 102 N. W. 144.

Ky.—*Cook v. Brandeis*, 3 Met. (Ky.) 555; *Beauchamp v. Withers*, 4 Ky. L. Rep. 262.

Mo.—*Van Horn v. Rucker*, 33 Mo. 391, 84 Am. Dec. 52; *St. Louis Range Co. v. Kline-Drummond Mercantile Co.* 120 Mo. App. 438, 96 S. W. 1040.

N. Y.—*Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Ackerman v. Rubens*, 167 N. Y. 405, 53 L.R.A. 867, 82 Am. St. Rep. 728, 60 N. E. 750; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. Supp. 380; *Stengel v. Hewit*, 37 Misc. 670, 76 N. Y. Supp. 378; *Levy v. Glassberg*, 92 N. Y. Supp. 50; *Isaacs v. Terry & T. Co.* 125 App. Div. 532, 109 N. Y. Supp. 792; *Wolfsheim v. Ammam Mfg. & Constr. Co.* 110 N. Y. Supp. 943; *Rusch v. Klausner*, 117 N. Y. Supp. 1074; *McEachron v. Randles*, 34 Barb. 301; *Westfall v. Peacock*, 63 Barb. 209.



the market, and whatever damage we may suffer by your refusal to accept it, we shall expect you to pay to us." Thereafter defendant in error continued to produce screenings at its mines and sold the same in Chicago, St. Louis, and Minneapolis. Approximately \$20,000 was credited to plaintiff in error's account as the net proceeds of these sales, although the screenings were sold much below the contract price. The defendant in error rendered monthly statements of the amount of shipments and receipts, and advised plaintiff in error of the balance claimed to be due. The amount of the loss upon the screenings shipped and sold, after deducting freights and commissions, was adopted by the court below as the correct measure of the defendant in error's

damages, and a verdict and judgment for that amount were rendered against plaintiff in error.

In the trial court, two questions were controverted:

First, the making of the contract and the subsequent attempt of plaintiff in error to rescind the same were admitted, and it sought to justify the course pursued by alleging that the screenings shipped under the contract were not up to sample. This contention presented a question of fact, and the affirmance of the judgment by the appellate court settles that question adversely to the contention of plaintiff in error.

Second, assuming that plaintiff in error is in default, a difference of opinion between the parties exists as to the proper measure

Ohio—Cullen v. Bimm, 37 Ohio St. 236.

Or.—Livesley v. Krebs Hop Co. 57 Or. 369, 97 Pac. 718, 107 Pac. 460, 112 Pac. 1.

Tenn.—McClure v. Williams, 5 Sneed, 718; Cole v. Zucarello, 104 Tenn. 64, 56 S. W. 850; Mayberry v. Lilly Mill Co. 112 Tenn. 564, 85 S. W. 401.

Tex.—Ogburn-Dalchau Lumber Co. v. Taylor, — Tex. Civ. App. —, 126 S. W. 48.

Va.—Rosenbaum v. Weeden, 18 Gratt. 785, 98 Am. Dec. 737.

Wash.—Henry H. Schott Co. v. Stone, 35 Wash. 252, 77 Pac. 192.

W. Va.—American Canning Co. v. Flat Top Grocery Co. 68 W. Va. 698, 70 S. E. 756.

Wis.—Pratt v. S. Freeman & Sons Mfg. Co. 115 Wis. 648, 92 N. W. 368.

Eng.—Maclean v. Dunn, 4 Bing. 722, 6 L. J. C. P. 184, 1 Moore & P. 761, 29 Revised Rep. 714; Hagedorn v. Laing, 6 Taunt. 162, 1 Marsh. 514.

### *b. Effect of election.*

These remedies are not concurrent, but inconsistent. Ogburn-Dalchau Lumber Co. v. Taylor, — Tex. Civ. App. —, 126 S. W. 48. And having elected to pursue one remedy, the vendor may not thereafter adopt a different one. Isaacs v. Terry & T. Co. 125 App. Div. 532, 109 N. Y. Supp. 792; Bridgford v. Crocker, 60 N. Y. 627; Gray v. Central R. Co. 82 Hun, 523, 31 N. Y. Supp. 704.

This rule forbids the election by the vendor of different remedies in dealing with different portions of the property forming the subject-matter of the same contract. When the contract is broken, the seller, having the choice of remedies, is put to an election, and having made one, and having dealt with a portion of the property left in his possession in accordance with that remedy, he must pursue the same remedy as to the whole. His subsequent relations to the property will be determined by the remedy which he first chooses and undertakes. Ogburn-Dalchau Lumber Co. v. Taylor, *supra*.

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And the vendor cannot elect one remedy or sue upon one theory, and recover upon another; he cannot sue upon the theory of rescission of the contract and the sale of the property as his own, and recover damages upon the theory of a sale on account of the purchaser. Gray v. Central R. Co. 82 Hun, 523, 31 N. Y. Supp. 704.

So an election by the vendor to treat the purchaser as the owner of the property precludes him from subsequently making a resale of the property on the claim that it is on account of the purchaser. Westfall v. Peacock, 63 Barb. 209; Maclean v. Dunn, 4 Bing. 722, 6 L. J. C. P. 184, 1 Moore & P. 761, 29 Revised Rep. 714. On the other hand, if the vendor resells the goods wrongfully rejected by the purchaser on account of the latter, he cannot thereafter maintain an action against him to recover their value on the theory that they are the property of the purchaser. Haas v. Tompkins, 2 Clark (Pa.) 16; Hagedorn v. Laing, 6 Taunt. 162, 1 Marsh. 514.

And a resale of the goods on account of the purchaser precludes an action against him on the theory that he is the owner, since a recovery of a judgment in such an action would entitle the purchaser to possession of the goods. Haas v. Tompkins and Hagedorn v. Laing, *supra*.

### *c. What constitutes election.*

An election of remedies is made by any affirmative binding act showing that the vendor elects to treat the goods as his own, as he necessarily does when he seeks to recover the difference between the contract price and the market price, which is inconsistent with the assertion of title in the purchaser, which is involved in suing for the difference between the contract price and the amount realized on a resale as agent for the purchaser. Isaacs v. Terry & T. Co. 125 App. Div. 532, 109 N. Y. Supp. 792.

And the vendor, by bringing an action for the purchase price of an article wrongfully rejected by the purchaser, thereby elects his remedy, and cannot thereafter sell the

of damages. Defendant in error contends that its measure of damages is the difference between the contract price and the net amount realized from a resale of the screenings, while plaintiff in error contends that the measure of damages is the difference between the contract price and the market price of such screenings in the city of Chicago. In other words, plaintiff in error contends that, since Chicago was the place of delivery under the contract, the right of the seller to resell the goods and hold the purchaser for the loss upon such resale is limited to the market designated as the place of delivery in the contract. On the other hand, the defendant in error contends that, when circumstances exist giving the seller a right to resell the goods, it is the duty

of the seller to use reasonable care and diligence in reselling, and to secure the largest net amount obtainable for the goods, and that the right to resell is not limited to the particular place designated in the contract as the place of delivery.

The court below adopted defendant in error's view of the law on this question, and embodied that view in the following instruction, given to the jury on behalf of defendant in error: "If you find from the evidence that the plaintiff sold the coal which it shipped under the contract, and which was not accepted by the defendant, to the best advantage under the circumstances, then the measure of plaintiff's damages is the difference between the contract price of the coal so shipped by plaintiff, and the net

property on account of the purchaser. *Westfall v. Peacock*, 63 Barb. 209; *Maclean v. Dunn*, 4 Bing. 722, 6 L. J. C. P. 184, 1 Moore & P. 761, 29 Revised Rep. 714.

The vendor, by reselling on account of the purchaser, elects to regard the contract of sale as breached, and he cannot thereafter maintain an action against the purchaser for goods bargained and sold, since an action of this character is consistent only with the theory of title and right of possession in the purchaser, upon the satisfaction of the judgment recovered. *Haas v. Tompkins*, 2 Clark (Pa.) 16; *Hagedorn v. Laing*, 6 Taunt. 162, 1 Marsh. 514.

Although the vendor declares upon the common counts in an action for damages for a breach of contract, following a resale of the property on account of the purchaser, after its rejection by the latter, he may nevertheless amend by filing an additional count declaring specially upon the contract and alleging a breach thereof and resulting damages. *Phelps v. Hubbard*, 51 Vt. 489.

If there has never been a completed sale and the title has not passed, it has been held that the vendor may abandon his claim under an action to recover the contract price, and set up a claim for damages for breach of the contract, and estimate the damages by a resale of the property, giving the defendant credit for the amount received, and he may either abandon the original action and institute a new suit, or by amendment seek this relief. *Redhead Bros. v. Wyoming Cattle Invest. Co.* 126 Iowa, 410, 102 N. W. 144.

A sale by the vendor in his own behalf constitutes an election to treat the property as his own, and not an election to sell on account of the purchaser. *Cullen v. Bimm*, 37 Ohio St. 236. And when he elects to treat a portion of the property as his own, and so disposes of it, that determines his relation to all of it. *Ogburn-Dalchau Lumber Co. v. Taylor*. — *Tex. Civ. App.* —, 126 S. W. 48. Or if he holds the property for an unreasonable time after the breach, this will be held to constitute an election to treat it as his own, and a resale thereafter made will be regarded as a

sale on his own account. *Guy v. United States*, 25 Ct. Cl. 61.

If the vendor seeks to recover the damages liquidated by a resale, he must sue therefor. He cannot sue for damages generally, and, by virtue of a resale made after commencing his suit, recover such liquidated damages, together with the expenses incurred in making the resale. *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797.

#### IV. Relation between the parties created by election to resell.

##### a. In general.

Where, after refusal by the purchaser to receive the goods purchased, the vendor resells them on the former's account, the relation between the parties is somewhat analogous to that of principal and agent, and it has frequently been asserted in this class of cases, that in making the resale the vendor acts as the agent of the purchaser, and is bound to exercise the same degree of good faith, care, and prudence as an agent is required to exercise in the sale of his principal's property.

*Ala.*—*Penn v. Smith*, 98 Ala. 560, 12 So. 818.

*Ariz.*—*Slaughter v. Marlow*, 3 Ariz. 429, 31 Pac. 547.

*Ga.*—*Mendel v. Miller*, 126 Ga. 834, 7 L.R.A.(N.S.) 1184, 56 S. E. 88.

*Ill.*—*Bagley v. Findlay*, 82 Ill. 524.

*Ind.*—*Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861.

*La.*—*Gilly v. Henry*, 8 Mart. (La.) 402, 13 Am. Dec. 291.

*Mich.*—*Piowaty v. Sheldon*, 167 Mich. 218, 132 N. W. 517, Ann. Cas. 1913A, 610.

*Miss.*—*Swann v. West*, 41 Miss. 104.

*Mo.*—*Ingram v. Matthien*, 3 Mo. 209.

*N. Y.*—*Pollen v. Le Roy*, 30 N. Y. 549;

*Dustan v. McAndrew*, 44 N. Y. 72; *Hayden*

*v. Demets*, 53 N. Y. 426; *Smith v. Pettee*,

70 N. Y. 13; *Mason v. Decker*, 72 N. Y.

595, 28 Am. Rep. 190; *VanBrocklen v.*

*Smeallie*, 140 N. Y. 70, 35 N. E. 415;

*Moore v. Potter*, 155 N. Y. 481, 63 Am. St.

amount realized by plaintiff from the sale of the same."

The court modified instruction No. 28, asked on behalf of plaintiff in error, which, in its original form, was a statement of the rule as to the measure of damages as contended for by plaintiff in error. The assignment of error upon the giving of the instruction above set out, on behalf of defendant in error, and the modification of instruction No. 28, and the giving of the same as modified, raise the only legal question that is open for consideration in this court.

In its brief filed in this court, plaintiff in error objects to the instruction given on behalf of defendant in error, on the ground that it does not include the hypothesis that

such resale must be fair, and must be made in good faith and in the mode best calculated to produce the real value of the goods, and omits the qualification that the charges for making the resale were reasonable and necessary, and also because, it is said, the instruction assumes the existence of a right in defendant in error to recover damages. An examination of plaintiff in error's brief filed in this cause in the appellate court, a certified copy of which, on motion of defendant in error, has been filed in this court, shows that none of the aforesaid objections were raised in the appellate court. Under numerous decisions of this court all questions not raised and argued in the appellate court are waived, and cannot be raised for the first time in this court. Dunn v.

Rep. 692, 50 N. E. 271; Austin v. Hartwig, 17 Jones & S. 256; McEachron v. Randles, 34 Barb. 301; Lewis v. Greider, 49 Barb. 606, affirmed in 51 N. Y. 231; Case v. Simmons, 4 Silv. Sup. Ct. 180, 7 N. Y. Supp. 253; House v. Babcock, 43 N. Y. S. R. 500, 17 N. Y. Supp. 640; Sands v. Taylor, 5 Johns. 395, 4 Am. Dec. 374.

N. C.—Vanstony Clothing Co. v. Stadiem, 149 N. C. 6, 62 S. E. 778.

Tenn.—Hardwick v. American Can Co. 113 Tenn. 657, 88 S. W. 797.

Tex.—White v. Matador Land & Cattle Co. 75 Tex. 465, 12 S. W. 866.

Va.—Rosenbaum v. Weeden, 18 Gratt. 785, 98 Am. Dec. 737.

It is not entirely accurate, however, to refer to the vendor as the agent of the purchaser in making a resale of property refused by the latter, since the vendor has a personal interest in the property to the extent of the purchase price due him thereon, and he has the right to protect this interest. While in so doing he generally also advances the interest of the purchaser, yet, in the matter of fixing upon a time and place for the resale, and of bidding upon the property if the resale is a public sale, the same rules do not apply to him that would apply to an agent, as will be hereafter more specifically pointed out.

Sustaining this view, it has been said that "the use of the words 'as agent of the vendee was not intended as a determination that the relation between the parties was that which ordinarily exists between a principal who owns property and an agent who may be authorized to manage or sell it. But it is a general expression which has been somewhat inaccurately used to define the right of a vendor to make a resale and hold the vendee responsible for his loss. It is quite manifest that a resale made under such circumstances is not made by the vendor strictly as the agent of the vendee, but he acts for himself in disposing of the property for the purpose of ascertaining the actual damages he may sustain. Doubtless, in making it the vendor would be bound to sell within a reasonable time, to exercise good faith to effect a sale at the 42 L.R.A. (N.S.)

best price he could obtain, to follow any proper instructions the vendee might give as to the time and manner in which it should be made, and to give credit upon the contract price for the amount received. His duties in making the sale may, in some respects, resemble those of an agent, and thus the expression that he acts 'as the agent of the vendee' has arisen. That he owes the vendee the duty to thus conduct the sale is clear, but that his acts in making it can be properly regarded as the acts of an agent, as that word is generally understood, is quite otherwise. Surely the fact that a vendor might seek this remedy against an insolvent or doubtful vendee would not confer upon the latter such a title as would enable him to demand and hold the property without complying with the terms of the contract. To say then that the vendor becomes the agent of the vendee in making the sale is not quite correct, and is to be regarded at most as a mere fiction of law, and the beneficial title does not pass to the vendee." Moore v. Potter, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271.

#### ***b. As affecting right of vendor to purchase.***

Upon the principle that the vendor in reselling acts as the agent of the purchaser, it has been held that the former is without capacity, either directly or indirectly, to purchase the property in whole or in part, where he undertakes to sell it in behalf of the defaulting purchaser, and if he so purchases it, he cannot claim to recover upon the theory of a resale upon the account of the buyer. Judd Linseed & Sperm Oil Co. v. Kearney, 14 La. Ann. 352. And that a resale by the vendor to himself is invalid where objected to by the original purchaser on this ground, and a subsequent sale will be regarded as a sale by the vendor in his own behalf, and hence as an election to treat the property as his own. Cullen v. Bimm, 37 Ohio St. 236.

But it has been held that the fact that on the resale the property is sold nominal-

Crichfield, 214 Ill. 292, 73 N. E. 386; Chicago & A. R. Co. v. American Strawboard Co. 190 Ill. 268, 60 N. E. 518; United Breweries Co. v. O'Donnell, 221 Ill. 334, 77 N. E. 547. The only objection urged against said instruction in the appellate court, and which is also argued here, is that the instruction does not state the correct measure of damages applicable to the case, and that said instruction was in conflict with instruction No. 28 as modified and given on behalf of defendant in error. The only question, therefore, that need be considered here, is whether the instruction complained of states a correct rule of law as to the measure of damages under the situation presented by this record.

In the early case of Bagley v. Findlay, 82

ly to a third person, but really for the benefit of the vendor, is not of interest to the purchaser, where the articles were sold at public sale, and it does not appear that they could have been sold for a higher price to any other buyer. *Lindon v. Eldred*, 49 Wis. 305, 5 N. W. 862. And the fact that the agent of the vendor purchases the goods, and afterwards turns them over to the vendor, does not show that the sale by auction was unfair. *Austin v. Hartwig*, 17 Jones & S. 256.

And there is neither fraud nor deception in the fact that the property is purchased by the vendor, where it is sold by public sale and other persons are present and bid and are urged to bid. *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845; *Ackerman v. Rubens*, 167 N. Y. 405, 53 L.R.A. 867, 82 Am. St. Rep. 728, 60 N. E. 750; *Austin v. Hartwig*, 17 Jones & S. 256.

In making a distinction in this regard between a private sale and a sale by auction, in *Ackerman v. Rubens*, supra, it is said that while it would be true that a private sale by the vendor to himself would not constitute a legal sale, it is not true of a sale at public auction "fairly conducted by a licensed auctioneer, and made at a reasonable time and place, after adequate opportunity to see the property, due advertisement to the public, and personal notice to the vendee, when the real purpose is to ascertain the value of the property. The law is satisfied with a fair sale, made in good faith, according to established business methods, with no attempt to take advantage of the vendee. Such, as the jury might have found, was the sale under consideration. The primary object of the sale was not to pass title from the vendor, but to lessen the loss of the vendee. The subject of the sale had no market value, and the amount for which it could be sold depended largely upon taste and fancy. A public competitive sale by outcry to the highest bidder, duly advertised, and made upon notice to the vendee, is a safer method of measuring the damages than a sale by private negotiation, which has been held 42 L.R.A. (N.S.)

Ill. 524, this court recognized and applied the rule that, when a vendee of goods sold at a specific price refuses to take and pay for the goods, the vendor may, after giving notice to the vendee, proceed to sell the goods to the best advantage, and recover from the vendee the loss if the goods fail to bring the amount of the contract price. In that case, it was observed that the vendor in such case takes the position of an agent for the vendee, and is held to the same degree of care, judgment, and fidelity that is imposed by law upon the agent put in the custody of such goods, with instruction to sell them to the best advantage. In so far as the rights of the vendor to resell, and his duty to use diligence and fidelity in conducting the sale, are concerned, there ap-

sufficient. . . . A fair public sale, in the absence of other evidence, is competent evidence of value. The plaintiff did not conduct the sale himself, but placed the yacht in the hands of a public auctioneer for sale, without reservation, on account of whom it might concern. While the auctioneer was his agent, he could not lawfully control him so as to prevent an honest sale. The defendant had notice and an opportunity to protect himself, yet he asked for no postponement, made no request, gave no instructions, and did not even appear at the sale. If the plaintiff's agent had refrained from bidding, the property would have gone to a stranger for a less sum than it finally brought, and yet in that event even, according to the defendant's theory, the sale would have been valid. The fact that the plaintiff outbid all competitors did not render the sale invalid; for he had a right to bid, provided he took no advantage by trying to prevent others from bidding, or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale, the action of the trial court in virtually withdrawing the case from the jury might have been justified; but the mere fact that he was the highest bidder at a public sale, the fairness of which is not questioned in any other respect, did not warrant the direction for nominal damages only. The object of the sale was to measure the damages caused by the default of the defendant, and they were diminished, instead of being increased, by the action of the plaintiff."

And while asserting that the vendor in conducting a resale acts as trustee or agent for the purchaser, it has, however, been said that his agency is coupled with an interest. If he deems it necessary to protect his interest, he can buy the goods, but in such case he holds them subject to redemption providing the original purchaser acts seasonably. After being apprised of the purchase, it is the right of the latter to have the articles returned to him upon tender to

pears to be no difference between a resale where the purchaser refuses to accept the goods and pay for them, and the case of a vendor who, owing to the insolvency of the vendee, in the exercise of his right of stoppage *in transitu*, repossesses himself of the goods, and, after notice to the vendee, resells them for the best price obtainable. In both cases, the vendee is liable to the vendor for the difference between the net amount realized upon the resale and the contract price. *Mechem, Sales*, § 1622; *Shaw v. Lady Ensley Coal, Iron & R. Co.* 147 Ill. 526, 35 N. E. 620.

As we understand the contention of plaintiff in error, the right of a vendor to resell the property contracted to be sold, upon the refusal or inability of the vendee to accept

and pay for the same, is not questioned as a general legal proposition; but its contention is that, where the contract designates a particular place of delivery, the right to resell can only be exercised at such place. If there were no authority on the subject, sound reason would seem to be against the limitation sought to be placed upon the right of resale by plaintiff in error. All of the authorities agree that the vendor must exercise reasonable diligence to minimize his damages by obtaining the highest possible price for the goods. This rule tends to protect the defaulting vendee by reducing the amount of damages for which he must ultimately respond. If the vendor must sell the goods at the place of delivery, regardless of the price at other available

the vendor of the contract price; or if the return of the goods is impossible, upon offer to pay the balance of the original purchase price, he is entitled to a credit for the actual market value of the goods purchased by the vendor, regardless of what they brought at the resale. *Strauss v. Lab-sap*, 59 Mo. App. 261 (sale by auction).

be disregarded by the latter and entirely futile. In the ordinary case, however, notice of the intention to resell is at least advisable, in order to give the purchaser an opportunity to protect himself, either by request as to the conduct of the resale, or by accepting the property and avoiding the necessity of a resale.

**V. Necessity and effect of giving purchaser notice of resale or of intention to resell, as affecting right of action:**

**a. Distinction between notice of resale and notice of intention to resell.**

In considering the question of necessity of notice of resale or of intention to resell, it is to be observed that while the two questions are considered together, they are, however, distinct, and involve the application of a different rule. Thus, the question of the necessity of notice of resale is frequently disposed of by the consideration of the question whether such a notice is practicable in a given case. Since the vendor, acting in good faith, has the right, and it is his duty, to exercise his best judgment and discretion in the manner of the resale, and he should be governed to a great extent by the usages of the trade with reference to the article to be resold, it is obvious that he will frequently be called upon to resell in a manner making it impossible, or at least impracticable, to give notice of the time and place of the resale; therefore to assert a rigid rule in all cases requiring such notice would render it impossible for the vendor to sell according to the usages of the trade, and make it necessary for him to sell in such a way as to enable him to give notice, and in many cases this would be detrimental to the interests of the purchaser.

On the other hand, it is both possible and practicable in all cases for the vendor to give notice of his intention to resell, and no reason exists why such a notice should not be given, unless the circumstances are such, together with the conduct of the purchaser, as to show that such a notice would

**b. Notice of resale.**

**1. In general.**

It has been said that the right of resale can be exercised only after due notice to the purchaser of the time and place of sale. *McEachron v. Randles*, 34 Barb. 301. But this case on this point is expressly disapproved in *Pollen v. Le Roy*, 30 N. Y. 549, and it is there asserted that the only requisite to such a sale, as a measure of the rights and the injury of the party, is good faith, including the proper observance of the usages of the particular trade. But in this case, notice of intention to sell was given the purchaser by the vendor, and the court was considering merely the question of necessity of giving notice of the time and place of resale, and this too in a case where, in following the usages of the trade, it was necessary to resell through brokers, — a case where notice of the time and place of sale would be impracticable. While this language might be construed as asserting the rule that the amount received from the resale would be the basis for measuring the rights and the injuries of the parties, if the sale was in good faith and conducted according to the usages of the particular trade, yet it is to be noted that there was no evidence of market value presented in the case other than the amount received from the resale. The question as to the conclusiveness of the amount received from the resale will be hereafter considered, and this case again referred to on this point.

And it is a general rule that, at least in the ordinary case, after a purchaser has unqualifiedly refused to receive the goods tendered him according to the contract, or refused to receive the same except upon

markets, he has no choice of markets and no opportunity to exercise his care and diligence to secure the highest price to be obtained. Suppose, in the case at bar, after plaintiff in error refused to receive and pay for the screenings purchased, such screenings would have brought only 10 cents per ton, net, in the Chicago market, and the same screenings would have sold for 50 cents per ton, net, in St. Louis. It would be as unjust as it is unreasonable to hold that defendant in error would be compelled to sell such screenings in Chicago, thereby increasing the damages plaintiff in error would have to pay, when it was known to defendant in error a more advantageous sale could be made in St. Louis. Such a rule, if applied generally, would often work a

great hardship upon the unfortunate vendee, without any corresponding advantage to the vendor.

The question under consideration is not, however, a new one, but has received the consideration of courts and text writers, and the authorities are practically uniform that the vendor is not bound to resell at the contract place of delivery, or within the contract time for delivery. 35 Cyc. 524; *Mechem, Sales*, § 1638. In the section cited above, *Mechem* says: "With respect of the place at which the resale should be made, no hard and fast rule can be laid down. A particular place is not to be insisted upon, but good faith and a fair and reasonable endeavor to get the best available price for the goods are essential. The place

conditions that he has no right to impose, the vendor, in exercising his right to resell, is under no obligation to give to the purchaser notice of the time and place of resale, at least so far as affects his right of action for the breach of the contract. As to whether or not the failure to give notice of resale affects the right to rely upon the amount received therefrom, as conclusive upon the purchaser as to the vendor's damages, see *infra*, V. d.

Colo.—*Magnes v. Sioux City Nursery & Seed Co.* 14 Colo. App. 219, 59 Pac. 879.  
Ga.—*Mendel v. Miller*, 126 Ga. 834, 7 L.R.A.(N.S.) 1184, 56 S. E. 88.

Ill.—*Ullmann v. Kent*, 60 Ill. 271; *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406.

Ky.—*Clore v. Robinson*, 100 Ky. 402, 38 S. W. 687.

Mich.—*Habicht, B. & Co. v. E. B. Gallagher & Co.* — Mich. —, 137 N. W. 685.

Neb.—*J. K. Armsby Co. v. Raymond Bros.*—Clarke Co. 90 Neb. 553, 134 N. W. 174, rehearing 90 Neb. 773, 134 N. W. 920.

N. Y.—*Pollen v. Le Roy*, 30 N. Y. 549; *Lewis v. Greider*, 51 N. Y. 231; *Bogart v. O'Regan*, 1 E. D. Smith, 590.

Tex.—*Leonard v. Porter*, 4 Tex. App. Civ. Cas. (Willson) 82, 15 S. W. 414.

Va.—*Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737; *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705.

On the theory that a resale is not conclusive as to the amount of the vendor's damage, since the purchaser may show that it was unfair, or that it was made under circumstances unusual and calculated to prevent a sale at a fair price, it has been held that there exists no reason for requiring that the purchaser be informed of the time and place of the resale. *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300. And where the agreement is silent in that regard, and no especial conditions exist to contend for it, and the extent of the purchaser's liability is not to be unalterably decided by the price obtained, no notice of the resale itself is necessary. *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167.

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And when the amount realized from the resale is regarded as conclusive, it has been asserted that, while it is not absolutely essential that notice of time and place of sale be given, yet as a sale must be fair and such as likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to resell, and quite unsafe to omit to do so. *VanBroeklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415. In this case, however, notice of resale was given, and no claim was made that the sale was unfair, or not productive of the best price obtainable.

Thus, if the goods are sold without any regard to their market value, and it is sought to hold the buyer for the difference between the contract price and the proceeds of the resale, without any reference to the value, there would then be necessity for notice to the purchaser to enable him to protect himself against a sacrifice of the property. *Ullmann v. Kent*, 60 Ill. 271. But notice of resale is not indispensable, and is hardly material or necessary, where the vendor makes due effort to sell at the best price obtainable, and does in fact sell at the best price that he can by reasonable effort obtain (*Clore v. Robinson*, 100 Ky. 402, 38 S. W. 687); or where he sells for the full market price (*Lindon v. Eldred*, 49 Wis. 305, 5 N. W. 862).

It has been said that there may be cases where the vendor would be required to give the purchaser notice before reselling, but the conduct of the latter may be such as to waive notice, as where he absolutely refuses to receive the goods and informs the vendor to do whatever he chooses with them. (*Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406); or where the purchaser gives notice of a refusal to complete the contract. (*Ullman v. Kent*, *supra*). And a notice of resale is not a prerequisite to recovery of damages by the vendor, where the purchaser has abandoned the property to destruction or decay, and but for the voluntary act of the former a total loss would have resulted (*Clore v. Robinson*, *supra*).

So, where the purchaser has absolutely

at which the buyer was to receive the goods is not necessarily the best place for the resale; neither is the nearest market, or even a market within the state, necessarily the most appropriate. Regard must be had for the character of the goods and the times, circumstances, and places that regulate and control their prices." In support of the text above quoted, numerous authorities are cited. In the cases of *North Georgia Mill Co. v. Henderson Elevator Co.* 130 Ga. 113, 24 L.R.A. (N.S.) 235, 60 S. E. 258; and *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527, the precise question under consideration here was presented and decided contrary to the contention of plaintiff in error. The place of delivery under the contract is not excluded from the mar-

kets where a resale may be made; but if the vendor resells at the place of delivery he does so, not because the contract designates such place for the delivery, but because, in the exercise of his best judgment and discretion, he believes that such place is the most advantageous market. Where a resale has been made in good faith, after notice to the vendee, the difference between the net amount realized from such resale and the contract price is the proper measure of damages. The effect of the resale, when properly made, is to liquidate the damages, and is conclusive upon both parties. *Mechem, Sales*, § 1649; *Pollen v. Le Roy*, 30 N. Y. 549; *Wonderly v. Holmes Lumber Co.* 56 Mich. 412, 23 N. W. 79; *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.* 91 Wis.

refused to receive the goods, and the vendor has given notice of his intention to resell on his account, further notice of the time and place of resale, although it was by auction, was unnecessary, it not appearing that the goods did not sell for what they were worth. *Habicht, B. & Co. v. E. B. Gallagher & Co.* — Mich. —, 137 N. W. 685.

But where the contract of sale creates between the vendor and purchaser the relation of pledgor and pledgee, a resale by the pledgee (the vendor) without notice to the pledgor (the purchaser) not only furnishes no basis for estimating the vendor's damages, but renders him liable to the purchaser for damages. *Ent v. Evans*, 1 Cin. Sup. Ct. Rep. 509; *Markham v. Jaudon*, 41 N. Y. 235.

## 2. The Indiana rule.

In Indiana notice of a resale is a material element in a cause of action for damages, where the property is resold on account of the defaulting purchaser, and the measure of damages is not the market price, but the price received; and to bind him thereby, he must be notified of the proposed resale. *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 361.

But in this jurisdiction, a distinction is made, as to the necessity of notice of resale, between cases where the title has passed to the purchaser and where it has not, and it has been said that if the title has passed by the contract of sale to the purchaser, and he has refused to receive the subject-matter thereof, the vendor cannot resell without giving notice to the purchaser, if he expects to hold him for the difference in price; but where the contract is an executory contract of sale, the vendor, before reselling to others, is not required to notify the purchaser, who has breached the contract by failing to receive the property. *Wallace v. Coons*, — Ind. App. —, 95 N. E. 132.

## c. Notice of intention to resell.

It has been asserted that notice of intention to resell must be given (*Mendel v.* 42 L.R.A. (N.S.)

*Miller*, 126 Ga. 834, 7 L.R.A. (N.S.) 1184, 56 S. E. 88); and that it is the duty of the vendor to notify the purchaser of his intention to resell the goods at the latter's risk. *Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737; *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705. The theory of these cases is that, if the vendor elects to sell the goods and hold the purchaser liable for the loss, he ought to notify the purchaser that such is his election, in order that the latter may know what the consequence of his continued default may be, thus giving him an opportunity, if he can and so chooses, to avert it by performing his contract and receiving the goods, or at least to endeavor to mitigate his loss by paying some attention to the resale of the goods. *Rosenbaum v. Weeden*, supra.

But it has been said that there is no necessity of giving notice of intention to resell where the purchaser has knowledge and notice of the facts which give to the vendor the right to resell. *Magnes v. Sioux City Nursery & Seed Co.* 14 Colo. App. 219, 59 Pac. 879.

*McDonald Cotton Co. v. Mayo*, — Miss. —, 38 So. 372, although apparently recognizing that there may be cases where notice of an intention to make an immediate resale is a condition precedent to any recovery by the vendor, holds that this is not in all cases essential, and it is said that "the general rule which recognizes the necessity of a notice to the vendee of the intention to make a resale fixes the liability of the vendee upon a subsequent action for breach of the contract of purchase, at the difference between the price fixed by the original contract and the amount actually realized for the commodity by the resale. In this state of case, when the resale is fairly conducted, no inquiry is permitted into what was the actual value of the commodity at the time of the resale, and the vendee is not permitted to dispute that the sum received was in truth the real value; the reason being that, having had notice of the vendor's intention to resell, he was given an opportunity to protect himself against undue loss,

667, 65 N. W. 513; *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797.

In *John A. Roebbling's Sons' Co. v. Lock Stitch Fence Co.* 130 Ill. 60, 22 N. E. 518, the resale was made at Joliet, Illinois, which was the place designated in the contract for the delivery. Notice by the vendee to the vendor that the vendee would receive no more of the goods was disregarded by the vendor, and it continued to ship and tender the wire as required by the contract. This the seller had a right to do, in order to establish that the vendor was willing and able to perform its part of the contract. It was not held, however, in that case, that the contract required the vendor to continue shipments to the place of delivery after the repeated announcements of the vendee that

no more of the goods would be received. The primary purpose of proving that the vendor continued its shipments to Joliet was to establish that element of the vendor's case which requires that he shall show that he was ready, willing, and able to perform the agreement on his part until the termination of the executory agreement. Clearly such readiness and willingness on the part of the vendor to perform may be shown by other competent evidence; and it is not necessary that shipments to the place of delivery should be continued after notice from the vendee that he will receive no more of the goods. After the completion of the shipments under the contract, the vendor gave the vendee notice, advertised the goods, and sold them at public auction in Joliet,

either by performing his contract or by being present at the resale and seeing that the commodity realized its full value."

None of the foregoing cases hold that notice of intention to resell is necessary in order to entitle the vendor to maintain his action against the purchaser for breach of the contract of sale, and while, in stating the rule as to the right of resale, the courts have frequently said that the vendor, after notice of his intention so to do, has the right to resell on account of the purchaser, yet the question is not considered in any of these cases, and the specific point as to the necessity of notice is not involved. It is reasonably certain that, in referring to the necessity of giving notice of intention to resell, the court had reference more to the question of necessity in order to bind the purchaser by the amount received from the resale, rather than necessity of notice as an essential element of or prerequisite to the right to maintain an action for the breach. Thus, in *Mendel v. Miller*, supra, while it is asserted that due notice of intention to resell must be given to the vendee, the court continues: "If, after such notice, a sale is properly made, and the goods bring less than the contract price, the vendee is conclusively bound by the resale and the amount realized by it." And in the other cases considering the question, the rule is stated apparently with the idea of asserting a duty devolving upon the vendor as a means to insure a fair sale, or of foreclosing the purchaser on this point, or as concluding him on the question of damages, rather than of asserting a rule of procedure to be followed by the vendor as a condition precedent to his right to maintain an action for damages on the theory of a resale; although in this connection it is to be noted that, in making his election to resell on account of the purchaser, the vendor must make his position clear (*Hughes v. United States*, 4 Ct. Cl. 64), and hence a notice of intention to resell on a purchaser's account has been held to be necessary in order to make it clear that the vendor, by a subsequent sale, sells on account of the purchaser, and not on his own account, since a sale by the vendor

without notice of any kind may constitute a rescission of the contract, which would bar him from thereafter planting an action for damages for breach thereof (*Redmond v. Smock*, 28 Ind. 370). But a resale by the vendor has been held not to be prima facie evidence of a rescission of the original contract (*Hurlburt v. Simpson*, 25 N. C. [3 Ired. L.] 233).

#### *d. As concluding purchaser by price received.*

Where notice of resale is not given, the purchaser is not concluded by the amount received therefrom, and he may show that it was made under circumstances unusual and calculated to prevent a sale at a fair price. *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300. And in such case his liability is not unalterably decided by the price obtained. *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167. The market value is considered to be established by the amount received from the goods on a resale if fairly made, after proper notice to the purchaser; but if no notice is given, the market value must be established by proper evidence. The amount realized from the resale, however, is generally some evidence tending to prove that value. *Anderson Carriage Co. v. Gilmore*, 123 Mo. App. 19, 99 S. W. 766. Hence, if the vendor does not give notice to the purchaser of resale, the latter is not precluded thereby, and the measure of the vendor's damages will be the difference between the contract price and the market value of the goods at the time and place for delivery, although they may have brought less than the market value at the resale. *Nelson v. Hirsch & Sons Iron & Rail Co.* 102 Mo. App. 498, 77 S. W. 590.

In such case the purchaser is entitled to show that the amount so received was less than the market value of the property at the time of the resale, and this is true although the sale is fairly conducted. *McDonald Cotton Co. v. Mayo*, — Miss. —, 38 So. 372; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

So, where a resale was made without no-



and charged the vendee with the loss on such resale. In that case, the difference between the contract price and the net amount received on resale was recognized as the proper measure of the seller's damages, not because the sale was made at Joliet, but because "the proof tends to show that the sale was fairly made with reasonable diligence, judgment, and care." The right of the seller to resell the goods which the vendee refuses to accept, in markets other than the place of delivery under the contract, was not involved or passed on in that case. It is not, therefore, an authority which has any bearing upon that question. In *Penn Plate Glass Co. v. James H. Rice Co.* 216 Ill. 567, 75 N. E. 246, the resale was made at a place other than that designated in the contract;

but that is not a case which decides the question under consideration here.

Plaintiff in error finally contends that the rule which authorizes the vendor to resell the goods which the vendee has refused to accept can only be applied to contracts for the sale of goods already produced or manufactured and ready for delivery, and cannot apply to executory contracts, where the goods are not in existence, but must be produced after notice that the vendee will not receive them. The distinction sought to be pointed out by plaintiff in error is not recognized by the law, but the contrary thereof is well established. *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797; *Davis Sulphur Ore Co. v. Atlanta Guano Co.* 109 Ga. 607, 34 S. E. 1011;

tice to a defaulting purchaser, at a much less price than the contract price, and sometime after the refusal of the latter to accept the goods, and there is no evidence of any diligence upon the part of the vendor in securing the best price, and he admits that he did not try to sell to anyone but the person who purchased, and the sale was private rather than public, and there is no evidence that the price obtained was a fair price as the market then stood, it was not such a resale as to fix the legal measure of damages to be recovered by the vendor. *Case v. Simmons*, 4 Silv. Sup. Ct. 180, 7 N. Y. Supp. 253.

In apparent recognition of this doctrine, it has been asserted that a resale must be fair and conducted in a manner likely to produce most nearly the full and fair value of the article, and hence it is always wisest to give notice of intention to resell, and quite unsafe to omit to do so. *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415.

Although holding it unnecessary to give notice to the purchaser of the time and place of resale, the doctrine has been asserted that where notice of intention to resell is given, the amount received by the resale is conclusive upon him. *Mendel v. Miller*, 126 Ga. 834, 7 L.R.A.(N.S.) 1184, 56 S. E. 88; *Leonard v. Porter*, 4 Tex. App. Civ. Cas. (Willson) 82, 15 S. W. 414.

But the better rule is that stated in *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368, to the effect that a resale, when properly conducted, and when the purchaser has been notified of the intention to resell, thereby giving him reasonable opportunity to prevent it by paying for the goods and receiving them, constitutes a basis binding on him for computing the damages for which he is liable for his breach of contract.

In this connection it is to be noted that while, in the foregoing cases, it is asserted or recognized that a notice of resale, or of intention to resell, will conclude the purchaser as to the price obtained, it may be doubted whether a resale would be held to be conclusive upon the purchaser although notice is given if the resale is unfair-

ly or dishonestly conducted, or if conducted in a manner not according to the usages of trade, or in a manner not likely to secure a fair price, especially where the price secured was not fair, but was substantially less than the actual market value of the property at the time of the resale. On this point see, *infra* X. a, b, c.

#### *e. As affecting time and place of sale.*

If he gives notice to the purchaser of his intention to sell for failure to accept the property according to the terms of the contract, the vendor is not bound to sell at the contract time and place of delivery; it is sufficient if the sale is made in good faith, within a reasonable time, and for the best price obtainable. *North Georgia Mill Co. v. Henderson Elevator Co.* 130 Ga. 113, 24 L.R.A.(N.S.) 235, 60 S. E. 258.

#### *VI. Form and sufficiency of notice.*

Timely notice to the purchaser of the vendor's intention to liquidate his damages by a resale of the property, and the failure of the purchaser to respond by tendering the amount due therefor, are sufficient to put the latter in default. *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368. So is a notice from the vendor that he intends to resell the goods wrongfully rejected by the purchaser, and hold him for the loss. *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705. It is sufficient if the notice to the purchaser of the vendor's intention to resell states in effect that he will assert his right of resale. *Leonard v. Porter*, 4 Tex. App. Civ. Cas. (Willson) 82, 15 S. W. 414. It need not give information as to time and place of sale. *Mendel v. Miller*, 126 Ga. 834, 7 L.R.A.(N.S.) 1184, 56 S. E. 88; *Leonard v. Porter*, *supra*; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368; *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705.

General notice, although in circular form and addressed to whom it may concern, that the vendor will offer for sale at a certain time and place certain property (meaning,

Ackerman v. Rubens, 167 N. Y. 405, 53 L.R.A. 867, 82 Am. St. Rep. 728, 60 N. E. 750; Mechem, Sales, §§ 1621, 1647, et seq.

The instruction given for defendant in error is not open to the objection urged against it in the appellate court. We express no opinion as to objections urged in this court for the first time.

Plaintiff in error contends that the court erred in modifying instruction No. 28. The instruction as originally submitted was clearly incorrect, and should have been refused. The instruction stated the measure

of damages directly contrary to the rule laid down in the instruction already considered, which was given for defendant in error. The court, however, undertook to modify the instruction, so as to bring it into apparent harmony with the instruction given for the other party. The result is that the instruction is not a correct statement of the law upon the theory of either party. A reading of the modified instruction shows that it is contradictory of itself, as well as of the instruction given for defendant in error; but we cannot see how

although not expressly stating, the property wrongfully rejected by the defendant), constitutes a sufficient notice. *Whitney v. McLean*, 4 App. Div. 449, 38 N. Y. Supp. 793.

Where the purchaser has refused to receive the goods according to his contract, notice to him by the vendor that, unless he receives and pays for the goods that day, they will be otherwise disposed of, is sufficient notice of resale. *Pennington v. Illinois Steel Co.* 62 Fla. 251, 56 So. 687.

Where the property is sold to be delivered at the place of sale, notice to the purchaser that the property is ready for delivery is all that is required from the vendor before reselling it on account of the purchaser. He need give no notice of sale or intention to sell. *Hickock v. Hoyt*, 33 Conn. 553. All the vendor is required to do in this regard is to give notice to the purchaser that he is ready to deliver, and wait a reasonable time thereafter, and if the purchaser makes default, the vendor may then resell in the best way, at whatever time he can. *Bogart v. O'Regan*, 1 E. D. Smith, 590.

Notice of intention to resell, where given to the agent of the buyer, is proper, although the relation no longer exists, the vendor having no knowledge of this fact. *Knox v. Schoenthal*, 36 N. Y. S. R. 595, 13 N. Y. Supp. 7.

## VII. Manner of resale.

### a. Exercise of good faith, etc.

A resale of property is but the mere means of determining the precise amount of damages caused by the breach, while the incidental effect is to satisfy the loss suffered by the vendor to the extent of the proceeds from the resale. *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

Hence, as to the time and manner of sale, the vendor has the right to exercise his discretion within reasonable bounds. *Penn v. Smith*, 98 Ala. 560, 12 So. 818. It is sufficient if he exercises proper discretion in these matters. *Williams v. Godwin*, 4 Sneed, 557.

Since, in such resale, the vendor acts as agent of the purchaser, and is without instruction from his principal as to the time and place of sale, and is uninstructed by 42 L.R.A.(N.S.)

statute in this respect, he is bound in good faith simply to exercise ordinary and reasonable care to sell the goods under such circumstances as to time and place as will be most likely to protect the interests of his principal, the original buyer. *North Georgia Mill. Co. v. Henderson Elevator Co.* 130 Ga. 113, 24 L.R.A.(N.S.) 235, 60 S. E. 258; *Magnes v. Sioux City Nursery & Seed Co.* 14 Colo. App. 219, 59 Pac. 879; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271.

The resale must be fair, must be made in good faith, and in a mode best calculated to produce the real value of the goods. *Baltimore & L. R. Co. v. Steel Rail Supply Co.* 59 C. C. A. 419, 123 Fed. 655; *Alden Speare's Sons Co. v. Hubinger*, 64 C. C. A. 68, 129 Fed. 538; *Penn v. Smith*, 98 Ala. 560, 12 So. 818; *Saladin v. Mitchell*, 45 Ill. 79; *Bagley v. Findlay*, 82 Ill. 524; *John A. Roebeling's Sons' Co. v. Lock Stitch Fence Co.* 130 Ill. 661, 22 N. E. 518; *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837; *Penn Plate Glass Co. v. James H. Rice Co.* 216 Ill. 567, 75 N. E. 246; *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657.

Since the vendor is bound to dispose of the property for the best price that may fairly and reasonably be obtained, he must exercise reasonable and proper care and diligence in selling. *Baltimore & L. R. Co. v. Steel Rail Supply Co.* 59 C. C. A. 419, 123 Fed. 655; *Zinsmeister v. Rock Island Canning Co.* 145 Ky. 25, 139 S. W. 1068. But the general requisites of a resale as the measure of the rights and injuries of the parties are good faith and the proper observance of the usages of trade. *Pollen v. Le Roy*, 30 N. Y. 549.

### b. Character of resale.

#### 1. In general.

In acting as trustee for the purchaser, the vendor is bound to proceed in the manner prescribed by the well-known and well-settled rules of law which fix the duties and responsibilities of trustees under such circumstances. *Hughes v. United States*, 4 Ct. Cl. 64. He must take the usual mode of reselling the property, and use due diligence in that regard. *Hayes v. Nashville*, 26 C. C. A. 59, 47 U. S. App. 713, 80 Fed. 641. The sale must be under circumstances indicating that the property sold

the giving of this instruction has in any way prejudiced plaintiff in error. The instruction as given is a jumble of contradictory and unmeaning phrases and sentences; but apparently the jury has followed a correct instruction in applying the measure of damages to the situation presented. Assuming the facts to be as found by the jury and approved by the appellate court, the true measure of damages has been applied in this case. That is all that either party was entitled to. It is apparent that the jury were not misled by the modified in-

struction complained of. There are no other questions open for our consideration upon this record.

The judgment of the Branch Appellate Court for the First District is affirmed.

**Cartwright, Hand, and Dunn, JJ., dissent.**

Petition for rehearing denied June 12, 1912.

for a fair price. *Lamkin v. Crawford*, 8 Ala. 153. The vendor cannot sell at an unusual place nor in an unusual manner, and rely upon the amount thus obtained as conclusive evidence of the amount of his loss. *Hooper, S. & Co. v. Bromley Bros. Carpet Co.* 11 Pa. Super. Ct. 634. Since the only purpose of the resale is to make evidence of market value binding upon the defaulting purchaser, a cash sale is the only one proper. *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368. The resale may be in bulk rather than in carload lots. *Penn v. Smith*, 98 Ala. 560, 12 So. 818. The vendor may resell only a part of the goods, but in such case he is entitled to recover merely the difference between the contract price of the goods resold and the amount received from the resale. *Barr v. Logan*, 5 Harr. (Del.) 52. The sale of a quantity of cases of sauerkraut is not unfair because a limited number of the cases were first put up with the understanding that the purchaser should have the option to take the latter at the same price, although the option was exercised, the sale being a public sale, and such understanding not appearing to be contrary to the usages of the trade. *Austin v. Hartwig*, 17 Jones & S. 256. The vendor may mix with the goods other goods, and resell the whole, if by such mixture he does not cause the goods theretofore wrongfully rejected to be sold at a less price than they otherwise would sell for. *Guillon v. Earnshaw*, 169 Pa. 403, 32 Atl. 545.

## 2. Whether at public or private sale.

A resale may be made at public auction or privately. In this regard the vendor has the right to exercise his discretion within reasonable bounds. *Penn v. Smith*, 98 Ala. 560, 12 So. 818; *Lewis v. Greider*, 51 N. Y. 231. It may be by public auction if made fairly and for the best obtainable price. *Mann v. National Linseed Oil Co.* 87 Hun, 558, 34 N. Y. Supp. 481. But it need not be at auction unless that is the customary method of selling such property. *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415. It need not be by auction nor in any other particular manner; the only requirement is that it shall be made in good faith and in such manner as is best calculated to produce the value of the property. *O'Brien v. Jones*, 91 N. Y. 193; *Crooks v. Moore*, 1 Sandf. 297; *Fox v. Woods*, 96 N. 42 L.R.A. (N.S.)

*Y. Supp.* 117; *Dobbins v. Edmonds*, 18 Mo. App. 307. A resale by auction made at the place of the breach of contract may be justified by the ordinary usages of trade. *Almy v. Simonson*, 52 Hun, 535, 5 N. Y. Supp. 696.

It is sufficient if the usual mode of selling such goods in the market is followed. If it is by auction, the vendor ought to dispose of them in that manner; if, however, large dealers in such articles never sell at auction, and the goods will sell to better advantage through a broker, it is equally the duty of the vendor to offer them in the market through a broker's agency. *Crooks v. Moore*, 1 Sandf. 297. Where a sale by auction is not customary as to articles of the character sold, and there is every reason to infer that such a sale would result more injuriously to the defaulting purchaser than a sale according to the ordinary usages of the trade, the vendor is bound to adopt the latter method, although it is by a sale through brokers. *Pollen v. Le Roy*, 30 N. Y. 549. A private sale through an agent competent to manage such a transaction is proper where the number of the customers are limited and the property is of a nature not generally in demand (a boiler). *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

It has been said that the only difference between a public sale of property and a private sale is that in the latter case the burden is upon the vendor to prove that he has accounted for the market value. When sold by a fair public sale, the amount received is competent and ordinarily satisfactory evidence of the value of the thing sold; hence, if the property wrongfully rejected by the purchaser is resold by the vendor at a private sale on account of the former, the latter is entitled to recover as his damages the difference between the market value and the contract price; but if it is sold at public sale, he may recover the difference between the contract price and the amount received from the resale. *Mayberry v. Lilly Mill Co.* 112 Tenn. 564, 85 S. W. 401.

## VIII. Time of resale.

### a. Necessity of diligence.

The vendor is the judge as to the time and place of resale, providing he acts in good

faith and with reasonable care and diligence (*Dustan v. McAndrew*, 44 N. Y. 72; *Sherwood v. Ribbons*, 6 N. Y. Week. Dig. 231); and in these regards, if he acts in good faith, he may exercise a reasonable discretion (*Penn v. Smith*, 98 Ala. 560, 12 So. 818; *Lewis v. Greider*, 51 N. Y. 231; *American Canning Co. v. Flat Top Grocery Co.* 68 W. Va. 698, 70 S. E. 756); he must, however, pursue a course dictated by ordinary prudence (*Carver v. Graves*, 47 Tex. Civ. App. 481, 106 S. W. 903).

One of the essentials of a resale is that it be made within a reasonable time after the date of delivery, where the purchaser on this date or prior thereto has refused to receive the goods.

Fed.—*Baltimore & L. R. Co. v. Steel Rail Supply Co.* 59 C. C. A. 419, 123 Fed. 655; *Alden Speare's Sons Co. v. Hubinger*, 64 C. C. A. 68, 129 Fed. 538; *Guy v. United States*, 25 Ct. Cl. 61.

Ga.—*North Georgia Mill. Co. v. Henderson Elevator Co.* 130 Ga. 113, 24 L.R.A.(N.S.) 235, 60 S. E. 258; *Brooke v. Robson*, 3 Ga. App. 136, 59 S. E. 323.

Ill.—*Bagley v. Findlay*, 82 Ill. 524; *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

Mich.—*Piowaty v. Sheldon*, 167 Mich. 218, 132 N. W. 517, Ann. Cas. 1913 A, 610.

N. Y.—*Smith v. Pettie*, 70 N. Y. 13.

Tenn.—*Granberry v. Frierson*, 2 Baxt. 326; *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797.

Tex.—*Carver v. Graves*, 47 Tex. Civ. App. 481, 106 S. W. 903.

Wis.—*Pickering v. Bardwell*, 21 Wis. 565; *Gehl v. Milwaukee Produce Co.* 116 Wis. 263, 93 N. W. 26.

Eng.—*Stewart v. Cauty*, 8 Mees. & W. 160, 2 Eng. Ry. & C. Cas. 616, 10 L. J. Exch. N. S. 348; *Roth v. Taysen*, 8 Asp. Mar. L. Cas. 120, 73 L. T. N. S. 628.

A resale should be at the earliest practicable moment after an absolute refusal to accept. *Jochams v. Ong*, 45 La. Ann. 1289, 14 So. 247. But delay in the resale at the request of the purchaser is no evidence of want of diligence in reselling. *Lindon v. Eldred*, 49 Wis. 305, 5 N. W. 862.

The price received from a resale unreasonably delayed is not binding upon the purchaser for the purpose of fixing the vendor's damages, and if there is no other evidence of the market value at the time of the breach, or of the vendor's loss other than the amount received from such resale, the jury are not warranted in giving the vendor substantial damages. *Alden Speare's Sons Co. v. Hubinger*, 64 C. C. A. 68, 129 Fed. 538.

Whether a resale is unreasonably delayed depends upon the facts and circumstances of each case. *J. K. Armsby Co. v. Raymond Bros.-Clarke Co.* 90 Neb. 553, 134 N. W. 174, rehearing 90 Neb. 773, 134 N. W. 920. It is, however, sufficient if the vendor in making a resale acts in good faith and according to his best judgment and without any unnecessary delay. *Almy v. Simonson*, 52 Hun, 535, 5 N. Y. Supp. 696. A delay in resale may be proper, as where, at the time

of the breach, the market is unsatisfactory, and by delaying the sale a better market is obtained. *Nelson v. Hirsch & Sons Iron & Rail Co.* 102 Mo. App. 498, 77 S. W. 590.

The rule, however, that if the vendor elects to resell on account of the purchaser, it is his duty to do so within a reasonable time after the breach, and after he has given notice of his intention to resell, is especially applicable if the market at that time is lower than at the time of the breach. *Guy v. United States*, 25 Ct. Cl. 61. The vendor cannot hold the property when the market is falling and recover the difference between the contract price and the amount realized, where this amount is substantially less than what might have been realized at the time of the repudiation of the contract by the purchaser, and the acquiescence therein by the vendor. *Roth v. Taysen*, 8 Asp. Mar. L. Cas. 120, 73 L. T. N. S. 628. Neither may he delay an election of remedies in order to secure to himself the benefit of a rising market, and impose upon the purchaser the risk of a falling one. *Case v. Simmons*, 4 Silv. Sup. Ct. 180, 7 N. Y. Supp. 253. And if he might have protected himself from all damages by a resale within a reasonable time after the breach, and fails to do so, he is not entitled to damages based upon a resale thereafter made. *Brooke v. Robson*, 3 Ga. App. 136, 59 S. E. 323. So the unreasonable rejection of higher offers than the final selling price, or neglect to take advantage of an existing market, constitutes a want of due diligence. *Gehl v. Milwaukee Produce Co.* 105 Wis. 573, 81 N. W. 666. If, between the day of the breach of contract of sale by the purchaser and the day of resale by the vendor, the latter might have resold the property for a price equal to or greater than the contract price, he cannot recover as his damages the difference between the smaller price he finally received and the contract price. *Thayer Export Lumber Co. v. Naylor*, 100 Miss. 841, 57 So. 227. Hence, the purchaser may show, as bearing upon the question of delay, that the market at the time of the sale was lower than at the time of the breach. *Almy v. Simonson*, 52 Hun, 535, 5 N. Y. Supp. 696. On the other hand, the question of delay in the resale is of no importance where there was no change in the market during the delay, and hence it has no effect upon the amount of the vendor's damages. *D. E. Foote & Co. v. Heisig & Norvell*, — Tex. Civ. App. —, 94 S. W. 362.

If the vendor does not resell or dispose of the goods within a reasonable time after default of the purchaser, any additional expense incurred in keeping them, or any depreciation in their market value, must be borne by him. *Zinsmeister v. Rock Island Canning Co.* 145 Ky. 25, 139 S. W. 1068.

As to perishable articles, the vendor, if he intends to resell on account of a purchaser wrongfully refusing them, cannot hold such an article for the chance of realizing better prices. *Hughes v. United States*, 4 Ct. Cl. 64.

*b. Illustrative cases.*

A resale within three days after the refusal of the purchaser to receive the property, where made at the place of delivery, is strong evidence of the market value on the day of the breach of the contract. *Marshall v. Piles*, 3 Bush, 249.

The vendor may recover the difference between the contract price and the amount received from a resale, although the resale was not immediately following the breach, where, however, it was made as soon as a purchaser could be obtained to the best advantage, even though a period of two years elapsed before all the property was resold, and the market was falling during the entire period. *Peck v. Southwestern Lumber & Exporting Co.* — La. —, 59 So. 113.

In *Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737, where, on the 15th of February, the purchaser failed to take and pay for the goods as agreed, but later in the same month agreed to carry out the contract, the vendor was held not to be guilty of unreasonable delay by holding the goods until the 5th of the following April before electing to resell them on the account of the purchaser; and it is said: "The plaintiffs, as we have seen, had a right of election to sell these goods or not, and could elect to sell them at any time while they remained in their hands and the default of the defendants continued. And this right was not at all affected by the fact that the goods, during all the time they remained in their hands, were falling in their market value. They still had a lien upon the goods which they could enforce or not, at their election. The defendants' plain remedy, as before mentioned, was to comply with the terms of sale, and take away the goods. There could be no room, then, for saying that the plaintiffs delayed the resale for an unreasonable time upon a falling market, since they might elect to sell at any time and in any state of the market."

But to conclude a purchaser by the result of a resale, it should take place as soon as practical after the refusal of the purchaser in the original contract to accept the property; the vendor cannot keep the article for months and then charge the loss caused by the delay to the purchaser. *Smith v. Pettie*, 7 Hun, 334.

The vendor is bound to resell within a reasonable time. He cannot wait a long and unreasonable period (fifteen months), until the conditions of the market have entirely changed, and then sell and call upon the original purchaser to make up the deficiency between the contract price and the amount realized from the resale. *Pickering v. Bardwell*, 21 Wis. 565.

Where a vendor of malt to be delivered to the purchaser at the warehouse of the former shipped it to another place and resold it some months after the refusal of the purchaser to take it according to the contract, the amount received from the resale was held not admissible to lay a foundation for the claim to recover the difference be-

tween the price thus obtained and the contract price. *Haines v. Tucker*, 50 N. H. 313.

A sale three months after the alleged breach of a contract to receive property theretofore sold, made at the place of sale without notice to the purchaser, does not authorize the vendor to recover as damages the difference between the contract price and the price obtained at such sale. *Guy v. United States*, 25 Ct. Cl. 61.

The vendor of a stock of goods, after the refusal of the purchaser to accept the same, cannot continue the business for nearly a year,—buying new goods, opening additional accounts, keeping traveling salesmen on the road,—and recover damages from the original purchaser on the theory that the resales made in this manner were on his account, and that the vendor is entitled to recover as his damages the difference between the amount thus received and the contract price. *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1, 42 S. E. 366.

*c. Whether computed from notice of breach or date for delivery.*

A buyer cannot, by giving notice of his intention to refuse to receive the property prior to the time of delivery, create a breach of the contract, casting upon the vendor the duty to sell within a reasonable time thereafter, if prior to the time of delivery according to the terms of the contract repudiated. *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548.

Of course, if the vendor accepts the notice and treats the contract as broken, he must resell within a reasonable time thereafter. *Ibid.*

It has, however, been held that, although the purchaser notifies the vendor of his intention to refuse to receive goods theretofore purchased, and repudiates the contract of purchase prior to the time of delivery, the vendor cannot, by a resale before the time fixed for delivery, hold the purchaser for the difference between the contract price and the amount received from such resale, at less than the market price on the day of delivery, since in such case the rule of damages is the difference between the contract price and the market price on the day of performance. *Brooke v. Laurens Mill. Co.* 78 S. C. 200, 125 Am. St. Rep. 780, 58 S. E. 806.

*IX. Place of resale.**a. Place of delivery.*

As to the place of resale, as well as to other matters connected therewith heretofore referred to, the vendor, acting in good faith in the matter, may exercise a reasonable discretion. *Penn v. Smith*, 98 Ala. 560, 12 So. 818; *Lewis v. Greider*, 51 N. Y. 231; *American Canning Co. v. Flat Top Grocery Co.* 68 W. Va. 698, 70 S. E. 756. Under ordinary conditions, however, where the goods are at the place of delivery at the time the purchaser refuses to receive them, the ven-

dor is entitled to and should resell them on the former's account at that place.

U. S.—*Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845; *Pope v. Filley*, 3 McCrary, 190, 9 Fed. 65.

Ala.—*Penn v. Smith*, 93 Ala. 476, 9 So. 609.

Ark.—*Arkansas & T. Grain Co. v. Young & F. Grain Co.* 79 Ark. 603, 116 Am. St. Rep. 99, 96 S. W. 142.

Cal.—*Frisbie v. Rosenberg Bros. & Co.* 11 Cal. App. 638, 105 Pac. 943.

Ga.—*McCord v. Laidley*, 87 Ga. 221, 13 S. E. 509.

Ky.—*Applegate v. Hogan*, 9 B. Mon. 69; *Bell & Offutt*, 10 Bush, 632.

Mass.—*Whitney v. Boardman*, 118 Mass. 242; *McLean v. Richardson*, 127 Mass. 339.

Mich.—*Williams v. Robb*, 104 Mich. 242, 62 N. W. 352; *Ginn v. W. C. Clark Coal Co.* 143 Mich. 84, 106 N. W. 867, 107 N. W. 904.

Mo.—*Dobbins v. Edmonds*, 18 Mo. App. 307; *Strauss v. Labsap*, 59 Mo. App. 260; *Logan v. Carroll*, 72 Mo. App. 613; *Baker v. McKinney*, 87 Mo. App. 361; *Nelson v. Hirsch Sons Iron & Rail Co.* 102 Mo. App. 498, 77 S. W. 590; *Rickey v. Tenbroeck*, 63 Mo. 563.

N. Y.—*Whitney v. McLean*, 4 App. Div. 449, 38 N. Y. Supp. 793; *Knox v. Schoenthal*, 36 N. Y. S. R. 595, 13 N. Y. Supp. 7; *Fox v. Woods*, 96 N. Y. Supp. 117; *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495; *Almy v. Simonson*, 52 Hun, 535, 5 N. Y. Supp. 696; *Sherwood v. Ribbons*, 6 N. Y. Week. Dig. 231.

N. C.—*Hurlburt v. Simpson*, 25 N. C. (3 Ired. L.) 233; *Grist v. Williams*, 111 N. C. 53, 32 Am. St. Rep. 782, 15 S. E. 889.

Pa.—*Moody v. McTaggart*, 29 Pa. Super. Ct. 465; *Girard v. Taggart*, 5 Serg. & R. 33, 9 Am. Dec. 335; *Guillon v. Earnshaw*, 169 Pa. 463, 32 Atl. 545.

S. C.—*Woods v. Cramer*, 34 S. C. 508, 13 S. F. 660.

Tex.—*Woldert Grocery Co. v. Boonville Elev. Co.* 42 Tex. Civ. App. 524, 94 S. W. 108.

It has been said that the damages for the breach of an executory contract of sale, where the title has not vested in the buyer, is the difference between the contract price and the market value at the place of delivery, and while this may be determined by a resale at such place, it cannot be determined by transporting the property to a distant place at the expense of the purchaser and there reselling it. *Chapman v. Ingram*, 30 Wis. 290.

And that a private sale at a place other than the place of delivery is not a proper mode of ascertaining the vendor's loss. *Benton v. Bidault*, 6 La. Ann. 30.

The vendor is not bound to ship to another market to resell, unless so requested by the purchaser. In the absence of such a request, a resale at the place of delivery in good faith, and in such a manner as will command a fair market value of the article, is sufficient. *Penn v. Smith*, 104 Ala. 445, 18 So. 38, s. c. prior appeal, 98 Ala. 560, 12 So. 818. 42 L.R.A. (N.S.)

He has the right to sell at the place of delivery, and if he acts in good faith in making a resale, and obtains the best possible price, this discharges his duty in this respect. If the buyer, after receiving a notice from the vendor of his purpose to resell, desires him to sell in one mode or another, or at a different place than the place of delivery, he should communicate his desires or instructions to the vendor, and in the absence of such instructions he cannot be heard to complain as to the manner or place of the sale, unless he can show that it was unfairly made. *Penn v. Smith*, 98 Ala. 560, 12 So. 818. And see *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271, supra, IV. a.

#### *b. Place of contract.*

Where the goods are at the place of sale, which is some distance from the place of delivery, the vendor may resell them at the former place. *D. E. Foote & Co. v. Heisig & Norvell*, — Tex. Civ. App. —, 94 S. W. 362. Or if at the place of business of the vendor, he may resell there. *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495. And a resale at the place of contract, where the property then is, rather than at the place of delivery, is proper where the market at the former place is better, and the property may be more easily disposed of there than at the place of delivery. *Bonds v. Thomas J. Lipton Co.* 85 Miss. 209, 37 So. 805. And the vendor may reship the article to the place where the contract was originally executed, and resell the same there, where the latter point is the best market for such articles, and by the reshipment and resale the best means are adopted to get the highest price for the article. *Sawyer v. Dean*, 114 N. Y. 469, 21 N. E. 1012.

But the vendor is not bound to reship to the place from which the original shipment was made and resell there, although at the latter place the article is bringing a greater price than at the place of delivery. *Ginn v. W. C. Clark Coal Co.* 143 Mich. 84, 106 N. W. 867, 107 N. W. 904.

Where the purchaser notifies the vendor to cancel his contract of purchase before shipment, the vendor cannot thereafter ship to the place of delivery, and, without notice to the purchaser, resell the property for a price less than the contract price, and hold the latter for the difference. *Faulk v. Richardson*, — Fla. —, 57 So. 666.

#### *c. Nearest available market.*

The market value is not restricted to the place of the breach of the contract; if there is no market at such place, the vendor may transport the property to the nearest point where such property is bought and sold, and resell the same there. *White v. Mator Land & Cattle Co.* 75 Tex. 465, 12 S. W. 866. Or if the vendor cannot make a fair sale of the property at the place of delivery, he may ship to the nearest point and sell the property at the market value, or fair value if there is no market value. *Texas*

& L. Lumber Co. v. Rose, — Tex. Civ. App. —, 103 S. W. 444. And a resale may be made at another place than the place of delivery if made in good faith, providing such place is the best available market. Rogers Grain Co. v. Jones, 145 Ill. App. 469. But it has been held that the resale must be at the market nearest the place of delivery. Johnson v. Listman Mill Co. 79 Ill. App. 435; Lawrence v. H. D. Lee Mercantile Co. 5 Kan. App. 77, 48 Pac. 749.

Barker v. Reagan, 4 Heisk. 590, while not discussing the question, holds that where cotton is sold to be delivered at the vendor's residence, upon the refusal of the purchaser to take the same, he is entitled to draw it to market and sell it, and recover the difference between the amount thus received and the contract price.

#### *d. Distant market.*

The place of sale is not necessarily restricted to the place where, by the contract, the buyer is bound to receive the property. If it cannot readily be resold at the place of delivery, the vendor, acting in good faith, may sell at another place where a sale can more readily be effected and a better price obtained. In this respect he may exercise a reasonable discretion. Lewis v. Greider, 51 N. Y. 231; American Canning Co. v. Flat Top Grocery Co. 68 W. Va. 698, 70 S. E. 756.

The vendor may ship to a distant market and resell, where his efforts to find and sell at a nearer market are unsuccessful. While it is the duty of the seller to exercise good faith, and realize the best price he can on resale, yet if, in the light of the facts before him, obtained in the exercise of due diligence, he pursues the course that prudence would dictate to a man of ordinary judgment, then the defaulting buyer ought not to be heard to say that the market in which the thing was sold was not in fact the most advantageous one. Waples v. Overaker, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527.

If there is no market, and hence no market value, at the time and place of the breach, the vendor may hold for, or seek a market within, a reasonable time, even though such market is found at a distant place. Piowaty v. Sheldon, 167 Mich. 218, 132 N. W. 517, Ann. Cas. 1913 A, 610; Simons v. Ypsilanti Paper Co. 77 Mich. 185, 43 N. W. 864; Greer Mach. Co. v. McCrary, — Tenn. —, 52 S. W. 1027.

A resale at a large city some distance away, where there is a great market for such products, is proper, although it is neither the place of sale nor delivery. Lewis v. Greider, 51 N. Y. 231.

And a sale of stock on the stock exchange of another city has been held to be the proper method of resale. Ashley v. Walker, 15 Ohio C. C. 660, 8 Ohio C. D. 285.

Or the resale may be made in neighboring markets, and the price obtained from the resale will be sufficient evidence of the market value at the place of delivery to make, in that respect, a *prima facie* case, 42 L.R.A. (N.S.)

where the resale was for the best price obtainable. J. K. Armsby Co. v. Raymond Bros.-Clarke Co. 90 Neb. 553, 134 N. W. 174, rehearing 90 Neb. 773, 134 N. W. 920.

The vendor may resell on the market controlling the market price at the place of delivery, it being the same market to which the purchaser was in the habit of shipping; and this is true although there is a nearer market, which, however, is not so extensive and hence not so available. Anderson v. Frank, 45 Mo. App. 482. Thus, where the value of cattle at the place of delivery and in that vicinity is dependent upon and governed by the market price at a distant city to which shipments are made by the buyer, and it is not shown that a better price could be obtained at the place of delivery, the seller, upon failure of the buyer to take the cattle according to agreement, may ship them himself to such distant city, and sell the same upon the market in the ordinary manner, if he acts in good faith and sells for the best market price he can procure. Ingram v. Wackernagel, 83 Iowa, 82, 48 N. W. 998. And where, by the contract for the sale of an article, its price is to be determined by the market at a distant place, upon the wrongful refusal of the purchaser to receive and pay for the article according to the contract, it is proper for the vendor to transport the same to a place thus agreed upon, and have it resold there. Clifton v. Newsom, 46 N. C. (1 Jones L.) 108.

Where a purchaser notifies the vendor that he will not accept the goods then in transit under shipment to him, the vendor may divert the goods to another point where he has a warehouse and agency, and resell the same from this point to the best advantage, and hold the purchaser for the difference between the amount derived from the resale and the contract price. J. K. Armsby Co. v. Raymond Bros.-Clarke Co. 90 Neb. 553, 134 N. W. 174.

But the vendor cannot ship the goods to an unusual and dangerous market. Hughes v. United States, 4 Ct. Cl. 64.

And it has been asserted that a resale at a place some distance from the place of delivery, made about a month after the breach, cannot be relied upon as conclusive evidence of the damage to the vendor. The court remarked that if the market value is to be ascertained by a resale, the resale should be at the place of delivery. Rickey v. Tenbroeck, 63 Mo. 563.

#### *X. Conclusiveness of resale as to vendor's damages.*

##### *a. In general.*

As affected by notice of resale or of intention to resell, see *supra*, V. d.

Resale is a method of ascertaining the damage suffered by the vendor, and the price obtained is evidence of the damages. Fox v. Woods, 96 N. Y. Supp. 117. And it has been held that the amount received from a resale is not conclusive as to the

measure of the vendor's damage, but is only evidentiary of the extent thereof. *Anderson v. Frank*, 45 Mo. App. 482. And although, upon the failure of the purchaser to receive goods according to his contract, the vendor may resell, and if the sale is bona fide and proper, he is entitled to recover the difference between the price received from the resale and the contract price, if the former is less than the latter, yet the price thus obtained is not conclusive if a mere equitable method of ascertaining the value of the goods may be resorted to. *Hooper, S. & Co. v. Bromley Bros. Carpet Co.* 11 Pa. Super. Ct. 634; *McCombs v. McKennan*, 2 Watts & S. 216, 37 Am. Dec. 506; *Girard v. Taggart*, 5 Serg. & R. 33, 9 Am. Dec. 327. And the amount received at a resale is not conclusive if the purchaser shows it to have been unfair, or made under circumstances unusual and calculated to prevent a sale at a fair price. *West v. Cunningham*, 9 Port. (Ala.) 104, 33 Am. Dec. 300.

Nevertheless, by the great weight of authority, if the resale is fairly made at the place of delivery, and if within a reasonable time after the refusal of the purchaser to receive the property, and the vendor has exercised reasonable diligence to secure the best price obtainable, and the sale is in a mode not unusual for disposing of such property, the amount received will be used as a basis for computing the vendor's damages, and he will be permitted to recover the difference between this amount and the contract price.

The cases sustaining the foregoing doctrine do not expressly require, as a condition to relying upon the amount received from a resale as conclusive upon the purchaser of the amount of the vendor's damages, that the latter give notice to the former of resale or of his intention to resell, although in most of them notice of intention to resell was given. The effect of such notice upon this question is considered, *supra*, V, d.

Ala.—*Penn v. Smith*, 93 Ala. 476, 9 So. 609, on subsequent appeal, 98 Ala. 560, 12 So. 818, 104 Ala. 445, 18 So. 38.

Ariz.—*Slaughter v. Marlow*, 3 Ariz. 429, 31 Pac. 547.

Ark.—*Arkansas & T. Grain Co. v. Young & F. Grain Co.* 79 Ark. 603, 116 Am. St. Rep. 99, 96 S. W. 142.

Colo.—*Magnes v. Sioux City Nursery & Seed Co.* 14 Colo. App. 219, 59 Pac. 879.

Ga.—*Brooke v. Robson*, 3 Ga. App. 136, 59 S. E. 323.

Ky.—*Bell v. Offutt*, 10 Bush, 632; *Sanders v. Bond*, 23 Ky. L. Rep. 2084, 66 S. W. 635.

La.—*Bartley v. New Orleans*, 30 La. Ann. 264.

Mass.—*Whitney v. Boardman*, 118 Mass. 242.

Nev.—*Northrup v. Cook*, 39 Mo. 208; *Rickey v. Tenbroeck*, 63 Mo. 564; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210.

Pa.—*Edson v. Magee*, 43 Pa. Super. Ct. 297.

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Tenn.—*Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797.

Va.—*Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737.

Wis.—*Gehl v. Milwaukee Produce Co.* 116 Wis. 263, 93 N. W. 26.

It is the duty of the vendor to obtain the best possible price at the resale, and if he does his loss is the proper measure of damages. *Penn v. Smith*, 93 Ala. 476, 9 So. 609, subsequent appeal 98 Ala. 560, 12 So. 818, 104 Ala. 445, 18 So. 38. And in order to conclude a purchaser by a resale, it must be made without unreasonable delay and after an honest effort to get the best price obtainable. *Brooke v. Robson*, 3 Ga. App. 136, 59 S. E. 323. But the market value of property is fixed by a resale if the vendor exercises reasonable diligence to secure the best price obtainable. *Gehl v. Milwaukee Produce Co.* 116 Wis. 263, 93 N. W. 26. It is sufficient if the resale is in the open market within a reasonable time. In such case the vendor may apply the proceeds from such resale as a payment *pro tanto* on the contract price, and recover the difference between the contract price and the amount received from the resale if less than the contract price. *Slaughter v. Marlow*, 3 Ariz. 429, 31 Pac. 547. And a resale to the original purchaser at the place of delivery is sufficient. *Arkansas & T. Grain Co. v. Young & F. Grain Co.* 79 Ark. 603, 116 Am. St. Rep. 99, 96 S. W. 142. If the vendor in open market, and on the day and at the place of delivery, resells, the difference between the amount thus realized and the contract price constitutes the measure of damages, rather than the difference between the contract price and the market price. *Sanders v. Bond*, 23 Ky. L. Rep. 2084, 66 S. W. 635.

He may sell for the best price obtainable, although it is not the market price. In such a case it is not the market price, but the actual selling price, of the article, which governs. *Ibid*.

That a resale is made at a price below the market does not prevent it from being relied upon as the basis for estimating the vendor's damages, where he exercises reasonable care and prudence as to the time and manner of the sale. *Penn v. Smith*, 98 Ala. 560, 12 So. 818.

But it has been held that, for a sale on the open market to be taken as the basis for estimating the vendor's damages, the best market price for articles of the character sold must have been secured. *Bartley v. New Orleans*, 30 La. Ann. 264.

If a resale at the place of delivery is not fairly made, the seller cannot recover the difference between the amount received from such sale and the contract price as his measure of damages for the default of the purchaser. *White v. Kearney*, 9 Rob. (La.) 495; *Judd Linseed & S. Oil Co. v. Kearney*, 14 La. Ann. 352.

The result of the resale can never control the question of damages, unless the vendor has exercised the right in good faith, and at such time and in such man-



ner, and by such methods and under such circumstances, as are best calculated to protect the rights of the defaulting vendee, and to secure the best market price for the property. *Magnes v. Sioux City Nursery & Seed Co.* 14 Colo. App. 219, 59 Pac. 879.

The measure of damages which the vendor is entitled to recover is the difference between the contract price of the goods and the price which they produced at the resale, if fairly made; if not so made, then the price which they would have produced at the resale if it had been fairly made, after deducting therefrom, in either case, the expenses of the vendor in caring for the goods and selling them. *Rosenbaum v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737.

A distinction is made in Indiana between executory and executed contracts. And it is held that the rule of damages for the refusal to accept goods sold by executory contract is the difference between the contract price and the market price at the time and place when and where the purchaser should have accepted the articles and refused so to do, and hence it makes no difference whether the seller retains the goods himself or sells them to a third person. If he resells them, the price received at the resale does not determine the amount of damages recoverable from the original buyer; therefore the seller may resell when and where he pleases. In any event his measure of recovery is the difference between the contract price and the market price at the place of delivery. But that where the title to the property has passed from the seller to the buyer, if the latter rejects the property, the seller may retake the same, and upon notice to the buyer, resell, and the measure of damages in such case is the difference between the contract price and the amount realized from resale, if within a time and in a manner adapted to realize the real value. *Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861.

And *Wallace v. Coons*, — Ind. App. —, 95 N. E. 132, also sustains the right to recover damages for the breach of an executory contract to purchase property, to the extent of the difference between the contract price and the amount received for the property upon a resale at the place of delivery.

**b. Where resale is according to statute or Code.**

Where by Code provision is made for a resale, the price received upon a resale is conclusive if the sale is made according to the terms of the Code. *Habenicht v. Lissak*, 77 Cal. 139, 19 Pac. 260; *Morrell v. San Tomas Drying & Packing Co.* 13 Cal. App. 305, 109 Pac. 632; *Frisbie v. Rosenberg Bros. & Co.* 11 Cal. App. 638, 105 Pac. 943; *Bridges Grocery Co. v. Dan Joseph Co.* 9 Ga. App. 189, 70 S. E. 964.

But a resale need not be made according to the Code. If, however, it is so made, 42 L.R.A. (N.S.)

the price realized therefrom is conclusive as to the value of the property, while if the property is not sold in this manner, the vendor must prove the value thereof. *Hewes v. Germain Fruit Co.* 106 Cal. 441, 39 Pac. 853.

**c. As affected by place of resale.**

The doctrine has been stated that where the vendor is unable to find a nearer market, he may transport the goods to a distant market for resale, and if, in the light of the facts before him, he pursues a course that prudence would dictate to a man of ordinary judgment, the defaulting buyer will not be heard to say that the market in which the goods were sold was not in fact the most advantageous one. *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. Rep. 727, 13 S. W. 527.

For the refusal to accept the goods purchased by executory contract the measure of damages is the difference between the contract price and the market value at the time and place of delivery. If there is no market for articles of the character sold at that time at the place for delivery, then the measure of damages is the difference between the contract price and the market value in the nearest available market, less the cost of transportation, etc. *Lawrence Canning Co. v. H. D. Lee Mercantile Co.* 5 Kan. App. 77, 48 Pac. 749.

Where there is no market at the place of delivery, and no person there to whom the sale may be made, the seller is entitled to recover, as damages for failure of the purchaser to accept the goods theretofore purchased, the difference between the amount received at a resale and the contract price (place of resale is not stated). *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 8 L.R.A. (N.S.) 433, 124 Am. St. Rep. 384, 97 S. W. 772.

And the amount received from a resale, although at a distant city, if made in good faith and for the best market price procurable, is the proper basis for computing the vendor's damages, where the market value at the place of delivery depended upon and was governed by the market price at the city where the property was resold. *Ingram v. Wackernagel*, 83 Iowa, 82, 48 N. W. 998.

Where the goods were shipped to another place, and then sold, the vendor has been permitted to recover the difference between the contract price and the amount received from the resale, although the question as to the place of resale was not discussed. *Greer Mach. Co. v. McCrary*, — Tenn. —, 52 S. W. 1027.

But the general rule has been asserted that if the vendor removes the goods to some place other than the place of delivery for resale, in order to entitle himself to recover the difference between the contract price and the amount received from the resale as a measure of his damages, the buy-

den is upon him to show that the goods brought as much or more than they would, had they been sold at the place of delivery. *Ingram v. Matthien*, 3 Mo. 209; *Willson v. Gregory*, 2 Cal. App. 312, 84 Pac. 356.

At any rate the price obtained from a resale in a neighboring market is sufficient evidence of the market value at the place of delivery, to make in that respect a prima facie case for the vendor, where the resale is for the best price obtainable. *J. K. Armsby Co. v. Raymond Bros.-Clarke Co.* 90 Neb. 553, 134 N. W. 174, rehearing 90 Neb. 773, 134 N. W. 920. And, as bearing upon the amount of the vendor's damages, the amount received from a resale at another place than the place of delivery is competent evidence. *Simons v. Ypsilanti Paper Co.* 77 Mich. 185, 43 N. W. 864.

Since the measure of the vendor's damages for the refusal of the purchaser to receive goods purchased, is the difference between the contract price and the market value, to establish the market value it is competent to show that subsequently to the purchaser's refusal to receive the property, the vendor sold the same at the place of delivery for the highest price obtainable, as this evidence, if true, furnishes a satisfactory indication of the market price at the time and place of the breach; and where an immediate sale is necessary to avoid a loss on the property, the vendor, on making the same in the manner mentioned, is entitled to recover the difference between the contract price and the amount received therefrom. *Williams v. Robb*, 104 Mich. 242, 62 N. W. 352.

#### ***XI. Evidence — burden of proof.***

The burden is on the vendor to show that, in exercising the right to resell on default of the purchaser, he acted in good faith, and exercised reasonable judgment and diligence. Thus, he should show the character of the sale, fairness and necessity, and the attendant conditions, in order that the court or jury may determine whether in all respects it was entirely fair and just, since the rule is not enforceable that the vendor may recover the difference between the contract price and the sum realized, if the resale has not been fairly made. This may be the quantum, but if it is not so made it is not the measure, of damages, since the right is not absolute in the vendor to sell when and where and as he pleases, and hold the purchaser for the difference. The result of the resale can never control the question of damages against the defaulting vendee, nor can it be given in evidence to that end, unless the vendor has satisfactorily proved that he exercised the right in good faith, and at such time and in such manner and by such methods and under such circumstances, as are best calculated to protect the rights of the defaulting purchaser, and to secure the best market price for the property. *Mag-* 42 L.R.A.(N.S.)

*nes v. Sioux City Nursery & Seed Co.* 14 Colo. App. 219, 59 Pac. 879.

And the burden is on the seller to show that he sold the property within a reasonable time, and that the sale was fair. *Neuberger v. Rountree*, 18 Ill. App. 610.

On a resale the vendor must show that he has resold for the market value, or that there was no market value, and that he resold for the best price reasonably obtainable. *Woldert Grocery Co. v. Boonville Elevator Co.* 42 Tex. Civ. App. 524, 94 S. W. 108 (resale at place of delivery). In determining his damages, it is incumbent upon him to produce the necessary facts to show that in reselling he observed due care and caution so to conduct the sale and sell as to procure the best price obtainable. *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657.

And it has been held that the burden of proof is on the vendor to show that he sold the article subsequently to the breach of the contract by the purchaser, for the best price obtainable during the time intervening between the breach and the resale. *Thayer Export Lumber Co. v. Naylor*, 100 Miss. 841, 67 So. 227. The defendant may show, as bearing upon the question of fact whether the vendor exercised good faith and reasonable diligence as to the time of the resale, that the market price of articles of the character resold was less than that at the time of the breach of the contract. *Almy v. Simonson*, 52 Hun, 535, 5 N. Y. Supp. 696.

If the seller resells at some other market than the place of delivery, the burden is upon him to show that there was no market at the latter place at the time of the breach of the contract, and that the place of resale was the nearest available market. *Lawrence Canning Co. v. H. D. Lee Mercantile Co.* 5 Kan. App. 77, 48 Pac. 749. In such case, the burden is on him to show that there was no market at the place of delivery; that he could not sell there at a fair value; that the place to which he shipped was the most accessible point for the sale of the property, and that he there sold it for its market value, or that there was no market value and that he sold it for a fair price. *Texas & L. Lumber Co. v. Rose*, — Tex. Civ. App. —, 103 S. W. 444. And it has been held that, if the vendor sells at some other place than that agreed upon for the delivery of the property, he must show that the price realized was equal to or greater than the price which could have been realized, had the sale been made at the place of delivery. *Willson v. Gregory*, 2 Cal. App. 312, 84 Pac. 356; *Ingram v. Matthien*, 3 Mo. 209.

The market price at the time of delivery has been held to furnish the measure of damages, but, as bearing upon this question, it is competent to show the amount received at a resale subsequently to the breach, although made at another place than the place of delivery, where there was no market at the place of delivery. *Simons*

v. Ypsilanti Paper Co. 77 Mich. 185, 43 N. W. 864.

### *XII. Questions for jury.*

In determining whether there was an unreasonable delay in a resale, it is proper for the trial court to take into consideration judicial knowledge that there was a general depression in business at the time of the breach by the purchaser, and it is also proper to inquire whether a careful dealer would make a hasty sale during such a period, and whether conditions justified the expense of storage and insurance. *J. K. Armsby Co. v. Raymond Bros.-Clarke Co.* 90 Neb. 553, 134 N. W. 174, rehearing 90 Neb. 773, 134 N. W. 920.

The question whether or not the vendor within reasonable bounds exercised his discretion as to the manner of the sale, whether by public auction or privately, is one of fact for the jury. *Penn. v. Smith*, 98 Ala. 560, 12 So. 818; *Lewis v. Greider*, 51 N. Y. 231. And whether a resale was fairly conducted is a question of fact for the jury (*Vanstory Clothing Co. v. Stadiem*, 149 N. C. 6, 62 S. E. 778), especially where the evidence raises an issue whether the resale was fairly made, and for the best price reasonably obtainable (*Woldert Grocery Co. v. Boonville Elevator Co.* 42 Tex. Civ. App. 524, 94 S. W. 108). So, where the circumstances leave room for controversy as to whether the vendor has acted with reasonable diligence as to the time of reselling, the issue thus made is one of fact for the jury. *Carver v. Graves*, 47 Tex. Civ. App. 481, 106 S. W. 903. And it is a question of fact for the jury whether an article is sold within such a reasonable time after the breach, and under such circumstances, as to warrant them in finding that the price obtained at the sale is the fair market price for the article at that time and also at the date of the breach. *Alden Speare's Sons Co. v. Hubinger*, 64 C. C. A. 68, 129 Fed. 538 (sale nine months after breach).

And however conclusive may be the evidence of the price obtained from a resale in determining the market value of the goods when the sale is made at auction or upon notice to the defaulting purchaser, where the sale is by private treaty, and no notice is given to the party to be charged, the question as to the manner in which the resale was conducted, and the reasonableness of the efforts made to obtain a fair price, should be submitted to the jury, especially where the evidence of efforts to obtain a large price is very meager. *Fox v. Woods*, 96 N. Y. Supp. 117.

But it is not error to refuse to submit to the jury the question whether a resale by auction was a fair sale, where the evidence incontrovertibly proves that it was a fair sale after notice thereof to the purchasers, one of whom was present and made no objection to the proceeding, nor any claim that it should be conducted in any 42 L.R.A. (N.S.).

other manner. *Austin v. Hartwig*, 17 Jones & S. 256.

*Habricht, B. & Co. v. E. B. Gallagher & Co.* — Mich. —, 137 N. W. 685, sustains the direction of a verdict for damages amounting to the difference between the contract price and the price for which articles wrongfully refused by the purchaser sold at a public sale at the place of the residence of the vendor, the articles being at that place. It is said that if the defendants had offered testimony to show that the difference between the price received on the resale and the contract price was not the fair measure of damages, it is possible that there may have been some ground for complaint that the case was not left to the jury.

It has been held that where a resale is made, it is only evidence of the market value at the time and place of default by the purchaser, and this evidence, together with any other evidence material on the question, is a matter to be left to the jury on the question of damages. *McCombs v. McKennan*, 2 Watts & S. 216, 37 Am. Dec. 505. Even though the vendor resell at the place of the original sale, where the goods are at such place at the time of the purchaser's default, or of notice thereof to the vendor, the jury are not bound to estimate the vendor's damages by the difference between the contract price and the amount received from the resale, if there is some other way more agreeable with the facts. *Girard v. Taggart*, 5 Serg. & R. 33, 9 Am. Dec. 335.

### *XIII. Miscellaneous questions of practice in.*

Where, by a resale, the vendor has fixed the amount of his damage for failure of the purchaser to receive the subject-matter of the sale according to his agreement, his action should be for damages for the sum so fixed and interest, with expenses added. *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797.

To be entitled to rely upon a subsequent sale to fix the market value of the property theretofore sold at the date of the failure of the purchaser to receive the same according to his agreement, the vendor must allege the price received, and the time when and the place where the sale was made. *Benjamin v. Maloney*, 155 Fed. 494.

In an action to recover damages for a breach of contract to take property according to a contract of purchase, where a resale is alleged, it is also necessary to allege that the property was sold at a loss. *Halbert v. Newell*, — Tex. Civ. App. —, 27 S. W. 767.

It is not necessary for the vendor to allege or prove notice of resale where the purchaser has absolutely refused to receive the goods, and has notice of all the facts giving to the vendor the right to resell. *J. K. Armsby Co. v. Raymond Bros.-Clarke Co.* 90 Neb. 553, 134 N. W. 174, rehearing 90 Neb. 773, 134 N. W. 920. A. G. S.

## IOWA SUPREME COURT.

D. H. GUTH

v.

A. B. BELL, Appt.

(153 Iowa, 511, 133 N. W. 883.)

**New trial — amendment of petition — sufficiency of support.**

1. A petition for a new trial for newly discovered evidence, which alleges that since the trial petitioner has discovered a witness who held the position of yard master at a place where hogs were unloaded which his opponent swore at the trial were not unloaded, and who could not be discovered before, is sufficient to support an amendment filed after the expiration of the time for filing such petitions, more specifically stating why the witness was not discovered sooner.

**Note. — Inconsistent testimony in another suit as ground for new trial.**

For the somewhat allied question as to the effect of a party's changing his testimony on a second trial, to supply defects in the case made on the first trial, see *Smith v. Boston Elev. R. Co.* 37 L.R.A.(N.S.) 429, and the note appended thereto.

In *Gant v. State*, 115 Ga. 205, 41 S. E. 698, the court refused to set aside a verdict in a criminal case on the ground that a material witness for the state when sworn in another case admitted that a portion of his former testimony was false, it not appearing that he had been convicted of perjury.

In *Illinois C. R. Co. v. McManus*, 24 Ky. L. Rep. 81, 67 S. W. 1000, where a person who was not called as a witness for either side, apparently because each was afraid to do so in view of his conflicting statements, subsequently gave material testimony in a prosecution of one of the witnesses for perjury, a new trial was awarded by the appellate court because of the discovery of such evidence; the evidence upon which the jury must have solely based their verdict being inherently improbable.

In *People v. Fridy*, 83 Hun, 240, 31 N. Y. Supp. 399, where one jointly indicted with defendant testified that defendant committed the crime and that he, the witness, had nothing to do with it, but on the next day, after defendant's conviction, withdrew his plea of not guilty and pleaded guilty, a new trial was granted by the appellate court because of that fact; it being by no means certain that defendant would have been convicted without the testimony of such witness.

In *Romaine v. Spring Valley*, 120 App. Div. 501, 105 N. Y. Supp. 256, an action involving an injury from an alleged defective sidewalk, where a motion for a new trial was made on the ground of newly discovered evidence consisting of a confession of perjury by one of plaintiff's witnesses, 42 L.R.A.(N.S.)

**Same — materiality of new evidence.**

2. The allegation of false warranty by a vender of hogs that they had not been unloaded at a stock yard in transit, as a defense in an action for their purchase price, raises an issue upon which newly discovered evidence of the yard master that they were unloaded may be material, so as to justify granting a new trial.

**Same — fraud — perjured testimony.**

3. Perjured testimony cannot be relied on as showing fraud practised in obtaining a judgment, to support a petition for new trial under a statute authorizing a new trial in case of a judgment obtained by fraud.

**Same — newly discovered evidence — inconsistent testimony of prevailing party.**

4. Testimony given by a successful party in a suit in another suit subsequently tried, which is inconsistent with that given by him in the suit in which he was successful,

in connection with his testimony as to the existence of the defect, together with the affidavits of about twenty other persons that the defect did not exist, a new trial was denied, because it appeared that plaintiff was also indicted for perjury in the same matter and on a trial at which most of the persons whose affidavits were offered were witnesses he was acquitted; the court saying that this virtually amounted to two adjudications that the defect existed.

In *Perry v. Hudson & M. R. Co.* 77 Misc. 646, 138 N. Y. Supp. 547, which was an action by a married woman for personal injuries, a new trial was granted on the ground of newly discovered evidence, consisting of the testimony of a physician in a subsequent suit by the husband for the same injury, that he did not make a blood test of the wife, whereas at the trial of the wife's case he testified that he had made such test.

In *Trevino v. State*, 38 Tex. Crim. Rep. 64, 41 S. W. 608, a trial for murder, defendant moved for a new trial on the ground of newly discovered evidence, consisting of the testimony of his sister, given in a subsequent trial of his brother for the same crime, contradicting her testimony given for the state on the trial of defendant. The motion was denied, however, on the ground that the sister's testimony in the second case was improbable in view of all the facts.

In *Shackelford v. State*, — Tex. Crim. Rep. —, 53 S. W. 884, a new trial on the ground that witnesses for the state had changed their testimony in a subsequent trial of appellant's codefendants was denied, the court saying: "The fact that a witness in a case may subsequently change his testimony in another trial is not ground for a new trial."

For perjury as ground for relief against judgment, see notes in 10 L.R.A.(N.S.) 216, 23 L.R.A.(N.S.) 564, and 25 L.R.A.(N.S.) 574.

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may be a ground for new trial of the former because of newly discovered evidence. Same — testimony of yard master.

5. The newly discovered testimony of the yard master where the transfer was made, supported by his records that hogs were unloaded from a car into a pen and then loaded into another car, will support a petition for new trial of an action for the purchase price of the hogs in which the defense was breach of warranty that the animals had not been unloaded into a pen where they were subject to contagion, and plaintiff testified that they were driven directly from one car into the other, across a platform laid between them.

Same — diligence — sufficiency.

6. Diligence in seeking evidence from a yard master with relation to the transfer of animals in the yard, to justify a new trial for newly discovered evidence, is shown by testimony that he was approached before trial, but stated that he had no recollection of the transaction, but after the trial he discovered a record which showed how the transfer was made.

Same — cumulative evidence — records and oral testimony.

7. Railroad-yard records of how a shipment of stock was transferred from one car to another in the yard is not merely cumulative with the oral testimony of a witness, so as to prevent the granting of a new trial upon its discovery.

(Deemer, J., dissents from proposition 4.)

(December 18, 1911.)

**A**PPEAL by defendant from an order of the District Court for Ida County refusing his petition for new trial of an action brought to recover the purchase price of a carload of hogs alleged to have been sold and delivered to defendant in which a judgment was rendered for plaintiff. Reversed.

#### Statement by McClain, J.:

This is a proceeding commenced by petition for a new trial, filed within one year after rendition of judgment against the defendant; the alleged grounds for new trial being that the testimony of plaintiff as a witness was false and untrue to his knowledge, as shown by his subsequent testimony in another case, and the discovery of new evidence which, if produced on the trial, would have tended to contradict the testimony of plaintiff as then given. The court, on motion, struck out an amendment to the petition for new trial, on the ground that it was filed more than one year after the rendition of judgment, and refused to grant plaintiff any relief under the petition for the reason stated, that the newly discovered

evidence was cumulative. The defendant appeals.

Messrs. Johnston Brothers for appellant.

Mr. J. C. Walter for appellee.

McClain, J., delivered the opinion of the court:

On the trial of the action in 1907, judgment was rendered for the plaintiff for the selling price of a carload of stock hogs delivered to defendant in 1902. The defense interposed on the trial was breach of warranty, that, first, the hogs were not afflicted with the disease known as hog cholera; and, second, that said hogs had not been unloaded from the time they were shipped from South Dakota until they were unloaded at Ida Grove; the result of the breach of warranty being that the hogs were of no value on account of their diseased condition when delivered.

From the averments of the petition for new trial and the evidence offered in support thereof, it appeared that soon after the rendition of judgment in this case, in another case brought by this plaintiff against other defendants to recover the purchase price of other hogs delivered at the same time, and a part of the same shipment, wherein the same defenses were interposed, plaintiff's testimony as to the transfer of the hogs from the cars of the Chicago, Milwaukee, & St. Paul Railway Company to the cars of the Chicago & Northwestern Railway Company, at Sioux City, in the course of their transportation from South Dakota to Ida Grove, was materially different from that given by him on the trial of this case, and that the difference was such as tended to show his testimony on the trial of this case to have been false; and, further, that a witness, one Marshall, who was yard master of the Sioux City stock yards at the time the hogs were transferred at that city, gave testimony, based on his records, materially contradicting the testimony of plaintiff as witness on the trial of this case, which testimony of Marshall this defendant, although exercising due diligence, had been unable to discover before judgment was rendered against him.

1. The petition for new trial as originally filed sufficiently recited the falsity of the testimony of plaintiff; and it further recited that defendant had "discovered new evidence which he could not and did not discover prior to the trial by the exercise of due diligence and care; that since said trial, and only recently, he has discovered and found the yard master of the Sioux City stock yards, who held such position at the

time the plaintiff unloaded the hogs sold to defendant in the yards at Sioux City, Iowa," and a new trial was asked on the ground of "the newly discovered evidence herein set forth and the false, fraudulent, and perjured testimony of the plaintiff." These averments constituted a very inadequate and insufficient statement of a claim for a new trial on account of the newly discovered evidence of the yard master; but we think it did constitute a claim in effect, that if defendant was granted a new trial he could produce as a witness said Marshall, the yard master, who would give testimony contradictory to that introduced for the plaintiff on the trial of the case. Therefore we think that the amendment to this petition, filed more than a year after the rendition of the judgment, more specifically referring to the reasons consistent with due diligence why the knowledge of Marshall as to the transaction in question was not sooner ascertained, was proper; and that, as no question was made at any stage of the proceeding in regard to the insufficiency of the averments relating to the newly discovered evidence of Marshall, save that due diligence was not shown, and that such evidence was cumulative, we shall proceed to determine the case on the theory that there was a sufficient averment in this respect of newly discovered evidence. The rule is that an amendment to a motion or petition for new trial may be made after the time limited by statute for the filing of such motion or petition, if no new grounds are therein presented. *Sowden v. Craig*, 20 Iowa, 477; *Dutton v. SeEVERS*, 89 Iowa, 302, 56 N. W. 398; *Means Bros. v. Yeager*, 96 Iowa, 694, 65 N. W. 993; *Harnett v. Harnett*, 59 Iowa, 401, 13 N. W. 408.

2. An objection to the sufficiency of the allegations in the petition now made for the first time, so far as indicated by the record, is that there was no issue in the case to which this newly discovered evidence of Marshall, or the inconsistency between the later testimony of plaintiff and his testimony on the trial in this case, would be pertinent. But it was alleged in the answer that plaintiff warranted and represented that the hogs had not been unloaded from the time they were shipped from South Dakota until they were unloaded at Ida Grove, and that this warranty was false and relied upon by defendant. From the proceedings on the trial of the case preserved in the record now presented, it appears that defendant undertook to prove as material matter the unloading of the hogs into the stock yards at Sioux City, and that at the time of purchasing the hogs he told plaintiff he would not buy

them if they had been in such stock yards, on account of the danger that they might have there contracted the disease of hog cholera, which they would not have had the opportunity to contract if they had not been unloaded at such stock yards, or similar public yards, in course of shipment. It is apparent, therefore, that, whether or not the averment of the answer was sufficient to show the materiality of the evidence offered in the petition for new trial, such evidence was material under the issues actually presented in the case as tried. We cannot say now that evidence squarely contradicting the testimony of the plaintiff on the trial would not be material, if the case should be retried.

3. It will be necessary to separately consider the proposed evidence that plaintiff in a subsequent case gave testimony wholly inconsistent with his testimony in this case, the inconsistency being of such character that its proof would be to this defendant's advantage, and the proposed proof that Marshall, the yard master, would give testimony on a material matter, inconsistent with the testimony of plaintiff in this case which was adverse to the defendant. The inconsistency between the testimony of plaintiff on this trial and his testimony on the subsequent trial of a different case consisted in the fact that on the trial of this case, for the purpose of showing that the hogs had not been unloaded into or transferred through the stock yards at Sioux City, so as to be exposed to danger of contracting hog cholera, and in explanation of the fact that the hogs were carried from Sioux City in a different car from that in which they reached that point in the course of their transportation from South Dakota to Ida Grove, plaintiff testified that after certain fat hogs intended for the Sioux City market were unloaded from the car into the yards the car was, by the railroad company, taken to a point beyond the stock yards, where the hogs intended for the defendant were transferred to another car by means of a platform extending between the two cars, which were placed side by side; while on the subsequent trial plaintiff testified that after the fat hogs were removed from the car he knew nothing further about what was done with this car and another car of hogs which accompanied it, intended for other purchasers at Ida Grove, and that he was not present when the hogs from these two cars were transferred to the cars in which they arrived at Ida Grove. We are satisfied, from the record, of the absolute inconsistency of the testimony of plaintiff on these two trials, and that, if his subsequent testimony on

the other trial was true, then plaintiff's testimony on the trial of this case was false, and to the prejudice of this defendant.

So far as plaintiff's subsequent testimony on the other trial might be relied upon for the purpose of showing fraud practised in obtaining the judgment in this case, under Code, § 4091, relating to new trials on petition filed within a year, we think it was not competent or material. We have held that in an action in equity, instituted after the expiration of the year within which a petition for new trial might have been filed, to set aside a judgment for fraud, it is not competent to prove that the judgment was procured by false swearing or perjury, such a fact being intrinsic and conclusively adjudicated in the judgment rendered (*Graves v. Graves*, 132 Iowa, 199, 10 L.R.A.(N.S.) 216, 109 N. W. 707, 10 Ann. Cas. 1104); and, as the equitable relief from a judgment on account of fraud which may be granted after the expiration of the year allowed for petition for new trial is limited to the kind of relief which might have been granted under the statute on application made within a year, we see no reason why this rule is not also applicable to that ground of relief, when relied upon in a petition under the statute. It has been so ruled without particular argument or discussion in *Dooley v. Gladiator Consol. Gold Mines & Mill. Co.*, 134 Iowa, 468, 109 N. W. 864, 13 Ann. Cas. 297, and *Kelly v. Cummins*, 143 Iowa, 148, 121 N. W. 540, 20 Ann. Cas. 1283. The decisions of this court relied upon for appellant to show that false swearing by a party to the action may be shown as a ground for a new trial seem not to be particularly in point. In several of them the ground for new trial relied upon was misconduct of the prevailing party or accident or surprise, which are grounds recognized in Code, § 3755, for a new trial applied for within three days after the judgment, but are not grounds which may be first presented by a petition for new trial filed within a year, under Code, § 4091. First Nat. Bank v. Wabash, St. L. & P. R. Co. 61 Iowa, 700, 17 N. W. 48; *Pickering v. Kirkpatrick*, 32 Iowa, 163; *Cleslie v. Frerichs*, 95 Iowa, 83, 63 N. W. 581. The cases of *Heathcote v. Haskins*, 74 Iowa, 566, 38 N. W. 417, and *Brown v. Byam*, 59 Iowa, 52, 12 N. W. 770, were sufficiently referred to in the case of *Graves v. Graves*, supra. So far, therefore, as the subsequent testimony of plaintiff in another case was relied upon to establish fraud in procuring the judgment in this case by perjury and false swearing, it was not competent or material, and could not be considered.  
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But newly discovered evidence is a ground for new trial which may be presented by petition. See Code §§ 3756 and 4094; *Heim v. Resell*, 153 Iowa, 356, 133 N. W. 881, decided at present term. Admissions of a party made against his interest are independent substantive evidence as against him, and their subsequent discovery may be a ground for a new trial, as constituting newly discovered evidence. They are not merely impeaching; nor are they merely cumulative. *Alger v. Merritt*, 16 Iowa, 121; *Eckel v. Walker*, 48 Iowa, 225; *Feister v. Kent*, 92 Iowa, 1, 60 N. W. 493; *Murray v. Weber*, 92 Iowa, 757, 60 N. W. 492; *Means Bros. v. Yeager*, 96 Iowa, 694, 65 N. W. 993; *Preston v. Otey*, 88 Va. 491, 14 S. E. 68; *Goldsworthy v. Linden*, 75 Wis. 24, 43 N. W. 656; *Andrews v. Mitchell*, 92 Ga. 629, 18 S. E. 1017; *Simons v. Cissna*, 60 Wash. 141, 110 Pac. 1011; *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711; *Gardner v. Mitchell*, 6 Pick. 114, 17 Am. Dec. 349; *Klopp v. Jill*, 4 Kan. 482; *Strout v. Stewart*, 63 Me. 227; *Rains v. Ballow*, 54 Ind. 79.

The question still remains, however, whether these declarations and admissions of plaintiff made in his subsequent testimony on another trial constituted newly discovered evidence, in view of the fact that such declarations and admissions had not been made when the trial in the present case took place. Can the unsuccessful party have a new trial on the ground of newly discovered evidence, where such evidence was not in existence when the trial was had? We find little light on this subject in the authorities. So far as we have been able to discover, the pertinent cases support the proposition that acts and declarations, subsequent to the trial, made by the successful party and inconsistent with his right to recover, may be shown as a ground for a new trial asked for within the period within which an application for a new trial is allowed to be made. *Stauffer v. Martin*, 43 Ind. App. 675, 88 N. E. 363; *Wall v. Trainor*, 16 Nev. 131; *Welch v. Nasboe*, 8 Tex. 189. The cases of *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243, and *Keeley v. Great Northern R. Co.* 139 Wis. 448, 121 N. W. 167, relate to statements of witnesses made after the trial in which they testified, and are therefore plainly not in point; for statements out of court made by a witness inconsistent with his testimony can only be shown for impeaching purposes, and new trials are never granted on the ground of newly discovered evidence which is merely impeaching in its character. The case of *Franklin Bank v. Pratt*, 31 Me. 501, is not in point; for, though the offer was to in-

introduce the testimony of a witness who could not have testified on the trial, by reason of the disqualification of interests which had been subsequently removed, the court held the offer insufficient, because the disqualification might have been removed prior to the trial, in the exercise of reasonable diligence, and the party at the trial was aware of its existence: The cases of Sullivan v. O'Conner, 77 Ind. 149, and Crow v. Brunson, 1 Ind. App. 268, 27 N. E. 507, sometimes cited in opposition to the rule which we have announced as supported by the weight of authority are on that point disapproved in Indianapolis v. Tansel, 157 Ind. 463, 62 N. E. 35, which is hereafter cited. It is true that in Dooley v. Gladiator Consol. Gold Mines & Mill. Co. 134 Iowa, 468, 109 N. W. 864, 13 Ann. Cas. 297, this court suggested that the act of a party after the trial, in the nature of an admission inconsistent with his position during the trial, could not be presented as a ground for new trial by petition, but, as the refusal of the lower court to sustain the petition for new trial was supported on other grounds, the suggestion on this point is in the nature of a dictum, and we are satisfied now that acts and declarations of the successful party which, if they had occurred prior to the trial, but were not ascertained in the exercise of reasonable diligence, might be shown as grounds for new trial in the nature of newly discovered evidence, may also be grounds for new trial, if they do not occur until after the trial, provided, of course, they do occur within the time within which a new trial may be asked on motion or petition on account of newly discovered evidence. An illustration of the propriety of granting a new trial on account of offered evidence of acts of the successful party inconsistent with the position taken by him on the trial is found in the cases holding that, where there has been a recovery for personal injuries predicated upon the apparent existing disability of the injured party as he appears in court, constituting an element affecting the measure of damages, a new trial may be granted on a showing that immediately after the recovery of judgment his physical condition was so much better than that apparent on the trial that he must have intentionally and falsely assumed an extent of disability which did not exist. Indianapolis v. Tansel, supra; Corley v. New York & H. R. Co. 12 App. Div. 409, 42 N. Y. Supp. 941; Brooks v. Rochester R. Co. 10 Misc. 88, 31 N. Y. Supp. 179; Cole v. Fall Brook Coal Co. 40 N. Y. S. R. 834, 16 N. Y. Supp. 789.

We are well aware of the reasonable objection to the prolonging of litigation by 42 L.R.A. (N.S.)

the offer to introduce newly discovered evidence, but in the interest of justice we think that in a proper case, and within the limited period of time fixed by the statute, the unsuccessful party ought to be allowed to secure a new trial on a showing that the acts and conduct of the successful party, even after the trial, have been absolutely inconsistent with the truthfulness of his testimony on the trial. The extension of the rule as to admissibility of evidence, so as to include as competent witnesses the parties to the litigation, makes it important that every practicable check be afforded to the procuring of an unjust result by their false testimony. The trial court erred, therefore, in refusing to sustain the petition for new trial, supported by a showing that plaintiff subsequently testified on another trial in a manner entirely inconsistent with the truthfulness of his testimony on the trial of this case; it appearing that his testimony in this case may well have been the controlling consideration in the minds of the jurors in reaching their verdict.

4. On the trial in which the judgment in this case, which it is now sought to have set aside, was rendered, the plaintiff testified unequivocally that the transfer of the hogs from the Milwaukee car to the Northwestern car was made at the Sioux City stock yards by placing the cars side by side on adjoining tracks, and running the hogs from one car into another over a chute or platform. This testimony was given on cross-examination, after the plaintiff had unequivocally stated on direct examination that they had not been unloaded from the time they left South Dakota until they reached Ida Grove, and that they had not been unloaded into or transferred through the Sioux City stock yards. In the proceedings under the petition for a new trial, Marshall, the yard master of the Sioux City stock yards, testified that he was such yard master at the time the hogs were thus transferred, and had the original records of the yards for the date on which such transfer, as appeared by plaintiff's testimony, took place. These records, being offered in evidence, showed that the hogs were unloaded into a certain specified pen of the yards from a Milwaukee car, and were loaded into a Northwestern car from the same pen. These records plainly tended to contradict the testimony of plaintiff given on the trial, and constituted material and competent evidence, which would be available to defendant on a retrial of the case.

With reference to the diligence exercised by defendant to discover this evidence prior to the trial, he testified that he had seen



Marshall relative to calling him as a witness, and that Marshall then told him he had no recollection of the transaction, and that it was not until the subsequent trial in the other case, brought against other defendants, that defendant learned the existence of records of the stock yards which would have been available to him, had he known of them. This, we think, constituted a sufficient showing that the discovery of the evidence afforded by the records was not made until after the trial of his case, and that it was not by reason of a failure to exercise due diligence that the existence of the records was not sooner ascertained.

The trial court, in refusing a new trial under the petition, held that defendant had used due diligence in attempting to get the evidence of Marshall, but refused a new trial on account of this evidence, on the ground that it was cumulative testimony. As to this feature of the case, the record shows that on the trial one Tummel, being called as a witness by the defendant, testified that he was a hog salesman in the employ of the commission firm to which were consigned the fat hogs out of the car in which the stock hogs sold to defendant had been brought as far as Sioux City, and that the stock hogs were unloaded in the Sioux City stock yards, and were reshipped to Ida Grove. We are clearly of the opinion that the lower court erred in holding that the records of the stock yards, which constituted a part of the testimony of Marshall, were merely cumulative with the testimony of Tummel on the same point. It was not evidence of the same kind, but was of a distinctively different probative character. *Murray v. Weber*, 92 Iowa, 757, 60 N. W. 492; *Hanousek v. Marshalltown*, 130 Iowa, 550, 107 N. W. 603; *Bullard v. Bullard*, 112 Iowa, 423, 84 N. W. 513; *Stineman v. Beath*, 36 Iowa, 73; *Hambel v. Williams*, 37 Iowa, 224; *Schnee v. Dubuque*, 122 Iowa, 459, 98 N. W. 298; *German v. Maquoketa Sav. Bank*, 38 Iowa, 368; *Bogges v. Read*, 83 Iowa, 548, 50 N. W. 43; *Wayt v. Burlington, C. R. & M. R. Co.* 45 Iowa, 217. The court erred, therefore, in holding that the records offered as a part of the testimony of Marshall were not sufficient to require the granting of a new trial, on the ground that such evidence was cumulative.

The ruling of the trial court, refusing a new trial on defendant's petition, is therefore reversed.

**Deemer, J., dissenting:**

I agree to the conclusion, but not with the third division of the opinion. Upon the proposition there involved, I am disposed 42 L.R.A. (N.S.)

to disagree with the conclusion of the majority.

Petition for rehearing denied.

## KANSAS SUPREME COURT.

CITY OF TOPEKA, Appt.,

v.

FRANK M. STAHL.

(86 Kan. 681, 121 Pac. 910.)

### Intoxicating liquor — replevin — bond — recovery — liability of officer.

Where an officer seizes intoxicating liquors upon a warrant issued under a city ordinance authorizing their destruction upon certain conditions, and after surrendering them upon an order of delivery in replevin, obtains a judgment for their value in default of their return, he holds such judgment for the benefit of the city, and upon its collection by him, he becomes liable to the city for its amount, less any expenses he may have necessarily incurred in obtaining it.

(March 9, 1912.)

**A**PPEAL by plaintiff from a judgment of the District Court for Shawnee County in defendant's favor in an action brought to recover certain moneys collected by defendant on judgments secured by him as chief of police and agent of the plaintiff city, and also to secure the payment to it of certain uncollected judgments recovered by defendant. Reversed.

The facts are stated in the opinion.

Messrs. W. C. Ralston and James W. Clark, for appellant:

The agent must account to the principal for all moneys which come into his hands by virtue of his agency.

1 Clark & S. Agency, 932, 935, 936; *Krutz v. Fisher*, 8 Kan. 90, 9 Kan. 501; *State v. Patterson*, 66 Kan. 447, 71 Pac. 860; *State v. Spaulding*, 24 Kan. 1; *Galbraith v. State*,

Headnote by MASON, J.

*Note.* — *Duty of officer to account for money or property he has recovered as result of litigation.*

While there are numerous cases upon the duty of a public officer to account for funds placed in his hands, there is a dearth of authority upon the precise question presented in *TOPEKA v. STAHL*, as to the duty of an officer to account for money or property he has recovered as the result of litigation.

The right of the public to fees unlawfully collected by an officer for his own benefit is the subject of a note to *State*

10 Lea, 568; Placer County v. Astin, 8 Cal. 303; People v. Robertson, 6 Cal. App. 514, 92 Pac. 498; United States Exp. Co. v. Lucas, 36 Ind. 361; State v. Tumey, 81 Ind. 559; People v. Hawkins, 106 Mich. 479, 64 N. W. 736; Fries v. Porch, 49 Iowa, 351; Hines v. Stahl, 79 Kan. 88, 20 L.R.A. (N.S.) 1118, 131 Am. St. Rep. 280, 99 Pac. 273, 17 Ann. Cas. 298.

Mr. W. H. Cowles, for appellee.

Suits against Frank M. Stahl and against Frank M. Stahl as chief of police, are just as absolutely distinct as if they were entitled against Stahl and against Smith. The replevin plaintiffs had an option to sue Stahl, chief of police, virtually the city, which was the real detainer of their stuff; or to sue Stahl, the man, the actual possessor at the time.

Burchett v. Purdy, 2 Okla. 391, 37 Pac. 1053; Irwin v. Walling, 4 Okla. 131, 44 Pac. 219; Greig v. Ware, 25 Colo. 184, 55 Pac. 163; Rose v. Cash, 58 Ind. 278; Cobbe, Replevin, 2d ed. §§ 432, 443.

They elected to sue Stahl. For him to answer that he claimed no interest personally, that he was simply the city's hired man, and to stop with that, would have been simply irrelevant. He held the stuff. To make any defense in replevin, he had to show that he did not wrongfully detain it.

Barnhart v. Ford, 37 Kan. 520, 15 Pac. 542; Whitford v. Horn, 18 Kan. 455; Central Nat. Bank v. Brooke, 71 Kan. 767, 81 Pac. 498; Lemaster v. Fisher, 82 Kan. 282, 108 Pac. 93.

Mason, J., delivered the opinion of the court:

On July 20, 1910, the city of Topeka sued Frank M. Stahl, its petition setting out ten counts or causes of action. A general de-

murrer to the whole was sustained, and it appeals.

The facts as stated in the first count were substantially as follows: In 1904 Stahl was chief of police. In that capacity he seized certain intoxicating liquor upon a warrant issued by the police judge under color of an ordinance providing for its destruction under certain circumstances, upon order of the police court. One E. S. Lee brought replevin for the liquor, and in that way obtained possession of it, as Stahl gave no redelivery bond. Then Lee caused the replevin action to be dismissed. Upon application to Stahl, the court then proceeded under the statute (Civil Code, § 184 [Gen. Stat. 1909, § 5777]) to inquire into his right of possession, and rendered a judgment in his favor, for the return of the liquor, or for its value if a return could not be had. The liquor was not returned. On February 4, 1909, Lee paid the amount of the alternative judgment into court, and the money was turned over to Stahl.

The second count was based upon similar facts. The third and fourth differed only in that the money was alleged to have been collected from the sureties on the replevin bonds. In each of the remaining counts it was alleged that under similar circumstances a judgment had been rendered in favor of Stahl in another replevin case, and that he had also obtained judgment either upon the replevin bond or upon a supersedeas bond given in the course of an unsuccessful appeal. Upon the first four counts the city asked judgment for the amounts collected by Stahl, and upon the last six it asked for such orders as would establish and protect its beneficial interest in the unpaid judgments standing in Stahl's name.

We think the demurrer should have been overruled. The argument is made in behalf

ex rel. McNary v. Dunbar, 20 L.R.A. (N.S.) 1015; and a note to Mecklenburg County v. Beales, 36 L.R.A. (N.S.) 285, discusses the liability of a public officer for loss of funds by the failure of a bank in which they are deposited.

Where a deputy deposited in a bank money collected by him on an execution, and recovered judgment therefor against the bank, the equitable title to the money and judgment was held to be in the execution creditor, until his claim against the sheriff for the laches of his deputy was paid by the sheriff; and upon payment of such claim, the sheriff was entitled to be subrogated to the rights of the execution creditor. Downer v. South Royalton Bank, 39 Vt. 25.

And where a constable levied upon property, and in a replevin suit by the defendant in execution recovered judgment for the property or its assessed value at his election, he electing to take the money, which exceeded the amount necessary to satisfy

the execution, it was held in Damm v. O'Connell, 1 Mo. App. 268, that the constable was obliged to refund the surplus to the execution defendant. "When the constable acquired the money proceeds of the replevin suit," said the court, "these stood in place of the property on which he had levied. The defendant in execution was as much entitled to the surplus remaining after satisfaction of the demand as if the officer had sold the property for the same amount in cash. Some technical distinctions are attempted, touching the presumption of ownership in defendant, arising from the result of the replevin proceeding. But they cannot prevail in face of the facts set out in the agreed statement. It is remarkable, to say the least, that the defendant should have supposed he could thus speculate with impunity upon the property of others which, as a sworn public officer, he had taken into custody for fiduciary purposes."

J. D. C.

of the defendant that the replevin actions were brought against him, not as chief of police, but in his individual capacity; and that he was personally entitled to the benefits of the judgments. No importance can be attached to the fact that the plaintiffs in the replevin actions did not describe the defendant as an officer, or allege that he held the liquor in an official capacity. They claimed the property and sued the person in whose possession they found it. He could have defended by showing any right of possession he had in any capacity. As each replevin action was dismissed, he asked a trial upon the question of his right to have the liquor returned to him. He obtained a judgment for the restoration of the property, or for its value in case a return could not be had, only because of the fact that he was an officer and had seized it upon a warrant. If the property had been returned to him, he would have held it as an officer. He would not have been at liberty to dispose of it in any other manner than as directed by the court. If he had used it for his own benefit, he would have been guilty of official misconduct. If he had sold it, he would doubtless have been liable to the city for the amount received. The money judgment was in a way a substitute for the property. The defendant's relation to it was official rather than personal.

In *Fries v. Porch*, 49 Iowa, 351, a peace officer holding intoxicating liquor on a state warrant was sued for its possession. He consented to a judgment for the plaintiff. An appeal was taken in his name in behalf of the public. The supreme court reversed the case, directing that the officer's successor should be substituted as defendant; and that, if the destruction of the liquors had been adjudged, an order should be made for their return to the defendant, and that, in default thereof, judgment should be entered in his favor, for the use of the state, for their value. That case was one of those relied upon by this court in affirming the judgment in favor of Stahl in one of the replevin actions. *Hines v. Stahl*, 79 Kan. 88, 20 L.R.A.(N.S.) 1118, 131 Am. St. Rep. 280, 99 Pac. 273, 17 Ann. Cas. 298. In reviewing that judgment, the difficult question was how to measure the value of the interest of an officer in liquor which he held only that he might destroy it, if it were found to have been used in violation of law. In the opinion it was said that "there is no way of compensating in dollars and cents the loss of the right to destroy contraband goods, unless it be by restoring their full value." p. 91. The right to destroy the liquor was essentially the right of the public, or of the officer in

his official capacity, and not that of an individual. The interest held in the property, which was required to be measured, and which was the basis of the recovery, was essentially the interest of the city, or of the officer as such, and not that of Stahl personally.

The situation is unusual, and there is a lack of decisions having any very close bearing. The question is somewhat analogous to that presented where an officer refuses to turn over money which has been paid to him because of his office, but to which neither he nor the public had originally any right. In some jurisdictions the criminal liability of an officer under such circumstances is denied (note in 23 L.R.A.(N.S.) 761), but his civil liability appears to be everywhere recognized (*Mechem, Pub. Off.* §§ 295, 915; 23 Am. & Eng. Enc. Law, 372, 373, note 9; 4 Supplement to 23 Am. & Eng. Enc. Law, 533). In *State ex rel. McNary v. Dunbar*, 53 Or. 45, 20 L.R.A.(N.S.) 1015, 98 Pac. 878, it was held that a state officer who collected fees for himself under an unconstitutional statute could not be required to pay them over to the state. In a note thereto three decisions are cited; one apparently supporting the view that an officer who without right collects fees avowedly for his own benefit, and not for that of the public, cannot be compelled to pay them into the public treasury, and the others having a contrary tendency. 20 L.R.A.(N.S.) 1015. Two other cases seem to incline to the latter view (*State v. Porter*, 69 Neb. 203, 95 N. W. 769, and *State v. Allen*, — Tenn. —, 46 S. W. 303), which appears to be more in accordance with the principle that requires an officer to account for any interest he receives on public funds (23 Am. & Eng. Enc. Law, 373), or for any personal profit he makes in administering his office (*United States v. Carter*, 217 U. S. 236, 54 L. ed. 769, 30 Sup. Ct. Rep. 515, 19 Ann. Cas. 594; *State ex rel. Atty. Gen. v. Leidtke*, 12 Neb. 171, 10 N. W. 703).

Upon these considerations we hold that the city was entitled to the benefit of the several judgments rendered in favor of Stahl. This disposes of the principal question involved; but various special objections to the petition are urged. It is argued that the city's right of action is barred by the statute of limitations, or by laches. We think that in each instance in which money was collected upon a judgment, the law implied a contract to pay it to the city, and a right of action accrued which would not be barred by the statute of limitations under three years. The counts in which no actual receipt of money

is alleged are in effect actions to declare the existence of a trust, and, whatever may be the period of limitation, it would not begin to run until a disavowal of the trust relation. It fairly appears from the petition that the city took no part in the litigation growing out of the replevin actions, but left Stahl to handle it in his own way and at his own expense. This does not bar the city from its interest in the judgments, but it is a sufficient reason for regarding Stahl as in effect having a lien upon all of them and their proceeds, for whatever expenses he has necessarily incurred in obtaining and collecting any of them, including, of course, his attorney's fees. It would manifestly be inequitable that the city should accept the benefit of Stahl's conduct without reimbursing him for his legitimate expenditures in the transaction. *Robertson v. Rawlings County*, 86 Kan. 10, 119 Pac. 316. The petition was not rendered demurrable, however, by its failure to include an offer to provide for such reimbursement, the amount of which is proper to be set out in an answer.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

Petition for rehearing denied May 11, 1912.

### KENTUCKY COURT OF APPEALS.

#### METROPOLITAN PLATE GLASS & CASUALTY INSURANCE COMPANY, Appt., v.

KATE R. HAWES, Admr., etc., of Edwin J. Hawes, Deceased.

(150 Ky. 52, 149 S. W. 1110.)

#### Insurance — sick benefit — outdoor treatment — effect.

That as a portion of his treatment, an insured, under direction of his physician,

*Note. — Construction and effect of condition in accident or health policy that assured must be confined to the house to entitle him to indemnity.*

The early cases upon the construction and effect of conditions in accident or health policies that the assured must be confined to the house to entitle him to a recovery are gathered in the note accompanying *Breil v. Claus Groth Plattsduischen Vereen*, 23 L.R.A.(N.S.) 359, and the present note is merely supplemental to that. The tendency of the courts is to construe the policies liberally. Each case, however, depends upon the wording of the contract of insurance and the particular facts which are made to appear.  
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sits out of doors a portion of the time, does not destroy his rights under a sick benefit policy insuring him against sickness while he is wholly disabled and under the care of a physician for a period during which "he shall be continuously and necessarily confined to the house."

(October 17, 1912.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Daviess County in plaintiff's favor in an action brought to recover the amount alleged to be due under a sick benefit insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. E. B. Anderson, for appellant:

Necessary and continuous confinement to the house during the period of the insured's disablement is a condition precedent to the right of recovery.

*Dunning v. Massachusetts Mut. Acci. Asso.* 99 Me. 390, 59 Atl. 535; *Rumford Falls Paper Co. v. Fidelity & C. Co.* 92 Me. 574, 43 Atl. 503; *Bishop v. United States Casualty Co.* 99 App. Div. 530, 91 N. Y. Supp. 176; *Gainor v. St. Lawrence Life Asso.* 21 Misc. 27, 46 N. Y. Supp. 965; *Liston v. New York Casualty Co.* 28 Misc. 240, 58 N. Y. Supp. 1090.

Mr. O. M. Finn for appellee.

Nunn, J., delivered the opinion of the court:

Appellee's intestate held an insurance policy in appellant company, which provided for weekly payments in the event of sickness. He became sick, gave the required notice, and made application for \$10 a week for twenty weeks. The company refused to pay; and this action was instituted. Appellee's intestate's deposition was the only evidence introduced on the trial, and the court found in appellee's favor the sum of \$200.

There is only one question raised on this appeal, and that is, What meaning should be given to clause one of the policy? It is

In *Ramsey v. General Acci. F. & L. Ins. Co.* 160 Mo. App. 236, 142 S. W. 763, where a policy provided for payment for the number of consecutive days after the first week "that the insured is necessarily and continuously confined within the house and therein regularly visited by a legally qualified physician," it was held that a recovery might be had where the insured, who was taken sick at a hotel, away from home, went home in a Pullman, after having been treated by a physician, and later went to a nearby city by Pullman and underwent certain operations, after which he rode or occasionally walked to his physicians for treatment, and later went home where he was confined to the house except when he occasionally sat on his porch, and was once

as follows: "If the insured shall, during the term of this insurance, suffer from any bodily disease or sickness not herein-after excepted, and such disease or sickness shall continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, the company will pay the insured, for the period of such disablement during which he shall be continuously and necessarily confined to the house, and dur-

ing which he shall be continuously under the care of and regularly treated by a legally authorized and licensed physician, but for no period of less than seven days nor more than fifty-two consecutive weeks, the following sum per week, to wit, Ten and no/100 dollars." The testimony shows that appellee's intestate was sick for more than twenty weeks, and was wholly unable to perform any labor; that he was confined at his home and under regular treatment of a

driven to his physician's and once to his place of business, where, however, he took no part in business matters.

The court said: "The position taken by defendant is, in effect, that the policy means that an assured must literally and actually be confined within the walls of a house all the time. We think that position untenable. We think that the contract should have a reasonable construction. And an assured who may be attacked with serious illness at his hotel, away from home, and is advised by a physician, who is called, that he should be taken home, and is transported in a Pullman car, where he may be accommodated with a bed; and who, on arriving home finds that he will be compelled to undergo an operation by skilled surgeons in a near-by city, goes there, and is operated upon and attended by them daily by being taken to them in a carriage from his hotel near by, and occasionally walking to them, when able being taken home, yet under the treatment of a physician, and confined within his house, except occasionally sitting on the porch and being once driven down to his place of business, though not taking part in business matters, and at another time to a physician's office, but with these exceptions, of short duration being in the house and much of the time in bed,—is within the protection of the policy."

But where a policy provides that "a disability to constitute a claim for sickness . . . shall require absolute, necessary, continuous confinement to the house for not less than fourteen days; . . . and no disability . . . shall constitute a claim for a longer period than the insured shall be totally disabled and absolutely, necessarily, continuously confined to his house,"—no recovery can be had thereunder by one who was seriously sick from May, when he began to be treated for paralysis of the throat and other troubles connected therewith to September, and was confined to the house from May until early July, except that he occasionally stepped into his store, but did no work, and went once or twice a week to his physician's for treatment, and on some of these occasions went beyond the office to a barber shop a quarter of a mile distant from his house, and it appeared that later in July he went to a beach upon the advice of his physician, and while there was driven to a barber's shop twice a week. *Sawyer v. Masonic Protective Asso.* 75 N. H. 276, 73 Atl. 168. The court in speaking of *Scales v. Masonic Protective* 42 L.R.A. (N.S.)

*Asso.* 70 N. H. 490, 48 Atl. 1084, which is set out in the earlier note, said: "The plaintiff relies upon *Scales v. Masonic Protective Asso.* 70 N. H. 490, 48 Atl. 1084. He claims that the case is authority for the proposition that total disability to labor entitles him to recover, although he was not in any sense confined to his house. If such a conclusion is to be drawn from what is said in the first paragraph of the opinion in that case, it cannot now be followed. The disability is to be such as to ordinarily confine one to the house as a matter of necessity. As was said in the *Scales Case*, the confinement is not a condition precedent. If the insured were taken out because the house was on fire, or if he were carried to a hospital in an ambulance, it would not defeat a recovery. But that case does not decide that one can recover under this policy when he is totally incapacitated to labor, yet in no sense confined to his house. To so hold would be to refuse to give any substantial meaning to the plain language used by the parties in making their agreement. The term used is to be given a reasonable interpretation. It is not to be read out of the contract. If necessity for confinement to the house is only an evidentiary fact, it is one that must appear. The disability must be of a nature to ordinarily confine one to the house. This is recognized in the *Scales Case*, and most of the opinion is devoted to showing that the essential fact existed. There was in that case not only a substantial, but a literal and technical, confinement of the insured to his house."

And in *Lieberman v. Columbia Nat. L. Ins. Co.* 47 Pa. Super. Ct. 276, where a health policy provided for certain payments when an illness "confines the insured to the house" and prevented him "throughout the period of such confinement from performing any and every kind of duty pertaining to his occupation;" and also provided for other payments while he was recovering from an illness "causing the said confinement to the house,"—it was held that no recovery of either benefit could be had by one who contracted bronchitis and was incapacitated from performing any part of his business for some time, but during the entire period of his sickness visited his physician and part of the time also spent a portion of the day in the open air, since it was held that one of the necessary elements to a recovery was lacking, i. e., a confinement to the house,

J. T. W.

physician. His sickness consisted of malaria and bronchial troubles.

Upon cross-examination he testified as follows:

Q. Mr. Hawes, I see in your petition you state that you were not continuously and necessarily confined to the house at all times during this twenty weeks that you claim sick benefits for, but that under the advice of your physician you sat outdoors rather than to be confined to the house. Is that correct?

A. Yes, sir; that is correct. My instructions were to take exercise when I had no temperature, and to sit out on the veranda, but, when I had temperature, to keep perfectly quiet, and in bed when my temperature was high, all of which I did.

It is upon this question and answer that appellant bases its claim of reversal. Its contention is that, as his sickness did not render it necessary for him to be continuously confined in the house for twenty weeks, he has no right to recover. Appellant cites, as sustaining its construction of the clause, the cases of *Dunning v. Massachusetts Mut. Acci. Asso.* 99 Me. 390, 59 Atl. 535; *Bishop v. United States Casualty Co.* 99 App. Div. 530, 91 N. Y. Supp. 176; *Gainor v. St. Lawrence Life Asso.* 21 Misc. 27, 46 N. Y. Supp. 965; *Liston v. New York Casualty Co.* 28 Misc. 240, 58 N. Y. Supp. 1090. While some of the language used in these opinions appears to support appellant's construction of the clause copied, the provisions of the policies under consideration in those cases and the facts thereof differ to some extent from the provision of the clause in the case at bar and from the facts of this case. On the other hand, appellee cites the following cases to sustain his construction of the clause, and that adopted by the lower court, to wit: *Hoffman v. Michigan Home & Hospital Asso.* 128 Mich. 323, 54 L.R.A. 746, 87 N. W. 265; *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 428, 70 N. W. 898; *Hohn v. Interstate Casualty Co.* 115 Mich. 79, 72 N. W. 1105, and several other cases from other states. The provisions of the policies upon which these opinions were based were not in the exact language as the one at bar, nor were the facts of those cases exactly the same as those in this case, but they tend to support appellee's position. We find no Kentucky case where a clause like the one in the policy under consideration was considered for guidance.

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It is a familiar rule that, in construing contracts like this, that construction, if at all allowable, should be given to it which is most favorable to the insured, rather than that which is favorable to the insurer. This is true because the insurer selects its own language and prepares its own contracts. In our opinion the purpose of the clause copied above was to allow a weekly indemnity to the assured of \$10 whenever he became so sick as to be continuously and wholly unable to perform any and every kind of duty pertaining to his occupation. Evidently, this was the intention of the parties to the contract, and, if he was actually and continuously so sick that he was not able to perform any kind of labor for a period of twenty weeks, he is entitled to the weekly indemnity. The other part of the clause, which says that he must be confined to the house and regularly treated by a licensed physician, was intended only to give the company evidence of his sickness and inability to labor, so that it would not be compelled to pay claims of mere malingerers, which was a reasonable requirement. Appellant makes no claim that appellee was not treated by a physician as required in the policy, but claims that he was not actually confined in the house all the time as it claims the policy required. Appellee's deceased was affected with tuberculosis, and it is of common knowledge that a person in that condition requires fresh air and as much as possible; and he testified that, while he was actually sick and would have felt much better in the house and in bed, his physician ordered him to get out in the open as much as possible, and he did so. He sat on the porch at times, as the weather was warm. In addition to this, the policy does not, in terms, require the assured to be necessarily and continuously confined in the house. It says "to the house," and we are of the opinion that the confinement of the insured in this case, as described in the evidence, was a full compliance with the terms of the contract. It would be unreasonable to hold that the language of the policy required him to be necessarily and continuously confined in the house at all times, when the testimony shows conclusively that he was actually sick as provided in the contract, and the taking of fresh air was directed by his physician for his benefit, and when his staying out of doors would have a tendency to shorten the duration of his sickness, and thus lessen the amount of appellant's liability.

For these reasons, the judgment is affirmed.

**KENTUCKY COURT OF APPEALS.****LOUISVILLE GAS COMPANY, Appt.,**

v.

**BERTIE GUELAT et al.**

(150 Ky. 583, 150 S. W. 656.)

**Gas — care in stopping pipes — sufficiency.**

1. A gas company which uses ordinary care to cap a pipe leading into a dwelling, upon the removal of a stove which has been supplied by it, and to maintain it in a safe condition, is not liable for the destruction of the house by fire due to the escape of gas therefrom.

**Trial — jury — negligence of gas company.**

2. The jury must determine whether or not a gas company which caps a pipe in a dwelling upon removal of the stove which had been supplied by it uses due care in permitting it to remain eight months without inspection.

**Evidence — negligence — sufficiency.**

3. A prima facie case of negligence on the part of a gas company is shown by evidence that gas leaked from a cap which it had placed on a pipe leading into a house, in such quantities that when a light was brought near it, the gas exploded and set fire to the house.

**Same — condition of one disconnecting gas pipes.**

4. In an action to hold a gas company liable for destruction of a house because of an escape of gas from a cap placed on a pipe by it, evidence is admissible as to whether or not one who approached the pipe to connect it with a stove was drunk, whether or not he had been drinking during the day, and his condition a short time after the accident.

(November 15, 1912.)

**A**PPEAL by defendant from a judgment of the Commons Pleas Branch, Second Division, of the Circuit Court for Jefferson County, in plaintiffs' favor in a suit to recover for the loss of the contents of a house by fire from an explosion of gas alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Humphrey & Humphrey and E. Leland Taylor for appellant.

Messrs. Edwards, Ogden, & Peak, for appellees:

If the company negligently failed to pro-

**Note.** — As to liability of gas company for negligence in escape or explosion of gas, see notes to Ohio Gas Fuel Co. v. Andrews, 29 L.R.A. 337, and Consolidated Gas Co. v. Connor, 32 L.R.A.(N.S.) 809, and related annotation referred to in the latter note.  
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tect or cover the place where the gas was intended to come into the house, and by reason thereof gas did come into the house and as a consequence the house was burned, it was the duty of the jury to find in favor of the plaintiff.

Triple-State Natural Gas & Oil Co. v. Wellman, 114 Ky. 79, 70 S. W. 49, 1 Ann. Cas. 64.

Hobson, Ch. J., delivered the opinion of the court:

In August, 1910, appellees bought a house and lot on Stratton avenue, in the city of Louisville, from a Mrs. Bevars. She moved out and they moved in. She had been using a gas stove which she took away with her. The stove was disconnected from the pipe. The meter was taken out, and a cap was placed on the pipe. Appellees had never used gas, and did not subscribe for the gas service. They lived in the house until the following April, when they bought a second-hand gas stove, and employed a man named Johnson to put it in. Johnson asked for a candle, saying that it was dark in the corner where the pipe was. He lit the candle, and stooped down near the pipe. The gas exploded, and set fire to the house, burning it up, with its contents. This suit was brought by appellees against the gas company to recover for the loss of the contents of the house on the ground that the fire was caused by its negligence. On several occasions during the winter the odor of gas in the house was detected, but they supposed it was from the sewer, and there was not enough of it to cause any great inconvenience. The pipe was sticking up through the kitchen floor 8 or 10 inches, and Johnson says that when he touched the plug it popped out, and immediately the gas took fire, but that he did not unscrew the plug. The plug or cap was a piece of metal with screw threads on it, and was or should have been screwed on the pipe which had similar threads on it. According to the proof for the gas company, the threads on the pipe after the fire were in good order. According to this evidence, also, Johnson admitted on the day of the fire that he had unscrewed the plug, and that the fire resulted from his opening the pipe. There was also some proof tending to show that he was drunk at the time. On this proof the circuit court gave the jury the following instruction: "(1) It was the duty of the defendant, Louisville Gas Company, to have and maintain its gas pipe in such condition as to prevent the escape of gas into the plaintiff's house, and if you believe from the evidence in this case that the gas company negligently failed to ac-

cover or protect the place where the gas was intended to come into the house, as to prevent it from escaping in the house, and by reason of such negligence on the part of the gas company, if any, its agents or employees, the gas was permitted to get into the house, and thereby caused the ignition of the gas and the burning of the house, then the law of the case is for the plaintiffs, and you should so find." The jury found for the plaintiffs in the sum of \$547, and the gas company appeals from the judgment entered on the verdict.

By the instruction of the court, the jury were, in substance, told that it was the duty of the gas company to have and maintain its gas pipe in such condition as to prevent the escape of gas into the plaintiffs' house, and that a failure on its part to do this was negligence. The instruction goes too far. In *Triple-State Natural Gas & Oil Co. v. Wellman*, 114 Ky. 79, 70 S. W. 49, 1 Ann. Cas. 64, we said: "The authorities lay down the rule, as gas is a useful article, almost indispensable in modern life under many circumstances, the manufacture and sale of it is not an illegal act; and that the company, in supplying this necessity to its customers, is bound only to exercise such care and skill in its management as the dangerous character of the substance and the attending circumstances demand of a person of ordinary prudence." The company is not an insurer of its pipes and it is not liable if it fails to keep its gas pipes in such condition as to prevent the escape of gas, where it has used ordinary care to this end. To illustrate in this case, it may be true that the gas company properly put the plug in the pipe, and that the pipe was in a safe condition as it left it, and it may be true that after this in some manner the plug was disturbed or the pipe was injured without its knowledge, and when it had no reason to anticipate that there was any danger. The court should have told the jury, in effect, that it was the duty of the gas company to use ordinary care to have and maintain its gas pipe in such condition as to prevent the escape of gas into the plaintiff's house; and if it failed to use such care, and by reason of such failure the loss occurred, they should find for the plaintiffs. By another instruction the care required of the gas company should be defined as in the *Wellman* Case.

In *State use of Brady v. Consolidated Gas. Co.* 85 Md. 637, 37 Atl. 263, the court said: "It was not negligence on the part of the company to leave its pipes on the premises, nor does the fact that it made no examination of the pipes raise any presumption of negligence in the absence of

any notice of the existence of any cause for an examination. Had there been such notice, its duty would have been to have discovered the cause of the leak, and to have used the proper means to remedy it. It was not required to keep up a constant inspection all along its lines without reference to the existence or nonexistence of a probable cause for the occurrence of leaks or escape of gas." To same effect, see *Mowers v. Municipal Gas Co.* 142 App. Div. 169, 126 N. Y. Supp. 1033; *Torrans v. Texarkana Gas & Electric Co.* 88 Ark. 510, 115 S. W. 389.

But in those cases the property owner was a customer of the gas company, and was using the pipes. Only a short time had elapsed. Here the gas company alone was using the pipe, and it was practically a part of its system of mains and pipes. The authorities are uniform in holding that it is incumbent on it to use ordinary care in inspecting its mains, and that the failure to inspect at reasonable intervals is evidence of negligence. Here there had been no inspection from August to April, and it was a question for the jury whether ordinary care had been used. See 14 Am. & Eng. Enc. Law, 937; 2 Lawson, Rights, Remedies & Practice, § 577; 20 Cyc. 1172-1174, and cases cited.

There is nothing in the case to show that the gas company, if the plug was properly put in, should have anticipated trouble from this pipe, or that any notice of the escape of gas into the house or of any trouble there was given it. No facts are shown from which it may be inferred that it was negligent in not anticipating trouble from the gas there, unless it may be inferred from the lapse of time that it should have inspected the pipe. It was necessary that a meter should be put on before the stove was connected, and no application had been made to it for a meter. Johnson apparently did not know that the meter had been taken out. Under the evidence, the court should have instructed the jury that, if the gas company used ordinary care to plug up the pipe in a safe condition to prevent the escape of gas, it was not responsible to appellees, unless, in the exercise of ordinary care, it should have inspected the pipe in the meantime and remedied the trouble, if any.

The court did not err in refusing to instruct the jury peremptorily to find for the defendant; for the escape of gas under the circumstances detailed by the proof for the appellees made out a prima facie case of negligence on the part of the company. *Smith v. Boston Gas Light Co.* 129 Mass. 318,



The court erred in excluding from the jury the evidence offered by the defendant to the effect that Johnson was drunk two or three hours after the explosion occurred; for this was a circumstance from which it might be inferred that he was drunk when he brought about the explosion. The court also erred in refusing to require Johnson to answer the questions asked him as to the drinking he had done that day. Whether he was drunk or sober at the time was an important question in the case, and his answers to these questions might have thrown no little light on the matter.

Judgment reversed, and cause remanded for a new trial.

# MAINE SUPREME JUDICIAL COURT.

JONAS EDWARDS

v.

AMERICAN EXPRESS COMPANY.

(— Me. —, 84 Atl. 987.)

**Carrier — memorandum on bill of lading — effect as to routing.**

A pencil memorandum on a bill of lading of horses, that they are to be unloaded for feeding at a certain place short of destination, does not require them to be routed through that place if another route is as safe and expeditious, so as to render the carrier liable in damages because the consignee wished to accept delivery of a part of the consignment at the place mentioned, and is put to expense to have the animals returned there.

(November 11, 1912.)

**R**EPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the Law Court of an action brought to recover damages for an alleged breach of contract for the transportation of horses. Judgment for plaintiff for overcharge.

The facts are stated in the opinion.

Messrs. Oakes, Pulsifer, & Ludden, for plaintiff:

A carrier who deviates from his agreement or instructions by despatching goods from the terminus of its route by a different conveyance or carrier, and thereby subjects them to increased freight, is liable for the difference.

Sutherland, Damages, § 902; Proctor v. Eastern R. Co. 105 Mass. 512; Pond-Decker

**Note.** — For duty of carrier as to route, see note to H. S. Emerson Co. v. Reunis, 37 L.R.A.(N.S.) 222. As to deviation from route as affecting carrier's right to avail itself of provisions of special contract of affreightment, see note to McKahan v. American Exp. Co. 35 L.R.A.(N.S.) 1046. 42 L.R.A.(N.S.)

Lumber Co. v. Spencer, 30 C. C. A. 430, 58 U. S. App. 173, 86 Fed. 846; Switzer Lumber Co. v. Texas & N. O. R. Co. 21 Inters. Com. Rep. 290.

When a carrier accepts goods to be carried with a direction on the part of the owner to carry them in a particular way, or by a particular route, he is bound to obey it; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exception in the contract.

3 Sutherland, Damages, § 931, p. 2746; Maghee v. Camden & A. R. Transp. Co. 45 N. Y. 514, 6 Am. Rep. 124; Hastings v. Pepper, 11 Pick. 41; Johnson v. New York C. R. Co. 33 N. Y. 610, 88 Am. Dec. 416.

When the carrier has an option, he must exercise it for the benefit of the consignee.

Stewart v. Comer, 100 Ga. 754, 62 Am. St. Rep. 353, 28 S. E. 461; Blitz v. Union S. B. Co. 51 Mich. 558, 17 N. W. 55.

Messrs. White & Carter, for defendant: A marginal notation or memorandum of a request of the consignee, made upon the bill of lading, does not vary the contract of carriage, or affect the materiality of the contract.

2 Cyc. 210; Bachellor v. Priest, 12 Pick. 399.

In the absence of any routing upon the bill of lading, if there are two or more routes, the carrier has the option of any route, so long as it is a usual and customary route, and is not excessive in its charges, and is reasonably expeditious.

McElveen v. Southern R. Co. 109 Ga. 249, 77 Am. St. Rep. 375, 34 S. E. 281; 4 Elliott, Railroads, 2237; Patten v. Union P. R. Co. 29 Fed. 591.

Whitehouse, Ch. J., delivered the opinion of the court:

This is an action to recover damages for an alleged breach of the defendant's contract with the plaintiff, who resided at Auburn, Maine, to transport twenty-eight horses from East St. Louis, Illinois, to Detroit, Maine.

The contract was evidenced by a bill of lading of the standard form employed in shipping live stock. The following memorandum was written in pencil on the margin, namely: "Consignee's request is that horses be fed and watered and unloaded at Auburn, Maine, besides Buffalo, New York." The stipulation in the bill of lading was for the transportation of twenty-eight horses, Big Four car 287, consigned to Jonas Edwards, at Detroit, for the sum of \$355. There was no express requirement that this car should go by the way of Auburn, Maine,

and there was no provision in the contract requiring the shipment to be made by any particular route. The plaintiff complains in his declaration that the horses were transported by a route which did not pass through Auburn, and that they were not unloaded, fed, and watered at Auburn in accordance with the consignee's request, and he avers that, in consequence of the defendant's failure to transport the horses by way of Auburn, he was deprived of his lawful right to accept delivery of them at Auburn, and to excuse the defendant from the further performance of the contract. It appears that in fact the plaintiff desired and intended to have sixteen of the horses left at Auburn, and twelve only actually delivered at Detroit, and he claims to recover as damages \$26 for the express paid for reshipping sixteen horses from Detroit back to Auburn, and \$35.92 for plaintiff's loss of time and expenses of men, besides an overcharge of \$20 inadvertently made.

The case comes to the law court on report. It is admitted in the agreed statement that the shipment of horses in question left East St. Louis May 9, 1911, at 8:18 P. M. on Big Four train numbered 24, which was a passenger train. On their arrival at Buffalo the horses were unloaded, fed, and watered, and given five hours' rest, according to the request in the memorandum on the bill of lading. They left Buffalo at 5:40 A. M. of May 11th, arrived in Boston at 7:50 P. M. of the same day, were shipped from Boston May 11th at 10 P. M. on a passenger train running by way of Portland and Augusta to Waterville, arriving at Waterville at 4 A. M. on May 12th, and left Waterville by the first train at 7:15 A. M. of May 12th, arriving at their destination at Detroit, Maine, the same morning.

The car containing the horses traveled by passenger trains the entire distance from Buffalo, New York, to Detroit, Maine. There was no train leaving Boston on the night of May 11th, after the arrival of the horses there at 7:50 P. M., which ran by the way of Auburn. At Portland the car containing the horses might have been detached from the train on which they left Boston, held at Portland, and forwarded to Auburn on the train leaving Portland at 7 o'clock the following morning, and reaching Auburn at 8:15 A. M., which was the same time the horses reached their destination at Detroit, Maine. May 12, 1911 the plaintiff paid for the services rendered under the contract at Detroit, Maine, \$398.25, of which the sum of \$23.25 was the advance charge for unloading, feeding, and watering the horses at Buffalo.

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It is a well-settled and familiar rule in the law of carriers that, where a bill of lading contains no stipulation prescribing the particular route by which the shipment of goods shall be made, the carrier has the option to select any one of the ordinary routes of travel which is reasonably safe, as well as expeditious, and not excessive in its charges. *McElveen v. Southern R. Co.* 109 Ga. 249, 77 Am. St. Rep. 375, 34 S. E. 281; *Patten v. Union P. R. Co.* (C. C.) 29 Fed. 591; 4 *Elliott, Railroads*, § 1440, and notes.

But it is contended in behalf of the plaintiff in the case at bar, that the consignee's request that the horses be unloaded, watered, and fed at Auburn became a part of the contract, and imposed upon the defendant the obligation to make the shipment of the horses by way of Auburn. It has been seen, however, that all of the twenty-eight horses were consigned to Jonas Edwards at Detroit, Maine, and the defendant had no knowledge of the plaintiff's secret purpose to have sixteen of them unloaded and retained at Auburn, until the evening of May 11th, when there was a discussion between the plaintiff's agent and the defendant's express agent at Lewiston respecting the rule authorizing the defendant to make a charge of \$10 a head for every horse unloaded and kept at Auburn under the conditions then existing, and even then it does not appear that the express agent was requested by the plaintiff or his representative to instruct the conductor of the train, then near Boston, to have the car containing the horses sent through Auburn.

It has been seen that the horses coming by the route through Augusta arrived at their destination at Detroit at the same hour at which they would have arrived at Auburn, if the car had been detached from the train at Portland, and sent through Auburn by the 7 o'clock train on the morning of the 12th, although Detroit is 70 miles further east than Auburn. In view of this fact, and of the fact that the through rate by express from East St. Louis to Detroit is the same as that to Auburn, it is not denied by the plaintiff that the route through Augusta was an expeditious one, and one which the defendant was justified in selecting, unless bound to go through Auburn by force of the plaintiff's request to have the horses watered and fed there. In the absence of information that any of the horses were to be left at Auburn, the defendant was warranted in assuming that the only purpose of his request for watering and feeding was to insure suitable care for the horses and to keep them in proper condition for use or sale. It was known that, if the horses were shipped by the Augusta route,

proper care would not require them to be fed and watered until they reached their destination at Detroit, and the needless expense of unloading, watering, and feeding at Auburn would thus be avoided.

But the plaintiff further contends that, in view of the confident claim of the defendant's local agent that the plaintiff would be chargeable with \$10 for every horse unloaded and retained at Auburn, he decided, on the evening of May 11th, to accept delivery of all the horses at Auburn and relieve the defendant of the further performance of its contract. The express agent denies that any such decision was made known to him on the evening of May 11th, and states that the first knowledge he had of it was on the morning of May 12th, after the horses had arrived at Detroit. There is a sharp conflict of testimony upon this question, and it is sufficient to say that the plaintiff's contention does not seem to the court to be established by a preponderance of the evidence. It is fairly to be inferred from all the evidence, that the real object of the plaintiff in having all of the horses consigned to him at Detroit, and requesting that they be watered and fed at Auburn, was to hold sixteen of them at Auburn, and save the local express rate on the other twelve horses from Auburn to Detroit. But this plan was defeated by the regulation requiring an unloading charge of \$10 a head.

The conclusion is that there was no breach of contract on the part of the defendant company. But, on account of the inadvertent overcharge admitted by the defendant, the certificate must be:

Judgment for the plaintiff for \$20, with interest from May 12, 1911.

#### NORTH CAROLINA SUPREME COURT.

#### ORINOCO SUPPLY COMPANY

v.

ILLINOIS SURETY COMPANY, Impleaded, etc., Appt.

(— N. C. —, 76 S. E. 273.)

#### Bond — building contractor — suit by materialman.

1. Laborers and materialmen may sue on the bond of a building contractor conditioned that the contractor shall pay for all

**Note.** — As to right of subcontractor, materialman, or laborer to maintain action on contractor's bond to owner, see note to Knight & J. Co. v. Castle, 27 L.R.A.(N.S.) 573, and see notes there referred to for annotation of related questions.  
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labor and material supplied for the building, and save the owner harmless from all claims arising out of contracts with materialmen and laborers.

#### Action — on contractor's bond — pre-maturity.

2. A suit by materialmen on the bond of a building contractor need not be postponed until the owner of the building has suffered pecuniary injury by reason of the contractor's default, where it is conditioned that the contractor shall pay for all materials supplied for the building.

(November 20, 1912.)

**A**PPEAL by defendant Illinois Surety Company from a judgment of the Superior Court for Forsyth County overruling a demurrer to the complaint in an action on a building contractor's bond. **Affirmed.**

The facts are stated in the opinion.

Messrs. Wilson & Ferguson, for appellant:

A bond for the performance of this contract is simply an indemnity against loss and damage; and therefore an action on the bond in favor of the owner will not lie until he has sustained a loss or suffered damage.

Clark v. Bonsal, 157 N. C. 270, 72 S. E. 954; Burroughs v. McNeill, 22 N. C. (2 Dev. & B. Eq.) 297.

Plaintiff was not a party or beneficiary, and could not maintain an action on the bond.

Peacock v. Williams, 98 N. C. 324, 4 S. E. 550.

Messrs. Manly, Hendren, & Womble, for appellee:

Plaintiff has a direct cause of action against the surety on the contractor's bond, entirely independent and outside of the lien laws, the amount of liability being the amount of the debt.

Smith v. Bowman, 32 Utah, 33, 9 L.R.A.(N.S.) 891, 88 Pac. 687; George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12; United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; Bank of Tarboro v. Fidelity & D. Co. 128 N. C. 366, 83 Am. St. Rep. 682, 38 S. E. 908; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; Knight & J. Co. v. Castle, 172 Ind. 97, 27 L.R.A.(N.S.) 573, 87 N. E. 976; St. Louis use of Glencoe Lime & Cement Co. v. Von Phul, 133 Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 843; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Gwinn v. Wright, 42 Ind. App. 597, 86 N. E. 453; Shoaf v. Palatine Ins. Co.

127 N. C. 308, 80 Am. St. Rep. 804, 37 S. E. 451; Voorhees v. Porter, 134 N. C. 604, 65 L.R.A. 736, 47 S. E. 31; Gastonia v. McEntee-Peterson Engineering Co. 131 N. C. 369, 42 S. E. 858; Korsmeyer Plumbing & Heating Co. v. McClay, 43 Neb. 649, 62 N. W. 50.

Hoke, J., delivered the opinion of the court:

In respect to the liability of the Illinois Surety Company, the complaint, after stating the contract on the part of J. T. B. Shaw to provide all the material and perform all the work for the erection and completion of rectory, continues:

"(3) That, amongst other provisions, contained in said contract, the said Shaw contracted and agreed to pay for all such labor and material, and to save the said J. C. Buxton and others, committee as aforesaid, harmless from any and all claims and liens which might arise out of contracts made by said Shaw with material furnishers and laborers; and expressly provided: 'Should there prove to be any such claims [for material or labor] after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises obligated in consequence of the contractor's fault.'

"(4) That on the 25th day of January, 1911, in pursuance of the contract as aforesaid, the said Illinois Surety Company executed as surety, together with the said Shaw as principal, a bond in the sum of \$2,500 in favor of the said vestry of St. Paul's Church, of Winston-Salem, North Carolina, as aforesaid, conditioned that the said Shaw should and would 'faithfully perform and carry out said contract according to the true intent and meaning thereof, and according to plans and specifications prepared by the said W. L. Brewer, architect, as aforesaid, and shall faithfully build and construct said rectory according to said plans and specifications, and according to the terms of said contract.'

"(5) That the plaintiff, at the request of the said J. T. B. Shaw and Shaw Bros. Lumber Company, furnished certain material, which was used by the said J. T. B. Shaw in carrying out his contracts, as aforesaid, for the construction and completion of the rectory, as aforesaid, and that there is now due to the said plaintiff and unpaid, on account of the furnishing of the material, as aforesaid, the sum of three hundred forty-six and 56/100 dollars (\$346.56), with interest thereon from July 1, 1911."

And by an amendment makes further 42 L.R.A. (N.S.),

averment as follows: "That the plaintiff, prior to the bringing of this action, had filed a lien in the office of the clerk of the superior court of Forsyth county against J. C. Buxton and others, forming a committee for the vestry of St. Paul's Church, and had instituted a suit which is now pending, and in which suit the Illinois Surety Company is a party defendant, for the purpose of foreclosing said lien. (2) That, prior to the institution of the action against this defendant, the plaintiff has instituted a suit against the contractor, J. T. B. Shaw, and since the filing of the complaint therein, has obtained judgment against said Shaw, issued execution, which has been returned *nulla bona*."

There have been several later decisions of the court applying the principle that, under certain circumstances, the beneficiaries of a contract could recover thereon though not named as parties,—a principle that usually prevails when it appears by express stipulation, or by reasonable intendment, that the rights and interests of such beneficiaries were contemplated and being provided for, as in *Gastonia v. McEntee Peterson Engineering Co.* 131 N. C. 363, 42 S. E. 857; *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720. In the case before us, it appears that the contractor had agreed to pay "for all labor and material supplied for the erection of the building, and to save the trustees of the church harmless from any and all claims and liens which might arise out of contracts made by him with material furnishers and laborers," etc., and the bond sued on, signed by the surety company, contains express stipulation that said contractor shall "faithfully perform and carry out said contract according to the true intent and meaning thereof." These provisions, in our opinion, clearly contemplate that the contractor shall pay the materialmen and laborers, and constitute such claimants the beneficiaries of the contract and bond, within the principle of the authorities cited. The cases of *Clark v. Bonsal*, 157 N. C. 270, 72 S. E. 954, and *Peacock v. Williams*, 98 N. C. 324, 4 S. E. 550, and others of like purport, were on contracts which were in strictness contracts of indemnity, providing and intending to provide protection for the contracting party alone, and giving no indication that the interests of third persons were contemplated, or that they were intended to be in any way directly benefited.

On the position that a cause of action does not arise on this instrument, unless and until it is shown that the obligee principal—that is the church—had suffered pe-

cuniary injury by reason of the contractor's default, it was held in *Hilliard v. Newberry*, 153 N. C. 104-106, 68 S. E. 1056, that this restriction on liability does not obtain where, in addition to saving the principal harmless, there is also an agreement to do some definite thing, which has not been complied with, in this instance to pay for the labor and material,—citing *Burroughs v. McNeill*, 22 N. C. (2 Dev. & B. Eq.) 297; 16 Am. & Eng. Enc. Law, 2d ed. 179; *Pingrey, Suretyship & Guaranty*, § 182. Under these authorities, therefore, and on the facts as they now appear, we are of opinion that a good cause of action has been stated against the appellant, and that the judgment overruling the demurrer must be affirmed.

**OKLAHOMA SUPREME COURT.**  
(Division No. 2.)

CHICAGO, ROCK ISLAND, & PACIFIC  
RAILWAY COMPANY, Plff. in Err.,

v.

ROGER MCKONE.

(— Okla. —, 127 Pac. 488.)

**Water — extraordinary flood — definition.**

1. An extraordinary flood is one of those unexpected visitations whose coming is not foreseen by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated and prevented by the exercise of ordinary foresight.

Same — ordinary flood.

2. An ordinary flood is one, the repetition of which, though at uncertain intervals,

might, by the exercise of ordinary diligence in investigating the character and habits of the stream, have been anticipated.

Same — damming back — loss — liability.

3. A defendant is not liable for damage resulting solely from an act of God; but if the defendant's negligence is a present contributing proximate cause, which, commingled with the act of God, produces the injury, then defendant is liable notwithstanding the act of God.

Trial — jury — flood.

4. In a suit for damages from a flood, where the defense is that the flood was so unusual and unprecedented as to amount, in law, to an act of God, thus relieving the defendant of all liability, the question should be submitted to the jury under proper instructions from the court, where the evidence is such that in weighing it, the minds of reasonable men might fairly differ on the question as to whether the flood was so unusual and unprecedented that its extent and resulting effects could not have been reasonably anticipated and provided against by an ordinarily careful person in defendant's situation.

Same — assisting construction — estoppel.

5. In a suit for flood damages resulting from a negligent construction or maintenance of a bridge and embankment across a stream and the adjacent lowlands, the fact that plaintiff, as a subcontractor, put in place part of the dirt embankment, does not operate as an estoppel against him in a suit based upon negligent construction and maintenance, where it is not shown that he possessed any knowledge, experience, or skill in engineering, or as to the suitability or sufficiency of such construction, but merely worked under the direction and specifications of defendant's engineers.

Headnotes by BREWER, C.

(October 23, 1912.)

*Note. — Assisting physically in creation of condition as affecting one's right to recover for damages to property caused thereby.*

An extensive search under the subject of waters and many other subjects in connection with which it seemed possible that the question indicated might have arisen has failed to reveal any other case like *CHICAGO, R. I. & P. R. Co. v. McKONE*, where the complaining party was but "a blind uncomprehending instrument," executing mechanically another's will. The distinction is obvious between this question and the question of estoppel arising in the following cases, which are merely illustrative, and do not purport to be exhaustive on the points with which they deal:

In *Shahan v. Alabama G. S. R. Co.* 115 Ala. 181, 67 Am. St. Rep. 20, 22 So. 449, an action for damages because of an overflow, it was held that proof that a spur track had been built at the request of the 42 L.R.A. (N.S.)

complainant was admissible, if it be shown that but for this track, constructed for the convenience and at the behest of the complainant, there would have been no damage. However, in this case, while the complainant, no doubt, did not anticipate the result of the building of the track, he was not engaged in the actual construction thereof.

But in *Louisville & N. R. Co. v. Daugherty*, 18 Ky. L. Rep. 273, 36 S. W. 5, where the claimants of a right to damages had actively assisted the railroad company in the purchase of a certain tract of land procured for the express purpose of building a dam, the result of which was to cause the formation of an offensive pond, which must have been anticipated by the claimants, it was held that the railroad company was at least entitled to some notice from the complainants of their objection to the nuisance before the institution of suits for damages. In this case the court held that the complainants must be presumed to have

**E**RROR to the District Court for Kingfisher County to review a judgment in plaintiff's favor in an action brought to recover damages for injury to his land by flood alleged to have been caused by the negligent construction of defendant's road-bed and bridge. Affirmed.

The facts are stated in the opinion.

Messrs. C. O. Blake, H. B. Low, and F. L. Boynton, for plaintiff in error:

'The defendant is required to take precautions only against ordinary storms which occur in the vicinity; and if the damage would have occurred by the act of God notwithstanding the obstruction, even if there were negligence on the part of the defendant, damages cannot be recovered.

Kansas City, P. & G. R. Co. v. Williams, 3 Ind. Terr. 352, 58 S. W. 570; Armstrong, B. & Co. v. Illinois, C. R. Co. 26 Okla. 352, 29 L.R.A.(N.S.) 671, 109 Pac. 216; Jefferson v. Hicks, 23 Okla. 684, 24 L.R.A.(N.S.) 214, 102 Pac. 79.

Plaintiff could not recover, if he entered into an agreement with defendant for the building of the grade and embankments and fills so that the flow of waters was reduced to the extent of diverting them, thereby causing his damage.

1 Cooley, Torts, 3d ed. pp. 226-264; South Side Pass. R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640; 29 Cyc. 506, 507; 33 Cyc. 366; Garst v. Love, 6 Okla. 46, 55 Pac. 19.

If the defendant company was guilty of a nuisance in the construction of the em-

bankment or the borrow pit, plaintiff, having accepted cheerfully the benefits resulting therefrom for a period of eight years, is estopped from claiming damages that resulted solely from an extraordinary and unprecedented storm and rainfall of such an extent as to come clearly within the rules defining *a vis major*.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421; Gulf, C. & S. F. R. Co. v. Moseley, 20 L.R.A.(N.S.) 885, 88 C. C. A. 236, 161 Fed. 72; 16 Am. & Eng. Enc. Law, 996, 997, and note; 29 Cyc. 1206, 1207; Stanard v. Sampson, 23 Okla. 13, 99 Pac. 796; Citizens' Nat. Bank v. Mitchell, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371; Enid Right of Way & Townsite Co. v. Lile, 15 Okla. 317, 82 Pac. 810; Hare v. Phaup, 23 Okla. 575, 138 Am. St. Rep. 852, 101 Pac. 1050.

Messrs. D. K. Cunningham and L. R. Weiss for defendant in error.

**Brewer, C.**, filed the following opinion:

This is a suit for flood damage. In 1900 a line of railroad was built from Kingfisher to Cashion, and has since been maintained and operated by the Chicago, Rock Island, & Pacific Railway Company as a branch line connecting with its main line running through Kingfisher. This branch line runs from Kingfisher easterly, and near the limits of the town, crosses "Uncle John's creek," and runs along the south end of plaintiff's 80-acre farm; the main body of the land lying east of the creek, but extending across it to the west side at the point the railroad crosses. The plaintiff deeded a

been aware of the consequences of the building of the dam. Thus, in this particular, the facts of this case are contrary to those in the principal case, where it was held that the complainant could not be expected to conceive of the results of his work.

In Burlington v. Gilbert, 31 Iowa, 356, it was held that property owners who urged the grading of a street by a petition in which was set out in exact terms the desired grade were precluded from obtaining damages because the establishment of the grade for which they had petitioned, and which was provided for in the ordinance, caused a deeper cut than they had anticipated, even though their mistake was induced by error in the survey and plat of the street in the city engineer's office.

In Doerbaum v. Fischer, 1 Mo. App. 149, the complainant was really the principal in causing the damage, although he did not anticipate the result of his act. He was held not entitled to recover for damages sustained as a result of the percolation of water from a point on the adjoining higher land, which found its way into his cellar, where it appeared that he had so erected his house and filled his lot as to dam up

the water upon the adjoining land. A similar conclusion was had in Laumier v. Francis, 23 Mo. 181 (*dictum*).

In People ex rel. Roediger v. Wayne County, 40 Mich. 745, the court held a writ of certiorari to be improvidently granted for the purpose of reviewing certain proceedings of the drainage commissioners in relocating a ditch by reason of which these complainants claimed damages, since it appeared in the record that one of the petitioners had been well acquainted with most, if not all, of the proceedings, and had taken a contract to dig a portion of the ditch in which operation he had already engaged.

But in Fogarty v. Junction City Pressed Brick Co. 50 Kan. 478, 18 L.R.A. 756, 31 Pac. 1052, one who leased land for the erection of a brick plant was held entitled to damages for injury to his growing crops by the generation of noxious gases caused by the method used by the company in burning bricks, and not estopped by reason of the lease, where it appeared that he was ignorant of the process to be employed in burning the brick, his lease embracing the right to burn brick, but to do so in a reasonable manner.

R. S. N.

right of way across his land when the road was built, and as a subcontractor put in part of the "dump" or fill on the west side of the creek. The roadbed out of town is a slight fill to the first bank or bench of the creek valley. From this first bank the land benches down to the water bed of the creek, a distance of about 300 feet, making a fill from the first bank down to the water bed bank of an average of 13 feet. This creek is bridged, the bridge being about 26 feet high in the center of the stream. The fill of earth extends down into the creek bed at the bottom, and slopes upward, leaving an opening of 210 feet at the rails and about 140 feet at the creek bed. On the east side the creek bank is lower than the track level on the west side, so that, at the east end of the bridge, there is a slight fill of about 14 inches. The land is higher right at the creek on the east side than between that point and the east bench of the creek valley, which marks the beginning of the uplands, so that the railroad, commencing with a slight fill at the east end of the bridge, gradually increases the fill as it proceeds east to an average of 4 or 5 feet, in places as much as 8 feet, until it strikes the upland. This fill extends along the south line of plaintiff's land, and prior to the flood had no opening or culvert between the east end of the bridge and the uplands, a distance of about a half mile. The creek flows north. The land between the immediate creek bank and the upland is lower than at the creek bank. After making this solid fill from the bridge east, a cut or borrow pit was made along the south side of the track from the bridge east, about 4 feet deep and 12 feet wide, so as to drain this lowland into the creek at the bridge. South of the bridge the creek runs northeasterly. At the bridge it runs nearly north, and then almost immediately bends slightly to the northwest. During the flood the creek's main channel was full of water, overflowing the banks of the bed of the stream at places. The water, when the banks had become full, struck the heavy fill of earth at the west end of the bridge, and the obstruction deflected the water into a current across the stream to the east bank, where it found an outlet in the borrow pit or drainage ditch extending east from the bridge across the lowlands to the hill. This water quickly filled the low valley depression south of the railroad dump, making of this lowland almost an inland sea. These waters so deflected, in connection, perhaps, with some overflow from further up the creek, accumulated into so large and heavy a volume that they finally overflowed the dump and washed it out for 1,000 feet. When it gave

way, this enormous body of impounded water, which is shown to have been nearly 18 inches higher south of the railroad than on the other side, together with telegraph poles, trees, brush, cross-ties, and other debris, swept across plaintiff's farm, washing the soil away as deep down as it had been plowed in places, destroying and carrying with it portions of 60 acres of ungathered cotton. The suit is based on the negligent construction and maintenance of the roadbed and bridge, especially in that the heavy fill on the west side obstructed the natural flow of flood waters, and caused such waters to debouch across to the east side, where the borrow pit led them into the lowlands south of the dump and of plaintiff's land, where, for want of a culvert or opening in the dump, they were impounded in such volume that, when they overflowed and washed out the dump, such a swift and heavy current was put in motion as to cause the damage complained of.

All the errors urged here are based on the assignment that the court should have granted a new trial, and the argument proceeds on the theory that the court should have directed a verdict for defendant. This contention is urged for the following reasons: (1) That the flood was an act of God. (2) That plaintiff, having conveyed the right of way across his land, and having constructed a portion of the dump as a subcontractor, was a joint tortfeasor in case the construction was negligent, and would therefore be estopped.

These questions were raised in a demurrer to plaintiff's evidence, and later by a request that the jury be instructed to find for defendant for the reasons thus stated.

1. We are asked to reverse this case because the court refused to instruct the jury that the flood responsible for the damage was an act of God, for which defendant could not be held in any way responsible. This we have no right to do under the evidence in the case, for two reasons at least. The evidence as to the extent of the rainfall and of the flood, as compared with other preceding rainfalls and floods, is not in entire harmony. While it may be true that the evidence all shows that the water in the creek was some higher than in any of the known former floods, yet it is shown that, while the main banks of the creek were overflowed in this flood at several places, it is also shown that they were overflowed in previous floods. More than one witness testified he had seen what he believed to have been heavier rainfalls in this vicinity. Whether the rainfall on this occasion, and the resulting flood, was so unusual and unprecedented as to amount to a *vis major*,

was, under the evidence, a proper question to be submitted to the judgment of the jury.

The lower court took this view of the evidence, and submitted it to the jury, defining when a flood would be an act of God as follows: "An extraordinary flood is one of those unexpected visitations whose coming is not foreseen by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated and prevented by the exercise of ordinary foresight." This is the definition approved in *Jefferson v. Hicks*, 23 Okla. 684, 24 L.R.A.(N.S.) 214, 102 Pac. 79.

And an ordinary flood thus: An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream, have been anticipated."

The jury were then told, if the flood in question was an extraordinary one, that the defendant could not be held liable. In so stating the matter, the court was rather more favorable to the defendant than it had the right to expect, in this, that, while the railroad would be exempt from liability, if the damage resulted solely from an act of God, yet, if its own negligence was a present concurring proximate cause, co-operating with the act of God in producing the injury, then the railroad would be liable notwithstanding the act of God. This is made clear by a careful reading of *Armstrong, B. & Co. v. Illinois C. R. Co.* 26 Okla. 352, 29 L.R.A.(N.S.) 671, 109 Pac. 216. And on the point the authorities are collected and discussed in *Missouri, K. & T. R. Co. v. Johnson*, — Okla. —, 126 Pac. 567. See also *Chicago, R. I. & P. R. Co. v. Logan*, 23 Okla. 707, 29 L.R.A.(N.S.) 663, 105 Pac. 343. There was evidence in this case tending to show that, although the flood should be held to be an act of God, yet that, but for the improper maintenance of its dump on the west side, and its borrow pit and dump on the east side of the bridge, without openings, in the light of its experience with another prior flood which washed out the west dump, the injury and damage might not have happened, even with the flood that occurred. This is the second reason why the court did not err in refusing to instruct a verdict for defendant. And although the court did not cover this phase of the case, had it done so, it would have been against the interest of defendant, and, of course, it does not complain that it was not done.

2. This brings us to a consideration of the contention that because plaintiff deeded the right of way across his land and then, as a subcontractor, put in a portion of the

dirt fill on the west side of the creek, that he is estopped from now complaining of the improper and negligent construction of the roadway, and from recovering for damages occasioned thereby. The matter of his deeding the right of way is not discussed in the brief to any extent, and no authorities cited to sustain the point. On the other point, that plaintiff made a portion of the fill, defendant states its position in the brief as follows: "It is an elementary principal laid down in the law of torts, that no person can recover from another for the consequence of their joint wrongful act. There are many illustrations of this, and many phases of the law arising out of different sets of facts. It is somewhat allied in its principles to the idea of contributory negligence, and contribution between joint tortfeasors." The defendant then uses several illustrations. For instance, that, where a person is injured while performing with another a wrongful act, he can have no action against such other person; or where a person is a member of a mob, or is committing a trespass, he can have no action if he is injured while so doing; or where two persons commit a joint wrong against a third, and recovery of damages is had against one, he cannot in payment have a contribution from his copartner in the wrongful act; or, where plaintiff's cause of action grows out of his own wrong, the door of the court is closed to him,—*ex dolo malo non oritur actio*. Authorities are cited along the line of the illustrations made. We do not care to review them. We have no controversy with the doctrine they announce. We do not take them to be in point here, as we shall presently show. It is not claimed, nor is it attempted to be shown, that this plaintiff has the slightest knowledge, experience, education, or skill with regard to engineering problems, or that he is other than an unskilled layman who can till the soil and haul and dump dirt in making a fill for a roadbed. That the proper and sufficient construction of roadbeds and bridges across streams and their adjacent bottom lands presents a problem demanding for its solution a high order of education, experience, and skill in technical engineering, needs no argument. It is a fact within the knowledge of all men. It is admitted here, when the defendant attempts to show a proper construction by the testimony of its highly trained and expert engineers. Indeed, this is probably the only way, when in doubt, the matter could be demonstrated without actual test. To illustrate,—to determine the necessary opening to leave under a bridge across a stream, one must be able to take levels, ascertain and compute



the drainage area to be accommodated. The volume of water a given rainfall, within a given period, on this drainage area, is likely to produce, and which will arrive at the same time for passage under the bridge. This involves the topography of the adjacent lands; if flat, they drain slowly; if they incline steeply and present precipitous slopes, more rapidly, and more water will seek an outlet at the same time. These matters can only be determined, approximately, by the highly trained engineer. A college professor, without such training, would be as helpless with such problem as a child. What did this plaintiff know about them, and whether the railroad was leaving an adequate waterway, sufficient to accommodate the flow of ordinary floods, or damming it up so as to overflow and injure his farm? There is no indication here that he knew anything about it. Was he then a joint tortfeasor with the railroad, when it is not shown that he had the slightest knowledge of what consequences would flow from carrying out the engineer's plans? It was the railroad's construction, it was its plan, its specifications, its mind through its engineer, determined the matter. The plaintiff hauling his scraper full of dirt and dumping it on the fill was, as far as the engineering problem was concerned, but a blind uncomprehending instrument, carrying out the will of the railroad, whose duty it was to know. He is not shown to have been in any wise responsible for the improper construction.

The case should therefore be affirmed.

**Per Curiam:**

Adopted in whole.

## PENNSYLVANIA SUPREME COURT.

AMOS TROUT et al.

v.

PHILADELPHIA ELECTRIC COMPANY,  
App't.

(236 Pa. 506, 84 Atl. 967.)

**Proximate cause — uninsulated condition of wires — death of boy.**

The uninsulated condition of wires strung near to, but out of reach from, a roof, is not the proximate cause of the death of a boy who, to recover his kite, which had become entangled in the wires, threw a string from the roof over a wire, drew it towards him and touched it, receiving a shock which killed him.

(May 22, 1912.)

42 L.R.A. (N.S.)

**APPEAL** by defendant from a judgment of the Court of Common Pleas No. 4 for Philadelphia County in plaintiff's favor in an action brought to recover damages for the death of their minor son alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. R. Stuart Smith, and Charles E. Morgan, for appellant:

The proximate cause of the accident was the independent intervening act of the boy himself in voluntarily getting the wire within his reach in a manner and under circumstances not reasonably to have been foreseen.

Oil City & Petroleum Bridge Co. v. Jackson, 114 Pa. 321, 6 Atl. 128; Guilmartin v. Philadelphia, 201 Pa. 518, 51 Atl. 312; Elliott v. Allegheny County Light Co. 204 Pa. 568, 54 Atl. 278; Marsh v. Giles, 211 Pa. 17, 60 Atl. 315; Everett v. Citizens' Gas & Electric Co. 228 Pa. 241, 77 Atl. 460; Carpenter v. Miller, 232 Pa. 362, 36 L.R.A. (N.S.) 932, 81 Atl. 439.

Messrs. William T. Connor and John R. K. Scott for appellees.

Moschzisker, J., delivered the opinion of the court:

Harvey Trout, a thirteen year old boy, was engaged in detaching a kite from an electric light wire on which it had been caught, when he received a shock which re-

**Note.**—Generally, as to the duty in stringing wires to guard against danger to children, see notes to Temple v. McComb City Electric Light & P. Co. 11 L.R.A. (N.S.) 449, and Wetherby v. Twin State Gas & Electric Co. 25 L.R.A. (N.S.) 1220. And for other questions in relation to electric wires, see notes referred to in index to notes under the title "Electricity," and cases cited under similar title in the digests to these reports.

Generally, as to whether the intervening act of a child will break a causal connection between defendant's negligence and the injury, see note to United States Natural Gas Co. v. Hicks, 23 L.R.A. (N.S.) 249. And see, in this connection, also notes to Akin v. Bradley Engineering & Machinery Co. 14 L.R.A. (N.S.) 586, and Finkbeiner v. Solomon, 24 L.R.A. (N.S.) 1257; and later cases, Olson v. Gill Home Invest. Co. 27 L.R.A. (N.S.) 884, and St. Louis & S. F. R. Co. v. Williams, 33 L.R.A. (N.S.) 94, on the general question of liability for injury to children from explosives left accessible to them.

A somewhat similar question is presented in the note to Bales v. McConnell, 40 L.R.A. (N.S.) 940, dealing with negligent condition of place or appliance as proximate cause of injury not primarily caused by that condition.

sulted in his death. The wire was stretched upon poles, and was swinging at a distance of about 4 feet 6 inches from the outside edge of the cornice of a house. The boy went up to the top of his father's house, through a trapdoor, and from there over the housetops to another roof some four doors distant, where he lay down on the tin cornice about 1 foot from the edge. He threw a corncob tied to the end of a string over the electric light wire and pulled it toward him. When the wire came within reach, he touched it with one hand and immediately received the electric shock. At that particular place the insulation was worn off the wire, leaving it exposed. The parents of the deceased boy sued the defendant company, alleging negligence in the maintenance of the wire, and recovered a verdict upon which judgment was entered. The defendant has appealed.

At the trial of the case, counsel for the defendant contended that the failure of the company to repair the defective insulation on the wire was not the proximate cause of the injury; that the boy's death resulted from his own independent intervening act in voluntarily getting the wire within his reach in a manner and under circumstances which could not reasonably have been foreseen. Upon this ground they asked for binding instructions, the refusal of which they now assign for error. The act of the boy in getting hold of the wire was wholly unrelated to any act of the defendant in connection therewith. Had the wire been so close to the house that the boy might naturally have come in contact with it while playing about the roof, it might be contended that its condition was the proximate cause of his death. But such was not the case. All of the defendant's wires were so far out from the house that they could not possibly have been reached by a full-grown man, much less a boy of thirteen. The boy could have run and played all over the roof without the possibility of his coming in contact with these wires. It was an original independent act of the deceased, which, could not reasonably have been anticipated, that brought about this most sad accident; and this act was not induced by or did not follow as a natural sequence to any negligence of the defendant in connection with its wires. Under such circumstances there could be no recovery, and the defendant was entitled to binding instructions as requested.

We have examined all the authorities cited by the appellees, and conclude that the present case is not ruled by any of them. *Mullen v. Wilkes-Barre Gas & Elec-* 42 L.R.A. (N.S.)

*tric Co.* 229 Pa. 54, 77 Atl. 1108, chiefly relied upon, was an instance where a boy, playing in a tree through which the defendant's wires ran, received a shock by coming in contact with a bare wire. The fact was notorious that children were accustomed to play about and climb this tree. The superior court held that the defendant's negligence in maintaining an uninsulated wire running through the branches of the tree was the proximate cause of the accident, because it was bound to know that children might accidentally come in contact with such wire; and we affirmed *per curiam*, saying that the case was "admittedly close." That case stands for and must be confined to its own facts.

The assignments of error are sustained, the judgment of the court below is reversed, and judgment is here entered for the defendant.

### INDIANA SUPREME COURT.

NIAGARA OIL COMPANY, Appt.,

v.

ELIJAH OGLE.

(— Ind. —, 98 N. E. 60.)

**Pleading — injunction — nuisance — contributory negligence.**

1. A complaint to enjoin the maintenance of a nuisance need not allege plaintiff's freedom from contributory negligence.

**Nuisance — oil and salt water — developing gas and oil wells.**

2. Pumping oil and salt water from oil and gas wells and permitting it to flow over the surface on to neighboring property to its injury is a nuisance rendering one liable to injunction and damages.

**Parties — injury to farm — possession of tenant.**

3. That a farm is in possession of a renter on shares does not prevent the owner, in the absence of any objection as to defect of parties plaintiff, from maintaining an action for damages to the property and crops by casting salt water and oil upon the property.

**Damages — permanent injury — abatement of nuisance.**

4. Damages for permanent injury may be recovered for destruction of the productive power of land by casting oil and salt water thereon, although the continuance thereof may be abated.

**Note. — Right to discharge water from mines or wells upon lower land.**

As to pollution of stream by mining operations, see notes to *Drake v. Lady Ensley Coal, Iron & R. Co.* 24 L.R.A. 64; *Straight v. Hover*, 22 L.R.A. (N.S.) 276; *Aminius Chemical Co. v. Landrum*, 33 L.R.A. (N.S.) 272.

**Appeal — excessive judgment — absence of motion to correct — effect.**

5. A decree enjoining the continuation of a nuisance cannot be questioned on appeal, notwithstanding a finding that the operations causing it would not be resumed, if no motion to modify it was made in the lower court.

**Nuisance — duty to minimize injury.**

6. No duty rests upon the owner of property which is being injured by a nuisance to take active measures to prevent further injury in order to minimize the damages for which the wrongdoer may be liable.

(April 3, 1912.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Henry County in plaintiff's favor in an action brought to

recover damages for an alleged nuisance and to enjoin its maintenance. Affirmed.

The facts are stated in the opinion.

Messrs. Abram Simmons and Frank C. Dailey, for appellant:

Appellant, in the production of oil, had the right to place salt water upon the ground and let it seek its own course. Its flowage by gravitation to the land of another could create no liability against appellant.

Weston Paper Co. v. Rope, 155 Ind. 399, 56 L.R.A. 899, 57 N. E. 719; Barnard v. Sherley, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453.

The complaint is insufficient because it

Cases of the discharge of water from one mine into another are excluded in the present note.

The principles governing cases of injury to riparian owners by the contamination of water in water courses are not applicable where subterranean water is brought to the surface, and not discharged into a water course, but allowed to flow by the law of gravity over the land of a lower proprietor. *Niagara Oil Co. v. Jackson*, — Ind. App. —, 91 N. E. 825. The reason is said to be that water courses are in the nature of natural sewers to carry off accumulated water and deleterious substances; and riparian owners locate on the banks with notice that their position is superior to those below and inferior to those above, and that as farms and cities gather along the banks impurities incident thereto will be cast into the stream and enjoyment of it thus modified.

It was accordingly held in the *Jackson Case*, where oil and salt water from oil wells were discharged upon the land of a lower proprietor, that damages could be recovered. In answer to the contention that the complaint was insufficient because the injuries were incidental to the exercise of a lawful right to produce oil, the court said that while lower land is servient to natural surface flowage, even though contaminated by such matter as comes from a reasonable use of higher land, yet it is not servient to unreasonable artificial flowage; and that if, as alleged, the injuries could have been prevented by the defendant at an inconsiderable cost he was liable therefor. The court also held, as in the principal case, that since the averments of negligence might be treated as surplusage, and a cause of action remain based upon nuisance, freedom from contributory negligence need not be alleged.

The question of negligence may, however, arise as an issue in the trial of the case. In *Ohio Oil Co. v. Westfall*, 43 Ind. App. 661, 88 N. E. 354, where oil and salt water from oil wells were allowed to flow upon plaintiff's land, and the defendant, while admitting the injuries, attempted to justify

them on the ground of consequences naturally resulting from reasonable use of the premises, it was held that the question of reasonable use and due care to avoid injury to land below was for the jury, and that the burden of proof was upon the defendant to establish his defense.

If an upper landowner, by pumping, increases the quantity of water which would naturally flow upon the land of a lower owner, changes the character from fresh to salt, and concentrates it at an artificial point, he is *prima facie* liable for the damages resulting from his acts; as an exception to the general rule of liability, he may prove that the water was discharged in the lawful and proper use of his own land; but the burden of proof is upon him to establish his defense. The "exception is founded on necessity, because otherwise he would himself be deprived of the beneficial use and enjoyment of his own land." *Pfeiffer v. Brown*, 165 Pa. 267, 44 Am. St. Rep. 660, 30 Atl. 844. In that case where salt water from an oil well was allowed to flow through a natural depression over the plaintiff's land, causing injuries, it was held that the use of expressions "at slight expense," "at small expense," in reference to the expenditure which it was the duty of the defendant to incur to prevent water from flowing upon plaintiff's land, was error. The court says: "If the expense of preventing the damage from his act is such as practically to counterbalance the expected profit or benefit, then it is clearly unreasonable, and beyond what he could justly be called upon to assume. If, on the other hand, however large in actual amount, it is small in proportion to the gain to himself, it is reasonable in regard to his neighbor's rights, and he should pay it to prevent the damage, or should make compensation for the injury done. Between these two extremes lies a debatable region where the cases must stand upon their own facts, under the only general rule that can be laid down in advance, that the expense required would so detract from the purpose and benefit of the contemplated act, as to be a substantial deprivation of the right

contains no averment that plaintiff was free from negligence contributing to the damage alleged to have been suffered by him.

*Wabash R. Co. v. Miller*, 18 Ind. App. 549, 43 N. E. 663; *Louisville, N. A. & C. R. Co. v. Lockridge*, 93 Ind. 191; *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40, 90 Ind. 62; *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760; *Tien v. Louisville, N. A. & C. R. Co.* 15 Ind. App. 304, 44 N. E. 45; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Toledo & W. R. Co. v. Thomas*, 18 Ind. 215.

The complaint is insufficient because it contains no averment showing what plaintiff did or failed to do relative to the water. The owner of land cannot recover damages for injury by water turned thereon, if, by exercising ordinary care, he could have protected his property therefrom.

*Louisville & N. R. Co. v. Moore*, 31 Ky. L. Rep. 141, 10 L.R.A.(N.S.) 579, 101 S. W. 934; *Wabash R. Co. v. Miller*, 18 Ind. App. 553, 48 N. E. 663; *Cromer v. Logansport*, 38 Ind. App. 661, 78 N. E. 1045.

Where a nuisance can be abated, no permanent injury can be recovered for.

*Cleveland, C. C. & St. L. R. Co. v. King*, 23 Ind. App. 574, 55 N. E. 875; *Muncie Pulp Co. v. Martin*, 164 Ind. 30, 72 N. E. 882.

to the use of one's own property. If damage could have been prevented short of this, it is *injuria* which will sustain an action."

Where surplus water from an artesian well which a city is digging for waterworks purposes flows along a natural water course through the land of a lower proprietor, causing him no damage, he is not entitled to have the digging of the well enjoined. *Mead v. Mellette*, 18 S. D. 623, 101 N. W. 355.

But although there is a natural drain through plaintiff's land, he can recover for injuries to his land from the discharge into the drain of waste oil and salt water from oil wells, where a statute provides that the servitude due by the estate below is to receive the water which runs naturally from the estate above, provided the industry of man has not been used to create the servitude; and that the proprietor above can do nothing whereby the natural servitude is rendered more burdensome. *McFarlain v. Jennings-Heywood Oil Syndicate*, 118 La. 538, 43 So. 155. It is said that, having extricated oil and water from the earth, the operators assumed the burden of confining or taking care of it in such manner as to prevent injury to an adjoining proprietor.

The fact that one has conveyed land with knowledge that it is to be used as a slate quarry will not estop him from claiming damages due to the discharge of water and rocks therefrom upon his own land. *Wilkins v. Monson Consol. Slate Co.* 96 Me. 42 L.R.A.(N.S.)

The law will not presume the continuance of a wrong.

*Cleveland, C. C. & St. L. R. Co. v. King*, supra.

A property owner is not entitled to recover for injuries to the enjoyment and occupation of premises while they are in possession of a tenant, by the maintenance of a nuisance not of a permanent character, on adjoining premises.

*Miller v. Edison Electric Illuminating Co.* 184 N. Y. 17, 3 L.R.A.(N.S.) 1060, 76 N. E. 734, 6 Ann. Cas. 146.

The damages caused by the alleged nuisance, if any, belong to the tenant, and not to the landlord.

*Bly v. Edison Electric Illuminating Co.* 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745; *Louisville & N. R. Co. v. Moore*, 31 Ky. L. Rep. 141, 10 L.R.A.(N.S.) 579, 101 S. W. 934.

Appellee was in duty bound to use ordinary care to protect his property from the injury of which he complains, and he is entitled to no damage which he might have avoided by the use of ordinary care.

*Louisville & N. R. Co. v. Moore*, supra; *Cromer v. Logansport*, 38 Ind. App. 661, 78 N. E. 1045.

Messrs. Orr & Orr, for appellee:

The acts of appellant in pumping salt water, oil, and noxious fluids from great

385, 52 Atl. 755, 22 Mor. Min. Rep. 185. The court says that the fact that plaintiff granted the quarry, to be used as such, cannot be regarded as conferring a right upon the defendant to make an illegal use of the quarry, to the grantor's detriment, nor as a waiver of damages resulting therefrom. The discharge upon the plaintiff's land is treated as unnecessary and preventable.

In *Parker v. Larsen*, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989, where water from an artesian well used by defendant for irrigation was allowed to stand in a ditch near the boundary of his land, and percolated upon land of the plaintiff, it was held that the defendant could be enjoined and compelled to pay damages. The court says the rule is general that where one brings a foreign substance on his land he must take care of it, and not permit it to injure his neighbor. The facts also showed that at small expense the defendant could prevent the injury by drainage of the water.

In *Robinson v. Black Diamond Coal Co.* 50 Cal. 460, 14 Mor. Min. Rep. 93, it was held that one who in mining coal caused water to overflow the land of a lower proprietor, when it would not naturally have flowed over such land, would be liable to injunction and damages, if the circumstances did not authorize or justify his acts, and that therefore a nonsuit was improper.

R. E. H.

depths on other premises near to and adjoining appellee's land, and in depositing them in large quantities on the surface, and in causing them to flow down on appellee's land to his injury and damage, were wrongful and tortious, for which he will be held liable in an action therefor.

*Pfeiffer v. Brown*, 165 Pa. 267, 44 Am. St. Rep. 660, 30 Atl. 844, 30 Am. & Eng. Enc. Law, 2d ed. 347; *Gould, Waters*, § 278; *Ohio Oil Co. v. Westfall*, 43 Ind. App. 663, 88 N. E. 354..

Appellee is not required to aver freedom from contributory negligence on his part.

*Williamson v. Yingling*, 80 Ind. 379; *Muncie Pulp Co. v. Martin*, 23 Ind. App. 560, 55 N. E. 796; *Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912; *Ohio Oil Co. v. Westfall*, 43 Ind. App. 661, 88 N. E. 354; *Paddock v. Somes*, 102 Mo. 226, 10 L.R.A. 256, 14 S. W. 746; *Wood, Nuisances*, 2d ed. 506; *Terre Haute & I. R. Co. v. McKinley*, 33 Ind. 274; *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L.R.A. 643, 34 Am. St. Rep. 710, 26 Atl. 644; *Satterfield v. Rowan*, 83 Ga. 187, 9 S. E. 677; *Bowman v. Humphrey*, 132 Iowa, 234, 6 L.R.A.(N.S.) 1111, 109 N. W. 714, 11 Ann. Cas. 131.

Every person who brings oil or stores it on land must confine it securely and not permit it to escape to the lands of another, whether by flowing over the surface or percolating through the soil, and if he does not, even though guilty of no negligence, he will be liable for damages suffered by the oil escaping.

*Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L.R.A. 642, 34 Am. St. Rep. 710, 26 Atl. 644; *Ohio Oil Co. v. Westfall*, 43 Ind. App. 661, 88 N. E. 354; *Thornton Oil & Gas*, § 584, p. 661; *Berger v. Minneapolis Gaslight Co.* 60 Minn. 296, 62 N. W. 336; *Kinnaird v. Standard Oil Co.* 89 Ky. 468, 7 L.R.A. 451, 25 Am. St. Rep. 545, 12 S. W. 938.

"Where a proper case is made, the nuisance may be enjoined or abated, and damages recovered therefor."

*Drake v. Schoenstedt*, 149 Ind. 90, 48 N. E. 629.

The claim that the defendant had an absolute right to flood plaintiff's land in the manner alleged, no matter how much injury was thereby inflicted, and that plaintiff was without redress, is effectually disposed of in the case.

*Weston Paper Co. v. Pope*, 155 Ind. 394, 56 L.R.A. 899, 57 N. E. 719.

Plaintiff was entitled to recover for injury to the clover and timothy meadow injured and destroyed in 1905.

*Evans v. Hardy*, 76 Ind. 527; *Mowrey v. 42 L.R.A.(N.S.)*

*Davis*, 12 Ind. App. 682, 40 N. E. 1108; *Murray v. Cazier*, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880.

*Morris*, Ch. J., delivered the opinion of the court:

Appellee in February, 1906, commenced this action against appellant for damages, for nuisance, and to enjoin the maintenance thereof. A demurrer to the complaint for want of facts was overruled. There was a trial by court, a special finding of facts, and conclusions of law thereon stated. Appellant excepted to each conclusion of law. Judgment for plaintiff for damages, and enjoining appellant from continuing the acts complained of.

Appellant vigorously assails the sufficiency of the complaint. It alleges, among other things, that appellee is the owner of a farm in Delaware county; that appellant is an oil company, and is the owner of gas and oil leases of a farm owned by one Shaffer, lying south of, and adjoining, appellee's farm, and also of a farm owned by one Allison, which lies south of and adjoins the Shaffer farm; that appellant has bored wells 1,200 feet deep on the Shaffer and Allison farms, and equipped them with pumps, by means of which it has drawn large quantities of salt water and oil from said wells to the surface of the land, and has in no way confined the same, but has permitted the same to spread out over the Shaffer and Allison farms, and run therefrom onto the land of appellee; that as a result thereof the oil and salt water has collected and stood on appellee's farm to a depth of from 6 to 18 inches, and has rendered from 15 to 20 acres of the farm uncultivable, wet, and unhealthful, and has killed the growing crops thereon, and has also killed a large amount of timber growing thereon. It is further alleged that the water permitted to flow on appellee's land, as aforesaid, is salty and impure, and destroys the productive power of the land over which it flows, or on which it stands, and destroys the use of such land for agricultural purposes; that said impure water which has been flowing onto appellee's land and standing thereon did not, and would not, come to the surface through natural flow or means, but has been drawn to the surface by appellant by means of pumps. It is further averred that in November and December, 1905, appellant collected and stored in tanks on the Shaffer and Allison farms 500 barrels of oil, and permitted the same to escape from the storage tanks and to flow over said farms onto appellee's farm, and spread out over the same, where it is still standing; that the oil and salt

water standing on appellee's farm emit foul and noxious odors, and is dangerous to the health of plaintiff's family, and to the community. It is also alleged that, unless enjoined, appellant will continue to cause and permit oil and salt water to flow on appellee's lands, and appellee prays that appellant be enjoined from flowing the same over and upon his land, and demands judgment for damages alleged to have been already sustained.

It is insisted that the complaint is defective because it contains no averment that plaintiff was free from contributory negligence, and no averment of facts showing that plaintiff could not have protected his property by exercising ordinary care. This theory is untenable. This is not an action for damages for negligence, but for damages for the maintenance of a nuisance, and to enjoin or abate the same. *Burns's Stat.* 1908, §§ 291, 292, 293. In cases of this character the rules governing the sufficiency of complaints for negligence have no application. *Niagara Oil Co. v. Jackson*, — Ind. App. —, 91 N. E. 825; *Lebanon v. Twiford*, 13 Ind. App. 384, 41 N. E. 844; *Williamson v. Yingling*, 80 Ind. 379; 29 Cyc. 1155.

Appellant's counsel also claim the complaint is insufficient, because the use which appellant made of the lands was in the exercise of the lawful right of the superior proprietor, and detriment to appellee's lower land is *damnum absque injuria*; and in support of this proposition cites *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, and *Barnard v. Sherley*, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117. In the *Sanderson* Case it was held that a coal mining company which discharged from its mine water that so polluted the mountain stream into which it flowed as to render the waters of the stream unfit for domestic purposes by the lower riparian owners was not liable to the latter for the injury, in the absence of malice or negligence. The court held that the mining of coal was lawful, and could be prosecuted only where the coal is found, and that the enjoyment of the stream of water by the lower owners must *ex necessitate* give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal.

Appellant contends that oil must be mined where found, and its mining is a lawful business, and the prosecution thereof requires that the owner of the lower lying land must bear the burden of the annoyances and inconveniences necessarily result-

ing in the careful prosecution of the business. In *Barnard v. Sherley*, *supra*, this court held that under the facts in that case a lower riparian owner could not recover from an upper proprietor for the pollution of a stream by contaminating the water of an artesian well which flowed into it. While the doctrine of the *Sanderson* Case seems to have been approved to some extent in *Barnard v. Sherley*, *supra*, it has since been greatly limited by the supreme court of Pennsylvania. *Hindson v. Markle*, 171 Pa. 138, 33 Atl. 74; *Com. ex rel. McCormick v. Russell*, 172 Pa. 506, 33 Atl. 709; *Keppel v. Lehigh Coal & Nav. Co.* 200 Pa. 649, 50 Atl. 302, 21 Mor. Min. Rep. 605. It has been expressly repudiated in England, Ohio, New Jersey, Alabama, and Tennessee. *Young v. Bankier Distillery Co.* [1893] A. C. 691; *Straight v. Hover* (1909) 79 Ohio St. 263, 22 L.R.A.(N.S.) 276, 87 N. E. 174; *Beach v. Sterling, Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286; *Drake v. Lady Ensley Coal, Iron & R. Co.* 102 Ala. 501, 24 L.R.A. 64, 48 Am. St. Rep. 77, 14 So. 749; *H. B. Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 9 L.R.A.(N.S.) 923, 100 S. W. 116, 10 Ann. Cas. 581, and note on page 587. In the last-cited case, the Tennessee supreme court said: "We are of opinion that the doctrine announced in *Pennsylvania Coal Co. v. Sanderson*, *supra*, is opposed by the great weight of authority in this country and in England, and is in our judgment subversive of fundamental private rights, while it discards, discredits, and discredits the honored principle of the common law embodied in the maxim, *Sic utere tuo ut alienum non ledas*." In *Straight v. Hover* (1909) 79 Ohio St. 263, 22 L.R.A.(N.S.) 276, 87 N. E. 174, the supreme court of Ohio said: "The *Sanderson* Case was a manifest departure from the rule of law often stated, and generally regarded as well settled, that, although there is a servitude upon the lower proprietor to receive the natural flow of water from higher grounds, it is his right to receive it in its natural state, and without deleterious change effected by artificial means. The case was cited as an authority in *Young v. Bankier Distillery Co.* [1893] A. C. 691, where Lord Watson said of it: 'Against the principle the appellants were able to cite only one American case, which I do not notice further, because it was decided on the express ground that, in so far as concerns the present question, the law of Pennsylvania essentially differs from the law of England.' In another opinion in the same case it was said that *Pennsylvania Coal Co. v. Sanderson* proceeded upon considerations which characterize making law,

rather than interpreting the law so as to give effect to sound, just, and well-recognized principles as to the common interest and rights of upper and lower proprietors in the running water of a stream."

Inasmuch as the oil and salt water which were permitted to flow onto appellee's farm from appellant's well did not follow any water course, but spread out over the surface and flowed onto appellee's farm, which was on a lower level, appellee's counsel maintains the complaint was sufficient, regardless of the doctrine of the Sanderson Case, because the salt water and oil were brought to the surface by artificial means, and so deposited on the surface that injury to appellee must necessarily result. The case of *Niagara Oil Co. v. Jackson*, supra, was decided by the appellate court in 1910. A petition to transfer the cause to this court was denied. The decision in that case fully supports appellee's contention, and consequently it is not necessary here to consider the rule announced in the Sanderson Case. The complaint was sufficient. *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Garrett v. Winterich*, 44 Ind. App. 322, 87 N. E. 161, 88 N. E. 308; *Anderson v. Drake*, 24 S. D. 216, 27 L.R.A. (N.S.) 250, 123 N. W. 673, and cases cited. The court, among other things, found that appellee for more than two years preceding the commencement of the action owned and lived on the farm described in the complaint, containing about 105 acres, all of which was under cultivation, except 5 acres, on which there was growing timber; that the farm was farmed by a tenant during this time under a contract by which all the crops raised were divided "half and half" between landlord and tenant; that in March, 1905, appellant drilled two oil wells, 1,200 feet deep, on the Shaffer farm, and in May following drilled an oil well on the Allison farm. That large quantities of salt water and oil were pumped from the wells after the completion thereof, and flowed onto appellee's farm, and accumulated and stood thereon in pools and ponds to the depth of from 6 to 18 inches, and spread out over about 15 acres of the farm and rendered the same impassable and wet and unhealthful, and destroyed the productive power of the land over which it flowed and on which it stood. It is further found that the flooding by appellant of appellee's land destroyed, killed, damaged, and injured the growing crops, meadows, grains, and grasses thereon belonging to plaintiff up to the time of the commencement of the action, and damaged, injured, and killed the growing timber on the farm, and permanently injured the land, and that plaintiff has

sustained damages in the sum of \$485. The court also found that since July, 1906, appellant "has ceased to operate said wells, and has abandoned said operations for oil, and has ceased to flood or flow salt water or oil on plaintiff's lands." The court stated as its conclusions of law that defendant's acts constituted a nuisance, and plaintiff was entitled to judgment for damages in the sum of \$485, and a decree abating the nuisance and enjoining defendant from flooding his lands with salt water and oil. The cause was tried in December, 1906. It is maintained by appellant that the court erred in its conclusions of law, because, as to the crops at least, the right of recovery was in the tenant, and not in the landlord; and it cites *Cunningham v. Baker*, 84 Ind. 597, and *Chicago & W. M. R. Co. v. Linard*, 94 Ind. 319, 48 Am. Rep. 155.

It may be conceded that where land is rented to a tenant under a contract by which the landlord is entitled to a share of the crops raised on the land, as rent, the landlord's share to be delivered by the tenant to the landlord, after measuring in the bushel, or weighing, the tenant is entitled to the possession of the crop until the same shall have been measured or weighed; but in this case the right of possession is in no way involved. The action is for damages for permanent injuries to the real estate, and for injury to, and destruction of, growing crops.

While growing, both landlord and tenant had an interest in the crops, and both would be entitled to damages for its injury or destruction; whether, at the time this suit was commenced, the landlord and tenant owned the crops as tenants in common; or whether they were in the possession of the tenant under a contract for the delivery of one half thereof, in the bushel or by weight, to the landlord, for rent, when harvested; or whether they had been, when the action was commenced, divided in equal shares between landlord and tenant,—would not affect the landlord's right to an action for damages for injury by a third person to the same. No right of possession of crops is here involved. The relief prayed is for damages for injury to specific property, and such relief will not be denied simply because a third party may be in the rightful temporary possession thereof. No question is raised here concerning a defect of parties plaintiff; and certainly, in the absence of such objection, the landlord, though the owner of the undivided half only of the crops, may alone maintain an action for such damages as he may have sustained by the injury. *North Bloomfield*

*Gravel Min. Co. v. Woodruff*, 122 U. S. 629, 30 L. ed. 1250, and cases cited; *Joyce, Nuisances*, § 445. In *Chesround v. Cunningham*, 3 Blackf. 82, it was held that one tenant in common may sue separately in ejectment for his undivided share in real estate, or in trespass for meane profits. In *Bowser v. Cox*, 3 Ind. App. 309, 50 Am. St. Rep. 274, 29 N. E. 616, it was held that one heir of a lessor might sue for rent accrued on a lease executed by the ancestor, without joining the other heirs of the lessor. In this case the inference most favorable to appellant is that appellee was the owner as tenant in common with the tenant of the crops injured. In the absence of any question of defect of parties plaintiff, the appellee's right to sue alone for such damage as he sustained cannot be questioned.

It is also claimed by counsel for appellant that a landlord cannot sue for injuries to the enjoyment and occupation of premises while they are in possession of the tenant, by the maintenance of a nuisance, not of a permanent character, on adjoining premises. Where land is rented for cash, it is manifest that the tenant only could recover for injuries to crops during the tenancy. But where, as here, the landlord has an interest in the crops, such rule does not apply.

It is also insisted that, where a nuisance can be abated, there can be no recovery for a permanent injury, and *Muncie Pulp Co. v. Martin*, 164 Ind. 30, 72 N. E. 882, is cited in support of the proposition. The complaint alleges, and the court finds, that not only were the growing crops injured, but, by reason of the deposit of oil and salt water on the land, its productive power was destroyed. Recovery for permanent injury to the land was authorized.

It is contended the court erred in decreeing an injunction, in face of the finding that after the action was commenced, but before the trial, appellant abandoned the operation of its wells.

There was no finding that appellant had surrendered the leases in question. Assuming, however, that the finding of the court is to the effect that operations would not be resumed, appellant's proper remedy in such case was a motion to modify the judgment by eliminating the portion thereof decreeing an injunction. *Migatz v. Steiglitz*, 166 Ind. 361, 365, 77 N. E. 400. No such motion was made. In any event, if the resumption of operation is not contemplated, appellant cannot be harmed.

It is further claimed that it was appellee's duty to prevent, if possible, or in any event to reduce to the lowest minimum, 42 L.R.A.(N.S.)

the damage to his land and crops. In *Wood, Nuisances*, 3d ed. § 435, it is said: "It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not prevent damages to his property therefrom, is no defense either to an action at law or in equity. A party is not bound to expend a dollar or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another." No reversible error was committed in either the admission or the exclusion of evidence. The decision of the trial court is fully supported by the evidence.

Judgment affirmed.

## INDIANA SUPREME COURT.

CHARLES FERGUSON, Appt.,

v.

STATE OF INDIANA.

(— Ind. —, 99 N. E. 806.)

### Gaming — slot machine — indicating reward — effect.

That a slot machine which delivers an article worth the coin deposited, and sometimes tickets for additional chances in addition thereto, indicates before each transaction what will be delivered, does not prevent its being within the operation of a statute prohibiting gaming devices.

(November 26, 1912.)

**A**PPEAL by defendant from a judgment of the Criminal Court for Marion County convicting him of keeping a gaming device in violation of statute. Affirmed.

The facts are stated in the opinion.

Messrs. Daniel Brown, Jr., Henry Seyfried, Frank C. Groninger, and Taylor Groninger, for appellant:

Appellant simply gave through his gum vender, at times, a premium to stimulate trade; at no time did he offer a wager or a bet.

*Alvord v. Smith*, 63 Ind. 58.

### Note. — Operating slot machine as gambling.

This note supplements the notes to *Territory v. Jones*, 20 L.R.A.(N.S.) 239, and *Mueller v. William F. Stoecker Cigar Co.* 34 L.R.A.(N.S.) 573.

A machine operated by depositing a nickel in the slot, whereupon the depositor always gets a package of gum, and always knows the exact number of trade checks which he will receive for that nickel, but is given an option to obtain a package of gum and an uncertain number of trade checks by the dropping of a second nickel, is a gambling



In a gaming transaction, one or the other of the parties to the transaction must either win or lose.

*Wagner v. State*, 63 Ind. 250; *Mullen v. Beech Grove Driving Park*, 64 Ind. 202.

*Messrs. Thomas H. Branaman, Edwin Corr, and James E. McCullough, with Mr. Thomas H. Honan, Attorney General, for appellee;*

It is not necessary, in order to constitute gaming, that each of the parties may win or lose; but it is sufficient if, as between the parties, one may win and one may lose.

*Parsons v. State*, 2 Ind. 499; *Mount v. State*, 7 Ind. 654; *Hizer v. State*, 12 Ind. 330; *State v. Willis*, 78 Me. 70, 57 Am. Rep. 784, 2 Atl. 848, 6 Am. Crim. Rep. 284; *Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep. 293, 59 Atl. 1021; *Shumate v. Com.* 15 Gratt. 653; *Horner v. United States*, 147 U. S. 449, 37 Atl. 237, 13 Sup. Ct. Rep. 409.

The purpose of § 2474 is to suppress the exhibition or keeping of device for the purpose of gaming; to prohibit the arousing and stimulating of the gambling propensity of getting "something for nothing."

*Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep. 293, 59 Atl. 1021; *Horner v. United States*, 147 U. S. 499, 37 L. ed. 237, 13 Sup. Ct. Rep. 409.

It is unlawful to keep or exhibit any gambling device for gain, or for the purpose of gambling, or to allow the same to be used for gaming.

*State v. Robbins*, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978; *State v. Derry*, 171 Ind. 18, 131 Am. St. Rep. 237, 85 N. E. 765.

*Morris, J.*, delivered the opinion of the court:

Appellant was convicted of keeping a gaming device in violation of § 2474, *Burns's Anno. Stat.* 1908. From a judgment imposing a fine of \$25, this appeal is prosecuted. The only error assigned is the action of the lower court in overruling appellant's motion for a new trial; and the only question raised under that assignment

relates to the sufficiency of the evidence to sustain the finding. Appellant's contention is that the evidence does not show that the device complained of was a gaming one. The evidence shows that the machine was operated by the player depositing a nickel in a slot and then turning a crank, whereupon the machine would automatically pay the reward. The machine would always pay to the player a package of chewing gum of the retail value of 5 cents, and sometimes, in addition thereto, would pay one or more checks. These checks could be used in playing the machine in the same manner as nickels were used. By means of indicators, the player was informed as to what the reward would be before each play, but there was no method of knowing what would be the reward of subsequent plays. Thus, if before being played the machine indicated that a package of gum would be the reward, after being played it might indicate that on the next play a package of gum and one or more checks would be the reward.

In *Lang v. Merwin*, 99 Me. 486, 105 Am. St. Rep. 293, 59 Atl. 1021, a device was under consideration similar to the one here, except that it did not indicate the reward before the deposit of the coin. In the course of its opinion, the court said: "In the case before us it is idle to assume, or concede, that the person putting his 5 cents into the machine may be doing so merely as a means or mode of buying a 5 cent cigar. It is idle to deny that the impelling motive is the hope of getting other cigars for nothing. If the machine did not afford that chance, it would not be used. True the cigar dealer sets up the machine to increase his trade, and is recouped by that increase for any losses, so that in the end he loses nothing, but he does so by arousing and stimulating the gambling propensity, the very propensity the legislature evidently seeks to repress. The element of chance is the soul of the transaction. The operator hopes by chance to get something for noth-

device, the use of which is prohibited by statute, the uncertain option having in it such an element of chance as constitutes gambling. *People ex rel. Verchereau v. Jenkins*, 153 App. Div. 512, 138 N. Y. Supp. 449.

The above case distinguishes *Yale Wonder Clock Co. v. Surman*, decided without opinion in 120 App. Div. 904, 105 N. Y. Supp. 1151, and affirmed without opinion in 193 N. Y. 632, 86 N. E. 1135, stating that the facts in that case were materially different. "Upon the machine there considered was a chart which indicated not only how much was to be received for the nickel deposited, but also how much was to be received for each subsequent nickel deposited, so that, by an examination of the chart, the 42 L.R.A. (N.S.)

exact return for the nickel was ascertainable, and there was no element of chance. It is possible that, in the machine there considered, this chart was placed so inconspicuously as not to attract attention, and so as to present to the ordinary customer, who did not study the chart, an uncertain option. If that machine had been attacked upon such a ground, it might well have been held to have been a gambling device; but that case was not tried upon any such theory. The referee in the case was not requested to find any fact in reference to such a theory, and as the case stood before this court, we were not authorized to find facts not found by the referee in order to reverse the judgment."

J. D. C.

ing. The dealer hopes chance will save him from giving something for nothing. Each is pecuniarily interested adverse to the other in a result to be determined by chance. . . . We have no doubt the transaction is 'gambling' in the statutory sense of the word. . . . However disguised the scheme or device, its essential element is that of affording a chance to get something for nothing: If it were not so, visitors to the store would not use it."

In the case of *Re Cullinan*, 114 App. Div. 654, 99 N. Y. Supp. 1097, the court said: "The chief element of gambling is the chance or uncertainty of the hazard. The chance may be in winning at all, or in the amount to be won or lost. In using the present machine we may assume that the player cannot lose. By far the greater majority of the checks called in trade for the precise sum deposited in the slot. If every ticket represented 5 cents, the machine would not be patronized. The bait or inducement is that the player may get one of the checks for a sum in excess of the nickel he ventures, and that is the vice of the scheme. If he wins more than he pays, the proprietor must lose on that discharge of the ticket. To constitute gambling, it is not important who may be the loser.

. . . The inventor of the present machine has attempted to obviate the criticism to which other slot machines have been subjected, by cunningly returning to the player operating the machine a check or ticket which secures to him in cigars or liquor the amount of his stake. Like most endeavors to adhere to the letter of the law while violating its spirit, he cannot succeed. The present device attractively ministers to the gambling humor the same as other slot machines of substantially similar design. Unless it did this, it would not entice the customer. If in every instance it actually returned 5 cents in coin to the player, no one would pretend that the device would attract anyone. So if on every cast a ticket was run out calling for 5 cents in trade, no person would take the trouble to drop a nickel in the slot. It is the hazard—the chance of winning more than the sum ventured—which draws people to the machine, and that element was the conspicuous one retained in its mechanism, and it is that which brings it within the condemnation of the statute."

The above opinions are in accordance with the weight of authority on the question as to what constitutes a gaming device, and rest on sound reasoning. In the present case, the fact that the machine would indicate the reward before it was played makes no difference. The inducement for each 42 L.R.A.(N.S.)

play was the chance that by that play the machine would be set to indicate that it would pay checks on the following play. The thing that attracted the player was the chance that ultimately he would receive something for nothing. The machine appealed to the player's propensity to gamble, and that is the device at which § 2474 is directed. The inventor of the machine has endeavored "to adhere to the letter of the law while violating its spirit," and, as always must be the result, has failed. The evidence shows that the machine was a gaming device within the intent of the legislature as expressed in § 2474, *supra*. *Lang v. Merwin*, *Re Cullinan*, *supra*; *Meyer v. State*, 112 Ga. 20, 51 L.R.A. 496, 81 Am. St. Rep. 17, 37 S. E. 96; *Lytle v. State*, — Tex. Crim. Rep. —, 100 S. W. 1160; *Horner v. United States*, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; *State v. Woodman*, 26 Mont. 348, 67 Pac. 1118; *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338, 20 L.R.A.(N.S.) 239, and case note, 20 Ann. Cas. 128; *Fielding v. Turner* [1903] 1 K. B. 867, 72 L. J. K. B. N. S. 542, 67 J. P. 252, 51 Week. Rep. 543, 89 L. T. N. S. 273, 19 Times L. R. 404, 20 Cox, C. C. 531.

Judgment affirmed.

## KENTUCKY COURT OF APPEALS.

BENJAMIN WILSON et al., Appts.,

v.

ELIZABETH W. IRWIN et al.

(144 Ky. 311, 138 S. W. 373.)

### Spite fence — Interference with justice — removal.

1. The court will order the removal of a spite fence erected to compel an adjoining property owner to abandon a suit instituted to enjoin the maintenance of a nuisance on the property of the one who erected it.

*Note.* — *Conduct designed to annoy a litigant and induce him to abandon suit as contempt.*

Generally, as to "Liability for malicious erection of fence," see note to *Barger v. Barringer*, 25 L.R.A.(N.S.) 831,

And see note in 62 L.R.A. 673, as to effect of bad motive to make actionable what would otherwise not be.

Cases involving suppression or fabrication of evidence, resistance to or interference with the execution of process or other mandate, or destruction or removal of subject of suit, are not included in this note.

Apart from the exclusions above referred to, a careful search has revealed but few

**Appeal — want of parties — first objection.**

2. An objection for want of parties cannot be made for the first time on appeal.

**Party — compelling tenant to remove fence — landlord not party.**

3. That the owner of the property is not a party to the proceeding will not deprive the court of power to compel a tenant to remove a spite fence erected by him with the consent of the landlord, to compel an adjoining property owner to abandon an injunction suit, where the fence adds nothing to the value of the property, but on the contrary is a detriment to it.

(June 21, 1911.)

**A**PPEAL by defendants from a judgment of the Chancery Branch, Second Division, of the Circuit Court for Jefferson County, requiring them to remove a spite fence erected to compel plaintiffs to abandon a suit instituted by them to enjoin the maintenance of a nuisance on defendants' property. Affirmed.

The facts are stated in the opinion.

Messrs. John H. Chandler and W. B. Fleming, for appellants:

One has a right to erect a fence on one's own premises to any height, even if the motive be malicious.

1 Tiffany, Real Prop., § 295; Pollock, Torts, pp. 154, 155; Wood, Nuisances, §

cases on this subject. And although the court in *WILSON v. IRWIN* was doubtless right in holding the defendant in contempt of court for the conduct complained of, the method there adopted of punishing such contempt is, perhaps, a new departure in this branch of the law, when it is remembered that fine or imprisonment, or both, are the well-accepted punishments for such offenses.

The mere filing and presentation of repeated motions which are thought to be for the purpose of vexation or delay does not constitute contempt of court. *Johnson v. State*, 18 L.R.A. (N.S.) 619. The court said: "The court may, in the exercise of its inherent powers, strike them [the motions] from the files, because they are not presented to subserve the ends of justice, and are merely for vexation or delay; but unless they are presented in a contemptuous or disrespectful manner, or unless they contain matter which, of itself, constitutes contempt, the court cannot treat them as contemptuous, merely because they are thought to be for vexation or delay."

So the defendant in an action for separation, and another, who visited plaintiff at her apartments on various occasions urging her to dismiss her attorney, and persistently endeavoring to procure a settlement of the action by offering her a sum of money to sign a paper which was read to her, were not guilty of contempt of court, under subd. 4 of § 14 of the Code of Civil Proc. of New 42 L.R.A. (N.S.)

6642; 29 Cyc. 1154; *Camfield v. United States*, 167 U. S. 523, 42 L. ed. 261, 17 Sup. Ct. Rep. 864; *Sadler v. Alexander*, 21 Ky. L. Rep. 1836, 56 S. W. 518.

To compel the removal of the fence by a contempt proceeding is not within the jurisdiction of the court.

4 Bl. Com. 283; *Rogers Mfg. Co. v. Rogers*, 38 Conn. 125; *Baldwin v. Miles*, 58 Conn. 502, 20 Atl. 618.

The granting of a license to build a fence is a defense against a proceeding in equity for maintaining a nuisance.

*Murtha v. Lovewell*, 166 Mass. 391, 55 Am. St. Rep. 410, 44 N. E. 347.

Mr. W. O. Harris for appellees.

**Hobson**, Ch. J., delivered the opinion of the court:

Elizabeth W. Irwin owned a house and lot on Second street, near York, in Louisville, which she rented to Mrs. G. T. Brooks. Benjamin Wilson and Mrs. Jennie D. Stratton were tenants of an adjoining residence, on which they kept dog kennels, in which were a number of dogs. The dogs were very annoying to the neighboring owners, and this suit was brought to enjoin the keeping of the dog kennels, on the ground that they were a nuisance. Proof was heard by the court, and on evidence, which amply sustained his conclusion, the

York, making that offense consist of "unlawfully detaining, or fraudulently and willfully preventing, or disabling from attending or testifying, a witness or a party to the action or special proceeding, while going to, remaining at, or returning from the sitting where it is noticed for trial or hearing; and for any other unlawful interference with the proceedings therein." *Herrmann v. Herrmann*, 82 App. Div. 437, 81 N. Y. Supp. 811.

It is contempt of court, however, to send a letter to a litigant threatening that if he allows a pending suit to go to judgment, he will at once be indicted for swindling, perjury, and forgery, and thus bring disgrace upon his family. *Smith v. Lakeman*, 26 L. J. Ch. N. S. 305, 2 Jur. N. S. 1202.

So, in *Sharland v. Sharland*, 1 Times L. R. 492, a defendant in an action for libel was held in contempt of court for sending post cards to plaintiffs threatening exposure by similar means if the action was persisted in.

And a third person who has no interest whatever in a pending divorce suit, but threatens to publish a statement of facts concerning the petitioner unless her petition is withdrawn by a certain date, is guilty of contempt of court. *Re Mulock*, 33 L. J. Prob. N. S. 205, 10 Jur. N. S. 1189, 13 Week. Rep. 278. In this case the court fined the contemner and remarked that one guilty of contempt subjected himself to fine or imprisonment, or both.

—W. W. A.

court granted a temporary injunction on July 5, 1909, restraining the defendants from maintaining the kennels for breeding purposes, or from keeping any dogs that bark unnecessarily or otherwise annoy the neighbors, and requiring them to remove from the lot all the dogs save one. After the preliminary injunction was granted, and while the suit was still pending, Wilson, to deter the plaintiffs from further prosecuting the suit, said to Mrs. Brooks: "If you women give me any trouble and make me move my dogs, I am going to put up a 20-foot fence." They persisted in their suit, and he then put up a 20-foot fence between the two lots. He did not move his dogs, and the court fined him for contempt in disobeying the order of the court. The plaintiffs filed an amended petition, in which they alleged that he had built the fence, beginning it on July 19th, for the purpose of deterring them from prosecuting the suit; that it was wholly unnecessary and useless, and was also built for the purpose of resisting and rendering difficult the enforcement of the court's injunction, and to punish them for resorting to law by making the property unsightly and driving away tenants. They alleged that the fence was a nuisance to them and to the entire neighborhood. They prayed that Wilson be required to remove the fence. The court, by his final judgment, made perpetual the preliminary injunction as to the dogs and kennels, and also required Wilson to remove the fence. This appeal is taken from so much of the judgment as requires the removal of the fence.

The court, in disposing of the question, filed a written opinion in which, among other things, he said: "The question is: Will the court sit quietly by and permit a litigant to annoy and harass his adversary in this manner, in the hope of deterring his adversary from seeking protection from the court? The fence was erected following a threat, and after the court had ordered the temporary injunction prohibiting the continuation of the dog-breeding establishment. The court's first duty is to protect its litigants, and to permit nothing to be done which tends to the miscarriage of justice. One may have the right to build a spite fence, but not for the purpose of driving a litigant from a court of justice. One may give a person \$50 to leave the state, but not to prevent him from testifying. Again, one may sue another, but he may not threaten to do so if he comes into the jurisdiction to testify. The question of contempt in the matter at bar is not difficult of distinction from the case of a complaining neighbor against one who has built a fence which excludes his light and

air. The doctrine of ancient rights is not involved here, but the doctrine of having causes in court heard and disposed of in an orderly way, free from duress and oppression. Much has been said about the feeling existing between the parties. Such feeling is deplorable, but may well be expected of persons of ordinary sensibilities who have a dog-breeding establishment maintained in their neighborhood, particularly in a densely populated neighborhood in a city."

The record leaves no doubt in our minds that the fence was built for spite, and in an effort to deter the plaintiffs from prosecuting their suit for the removal of the dogs and kennels. Finding himself unable to defeat the action in court, Wilson undertook to intimidate the two women by threatening to erect, and then erecting, an unsightly and unreasonable fence, which injures all the property in the neighborhood. Any obstruction of public justice is a public offense. Any effort to thwart justice, or to interfere with its orderly administration, is a contempt of court. In *French v. Com.* 30 Ky. L. Rep. 98, 97 S. W. 427, the defendant was fined \$5,000 for running off a witness to keep him from testifying on the trial of a case. Upon the same principle it has been held that suing a witness for the purpose of intimidating him from testifying is a contempt of court, where no proper motive inspired the suit. *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713. See also *Bridges v. Sheldon* (C. C.) 7 Fed. 19. Justice cannot properly be administered if litigants are intimidated. The courts must be free, and it is the duty of the court to protect litigants, no less than witnesses, that the orderly administration of justice shall not be impeded. The record amply sustains the court's findings of fact, and on these findings he properly required the fence to be removed. It is insisted that Wilson had the right to build a fence on his own land, and build it as high as he pleased; but he had no right to interfere with the administration of justice, and he may be required to remove anything that was built to interfere with justice.

It is also insisted that Wilson does not own the lot, and is only a tenant; that the landlord is not a party to the action, and that the court was without power to order the fence removed without the landlord being before the court. An objection for the want of proper parties must be made in the trial court. This objection seems to be first made here. Wilson built the fence. It was his fence, built for his purposes. It adds nothing to the value of the property, but, on the contrary, is an injury to it. It was built, pending the lit-

igation, with the consent of the landlord. The building of the fence was, under the circumstances, a contempt of court, and the court had authority to require the defendant, who so built it, to remove it. Judgment affirmed.

Petition for rehearing denied.

### NORTH CAROLINA SUPREME COURT.

ALICE BROADNAX, Appt.,

v.

ALICE BROADNAX, Admr., etc., of William Broadnax, et al.

(— N. C. —, 76 S. E. 216.)

**Executor and administrator — widow's support — allowance for wrongful death of husband.**

A widow is not entitled to her year's sup-

*Note. — Widow's right to year's support or allowance out of fund recovered for the negligent killing of husband.*

Besides BROADNAX v. BROADNAX no case has been found discussing the question whether the "widow's allowance" may be deducted from a fund recovered for damages for wrongful death, before its distribution.

There are, however, some similar cases in which the omission to raise the question is of interest.

In *Duzan v. Myers*, 30 Ind. App. 227, 96 Am. St. Rep. 341, 65 N. E. 1046, where the deceased left no property, the fund recovered was divided one third to the widow, and two thirds to the children, the statute requiring that distribution must be made in the same manner as personal property of the decedent is distributed. The question of the widow's allowance does not appear to have been raised, although the Indiana statute allows the widow to take articles or cash at her option up to \$500, after the expenses of administration and of last sickness and funeral have been deducted.

So an equal division of the fund recovered, after deducting the expenses of administration, was directed between the childless widow and mother, in *Re Griffin*, 89 Neb. 733, 131 N. W. 1033, without referring to the "widow's allowance," the Nebraska statute providing that the amount recovered "shall be for the exclusive benefit of the widow or widower and next of kin of such deceased person, and shall be distributed to such widow or widower and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate."

In New York it is provided by statute that, among the "articles" not to be deemed "assets," but to remain in the possession of the widow, are "other necessary household furniture, provisions, or other personal property, in the discretion of the apprais-

port out of a recovery for the wrongful death of her husband, under statutes providing for such support out of the crop, stock, and provisions, the balance to be made up from the personal estate of the deceased, and requiring the distribution of such recoveries as of personal property in case of intestacy.

(November 13, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Forsyth County denying her claim to a year's support out of the recovery for the wrongful death of her husband. Affirmed.

Statement by Allen, J.:

This is a controversy submitted without action, and the material facts are that William Broadnax, the husband of Alice Broadnax, the plaintiff herein, was an employee at the plant of the Reynolds Tobacco Company, and, while so employed, was killed.

ers, to the value of not exceeding \$150." And the damages recovered for wrongful death are exclusively for the benefit of the decedent's husband or wife, and next of kin, and are not subject to debts or expenses, except for the action and for commissions, and "must be distributed . . . as if they were unbequeathed assets." *Re Snedeker*, 164 N. Y. 58, 58 N. E. 4, where a division was directed between the childless widow and the father, and the question of the "widow's allowance" does not appear to have been raised.

The same course was followed in result under similar circumstances in *Re Taylor*, 144 App. Div. 634, 129 N. Y. Supp. 378, where the amount recovered was paid on an offer of judgment.

While without the scope of this note, reference may be made in this connection to *Re Wolfe*, 154 Mo. Ap. 218, 134 S. W. 33, where the childless widow of a postal clerk, who was also his administratrix, received \$1,000 which came from an appropriation by Congress, to enable the Postmaster General "to pay the sum of \$1,000, which shall be exempt from the payment of debts of the deceased, to the legal representatives of any railway clerk who shall be killed while on duty." The probate court divided the fund as if surplus assets of an intestate, one half (\$500) to the widow and one half to the mother and brother of decedent. On the widow's appeal, it was held that she was entitled first to a "widow's allowance" of \$400, and also to funeral expenses, not exceeding \$314, in addition to the \$500 already allowed,—as to which no appeal had been taken,—and that this would exhaust the entire fund of \$1,000. The court does not inform us, if the widow was entitled to \$400 and \$314, why the balance, \$286, should not have been divided one half to the widow and the other half to the mother and brother of the intestate. B. B. B.

He left several children, both minors and adults, but no property, either real or personal. Alice Broadnax qualified as his administratrix, and settled any claim which she, as administratrix, had by reason of the death of her intestate, receiving, as the result of said settlement, the sum of \$900, and the only question involved in this appeal is whether Alice Broadnax, as the widow of William Broadnax, is entitled to her year's allowance out of the said fund of \$900. His Honor held against the claim for a year's allowance, and the widow excepted and appealed.

**Mr. John M. Robinson, for appellant:**

The year's provision takes precedence of all other claims against the estate.

*Jones v. Layne*, 144 N. C. 600, 11 L.R.A. (N.S.) 361, 57 S. E. 372.

Damages recovered for the negligent killing of the husband are such a part of his estate that, in the absence of other property, the widow's year's allowance may be allotted out of the fund thus created.

*Neill v. Wilson*, 146 N. C. 242, 59 N. E. 674; *Wolfe v. Wolfe*, 154 Mo. App. 218, 134 S. W. 33.

**Mr. W. Reade Johnson for appellee administratrix.**

**Mr. Louis M. Swink, for other appellees:**

A widow is not entitled to her year's support out of moneys recovered as damages for the wrongful or negligent killing of her husband.

*Howell v. Yancey County*, 121 N. C. 362, 28 S. E. 362; *Killian v. Southern R. Co.* 128 N. C. 261, 38 S. E. 873; *Bolick v. Southern R. Co.* 138 N. C. 370, 50 S. E. 689; *Hartness v. Pharr*, 133 N. C. 570, 98 Am. St. Rep. 725, 45 S. E. 901; *Denton v. Tyson*, 118 N. C. 542, 24 S. E. 116; *Williams v. Jones*, 95 N. C. 504; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

**Allen, J.**, delivered the opinion of the court:

At common law there was no right of action to recover damages for wrongful death, and the right of action conferred by statute is one that did not exist before. *Killian v. Southern R. Co.* 128 N. C. 261, 38 S. E. 873; *Bolick v. Southern R. Co.* 138 N. C. 371, 50 S. E. 689.

The right of the widow to a year's support is also purely statutory. *Williams v. Jones*, 95 N. C. 506.

It follows, therefore, that the determination of this controversy depends upon a construction of the two statutes. The first was enacted in 1854 (Laws 1854-55, chap. 42 L.R.A.(N.S.)

39) and was re-enacted in the Revised Code, chap. 1, §§ 8, 9, 10, and 11, in the Laws of 1868-69, chap. 113, §§ 70, 71, and 72, in the Code of 1883, §§ 1498, 1499, and 1500, and in the Revisal of 1905, §§ 59 and 60.

In the original act and in the Revised Code it was provided that any recovery of damages should be disposed of according to the statute for the distribution of personal property in case of intestacy, and in the act of 1868-69, in the Code of 1883, and in the Revisal of 1905, the statute became a part of the chapter for the settlement of the estates of deceased persons; it being provided in the first (Laws 1868-69) that "the amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy,"—and in the others (Code 1883 and Revisal 1905): "The amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." Note that the language since the Code of 1883 is that the amount recovered shall be disposed of as provided "in this chapter" for the distribution of personal property in case of intestacy, and when we turn to the chapter we find the statute of distribution a part of it, but no provision therein for the widow's year's support. It would seem, therefore, that the language of the statute conferring the right of action in the event of death is directly opposed to the contention of the widow, and, if we examine the provisions relating to a year's allowance, this conclusion is supported and strengthened. Revisal, 3095: "Such allowance shall be assigned from the crop, stock, and provisions of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased." The allowance can only be set apart from the personal estate of the deceased, and the right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of the term. *Baker v. Raleigh & G. R. Co.* 91 N. C. 310; *Hartness v. Pharr*, 133 N. C. 566, 98 Am. St. Rep. 725, 45 S. E. 901; *Vance v. Southern R. Co.* 138 N. C. 463, 50 S. E. 860.

In the *Baker Case* the court says: "The administrator thus occupies the place of trustee, for a special purpose, of such fund as he may obtain by the suit, holding it, when recovered, solely for the use of those

who are entitled under the statute of distributions, free from the claims of creditors and legatees, and subject only to such charges and expenses, inclusive of counsel fees and his own commissions, as may have been reasonably incurred in prosecuting and securing the claim. Diminished by these deductions, the remaining duty is to pay over to the distributees." And in the Hartness Case: "It must be borne in mind that, whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person, or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him; and this is so although the personal representative may be designated as the person to bring the action. . . . The latter does not derive any right, title, or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it, when recovered, actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative, he may perhaps be liable on his bond for its proper administration." It is true the recovery is spoken of as a part of the estate of the deceased in *Neill v. Wilson*, 146 N. C. 244, 59 S. E. 674, but only for the purpose of distribution.

There is no error.

#### SOUTH CAROLINA SUPREME COURT.

MRS. P. J. WELLS, Appt.,

v.

MRS. A. B. HAYS, Exrx., etc., of R. M. Hays, Deceased, Respnt.

(— S. C. —, 76 S. E. 195.)

**Evidence — memorandum on check stub — object of payment.**

1. A memorandum on the stub of a check, that it was intended as payment upon an indebtedness to the payee's principal, is not

**Note. — Admissibility of memoranda on check stubs.**

By the weight of authority, check stubs are not admissible in evidence. It is considered that they are not books of account and that, even if so viewed, they fall within the old objection against entries relating to cash payments.

The memoranda on the stubs of a check book do not constitute a book of account. *Wilson v. Goodin*, *Wright* (Ohio) 219, *infra*; 42 L.R.A. (N.S.)

admissible in evidence in an action by the principal to enforce payment of such indebtedness.

**Same — book entries — person since deceased.**

2. Entries in the books of a person since deceased, showing that a payment to one person was intended to be applied in satisfaction of a debt to another, or that cash payments were to be applied in satisfaction of indebtedness on a duebill, are not admissible in evidence in an action by the latter to enforce his claim.

**Same — object of payment — ownership of property.**

3. One suing on a duebill upon which a payment to a lumber company is claimed as a credit may be required to testify that her husband owned no real estate, for the purpose of showing that the lumber furnished by the company was used on her property.

**Same — corroborative — admissibility.**

4. It is not error to admit evidence corroborative of other evidence which has been received without objection.

(November 16, 1912.)

**A**PPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Greenwood County in her favor for a less sum than demanded in an action brought to recover a balance alleged to be due and unpaid on a duebill. Reversed.

The facts are stated in the opinion.

Messrs. H. C. Tillman and Featherstone & McGhee for appellant.

Messrs. Grier, Park, & Nicholson, for respondent:

The books of account were admissible in evidence.

*Sinclair v. Price*, 2 Hill, Eq. 160, note; *Lever v. Lever*, 2 Hill, Eq. 158; *Lewis v. England*, 14 Wyo. 128, 2 L.R.A. (N.S.) 401, 82 Pac. 869; *Wilson v. Wilson*, 6 N. J. L. 99; *Seaboard Air Line R. Co. v. Railroad Comrs.* 86 S. C. 91, 138 Am. St. Rep. 1028, 67 S. E. 1069; *Charles v. Bishoff*, 1 Sadler (Pa.) 260, 1 Atl. 572; *Lapham v. Kelly*, 35 Vt. 195; *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650; *Fleming v. Yost*, — Ind. —, 36 N. E. 705; *Chicago, St. L. & N. O. R. Co. v. Province*, 61 Miss. 288; 1 Greenl. Ev. 118; *Union*

*Watts v. Shewell*, 31 Ohio. St. 331, *infra*. *Contra*, *Fulkerson v. Long*, 63 Mo. App. 268, *infra*.

The earliest case found on the subject of the use of check stubs in evidence is *Wilson v. Goodin*, *supra*, where the defendant in an action on a promissory note, to prove a payment thereon by the stub of his check, offered to be sworn to "a blank check book" with stubs, as if to a book account, but the court said: "That is no book account. It is a *check book*, a mere

Bank v. Knapp, 3 Pick. 96, 15 Am. Dec. 181; Leland v. Cameron, 31 N. Y. 115; Ganahl v. Shore, 24 Ga. 24.

Hydrick, J., delivered the opinion of the court:

This action was brought to recover the balance due on a duebill for \$1,138.53, dated March 29, 1904, and given to plaintiff by R. M. Hays & Brother, a mercantile firm

composed of R. M. and A. G. Hays, both of whom died before the commencement of the action. The action was brought against defendant alone, because she assumed payment of the duebill. Plaintiff admits one payment of \$200, which was credited on the duebill. Defendant pleads four others, which, with that admitted, aggregate \$964.67, leaving a balance of only \$319, for which amount the jury found a verdict for

memorandum of a merchant of the checks he draws on his banker. He cannot be sworn to such memorandum in his own case."

In Carter v. Fischer, 127 Ala. 52, 28 So. 376, where the plaintiff's evidence showed that a check given by the defendant was on account of the claim in suit, the defendant was not permitted to put in evidence his check book, showing on the stub of the check the word "borrowed," as indicating a loan, and not a payment. The court said: "The giving of a check by defendant to the plaintiff was admitted, and the entry made by defendant on the stub of the check, of the purpose for which it was given, was but the defendant's secret declaration, and as such was not evidence against the plaintiff. The stub was properly excluded from the evidence and the defendant was not injured by its being detached from his deposition."

But in Fulkerson v. Long, supra, where one of the issues was whether the plaintiff's intestate purchased the note in suit from the payee, the court said: "As tending to prove this, the stub of the check book of the deceased, Fulkerson, was introduced, after proof of his handwriting, wherein it appeared he had, at the time, given a check to pay for said note. This evidence was objected to, and the admission thereof is now complained of. The matter here objected to is rightly classed as that of an account book of original entries, fair upon its face, and shown to have been kept in the usual course of business, and is now, under the late rulings in this state, competent evidence, even in behalf of the party who kept the book."

As evidence of cash transactions.

As indicated in WELLS v. HAYS, the weight of authority does not countenance the admission in evidence of check stubs as evidence of cash transactions. Carter v. Fischer, supra; MacKenzie v. Barrett, 148 Ill. App. 414, infra; Simons v. Steele, 82 App. Div. 202, 81 N. Y. Supp. 737, infra, affirmed without opinion in 177 N. Y. 542, 69 N. E. 1131; Leask v. Hoagland, 205 N. Y. 171, 98 N. E. 395, infra; Wilson v. Goodin and Watts v. Shewell, supra.

In Simons v. Steele, 82 App. Div. 202, 81 N. Y. Supp. 737, affirmed without opinion in 177 N. Y. 542, 69 N. E. 1131, the court said where it was argued that the stubs of a testator's check books were evidence of loans to the defendant's testator: "It is conceded that the stub entries in the check books were not admissible in evidence L.R.A.(N.S.)

dence to show cash transactions, if they are to be treated as books of account. Such is the effect of the decisions. . . . The plaintiff claims, while admitting this rule, that they were admissible as a part of the *res gestæ*, and as constituting the best evidence procurable. If admissible for the purpose of showing that the parties had transactions, and for nothing else, they would be insufficient to establish an indebtedness, and resort could not be had to them for that purpose; consequently, if admissible to this limited extent, the plaintiff would not be aided, because they did not establish the indebtedness, and were not competent for such purpose. It can scarcely be claimed with any show of reason that because no other evidence was procurable, that therefore they may be resorted to, to establish an indebtedness. Lack of evidence may be the plaintiff's misfortune, but it does not avail as a basis upon which to found a claim. That must be proved by competent testimony."

In MacKenzie v. Barrett, 148 Ill. App. 414, where the plaintiff sued on a claim against the defendant's intestate for loans, etc., he offered three checks and their stubs; one of the checks was to the order of a life insurance company, and the stub stated it was for the intestate; the other two checks were to the intestate's order, and the stubs respectively stated that the check was to the intestate's order "for loan." There was evidence that the custom of the plaintiff was to write checks and notations on the stubs contemporaneously. It was held that the stubs were no more available than if entries in a book of loans, which would not be evidence of the loans, and that they were not admissible as part of the *res gestæ*, and as to the check to the insurance company, it was at best, on the evidence, but a voluntary payment.

—as part of the *res gestæ*.

Check stubs are not admissible as part of the *res gestæ*. MacKenzie v. Barrett and Simons v. Steele, supra.

In Watts v. Shewell, 31 Ohio St. 331, where there had been an assignment in trust to pay certain debts, and the assignor was defending against one of such debts, it was held that the stubs of the check book of the assignee's firm were not admissible after his death to show payments on account of the trust, the court stating that they were not admissible as entries in the usual course of the business, as they



plaintiff. From the judgment entered on the verdict, the plaintiff appealed.

Three of the alleged payments, including the one admitted by plaintiff, were checks of R. M. Hays & Brother, payable to the order of J. W. Wells, the husband of the plaintiff, and indorsed by him. There was nothing on the checks to indicate for what purpose they were given; but there was a memorandum on the stub of each

were not made by an agent, and it was not the uniform course of the firm to note the transaction in the margin, but only occasionally; nor were the entries admissible as against interest, as indicating a liability on an obligation greater than that paid, as the trustee was not liable on the obligation beyond the funds received; nor were they admissible as part of the *res gesta*.

It will be seen that in the Watts Case it is possibly left open for argument that stub entries made by an agent in the usual and uniform course of business might be admissible; and that in Leask v. Hoagland, *infra*, it is suggested that stub entries by an agent might be competent if the agent were conversant with the actual character of the transactions to which the entries related.

In Leask v. Hoagland, 205 N. Y. 171, 98 N. E. 395, where the question was whether the defendant was indebted to the plaintiff's testator (beyond an admitted note for \$10,000), and whether his share as legatee was consequently to be diminished, it appeared that the testator had given certain checks to the defendant which had been paid, that the stub of one of the checks indicated a loan, and the stub of another check to the order of a third party, while ambiguous, possibly indicated a loan to the defendant through such third party, and that there were also stubs indicating earlier checks amounting to \$9,900 to defendant, the checks of which were not produced; all these stubs were in the handwriting of the decedent's secretary, who had died since decedent, and who, so far as appeared, had not been generally aware of the purposes of the checks. It was held that the stubs for which the corresponding checks were offered were no evidence of loans in the absence of evidence showing some personal knowledge of the nature of the transactions, in the writer of the stubs. The stubs for which no corresponding checks were produced were offered as indicating an indebtedness of \$9,900, substantially represented by the note of \$10,000, which was given subsequently to these checks, and as establishing a "course of dealing" of loans which was continued by the subsequent checks; but it was held that these stubs were inadmissible, and that they did not even prove that the corresponding checks had ever been issued.

As memorandum of weight or quantity.

Where, in an action for delay in getting hogs to market, causing shrinkage in weights, the plaintiff testified from a memo-

in the check book, and also in the cashbook of R. M. Hays & Brother, to the effect that they were intended as payments to Mrs. Wells. One of the checks was payable to the order of W. J. Snead Lumber Company, and there was a similar memorandum on the check stub and in the cashbook. One of the payments alleged was an item of \$150, charged on the cashbook to Mrs. Wells as cash paid to her. In the ledger

random book of the weights, transcribed by him from the stubs of his checks, where the original entries of the weights had been made, it was held that if the transcriptions were shown to be correct, and there was simply a refreshing of the memory there was no error, but if it was sought to prove the weights from the entries on the check books as original evidence, then the stubs would be necessary, or their absence would have to be accounted for. *San Antonio & A. P. R. Co. v. Turner*, 42 Tex. Civ. App. 532, 94 S. W. 214, where a new trial was ordered on other grounds.

As declaration against interest.

In *Reg. v. Wilkinson*, 10 Cox, C. C. 537, where the manager of a company was charged with applying its funds to his own use, a counterfoil corroborative of other evidence of his use of the company's check was held admissible against him. It was asserted for the Crown that, the prisoner being manager of the company, every book in its office was evidence against him.

Statute.

In *Woolsey v. Bohn*, 41 Minn. 235, 42 N. W. 1022, where the statute upon the subject related to "books of account kept for that purpose," and containing "the original entries of charges for moneys paid," etc., but did not prescribe the form in which they should be kept, nor the degree of definiteness to be observed in making entries, the court said as to the defendant's journals: "It was error to have received the journals in evidence, for the reason that the charges offered from these books were not, as required by statute, 'original entries, . . . made at the time of the transactions therein entered.' They were made by transcribing the data from the stubs of checks retained in the check books after the checks had been detached, and were written up several days after the giving of the checks. The checks themselves were in the defendant's possession when this evidence was offered. . . . The objectionable character of the entries thus made is illustrated in this case by the fact that when the journals were made up, several days after the giving of the checks, the word 'Woolsey' was entered in connection with each item, while upon the checks there was nothing to indicate that they were given on his account." But the error was held immaterial. The court does not state whether the stubs of check books themselves would have been admissible under the statute. B. B. B.

account of plaintiff on the firm books, she is credited with \$1,138.53 as of the date of the duebill, and debited with the several amounts claimed by the defendant as payments thereon, at the respective dates thereof. These amounts were carried to the ledger by the bookkeeper from the check stubs and the cashbook.

J. W. Wells testified that he was a contractor, and that, during the period within which the payments claimed by defendant were made, he had a running account with R. M. Hays & Brother, and with the Hays Live Stock Company, in which they were interested, if not the owners, and that he also had an account with R. M. Hays individually, involving some farming operations carried on by them on a farm which they owned together. He also testified that all the payments set up by defendant, except the one admitted by plaintiff, were amounts paid to him by R. M. Hays on account of their individual matters; that Hays always paid him with checks of the firm; and that, after deducting his indebtedness to the firm and to the Live Stock Company, R. M. Hays still owed him a considerable balance. There was an account against J. W. Wells on the books of R. M. Hays & Brother, and also one on the books of the Hays Live Stock Company, showing that he was indebted to both, and none of the payments claimed by defendant appeared in the accounts of J. W. Wells, either with the firm or the Live Stock Company. There was testimony tending to show that J. W. Wells was the general agent of the plaintiff and attended to all her business. The plaintiff testified that she knew nothing of the alleged payments except the one credited on the duebill, and that she did not authorize her husband to receive any other.

The question upon which the appeal must turn is: Did the court err in admitting the books of account of R. M. Hays & Brother and their check book stubs, containing the memoranda thereon, as evidence of the alleged payments to the plaintiff? The decisions of this court clearly answer that question in the affirmative. From time immemorial, the books of merchants, shopkeepers, tradesmen, and others whose business or occupation necessitates the keeping of books, have been admitted in the courts of this state to prove accounts for goods sold and delivered, services rendered, work and labor done, and materials furnished; but this court has uniformly held

that books of account or private memoranda are inadmissible for the purpose of proving special contracts, such as are not shown by, or to be inferred from, the entries alone, regularly and properly made in the usual course of business in books of one of the classes above mentioned.

In *Deas v. Darby*, 1 Nott & M'C. 436, the books of a tailor were held incompetent as evidence to prove a verbal order of defendant to let his ward have clothes. The court, by Mr. Justice Johnson, said: "The liability of a defendant to pay an open account of a merchant or shopkeeper does not arise merely on account of the charge against him, but in consequence of the delivery of the goods to him, or to his servant or agent for his use; or, in other words, it is in respect to the consideration which he has received. So that book entries prove no more than the delivery of the articles charged. Now, if from these it appears that the articles were delivered to another, and for another's use, the liability ceases, unless he be liable in respect to some other special contract; and if a merchant or shopkeeper were allowed to make every contract the subject of book entry, and themselves to prove it, the community would indeed be at their mercy; for, although, as a class, they are entitled to the highest respect and consideration, yet, like every other, there may exist among them those whose consciences would not secure justice to the community." The argument advanced by the learned justice against the admission of such evidence, though it had reference to the law then existing, under which parties to the record were incompetent as witnesses, is none the less forceful under the present state of the law, notwithstanding the disability of parties as witnesses has been removed by statute, especially when it is sought, as in this case, to make such entries, made by one who has since died, competent evidence to prove a special agreement. The admission of such entries would open wide the door to fraud, and afford strong temptation to perjury, and make it easy for a debtor to manufacture the evidence by which he might discharge his note, bond, or other contract without actual payment or performance thereof. While we do not mean to intimate that any such thing was done or attempted in this case, still the possibility of its being successfully done is strong reason against such an extension of the rules of evidence. The exclusion of such book entries is sustained by the fol-

lowing cases: Pritchard v. M'Owen, 1 Nott & M'C. 131, note; St. Philip's Church v. White, 2 McMull. L. 306, 39 Am. Dec. 125; Gage v. Mellwain, 1 Strobh. L. 135; Kinloch v. Brown, 1 Rich. L. 223. The weight of authority elsewhere is in accord with our own decisions. 1 Greenl. Ev. §§ 117 et seq., and notes; Wigmore, Ev. §§ 1523 et seq.; 17 Cyc. 379 et seq.; 22 Am. & Eng. Enc. Law, 2d ed. 582. For stronger reason, the check stubs are inadmissible to prove the memoranda thereon, for they are not books of account. 17 Cyc. 373, 374; 22 Am. & Eng. Enc. Law, 2d ed. 585.

As a rule, the authorities are against the admission of books of account as evidence to prove such cash transactions as money loaned or payments made on notes, bonds, or other obligations. Williams v. Gregg, 2 Strobh. Eq. 315; Wigmore Ev. § 1539; 9 Am. & Eng. Enc. Law, 2d ed. 930, 931; Lewis v. England, 2 L.R.A.(N.S.) 401, and note (14 Wyo. 128, 82 Pac. 869). To this general rule some authorities make an exception of bank books kept in the usual course of business, and account books generally, where the cash items appear in the general course of accounts as part of the ordinary transactions between the parties. Lever v. Lever, 2 Hill, Eq. 158; Sinclair v. Price, 2 Hill, Eq. 160, note. There may be other exceptions to the rule, but, as this case does not fall within any of them, we express no opinion as to what exceptions may be made to the general rule, or what circumstances of necessity would warrant the making of them. The point decided does not conflict with the well-settled rule that such entries or memoranda may be referred to by the person who made them for the purpose of refreshing his memory, and thereby enabling him to testify to the transactions so recorded, if he is otherwise competent.

The exception which imputes error in allowing defendant to prove by Mrs. Wells that J. W. Wells owned no real estate cannot be sustained for two reasons: First, it was relevant because it tended to show that the lumber bought from the W. J. Snead Lumber Company was used on her property; second, because W. J. Wells testified to the same fact without objection.

As there must be a new trial, the assignment of error in the charge need not be considered, as no principle is involved which may arise in the next trial.

Reversed.

Gary, Ch. J., and Woods and Fraser, JJ., concur. Watts, J., disqualified.  
42 L.R.A.(N.S.)

## IDAHO SUPREME COURT.

CLAUDIO MENDILIE, Respt.,

v.

G. D. SNELL, JR., et al., Appts.

(— Idaho, —, 127 Pac. 550.)

### Lien — labor.

1. Under the provisions of § 3446 of the Rev. Codes, "every person who, while lawfully in possession of an article of personal property, renders any service to the owners thereof, by labor or skill employed for the protection, improvement, safe-keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due him from the owner for such service."

### Same — possession — sufficiency.

2. Under the provisions of § 3446, Rev. Codes, the possession necessary to entitle the party to a lien must be such as to give the party for the time the exclusive care, control, and direction of the property, which must be more than that of a mere servant for hire from day to day or month to month, who is subject to the direction and orders of the master.

### Agister — lien — food and pasture.

3. Section 3446, Rev. Codes, is intended to apply to cases where a party takes the possession of personal property, such, for example, as live stock, and agrees to graze,

Headnotes by AILSHIE, J.

*Note. — Right of servant to the common-law possessory lien, or its statutory substitute, for services in connection with property.*

This, of course, excludes cases passing upon statutes expressly giving a servant a lien or a preference to protect his claim for wages.

As to who is a "farm" or "agricultural" laborer within statute giving lien, see note to Lowe v. Abrahamson, 19 L.R.A.(N.S.) 1039.

In the absence of statute or special contract securing a lien, a servant has no lien upon the property of his master as security for his wages.

The common-law lien to which personal property is subjected in favor of an artisan or tradesman who has expended work upon it is not available to an ordinary servant in respect to his master's property, as a means of securing the payment of his wages. Labatt, Mast. & S. 2d ed. § 313, 28 Cyc. 1066; M'Intyre v. Carver, 2 Watts & S. 392, 37 Am. Dec. 519; Quist v. Sandman, 154 Cal. 748, 99 Pac. 204 (one employed to peel bark); Hoover v. Epler, 52 Pa. 522 (holding one employed as servant to act as groom not entitled to a lien); Ritter v. Gates, 1 Am. L. Reg. 119 (holding that a laborer employed to dig ore has no lien upon it for his wages); Fitzgerald v. Elliott, 162 Pa. 118, 42 Am. St. Rep. 812, 29 Atl. 346 (holding one employed to cut and skid logs not entitled to a lien for his wages); Ex parte

feed, or pasture the stock for a period of time, and assumes the exclusive care of and responsibility for the property, and furnishes or procures the feed or pasture therefor, whether it be from his private inclosure or on the public domain.

(October 21, 1912.)

**A** PPEAL by defendants from a judgment of the District Court for Ada County in plaintiff's favor in an action brought to recover damages for the taking of sheep from his possession on which he claimed a lien for wages. Reversed.

The facts are stated in the opinion.

Messrs. Griffiths & Griffiths, for appellants:

The liens provided for by the section of

Corran, — Cal. —, 41 Pac. 464 (holding one employed to superintend canvass for subscriptions to a publication not entitled to hold such subscription contracts as security for salary due for his services); Hunt v. Wing, 10 Heisk. 149 (holding that laborers on a farm have no lien on the crop at common law); Bristow v. Whitmore, 4 De G. & J. 325, 1 Johns. V. C. (Eng.) 96, 6 Jur. N. S. 29 (denying master of a ship the right to claim a lien for wages either against the ship or the freight, he being only the servant of the owner, and therefore not having, as against him, any possession of the ship of the freight), citing Hussey v. Christie, 9 East, 426, 13 Ves. Jr. 594, 9 Revised Rep. 585; Smith v. Plummer, 1 Barn. & Ald. 575, 19 Revised Rep. 391.

And in Wilcox v. Matthews, 44 Mich. 192, 6 N. W. 215, it was said that if the party claiming a lien upon certain personal property in his possession was a clerk or agent, no lien existed in his favor.

The reason for the rule is that an exclusive right to the possession of the property, independent and distinct from that of the owner of the property, is the basis of the common-law lien, and it cannot exist in favor of an ordinary servant, since the servant's possession of his master's property is deemed that of his master. He who claims the benefit of the common-law lien, therefore, must be a bailee under a contract of bailment.

In M'Intyre v. Carver, 2 Watts & S. 392, 37 Am. Dec. 519, it was said in this connection: "But as an exclusive right to the possession of the thing is the basis of such a lien, it exists not in favor of a journeyman or day laborer, whose possession is that of his employer, and who has no other security for his wages than the employer's personal responsibility on the contract of hiring; and he who claims it, therefore, must be a bailee under the contract which the civilians call *locatio operis faciendi*."

And in Ex parte Corran, — Cal. —, 41 Pac. 464, it was said: "We know of no principle of law which authorizes an employee to take or retain property of his

the statute are not applicable to the facts in this case, and under the statutes of this state there is no lien provided in favor of a person who is employed by the month to herd stock upon the public range.

2 Cyc. 317; Skinner v. Caughey, 64 Minn. 375, 67 N. W. 203; Underwood v. Birdsell, 6 Mont. 142, 9 Pac. 922; Bailey v. Davis, 19 Or. 217, 23 Pac. 881; Hooker v. McAllister, 12 Wash. 46, 40 Pac. 617; Hoover v. Epler, 52 Pa. 522; Boston & K. C. Cattle Loan Co. v. Dickson, 11 Okla. 680, 69 Pac. 889; H. Feltman Co. v. Chinn, 19 Ky. L. Rep. 1147, 43 S. W. 192; Cunningham v. Hamill, 84 Mo. App. 389; Cotton v. Arnold, 118 Mo. App. 596, 95 S. W. 280; W. H. Howard Commission Co. v. National Live Stock Bank, 93 Ill. App. 473; Wenz v. Mc-

employer until his wages shall have been paid."

In applying this principle, it has been held that no lien exists in favor of the mere workman or servant of the bailee. Wright v. Terry, 23 Fla. 100, 2 So. 6; Hollingsworth v. Dow, 19 Pick. 228.

General statutes exist in numerous states which create rights in the nature of common-law liens, in that they authorize those who expend labor upon property to retain it as security, and deem the right lost when possession is parted with.

Statutes of this character are said to be only declaratory of the common law, and must be interpreted in conformity with its principles. Jones, Liens, 2d ed. § 749; McDermid v. Foster, 14 Or. 417, 12 Pac. 813; Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661.

Accordingly, under such statutes, it is generally held that where the relation of the parties is shown to be that of master and servant, the latter is denied the right to claim its benefits, upon the ground that he does not have such possession of the property as is contemplated by the statute. Quist v. Sandman, 154 Cal. 748, 99 Pac. 204 (one employed to peel bark); Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661 (servant employed by month, with others, to make brandy); Boston & K. C. Cattle Loan Co. v. Dickson, 11 Okla. 680, 69 Pac. 889 (one employed to care for animals); McDermid v. Foster, 14 Or. 417, 12 Pac. 813 (one employed to cut and stack grain).

And the same rule of construction has been applied to statutes giving a lien to persons who herd and care for animals,—it being held that where the relation of the parties is established to be that of master and servant, no right to a lien for amount due for services is afforded by the statute. MENDILIE v. SNELL; Skinner v. Caughey, 64 Minn. 375, 67 N. W. 203; Underwood v. Birdsell, 6 Mont. 142, 9 Pac. 922; Boston & K. C. Cattle Loan Co. v. Dickson, 11 Okla. 680, 69 Pac. 889; Bailey v. Davis, 19 Or. 217, 23 Pac. 881; Hooker v. McAllister, 12 Wash. 46, 40 Pac. 617. A. L. R.

Bride, 20 Colo. 195, 36 Pac. 1105; King v. Indian Orchard Canal Co. 11 Cush. 231; McDearmid v. Foster, 14 Or. 417, 12 Pac. 813; Sharp v. Johnson, 38 Or. 246, 84 Am. St. Rep. 788, 63 Pac. 485.

Messrs. Frawley & Block, for respondent:

Plaintiff, having been intrusted with the care, keeping, and protection of the sheep was entitled to the lien claimed.

Wingard v. Banning, 39 Cal. 543; Phillips v. Salmon River Min. & Development Co. 9 Idaho, 149, 72 Pac. 886; Idaho Comstock Min. & Mill. Co. v. Lundstrum, 9 Idaho, 257, 74 Pac. 975; Williamson v. Moore, 10 Idaho, 749, 80 Pac. 227.

Allshie, J., delivered the opinion of the court:

This action was instituted by the plaintiff against defendant Snell, as mortgagee of a certain band of sheep, and James M. Roberts, as sheriff of Ada county, for the purpose of recovering some \$1,122 as damages alleged to have accrued by reason of the defendant's taking the sheep from the possession of the plaintiff. The plaintiff alleged that he was employed by the owners of the sheep, Joe Odiago and Frank Marcuerquiago, at the agreed wage of \$45 per month and board, to herd and care for this band of sheep, and that he began work for the owners in September, 1909, and continued to work under such employment until October, 1911, and that, at the time the defendants took possession of the band of sheep, plaintiff was holding a lien against the property for his wages, under the provisions of § 3446, Rev. Codes. Judgment was entered in favor of the plaintiff, and defendants appealed.

Section 3446 provides as follows: "Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, by labor or skill employed for the protection, improvement, safe-keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due him from the owner for such service. Livery or boarding or feed stable proprietors, and persons pasturing live stock of any kind, have a lien, dependent on possession, for their compensation in caring for, boarding, feeding, or pasturing such live stock."

The appellants contend that respondent was a mere hired man by the month, subject to the constant orders and directions of the master, the employer, and owner of the sheep, and that the employee had no such possession of the sheep as is contemplated by the provisions of § 3446, and

that he could not and did not acquire a lien under the provisions of the statute. There is no substantial difference or conflict between the parties as to the nature of respondent's employment and the character of service he rendered. It appears quite clearly that he was employed in the ordinary capacity of herder, and that the sheep he was herding were grazed on the public domain, except during the winter seasons, when they were kept and fed on Snake river, and were herded and grazed about through the sage brush as well as could be done during the winter weather. The owners of the sheep exercised the same right of control and possession as they had always done. They furnished all feed and supplies. They boarded the respondent. They assisted in moving camp, and apparently selected the ranges where the sheep should be grazed. It is true that Odiago, one of the owners, testified that respondent was to be responsible for the care and protection of the sheep, and for any that might be lost or destroyed by wild animals, and that he was to withhold the price of any such animals from the respondent's wages. During all this time the owners sold sheep and lambs from the band at any time they saw fit to do so, to the aggregate of somewhere between 3,000 and 4,000 head. They sheared the sheep and sold the wool, and at the time the appellants took these animals from respondent they found him in charge of only about 1,100. It also appears from the evidence that a portion of the time there were about 5,000 head of sheep in this band, and that they were run and herded in three separate bands, and that, when so separated, the respondent was in charge of one band and another herder in charge of another and one of the owners was in charge of the third. It appears from the evidence that the owners had one other herder employed all the time that respondent was in their employ, and that this other herder had the same and like possession of the sheep as respondent had. The case was tried to a jury, and the trial court instructed the jury on the question of possession as follows: "The statute says that the lien created by it is, dependent on possession. The possession of a mere servant performing service is not, and cannot be, exclusive of his master's possession, and such an exclusive possession is not required. In order to satisfy the statute, so far as the question of possession is concerned, the plaintiff in this case must have been placed in possession of the sheep by the owner for the purpose of performing the services called for by his contract, and must have continuously maintained possession for

such purpose from the time that he took such possession until the sheep were taken from him, and such possession must have been for the protection and sake-keeping of said sheep. The mere fact that his possession was his master's possession, and that another coservant had joint possession of the sheep with the plaintiff by the orders of the master, would not defeat the plaintiff's claim to a lien. But his possession must have been continuous, and must have been exclusive as against all parties except the master and the said coservant."

Respondent cites no case directly in point, but relies chiefly upon *Idaho Comstock Min. & Mill. Co. v. Lundstrum*, 9 Idaho, 257, 74 Pac. 975, and *Williamson v. Moore*, 10 Idaho, 749, 80 Pac. 227, as sustaining the instruction of the trial court as to the character of possession necessary to establish the lien in this case. Counsel lays stress on the following language employed by this court in the *Lundstrum Case*: "It is evident that the legislature intended to protect employees in their services by giving them a special lien on the property left in their care. That there was personal property left in the care of defendant when he was placed in charge of the property we think is beyond controversy. . . . As we view it, this section of the statute was enacted to protect laborers in their just compensation for their services." It will be noted from the language employed by the court in that case that there was no controversy about the claimant having had the undisputed and unqualified possession and control of the property. The statement of facts is quite exhaustive in that case, and it discloses that *Lundstrum* was employed and placed in charge of certain personal property situated on a mining claim as keeper and watchman, and that he had the sole and exclusive possession, control, and custody of the property for a long period of time, and for such services he claimed a lien under the provisions of § 3445 of the Revised Statutes, which was the same section as is now numbered 3446 in the Revised Codes. In the *Williamson Case* there had been a sale of certain real estate, and the purchasers were given the possession and use of certain personal property on the farm, including a cow and six head of horses, which were to remain on the farm and be in the possession, care, and subject to the use of the purchaser until the land should be paid for. A controversy subsequently arose between the parties, and the owners of the live stock sought to recover them without paying the

keepers their bill for feed and care. In course of the opinion this court, in holding that the defendant *Moore* had a lien on the property, said: "Under the provisions of § 3445, supra, and the authority of *Idaho Comstock Min. & Mill. Co. v. Lundstrum*, supra, decided by this court, the defendant is entitled to a lien, dependent upon possession, on the personal property which had been intrusted to his care, keeping, and protection under the agreement of September 3d, between himself and *Newland and Jensen*. . . . It necessarily follows that one caring for such property under employment from the tenant in possession thereof is entitled to his lien under § 3445, supra." It will be seen from the foregoing that the question of what constitutes a possession sufficient to satisfy the requirements of the statute in order to entitle the party to a lien was not considered or discussed in either of the foregoing cases.

Oklahoma has a statute (§ 31, chap. 48, Statutes 1893) in the identical language of the first sentence of our § 3446, supra, and the supreme court of that state in *Boston & K. C. Cattle Loan Co. v. Dickson*, 11 Okla. 680, 69 Pac. 889, had occasion to consider and construe it, and held that a herder of cattle employed by the month and working under the direction and control of the owner cannot acquire a lien under this statute. After setting forth the statute, the court said: "This section, like the other one relied upon by defendant in error, has no application to a case like the one at bar. If *Dickson* had taken possession of the cattle, and cared for them and fed them for plaintiff, under a contract to do so, then there might be some reason in the contention; but if *Dickson* has a lien on the cattle which he was herding, then, under the same reasoning, every farm hand has a lien on the corn which he husks, on the wheat which he cuts, on the horses which he feeds and cares for, and so on. That was not the intention of the legislature. *Dickson's* possession of the cattle was the possession of his employer." The state of Washington has a statute (*Hill's Anno. Stats. & Codes*, § 1705) quite differently worded, but in substance covering the same ground as our statute, and in the case of *Hooker v. McAllister*, 12 Wash. 46, 40 Pac. 617, the court was confronted with a case where a man had been employed as a herder of a band of sheep at an agreed wage of \$40 per month. He subsequently claimed a lien on the band of sheep under the provisions of the statute for his services. The court held that he did not come within the pur-

view and meaning of the statute, and was not entitled to a lien, and, among other things, said: "We are satisfied, both from an investigation of the statute itself and from the authorities which we have examined, that it was not the intention of the legislature to confer a lien upon persons who were merely hired by the month or day to herd sheep or cattle of any kind, where the possession remained in the owner, and where the owner was responsible for such cattle; but that the statute intended to confer this lien upon agisters, upon those who took possession of the stock above referred to, and who became responsible for them, and that the word 'herder,' used in the statute, has reference to that class of persons to whom is intrusted the possession and control of the property mentioned." The state of Montana seems to have a statute (§ 1394, Comp. laws) almost identical with the Washington statute construed in *Hooker v. McAllister*, and that statute has been considered by the supreme court of Montana on several occasions, as may be seen from an examination of *Vose v. Whitney*, 7 Mont. 385, 16 Pac. 846, and the court has in those cases analyzed their statutes at considerable length, and reached substantially the same conclusion as that indicated by the Washington court.

After a consideration of the statute and an examination of the authorities which have construed like statutes, we cannot avoid the conclusion that the possession meant and intended by our statute (§ 3446) must be such as gives the party for the time the exclusive care, control, and direction of the property, and must be more than that of a mere servant for hire from day to day or month to month. The statute was evidently intended to apply to cases where a party takes the possession of personal property, as, in this case, live stock, and agrees to graze, feed, or pasture the stock for a time, and assume the exclusive care of and responsibility for the property, and furnish or procure the feed or pasturage. It might be on the public range or in his private inclosure.

We conclude that, upon the evidence as contained in the record, the respondent acquired no lien on the property taken by the sheriff.

The judgment must therefore be reversed, and a new trial is granted. Costs awarded in favor of appellants.

Stewart, Ch. J., and Sullivan, J., concur.  
42 L.R.A. (N.S.)

## IOWA SUPREME COURT.

### STATE OF IOWA

v.

JOHN R. DOBBINS, Appt.

(152 Iowa, 632, 132 N. W. 805.)

#### Larceny — securing money by fraud — pretended horse race.

1. One who induces another to put up his money on a pretended horse race, for the purpose of getting others to bet, under the promise that it shall be returned as soon as it has served its purpose, but in reality with the intent that the stakeholder shall convert it to the use of several co-conspirators, including the promisor, is, if the intent is carried out, guilty of larceny; and it is immaterial that the transaction was such that the identical money was not to be returned, but the owner had in fact parted with the title.

#### Indictment — larceny — manner of taking.

2. The method and manner of the unlawful taking and carrying away need not be set out in an indictment for larceny to permit the introduction of evidence thereof.

#### Appeal — absence of exception — remarks of judge.

3. Statements made by the judge during a criminal trial cannot be considered on appeal if no exception to them was taken.

#### Same — opinion on evidence — error.

4. A statement of the judge to the jury in a criminal case that certain evidence which had a certain tendency could be considered only under certain circumstances is not reversible error, as intimating the opinion of the judge on the evidence, where the sole purpose of the statement was to

#### Note. — Larceny by fraudulent race or game.

This question is covered in the notes to *State v. Ryan*, 1 L.R.A. (N.S.) 862, and *State v. Donaldson*, 20 L.R.A. (N.S.) 1164. Since those notes it was held in *Fleming v. State*, 174 Ind. 264, 91 N. E. 1085, that defendant was properly convicted of larceny where, as the result of a conspiracy with others and with the felonious intent to appropriate the money, he induced the prosecutor to bet a large sum of money on a fraudulent wrestling match, it appearing that the latter did not intend to part with his title to the money, but only to part with the possession thereof temporarily. It was so held even upon assumption that the facts constitute an offense under the statute denouncing "bunko steering;" the court saying that in such circumstances the state might elect under which statute it would proceed.

As to illegal intent of prosecutor as affecting guilt of obtaining property by false pretense or confidence game, see notes to *People v. Turpin*, 17 L.R.A. (N.S.) 276, and to *Horton v. State*, 39 L.R.A. (N.S.) 423.

R. S. N.

identify it so as to limit its application in favor of accused.

**Evidence — conspiracy — other act — scope.**

5. Upon a trial for larceny through conspiracy to secure money from a certain person by fraud, evidence is admissible that the same persons swindled another person by similar means, for the purpose of showing the scope and purpose of the conspiracy, if one is found to exist, although accused is not shown to have been connected with the conspiracy until a date later than that to which the evidence relates.

(October 18, 1911.)

**A**PPEAL by defendant from a judgment of the District Court for Pottawattamie County convicting him of larceny. Affirmed.

Statement by Weaver, J.:

The defendant appeals from a judgment of conviction on charge of larceny.

Messrs. Tinley & Mitchell, for appellant:

The evidence does not show that the defendant committed any crime, and is wholly insufficient to support a conviction of the defendant for larceny.

State v. Loser, 132 Iowa, 419, 104 N. W. 337; State v. Edwards, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429; People v. Morse, 99 N. Y. 662, 2 N. E. 45; State v. Anderson, 47 Iowa, 142, 2 Am. Crim. Rep. 100; State v. Hall, 76 Iowa, 85, 14 Am. St. Rep. 204, 40 N. W. 107, 8 Am. Crim. Rep. 463; Loomis v. People, 67 N. Y. 329, 23 Am. Rep. 123, 2 Am. Crim. Rep. 345; State v. Kube, 20 Wis. 229, 91 Am. Dec. 390; State v. Vickery, 19 Tex. 326; Com. v. Lannan, 153 Mass. 287, 11 L.R.A. 450, 25 Am. St. Rep. 629, 26 N. E. 858; Stinson v. People, 43 Ill. 397; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589; 25 Cyc. 33; Haley v. State, 49 Ark. 147, 4 S. W. 746, 7 Am. Crim. Rep. 328; State v. Kallaher, 70 Conn. 398, 66 Am. St. Rep. 110, 39 Atl. 606; Pease v. State, 94 Ga. 615, 21 S. E. 588; Welsh v. People, 17 Ill. 339; State v. Will, 49 La. Ann. 1337, 22 So. 378; Smith v. People, 53 N. Y. 111, 13 Am. Crim. Rep. 474; Hindman v. State, 72 Ark. 516, 81 S. W. 836; People v. Proctor, 1 Cal. App. 521, 82 Pac. 551; Lowe v. State, 44 Fla. 449, 103 Am. St. Rep. 171, 32 So. 956; State v. Waller, 174 Mo. 518, 74 S. W. 842; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506; People v. Campbell, 127 Cal. 278, 59 Pac. 593; People v. Raschke, 73 Cal. 373, 15 Pac. 13; State v. Kosky, 191 Mo. 1, 90 S. W. 457; Martin v. State, 123 Ga. 478, 51 S. E. 334.

The court, in stating to the jury what the evidence showed or tended to show, 42 L.R.A.(N.S.)

usurped the province of the jury and directed the jury on the force and effect of certain testimony which the court had no power to do.

State v. Lightfoot, 107 Iowa, 344, 78 N. W. 41, 11 Am. Crim. Rep. 588; State v. Tucker, 96 Iowa, 276, 65 N. W. 152; State v. Douglass, 96 Iowa, 308, 65 N. W. 151; Com. v. Knapp, 10 Pick. 477, 20 Am. Dec. 534; People v. Webster, 111 Cal. 381, 43 Pac. 1114; People v. Murray, 86 Cal. 31, 24 Pac. 802; People v. Casey, 65 Cal. 260, 3 Pac. 874, 5 Am. Crim. Rep. 318; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Houston v. State, 4 G. Greene, 437; State v. Willing, 129 Iowa, 72, 105 N. W. 355; Doyer v. State, 93 Tenn. 216, 23 S. W. 971; People v. Ah Sing, 59 Cal. 400; Steele v. State, 83 Ala. 20, 3 So. 547; Mead v. State, 26 Ohio St. 505; State v. Crofford, 121 Iowa, 395, 96 N. W. 889; State v. Hunter, 118 Iowa, 686, 92 N. W. 872.

The testimony of Hedford and others details separate and distinct alleged offenses, and was incompetent, and should not have been received.

State v. Crofford, 121 Iowa, 395, 96 N. W. 889; Johnson v. State, 75 Ark. 427, 88 S. W. 906; State v. Dexter, 115 Iowa, 678, 87 N. W. 417; 4 Elliott, Ev. § 3057; People v. Tucker, 104 Cal. 440, 38 Pac. 195; State v. Goetz, 34 Mo. 85; Wilcox v. State, 3 Heisk. 110; Ballow v. State, 42 Tex. Crim. Rep. 263, 58 S. W. 1023; McIver v. State, — Tex. Crim. Rep. —, 60 S. W. 50; State v. Brady, 100 Iowa, 191, 36 L.R.A. 693, 62 Am. St. Rep. 560, 69 N. W. 290; State v. Walters, 45 Iowa, 389; State v. Wackernagel, 118 Iowa, 13, 91 N. W. 761; State v. McGee, 81 Iowa, 17, 46 N. W. 704.

Messrs. George S. Wright and E. J. Mulick also for appellant.

Mr. H. W. Byers, for the state:

Defendant was guilty of larceny.

State v. Hall, 76 Iowa, 85, 14 Am. St. Rep. 204, 40 N. W. 107, 8 Am. Crim. Rep. 463; State v. Loser, 132 Iowa, 429, 104 N. W. 337; Defrese v. State, 3 Heisk. 53, 8 Am. Rep. 1; United States v. Murphy, MacArth & M. 375, 48 Am. Rep. 754; State v. Skilbrick, 25 Wash. 555, 87 Am. St. Rep. 784, 66 Pac. 53; People v. Shaw, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121, 6 Am. Crim. Rep. 403; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123, 2 Am. Crim. Rep. 345; People v. Shaughnessy, 110 Cal. 598, 43 Pac. 2; Doss v. People, 153 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; Aldrich v. People, 224 Ill. 622, 7 L.R.A.(N.S.) 1149, 115 Am. St. Rep. 166, 79 N. E. 964, 8 Ann. Cas. 284; Kellogg v. State, 26 Ohio St. 18, 2 Am. Crim. Rep. 96; Levy v. State, 70 Ala. 259; Frazier v. State, 85 Ala. 18, 7 Am. St. Rep. 21, 4 So. 691; Huber v. State, 57 Ind. 341,



26 Am. Rep. 57; Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178; March v. State, 117 Ind. 547, 20 N. E. 444; Crum v. State, 148 Ind. 401, 47 N. E. 833; Bradley v. State, 165 Ind. 397, 75 N. E. 873; People v. Berlin, 9 Utah, 383, 35 Pac. 498; Hunt v. State, 72 Ark. 241, 65 L.R.A. 71, 105 Am. St. Rep. 34, 79 S. W. 769, 2 Ann. Cas. 33; State v. Skilbrick, 25 Wash. 555, 87 Am. St. Rep. 784, 60 Pac. 53; Devore v. Territory, 2 Okla. 562, 37 Pac. 1092; State v. Will, 49 La. Ann. 1337, 22 So. 378; United States v. Rodgers, 1 Mackey, 419; Hall v. State, 6 Baxt. 522; State v. Edwards, 51 W. Va. 220, 59 L.R.A. 465, 41 S. E. 429; People v. Rae, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1; People v. Campbell, 127 Cal. 278, 59 Pac. 593; Schafer v. State, — Ala. —, 8 So. 670; Porter v. State, 23 Tex. App. 295, 4 S. W. 889; Stinson v. People, 43 Ill. 397; Doss v. People, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; People v. Morse, 99 N. Y. 662, 2 N. E. 45; People v. Dean, 35 N. Y. S. R. 931, 12 N. Y. Supp. 749; People v. Miller, 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474; Miller v. Com. 78 Ky. 15, 39 Am. Rep. 194; Elliott v. Com. 12 Bush, 176; State v. Watson, 41 N. H. 533; State v. Lindenthall, 5 Rich. L. 241, 57 Am. Dec. 743; State v. Meldrum, 41 Or. 380, 70 Pac. 526; State v. McRae, 111 N. C. 665, 16 S. E. 173; State v. Woodruff, 47 Kan. 151, 27 Am. St. Rep. 285, 27 Pac. 842; State v. Walker, 65 Kan. 92, 68 Pac. 1095; Com. v. Barry, 124 Mass. 325; Com. v. Lannan, 153 Mass. 287, 11 L.R.A. 450, 25 Am. St. Rep. 629, 26 N. E. 858; Hecox v. State, 105 Ga. 625, 31 S. E. 592; Martin v. State, 123 Ga. 478, 51 S. E. 334; State v. Ryan, 47 Or. 338, 1 L.R.A. (N.S.) 862, 82 Pac. 703; Johnson v. State, 75 Ark. 427, 88 S. W. 905; State v. Murphy, 90 Mo. App. 548; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123, 2 Am. Crim. Rep. 345; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506; People v. Raschke, 73 Cal. 378, 15 Pac. 13; People v. Johnson, 91 Cal. 265, 27 Pac. 663; People v. Laurence, 137 N. Y. 517, 33 N. E. 547; Com. v. Lannan, 153 Mass. 287, 11 L.R.A. 450, 25 Am. St. Rep. 629, 26 N. E. 858; Fleming v. State, 136 Ind. 149, 36 N. E. 154.

Where several persons enter into a conspiracy and take measures toward carrying it out, a party subsequently joining in the conspiracy ratifies the various acts of the conspirators, at least, to such extent as to make evidence of their prior acts and declarations admissible against him.

State v. Lewis, 96 Iowa, 286, 65 N. W. 295; State v. Donovan, 125 Iowa, 239, 101 N. W. 122; State v. Brady, 100 Iowa, 191, 36 L.R.A. 693, 62 Am. St. Rep. 560, 69 N. W. 290; State v. Levich, 128 Iowa, 372, 104 42 L.R.A. (N.S.)

N. W. 334; State v. Wrand, 108 Iowa, 73, 78 N. W. 788; State v. Lee, 91 Iowa, 499, 60 N. W. 119; Weyman v. People, 4 Hun, 511; Mayer v. People, 80 N. Y. 376; State v. McIntosh, 109 Iowa, 209, 80 N. W. 349; State v. Lee, 91 Iowa, 499, 60 N. W. 119; 3 Rice, Ev. § 431, p. 711; Bishop, New Crim. Proc. §§ 1120-1129; Smith v. State, 21 Tex. App. 96, 17 S. W. 560; Blain v. State, 33 Tex. Crim. Rep. 236, 26 S. W. 63; Com. v. Blood, 141 Mass. 571, 6 N. E. 769; State v. Flood, 148 Iowa, 146, 127 N. W. 48.

Messrs. George Cosson, Attorney General, John J. Hess, and John P. Organ also for the State.

Weaver, J., delivered the opinion of the court:

The indictment is in the ordinary short form, charging that on or about October 13, 1908, the defendant did wilfully, unlawfully, and feloniously take, steal, and carry away \$30,000 lawful money of the United States belonging to one T. W. Ballew. To this accusation the defendant entered a plea of not guilty.

It is the theory of the state that defendant, with several other persons, entered into a conspiracy to defraud whomsoever they might be able to deceive by means of pretended horse races, upon the result of which the victims of the deception were to be induced to stake or risk their money, and that, in pursuance of such conspiracy, the said confederates did take from the complaining witness a large sum of money in a manner and by methods which in legal contemplation amounts to larceny. In support of this claim, a large amount of testimony was offered tending to show that defendant and another man, known by the name of Martin, approached Ballew, who was a person of considerable wealth and business experience, and represented to him that several "millionaires from Pittsburg, Pennsylvania," were traveling leisurely over the country promoting new railroads and buying bonds, and, as a means of diversion or relief from the burden of their business cares, they took with them in their journeying a race horse in order that they might have a "little fun once in a while." Their wealth was such, Ballew was told, that they were indifferent to the losses they might sustain, and their confidence in the speed of their horse was so great they were willing to back him without limit. They were, however, of such eminently respectable and discreet character they would not bet their money with professional sports and gamblers, to which class defendant and Martin admittedly belonged, and, in order for the latter to obtain any wagers with these exclusive gentlemen, the transaction

must be negotiated through some other person. Martin further represented that he had been to California, where he discovered and purchased a horse, which had been privately tried and tested and found to be a much better animal than the one owned by the "Pittsburg millionaires," and, if a race could be arranged, it was an absolute certainty the latter animal could be beaten, and a large amount of money won from its owners. On this showing Ballew was urged to go to Council Bluffs and become a backer of the California horse. He was told he need not risk a dollar himself, and need only bet the money which would be furnished him by others, and for his services he would receive 10 per cent of the winnings.

Defendant was an old acquaintance of Ballew, and vouched for the honesty and reliability of Martin. Ballew, after some urging, consented to play the part thus assigned him, and went with the parties to Council Bluffs, where the millionaires and their horse were said to be, and where arrangements had been made for a race. On arriving at Council Bluffs, Ballew was introduced to one Wilson, who was said to be the private secretary of the millionaires and brother-in-law of Martin. Wilson represented that his wealthy employers had not treated him fairly, and he was willing to help beat their horse in the race. To that end, he said he and Martin had privately raced the two horses together, and Martin's was by far the better, and faster, and was certain to win. He asked Ballew if he had any money or drafts with him to exhibit if any question were raised as to his financial ability to take part in a game of these proportions, and thus secure large bets from the millionaires. Yielding to the request of the conspirators, Ballew obtained bankers' checks or drafts to the amount of \$30,000. By agreement with the millionaires, Wilson was selected as stakeholder, and at a meeting in a room in a hotel the betting began. Ballew was furnished a considerable sum of money by Martin with which he covered the wagers offered by the backers of the Pittsburg horse. At the close of the session, the bets aggregated many thousands of dollars. After adjournment, Ballew was told that the millionaires were still anxious to put up more money on the race, but Martin and his friends had exhausted their funds. In order to increase their bets and consequent harvest of winnings, they suggested that Ballew cash his checks and bet the money for them, and promised that, if he would do so, Wilson, the stakeholder, who was interested with them, would return it as soon as the betting was over, and before the race was pulled off. The scheme worked, Ballew obtained

\$30,000 in cash, and with it covered the wagers offered against the Martin horse. When the money was all in the stakeholder's hands, a pretended controversy arose between some of the alleged conspirators in regard to a claimed mistake in recording the bets, and a demand was made that the money be counted. This was objected to, but a "compromise" was agreed upon, by which the stakeholder swept all the money into a valise, where it was to be held until the race was over, and then all disputes were to be adjusted.

Proceeding to the race track, the horses were brought forth and a start made, from which, the Martin horse took the lead. Before the course was completed, however, the rider of the Martin horse pretended to become suddenly ill, fell forward on the animal's neck, when the Pittsburg horse passed him, and came first under the wire. A simulated quarrel immediately arose between the "opposing" ranks of backers, in the midst of which an alarm was given that the police were coming, and all persons engaged in the deal were liable to be immediately arrested. Thereupon the crowd separated, the several members pretending to hasten out of the city. Wilson told Ballew that his money had been deposited in a safety vault, and that he would at once get it, and bring it to him at Kansas City, Missouri, which, of course, he never did. It is also the theory of the state, and there is evidence tending to show, that the \$30,000 thus fraudulently obtained from Ballew was divided between the conspirators; the defendant herein receiving \$7,500 for his share of the spoils.

The foregoing outline of the evidence is by no means full or complete, but it is sufficient to indicate in a general way the nature of the case made by the state. The appellant, who offered no evidence in his own behalf, does not seriously contend that no crime of any kind is disclosed by the record, but plants his demand for a reversal of the judgment against him on the proposition: (1) That the crime, if any, thus shown, is not larceny; (2) that the evidence offered in support of the charge is not admissible under the allegations made in the indictment; (3) that the court erred to his prejudice in its rulings upon the admission of evidence; and (4) that the court erred to his prejudice in the instructions given to the jury and in refusing his requests for other instructions.

1. The contention that the offense, if any, shown by the evidence is not larceny, and therefore does not support the verdict and judgment in this case, presents the first important question urged in appellant's argument, and upon its decision many of the

other propositions made in his behalf will necessarily turn. Stated in brief terms, the contention is that Ballew, in passing his money to the stakeholder, intended to part with his title thereto; and that, if such be the case, there was no larceny, but the offense, if any, was that of cheating by false pretenses.

It is true that larceny and cheating by false pretenses are distinct offenses, and that under a charge of one of these crimes the accused cannot rightfully be convicted upon proof of the other. *State v. Loser*, 132 Iowa, 429, 104 N. W. 337. It is also true that the line of technical distinction between larceny and false pretenses is sometimes quite obscure and difficult to trace; and the decided cases, especially where money has been obtained by means of a pretended wager, are not altogether harmonious, but we are not disposed to increase the confusion by indulging in over-refinement of definition, which serves less to uphold and protect substantial rights than to open doors of escape to violators of the law. Speaking to this point in a case very similar to the one at bar, the Michigan court well says: "There is some rather attenuated discrimination to be found in the books between such cheats as induce a person to give temporary custody of his property to another who keeps or disposes of it, and those whereby he is induced to part with it out and out. We do not think it profitable to draw overnice metaphysical distinctions to save thieves from punishment. If rogues conspire to get away a man's money by such tricks as those which were played here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking and so make the conversion felonious." *People v. Shaw*, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121, 6 Am. Crim. Rep. 403.

That a felonious taking is necessary to constitute larceny and that, generally speaking, a taking which is accomplished with the consent or acquiescence of the owner of the property is not felonious, will be readily conceded; but where such consent is obtained by fraud or trick, with promise to return the property after it has served some temporary use or purpose, but with the secret intention on the part of the receiver to convert it, then, as has already been said, the fraud supplies the place of trespass in the taking, and the offense committed is larceny. Says the California court: "Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if person, *animo furandi*, avail himself of a temporary possession for a specific purpose obtained by

consent, to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. He is therefore acting against the will of the owner, and is a trespasser." *People v. Rae*, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1. The rule as thus stated has been frequently recognized in cases substantially like the one we are now considering, and is too manifestly just and wholesome to require further discussion at our hands. *State v. Loser*, supra; *State v. Ryan*, 47 Or. 338, 1 L.R.A.(N.S.) 862, 82 Pac. 703; *Miller v. Com.* 78 Ky. 15, 39 Am. Rep. 194; *People v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2; *Johnson v. State*, 75 Ark. 427, 88 S. W. 905. The showing made by the state which appellant has in no wise undertaken to controvert except by his plea of not guilty makes it apparent beyond all doubt that Ballew, the quality of whose character and motive is not of controlling importance, was made the victim of a gross fraud in which the appellant was an active and influential agent, and was by defendant and his confederates robbed of a very large sum of money, possession of which was obtained under pretense that it was to be temporary only, but with the secret intent to deprive him thereof permanently and entirely. If this does not constitute larceny, it will be very difficult to frame any definition of that crime through which a cunning thief may not find an avenue of escape with his booty. The trial court instructed the jury, in effect, that if Ballew gave his money as a bet to the stakeholder, who received it for that purpose, and not as part of a scheme in which the stakeholder participated to get possession of it, and appropriate it without regard to the event on which the wager was made, then the taking was not felonious, and defendant should be acquitted.

The jury were further told as follows:

"(7) If Ballew was induced by parties acting in furtherance of such a conspiracy to deliver his money to one of the conspirators under a promise that it would be returned to him, which he believed, and expected its return, but that the transaction as a whole on the part of the persons who were conducting it with Ballew was merely a trick or scheme to get the money into their possession, they having at the time an intent to appropriate and convert it to their use; and that having by means thereof obtained possession of Ballew's money they did so appropriate and convert it under color of other transactions designed to deceive and mislead him, this would make out the crime charged in the indictment, and, if defendant was a party to such conspiracy, he should be found guilty. Whether Ballew expected the same money to be returned, or

that it would be exchanged for its equivalent which would be returned to him, would make no difference in this connection if either is shown.

"(8) It is claimed on behalf of defendant that Ballew put his money in the hands of a stakeholder as a bet. On this point you are instructed that even though you find that Ballew parted with his money by delivering it, or having it delivered to another to be held as a stake upon a bet, if the evidence shows that he was induced so to do by parties acting in furtherance of a conspiracy to defraud him among whom was the stakeholder, that the betting of other parties was merely simulated, the race a mere pretense and a sham, and all the transactions had with him merely part of a scheme to obtain possession of his money by trick, deceit, or fraud, and then appropriate and convert it, and, pursuant thereto, the money of Ballew was appropriated and converted to their use by the parties so dealing with him, this would also make out the crime charged in the indictment, and, if the defendant was a party to such conspiracy, he should be found guilty."

This we think stated the law as favorably to the defendant as he was entitled to expect or demand. That precedents may be found which state the rule much more narrowly must be admitted. Counsel for the defense have collated them with industry, and in argument zealously press them upon our attention, asking us to broadly hold that if Ballew intended that the title to the particular money delivered by him should pass to the stakeholder, no matter by what deception, fraud, trick, or device that intent was induced, the charge of larceny cannot be predicated on the transaction, and that the jury should have been so instructed. We are not willing to so hold. The instructions are in substantial harmony with the views we have expressed, and the exceptions taken thereto cannot be sustained.

2. It is further urged that, as the indictment does not set forth the particular acts done or methods alleged to have been employed by the appellant in perpetrating the offense, evidence of such acts and conduct is not admissible. It has been too often held to admit of argument that an allegation that the accused feloniously took, stole, and carried away certain described money, goods, or chattels of the property of another is a sufficient description of the offense of larceny. The method and manner of the unlawful taking and carrying away or conversion are matters of evidence merely, and need not be pleaded in the formal charge. No authority holding otherwise in a case of common-law larceny has been 42 L.R.A. (N.S.)

called to our attention by counsel, and we are quite confident none is to be found.

3. In the course of the trial below, the court, in ruling upon certain objections to testimony and explaining its views concerning the question so raised, spoke of the testimony already introduced as "tending to show that defendant entered into a fraudulent scheme whereby Ballew was deprived of his money in a manner amounting to larceny." Other language of similar effect was made use of by the court. As this statement was made in the presence of the jury, error is assigned thereon. The record does not disclose any exception taken at the time by defendant to the language of the court, and we need not, therefore, stop to consider whether, if objection had been made thereto and the statement had not been withdrawn or modified, it would have constituted reversible error.

In its formal charge to the jury, however, the court, after stating the claim of the state that defendant and others had conspired together to defraud persons generally, said that "to support this claim, the state has introduced testimony tending to show that the parties or some of them with whom the defendant is alleged to have thus colluded had, pursuant to such conspiracy, and through and by means of such a scheme, defrauded other parties than Ballew, both before and after the transaction with the prosecuting witness." The jury were then told that, before considering such testimony for any purpose, it must first be found from other evidence that defendant entered into a general conspiracy of that character, and, if such fact had not been established, then the testimony first mentioned should be disregarded altogether. This reference to the testimony and its tendency is excepted to as indicating to the jury the opinion of the court upon a material fact. Taking it as a whole, we see nothing to criticize in the instruction complained of. It is, of course, of the highest importance that the court should refrain from invasion of the province of the jury and avoid all expression of personal opinion concerning the truth of evidence offered on either side, but this rule does not appear to have been here transcended. The instruction was clearly intended to protect the rights of the defendant, and limit the use and effect of the particular testimony there mentioned to its legitimate purpose. No prejudice could have resulted to the defense therefrom.

4. The state produced as a witness one Bedford, who, over defendant's objection, was allowed to testify that in August prior to the transaction now under consideration, which took place a month or two later, he

saw defendant with the alleged millionaires and their confederates in the city of Council Bluffs. He then proceeded to state that his said visit to said city had been induced by one of the men who gave the name of Carson, and that by means very similar to those alleged to have been employed in influencing Ballew he had been swindled by these parties out of a large sum of money. This witness did not identify the defendant as taking part in the race or the spurious betting by which he was swindled, but claims that immediately prior thereto he saw defendant in association with the other alleged conspirators. Referring to this class of evidence, the jury was told it could not be considered for the purpose of finding a conspiracy, but, if such conspiracy had been otherwise established, the testimony was admissible upon the question of its scope and purpose. The admission of this testimony and the use thus made of it are also assigned as error. We are disposed to hold the testimony admissible for the purpose indicated by the trial court.

The fact that defendant's active connection with this alleged league of swindlers is not shown until a somewhat later date is not a sufficient objection. There is abundant evidence showing such connection subsequently with the transaction whereby Ballew was relieved of his money. The existence of a conspiracy at that date at least is sufficiently established. Then, if not before, he became a party to it; and, while he may perhaps not be held criminally liable for offenses committed prior to his participation therein, he will be presumed to have known the character and purpose of the unlawful combination. Its character and purpose may, we think, be shown by its acts and conduct prior as well as subsequent to the date of his entrance into its machinations.

There was no error in the admission of the testimony, or in the instruction limiting its use by the jury. What we have here said applies equally to the testimony of several other witnesses giving testimony similar in character to that of Bedford.

Other exceptions have been briefly suggested by counsel, but we cannot properly prolong this opinion for their discussion.

We have examined the record with reference to each point made, and find no reversible error. There is no room for question as to the justice of the verdict of the jury. The rights of the defendant appear to have been carefully guarded by the trial court, and there is nothing to justify interference by us with the judgment appealed from.

Affirmed.

Petition for rehearing denied.  
42 L.R.A. (N.S.)

# MAINE SUPREME JUDICIAL COURT.

EVIE M. ADAMS

v.

LEMUEL B. HODGKINS.

(— Me. —, 84 Atl. 530.)

**Estoppel — disclaimer of easement — want of notice of interest.**

1. A disclaimer of a right of way across property will not work an estoppel in favor of one who purchases the property in reliance upon it, if the owner of the easement had no notice of the intended purchase.

**Evidence — release of way — sufficiency.**

2. The release of a right of way cannot be presumed from the evidence of a single unfriendly witness, as to a declaration of abandonment by the owner of the way, who has since deceased, made thirty-five years before the trial in the presence of such witness, who was then only nineteen years old.

**Easement — right of way — use of other way — extinguishment.**

3. The mere use by the owner of a right of way of another way from his property to the highway, which is equally convenient to his own, does not extinguish his right.

**Same — nonuser — effect.**

4. A right of way created by grant is not lost by mere nonuser, unaccompanied by intention to abandon and adverse possession by the owner of the servient tenement, or expense or damage sustained by him.

(September 30, 1912.)

**Note. — Abandonment or loss of private way by nonuser or improvements inconsistent with its use.**

The earlier cases upon this subject are collected in the note to Trimble v. King, 22 L.R.A. (N.S.) 880.

As to whether failure to maintain an easement will raise a presumption of its abandonment, see note to Oney v. West Buena Vista Land Co. 2 L.R.A. (N.S.) 832.

Whether a right of way created by grant has been abandoned is a question of fact and intention, and when that is the issue it should go to the jury. Southern R. Co. v. Howell, 89 S. C. 391, 71 S. E. 972, Ann. Cas. 1913 A, 1070. This was a railroad right of way.

It has been stated that cases in which an easement is said to be extinguished by abandonment form a law unto themselves, that is, each case depends upon its own particular facts as to whether or not there has been an abandonment, irrespective of any question of the operation of a statute of limitations. Abandonment depends upon the nature of the acts done or acquiesced in with reference to the obstruction of the way. The time of the ceasing of the use may be wholly immaterial, and the period of time in any given case must depend on all the accompanying circumstances. Mason v. Ross, 75 N. J. Eq. 136, 71 Atl. 141.

**R** EPORT by the Supreme Judicial Court for Franklin County for the opinion of the Law Court of an action brought to recover damages for trespass *quare clausum fragit* in attempting to use an alleged right of way. Judgment for defendant.

The facts are stated in the opinion.

Mr. Elmer E. Richards, for plaintiff:

Defendant's predecessors in title, by their nonuser in connection with definite acts and statements, lost whatever right or claim they may have had to a way by necessity across the Adams land.

Illinois C. R. Co. v. Houghton, 126 Ill. 233, 1 L.R.A. 214, 9 Am. St. Rep. 581, 18 N. E. 301; Kelly Nail & Iron Co. v. Lawrence Furnace Co. 46 Ohio St. 544, 5 L.R.A. 652, 22 N. E. 639; Moseller v. Deaver, 106

N. C. 494, 8 L.R.A. 537, 19 Am. St. Rep. 540, 11 S. E. 529; Moseller v. Deaver, 8 L.R.A. 538 note; Westcott v. New York & N. E. R. Co. 152 Mass. 465, 25 N. E. 840; New York, N. H. & H. R. Co. v. Benedict, 169 Mass. 262, 47 N. E. 1027; Ballard v. Butler, 30 Me. 94.

It is not the duration of the cesser to use the easement, but the nature of the act done by the owner of the easement, or of the adverse act acquiesced in by him, and the intention which one or the other indicated, that is material.

Fitzpatrick v. Boston & M. R. Co. 84 Me. 38, 24 Atl. 432; Dyer v. Sanford, 9 Met. 401, 43 Am. Dec. 399; Pope v. Devereux, 5 Gray, 412; Warshauer v. Randall, 109 Mass. 586.

As stated in the former note, mere nonuser of a private way created by grant will not work an extinguishment of the easement therein. Brunthaver v. Talty, 31 App. D. C. 134; Murphy Chair Co. v. American Radiator Co. — Mich. —, 137 N. W. 791; Dulce Realty Co. v. Staed Realty Co. — Mo. —, 151 S. W. 415.

Thus, a mere nonuser for twenty-three years, not amounting to abandonment, with no adverse use by the owner of the servient estate inconsistent with the continuance of the easement, will not extinguish a right of way. Willets v. Langhaar, 212 Mass. 573, 99 N. E. 466.

And the right of a private way is not lost by nonuser, where twenty years of nonuse has not continued coupled with an adverse enjoyment. Mason v. Ross, supra.

Generally speaking, a private way created by an express grant cannot be destroyed without a new grant of equal solemnity, or adverse possession continuing long enough to create a prescriptive title; nor can it be destroyed by nonuser by the dominant owner, unless adverse occupancy for the statutory period be added thereto. Citizens' Electric Co. v. Davis, 44 Pa. Super. Ct. 138.

There is no way in which a private way created by a grant can be extinguished by abandonment or nonuser, unless there has been, in connection with acts inconsistent with the intent to use, some acquiescence in its obstruction by another for a reasonable period at least, or some representations that would work an estoppel. Brunthaver v. Talty, 31 App. D. C. 134.

Abandonment is as much a matter of intention as of time, and mere nonuser will not defeat the right to occupy a right of way for purposes expressed in a grant, when no time has been stipulated for the use. McAdam v. Benson Logging & Lumbering Co. 57 Wash. 407, 107 Pac. 187.

So a private way in an alley, created by grant, will not be extinguished by reason of the fact that the grantee erects a building extending up to the line of the alley, and constructs in the wall no door opening; this amounts to nothing more than nonuser of the easement, which the grantee can 42 L.R.A. (N.S.)

later avoid by cutting such an opening whenever it suits his convenience. Brunthaver v. Talty, supra.

And where, in an agreement of settlement of condemnation proceedings whereby a railway company obtains a right of way through a farm, there is reserved for the use of the farm a perpetual right to a pass way under the railroad track, even if this pass way is not used for eighteen years, such nonuse could not operate to defeat the right to use it. Cleveland, C. C. & St. L. R. Co. v. Griswold, — Ind. App. —, 97 N. E. 1030.

Likewise, a right of way reserved in a deed in favor of the grantor therein is not extinguished by the erection and maintenance by the grantee of a building across the right of way, where another way around this structure is substituted by mutual arrangement, and acquiesced in for twenty-five years. Hall v. Hall, 106 Me. 389, 76 Atl. 705.

And where land is conveyed to a shipwright, together with a privilege or passageway from a certain creek thereon to a neighboring river, access to the latter being necessary to the grantee since he had his shipyard upon the river, this was held to describe a right of passage over the flats, whether bare or covered with water, at any and all times and by any reasonable method of travel, and, accordingly, such easement was not defeated or extinguished by reason of the fact that the creek dried up, or that the premises conveyed were no longer used as a shipyard, but were used in connection with the business of a diver, who likewise must have access to the same river. Old Colony Street R. Co. v. Phillips, 207 Mass. 174, 93 N. E. 792.

And where one abutting owner holds the easement by grant in a passageway upon the lands of another, the fact that a post is set out and maintained therein by common consent, for the purpose of preventing horses and carriages from using the way beyond a certain point, cannot affect the rights of the parties; when the consent of one party is withdrawn, they are left to their original rights under the deed. Cotting v. Murray, 209 Mass. 133, 95 N. E. 212.

An owner of a right of way or to the easement may, without deed, abandon his right so as to relieve the servient estate of the encumbrance.

King v. Murphy, 140 Mass. 254, 4 N. E. 566.

Mr. Frank W. Butler, for defendant: Jonathan Sylvester, having deeded a tract of land to Knowlton bounded entirely by land owned by third parties, except the remaining land of said Sylvester, conveyed by implied grant a way of necessity over and across the remaining land to the highway.

Whitehouse v. Cummings, 83 Me. 97, 23 Am. St. Rep. 756, 21 Atl. 743; Gaines v. Lunsford, 120 Ga. 370, 102 Am. St. Rep. 109, 47 S. E. 987; Kingsley v. Goulds-

borough Land Improv. Co. 86 Me. 280, 23 L.R.A. 502, 59 Atl. 1074; Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302; Schmidt v. Quinn, 136 Mass. 576; New York & N. E. R. Co. v. Railroad Comrs. 162 Mass. 83, 38 N. E. 27.

Mere nonuser of a right of way for any period does not of itself extinguish the right.

Tabbutt v. Grant, 94 Me. 372, 47 Atl. 899; Barnes v. Lloyd, 112 Mass. 231; White v. Crawford, 10 Mass. 183; Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176; Jennison v. Walker, 11 Gray, 423; Bannon v. Angier, 2 Allen, 128; Owen v. Field, 102 Mass. 90; Arnold v. Stevens, 24 Pick. 113, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176; White v. Crawford, 10 Mass.

In the case of an easement created by deed in a private alley, evidence that, during a period of time when very little of the surrounding property was improved, and when there was therefore no occasion to use the alley, an iron fence was built along a highway and across the alley, leaving no gate or opening, without any intention of obstructing the alley or of asserting an adverse claim against its use as such, is not sufficient to establish an abandonment of the same. Litchfield v. Boogher, 238 Mo. 472, 142 S. W. 302.

And a right of way created by an unambiguous written instrument, such as a reservation in a contract of sale, is not extinguished by the fact that the owner failed for six years to compel the proprietor of the servient estate to remove permanent obstructions from the way. Ballinger v. Kinney, 87 Neb. 342, 127 N. W. 239.

And under the established doctrine that, in case of nonuse for less than twenty years, of a way created by grant, nothing short of an intention to abandon and release the easement will operate to have that effect, unless other persons have been led by such acts to treat the servient estate as if free from servitude, abandonment is not established by showing merely that the owner of the servient estate has built upon the reserved right of way, without showing that the owner of the dominant estate has also intended to close up the way, it appearing that he has simply had no occasion to use the way. Blenis v. Utica Knitting Co. 73 Misc. 61, 130 N. Y. Supp. 740.

And where a deed of partition contains a mutual covenant to maintain a way across the lands of both parties, which has already been long in existence, the right of one party therein is not extinguished by reason of the fact that the planks upon the way are swept away by a flood and are not replaced, especially where there is also a mutual covenant for repairs. Citizens' Electric Co. v. Davis, 44 Pa. Super. Ct. 138.

The right of one party in a way created by deed of partition is not lost by reason of the fact that that party has used or proposes to use the way in a manner different 42 L.R.A.(N.S.)

from that allowed by the deed, so as to justify the other party in obstructing the way; his remedy in such a case is by action. Ibid.

And where a tract of land is divided into two lots, which are sold separately, with a right of way created by the deeds along the side of one lot imposed upon that one in favor of the other, the fact that, at the time of a subsequent conveyance of the servient estate under a deed retaining the same provision as to the easement, there is a stable upon one end of this right of way, does not affect the title to the easement throughout its full length, but only postpones its full use until the stable is removed. McKinley v. Ulery, 47 Pa. Super. Ct. 353.

Nor will a right of way by grant for a private railroad be extinguished by reason of the fact that the rails are removed therefrom, and are not returned until about ten years, where there is no intention to abandon, but the rails are removed for temporary use in another place. McAdam v. Benson Logging & Lumbering Co. 57 Wash. 407, 107 Pac. 187.

And where a right of way is conveyed by written instrument reciting it to be upon condition that the grantee shall not erect any structure of any kind or fence, or place any material or obstruction thereon other than a construction and repair of walks, the placing thereon of forty or fifty loads of earth in order to fill in a depression, so that a wagon can more easily be driven over the same, will not work a forfeiture. Central Christian Church v. Lennon, 59 Wash. 425, 109 Pac. 1027.

Since the question whether the closing up of a brick wall between two store buildings, so as to prevent access to one through halls and stairways in the other, constitutes an abandonment of the easement, depends upon the intention, and since, in the absence of evidence upon that point, it will not be presumed that the owner of the easement intended to part with it, when it was not for his interest to do so, and not necessary, evidence of such closing will not defeat the easement, especially where there has been no adverse possession with the openings closed

183; Eddy v. Chace, 140 Mass. 471, 5 N. E. 306; Barnes v. Lloyd, 112 Mass. 224; King v. Murphy, 140 Mass. 254, 4 N. E. 566.

Bird, J., delivered the opinion of the court:

This is an action of trespass *quare clausum*. The defendant justifies under a claim of a right of way, and plaintiff replies, alleging abandonment. It is here upon report.

In June, 1876, one Sylvester conveyed to Samuel D. Knowlton a lot of land in

for twenty years. *Sansbury v. Johnson*, 134 N. Y. Supp. 130.

And an easement by implication, resulting from the construction of a building in such a manner that stairways in one side of the building are used for access to the second floor of the other side, will not be deemed permanently abandoned by mere non-user during a time within which there is no occasion to use it. *Kane v. Templin*, — Iowa, —, 138 N. W. 901.

But a private way created by grant may be extinguished by abandonment and non-user for a period of twenty years (here over fifty), under circumstances showing an intention to surrender the easement. *Re Buffalo*, 65 Misc. 636, 120 N. Y. Supp. 611.

And if the servient owner has acted upon an apparent abandonment by the dominant owner, and if, in regard to him, it would operate unjustly if the exercise of the easement should be resumed in favor of the dominant estate, added force is given to the claim of abandonment. *Ibid*.

The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case, and no one case can be authority for another. *Ibid*.

So a right of way by necessity will be deemed abandoned and lost after thirty years of nonuser, with no claim of the right, especially when the owner of the alleged servient estate sells some of the land and leases some to other parties, both acts being hostile to any easement, and known to the owner of the alleged dominant estate, and amounting to a repudiation of the easement. *Bauman v. Wagner*, 146 App. Div. 191, 130 N. Y. Supp. 1016.

And a right of way may be lost by being totally obstructed for all practical purposes, by reason of an abutment wall built across it 17 feet high, with a fill sloping down to the level of the way and appropriated by another, continuing thus for seventeen years, and acquiesced in by the owner of the right; the possession of the other must then be deemed an indefeasible right, and this on the ground of an equitable estoppel. *Mason v. Ross*, 75 N. J. Eq. 136, 71 Atl. 141.

Also occupation of land for twenty-one years, adverse to a right of way and inconsistent with it, bars the right. *Jessop v. 42 L.R.A. (N.S.)*,

*Farmington*, bounded upon three sides by land of strangers, and upon the fourth side by land of the grantor, which extended easterly to the highway or "River road." Neither did Knowlton own, nor have his successors in title owned, any right of way to the premises conveyed him over adjoining lands not at the time of the conveyance owned by his grantor, and his deed is silent as to any right of way. In August, 1876, Sylvester conveyed his remaining land to one Goodwin. At the time of the alleged trespass, plaintiff and defendant had succeeded to the respective titles of Goodwin

*Kittanning*, 225 Pa. 589, 74 Atl. 554. In this case the way had been closed for forty-five years and buildings had been erected thereon for twelve or thirteen years.

Likewise, a private way may be extinguished by abandonment for more than thirty years; and this is shown by evidence that it was fenced off and cultivated as a field. *Tuttle v. Sowadzki*, — Utah, —, 126 Pac. 959.

And where deeds of adjoining tracts of land stipulate for a private way of a certain width between them, and where later conveyances have been made by occupation lines, rather than by metes and bounds, it is competent to show that the whole original right of way has been for many years inclosed by a stone wall and fences, and that it has been divided in the middle by another fence, and that the land so fenced off has been used and occupied by the respective adjacent owners for raising grass, for gardens, or for other uses incident to private ownership and entirely inconsistent with the use thereof as a way, for a length of time greater than or equal to the limitation period, as evidence that the original easement has been extinguished or renounced by the parties entitled to the fee in the land covered by the way. *Faulkner v. Rocket*, 33 R. I. 152, 80 Atl. 380.

And it is said in *Wimpey v. Smart*, 137 Ga. 325, 73 S. E. 586, that the encroachment of a building upon a right of way in an alley for a period of thirty years destroys the right of easement over the portion thus covered, and gives the owner of the building prescriptive title to the encroachment.

Finally, one who has, by reservation in a deed of land to a railroad company, a right to a private grade crossing over the railroad, must be deemed to have renounced and abandoned such private easement when he signs a petition for the appointment of viewers to lay out a public road over his private right of way, thereby forcing upon the railroad company the responsibility of a public crossing at grade, instead of a mere private crossing. *McKinney v. Pennsylvania R. Co.* 222 Pa. 48, 21 L.R.A. (N.S.) 1002, 70 Atl. 946.

In connection with the report of the last case in 21 L.R.A. (N.S.) 1002, see the note as to extinguishment of easement for a private way by its incorporation in a public way.

H. C. Sh.



and Knowlton. That a way of necessity was impliedly granted under the circumstances by the deed of Sylvester to Knowlton does not seem to be seriously questioned by plaintiff.

The latter, however, urges that the right of way of necessity of defendant has been extinguished by abandonment, and in support of her contention relies upon a declaration in the nature of a disclaimer made by Knowlton after his purchase in June, 1876, and prior to the conveyance of the alleged servient premises to Goodwin, the use by defendant and his predecessors in title of ways over lands other than the alleged servient estate, and nonuser.

It is agreed that neither Knowlton, nor any of the other predecessors in title of the defendant, made use of any way over the premises lying between their land and the highway, the alleged servient estate, until August 27, 1911, the day of the alleged trespass. It also appears that for fifteen or eighteen years after his purchase, Knowlton obtained access to his premises by a way over land of a relative, situated in the rear of the premises and extending therefrom to a crossroad running westerly from and at right angles with the "River road," on which crossroad the farm of Knowlton was apparently located. For the enjoyment of this way he paid a nominal sum, obtaining, however, no permanent right. It also appears that at some time during his ownership he cleared his lot, and, by permission and license of the owner of land adjoining his lot upon the south, hauled the lumber through the pasture of the latter to the "River road." The son of the purchaser from Sylvester of the alleged servient estate testifies that, prior to his purchase, his father in his presence inquired of Knowlton "if he had or claimed any right of way from that land in an easterly direction across the remainder of the farm, the balance of the farm," and that Knowlton replied that "he had no right of way, that he had no use for a right of way in that direction, and that he claimed none whatever." As to the character and uses of the tenements, little evidence is offered, but we are, we believe, warranted to infer from the pleadings and the evidence that the servient estate consisted of woodland and pasture, and that the dominant estate was either wholly or in great part woodland.

In this case we are concerned with an easement arising from deed or grant. *Nichols v. Luce*, 24 Pick. 102, 104, 35 Am. Dec. 302; *Morse v. Copeland*, 2 Gray, 302, 305; *Viall v. Carpenter*, 14 Gray, 126, 127. The distinction between easements created by

deed and those acquired by prescription was early recognized *obiter* in *Farrar v. Cooper*, 34 Me. 394, 400; and, although the distinction is doubted in *Pratt v. Sweetser*, 68 Me. 344, 345, the right of way there under consideration being acquired by prescription, as it was in *Farrar v. Cooper*, we do not consider that the distinction has been abolished by the case. The distinction is preserved in Massachusetts and other jurisdictions. *Owen v. Field*, 102 Mass. 90, 114; *White v. Crawford*, 10 Mass. 183; *Arnold v. Stevens*, 24 Pick. 106, 112, 113, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176; *Welsh v. Taylor*, 134 N. W. 450, 460, 18 L.R.A. 535, 31 N. E. 896.

An easement created by deed or grant, whatever may be the rule as to one acquired by prescription, may be extinguished, among other modes, by abandonment, so called, or nonuser and adverse possession for twenty years. *New York, N. H. & H. R. Co. v. Benedict*, 169 Mass. 262, 267, 47 N. E. 1027. Of adverse possession, however, there is no evidence in this case. Has the easement claimed by defendant been lost by abandonment? The burden of proof upon this issue is upon the party alleging it, and it must be established by evidence clear and unequivocal of acts decisive and conclusive. *Dyer v. Sanford*, 9 Met. 395, 402, 43 Am. Dec. 399; *Eddy v. Chace*, 140 Mass. 471, 472, 5 N. E. 306; *Hayford v. Spokesfield*, 100 Mass. 494; *Waring v. Crow*, 11 Cal. 366, 5 Mor. Min. Rep. 204; *Richardson v. McNulty*, 24 Cal. 339, 1 Mor. Min. Rep. 11.

It seems to have been stated *obiter*, in one case at least, that a parol disclaimer might work an abandonment of a way, a release being presumed (*Norbury v. Meade*, 3 Bligh, 211, 241, 242); and it has been held in other cases that the denial of the right to an easement, or a declaration of relinquishment of it, coupled with acts on the part of the declarant in furtherance of and conformity to the denial or declaration, is evidence of abandonment and adverse possession (*Warshauer v. Randall*, 109 Mass. 586, 588; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566).

Assuming for the moment that full credence may be given to the evidence of a disclaimer by Knowlton, it worked no estoppel, because it does not appear that he was advised of the proposed purchase by the person to whom it was made (*Morton v. Hodgdon*, 32 Me. 127, 129); but while the declaration does not operate as an estoppel, it is, if entitled to weight, evidence to be considered. But the court is not impressed with the character of the evidence. The witness who testifies was but nineteen years

of age at the time of the alleged conversation, which occurred thirty-five years prior to the trial. While disposed to believe that some conversation between the parties may have occurred, we feel that the testimony of a single witness, subject to suspicion, at least, of unfriendliness to defendant, after the decease of the declarant and the lapse of so many years, is not evidence of that clear and convincing character from which a release may be presumed. *Liberty v. Haines*, 103 Me. 182, 192, 68 Atl. 738; *Wilbur v. Toothaker*, 105 Me. 490, 75 Atl. 42, 18 Ann. Cas. 1190; *Lord's Appeal*, 106 Me. 51, 56, 75 Atl. 286.

As to use by defendant's predecessors in title of ways other than a way over the alleged servient estate, a right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is intentional abandonment of the former way. *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3, 4; *Hayford v. Spokesfield*, 100 Mass. 491, 494. There is no evidence that the ways used by Knowlton were not equally convenient, and the burden is upon the plaintiff to show otherwise. The ways used were obtained by the mere revocable permission of the owners of adjoining lands, and the use of a way so obtained has been held not to extinguish the right. *Lide v. Hadley*, 36 Atl. 627, 628, 76 Am. Dec. 338, 339.

Abandonment necessarily implies nonuser, but nonuser does not create abandonment, no matter how long it continues (*Welsh v. Taylor*, 134 N. Y. 450, 457, 18 L.R.A. 535, 31 N. E. 896; *Eddy v. Chace*, 140 Mass. 471, 472, 5 N. E. 306), and an easement proved by grant or reservation is not lost by nonuser alone (*Tabbutt v. Grant*, 94 Me. 371, 373, 47 Atl. 899; *White v. Crawford*, 10 Mass. 183, 189; *Barnes v. Lloyd*, 112 Mass. 224, 231; *Butterfield v. Reed*, 160 Mass. 361, 369, 35 N. E. 1128; *Smyles v. Hastings*, 22 N. Y. 217, 224). It has been said that an easement acquired by grant cannot be lost by mere nonuser, though it may be by nonuser coupled with an intention of abandonment. *Welsh v. Taylor*, 134 N. Y. 450, 18 L.R.A. 535, 31 N. E. 896. And in this case the court says: "This conclusion leaves the case to rest entirely upon the fact of nonuser. And, the easement having been created by deed, that is not sufficient to sustain the finding that it had been given up and was extinguished. A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land, and it is no more neces-

sary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by nonuser, and unless there is shown against him some adverse possession or loss of title in some of the ways recognized by law, he may rely on the existence of his property with full assurance that, when the occasion arises for its use and enjoyment, he will find his rights therein absolute and unimpaired." See also *Arnold v. Stevens*, 24 Pick. 108, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176; *Seaman v. Vawdrey*, 16 Ves. Jr. 390, 10 Revised Rep. 207, 13 Mor. Min. Rep. 62, 17 Eng. Rul. Cas. 585.

Indeed, it seems to be the general rule of law that a way or easement created by deed or grant is not lost by mere nonuser, without proof of intention to abandon and adverse possession by the owner of the servient tenement (*Tabbutt v. Grant*, 94 Me. 371, 47 Atl. 899; *Bannon v. Angier*, 2 Allen, 128, 129; *Jennison v. Walker*, 11 Gray, 423, 425; *Owen v. Field*, 102 Mass. 90, 114; *Kuecken v. Voltz*, 110 Ill. 264, 271; *Noll v. Dubuque, B. & M. R. Co.* 32 Iowa, 66, 70, 71; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Horner v. Stillwell*, 35 N. J. L. 307, 314; *Curran v. Louisville*, 83 Ky. 628, 632), or expense or damage sustained by him (*Vogler v. Geiss*, 51 Md. 407, 411; *Snell v. Levitt*, 110 N. Y. 595, 602, 1 L.R.A. 414, 18 N. E. 370; *Barnes v. Lloyd*, 112 Mass. 224, 231). When these elements concur, they operate as a present abandonment, and without regard of the cesser to use.

In the case under consideration, there is no evidence that the plaintiff or her predecessors in title have held possession of the servient estate adversely to the defendant or his predecessors in title, or have held it under any claim of right, or have at any time taken any action to prevent the enjoyment of the right. *Farrar v. Cooper*, 34 Me. 394, 400, 401. And the case is equally barren of evidence of any acts of the owner of the alleged dominant estate done upon either of the tenements indicating an intention to abandon the right of which the enjoyment was suspended. See *Ballard v. Butler*, 30 Me. 94, 98, 99; *Farrar v. Cooper*, 34 Me. 394, 400; *New York, N. H. & H. R. Co. v. Benedict*, 169 Mass. 262, 267, 47 N. E. 1027; *Curran v. Louisville*, 83 Ky. 628, 632.

It has been stated as a general rule of law, that the only way in which an easement can be extinguished by the act of the parties interested is by release, actual or presumed; that abandonment will not have that effect, unless a release can be pre-

sumed from that, and the surrounding circumstances are such that a release can be presumed. *Goddard, Easements, Bennett's ed.* 461. In harmony with this statement are *Lovell v. Smith*, 3 C. B. N. S. 120, 127; *Ballard v. Butler*, 30 Me. 94, 99; *Jennison v. Walker*, 11 Gray, 423, 425, 426; *Arnold v. Stevens*, 24 Pick. 106, 112, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176; 3 Kent, Com. 13th ed. (636) \*\*448, 449.

But no case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter, necessary to make it complete in point of form. In such cases, where the possession is shown to have been consistent with the fact directed to be presumed, and in such cases only, has it ever been allowed. *Tindal, Ch. J., in Doe ex dem. Hammond v. Cooke*, 6 Bing. 174, 179. See *Doe ex dem. Marston v. Butler*, 3 Wend. 149, 153.

It has been held that a way created by the necessity for its use cannot be extinguished so long as the necessity exists. *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188, 36 Pac. 778. This statement of the law evidently requires modification or restriction. See *Richards v. Attleborough Branch R. Co.* 153 Mass. 120, 122, 26 N. E. 418. And in *Smyles v. Hastings* it is held that such a right cannot be extinguished by nonuser, but only by a holding strictly adverse for twenty years. 22 N. Y. 217, 224. However this may be, upon the evidence presented, the court must hold that plaintiff has not shown abandonment, either as a conclusion of law or of fact.

Judgment for defendant.

## TEXAS COURT OF CRIMINAL APPEALS.

CLEVELAND ANDREWS, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 141 S. W. 220.)

### Appeal — sufficiency of evidence.

1. The appellate court will not disturb a conviction where the question of credibility

*Note. — Right to impeach one's own witness because he has not testified as expected, where his testimony is not affirmatively injurious.*

As to the right to discredit or impeach one's own witness, generally, see notes to *Hurley v. State*, 4 L.R.A. 161, and *Selover v. Bryant*, 21 L.R.A. 418.

This note is confined to cases expressly considering the question whether the right

of witnesses and the weight to be given to the testimony is for the jury, if there is any unimpeached evidence to sustain the verdict.

### Witness — impeaching own — criminal law.

2. It is error for the prosecuting attorney to ask his own witness if he had not stated specific facts to him out of court different from those testified to by him, accompanying the question by the assertion that he had done so, for the alleged purpose of impeachment, and by so doing get before the jury evidence that could not be secured otherwise; and it is not cured by the subsequent withdrawal of the evidence from the jury.

### Evidence — statements of accused — admissibility.

3. Statements of an accused are not rendered inadmissible at his trial by the fact that at the time of making them he was a convict hired out on bond.

(November 22, 1911.)

**A**PPEAL by defendant from a judgment of the District Court for Panola County convicting him of burglary. Reversed.

The facts are stated in the opinion.

Mr. H. N. Nelson for appellant.

Mr. C. E. Lane, Assistant Attorney General, for the State.

Harper, J., delivered the opinion of the court:

Appellant was indicted, charged with burglary, and when tried was convicted and sentenced to two years' confinement in the penitentiary, from which judgment he appeals.

The appellant in his motion for a new trial vigorously assails the judgment on the ground that the evidence does not support the verdict. Some meat, flour, and other things were stolen from Mr. George Furrh, and these articles were taken out of his smokehouse. This much is proven beyond a reasonable doubt, but the question presented is, Does the evidence prove that defendant was the person committing the theft? Mr. Furrh states he left defendant and another negro at his house when he went away; both negroes worked for him, and ate at his house. This witness states

to impeach one's own witness, where such right is recognized under any circumstances, extends to cases where the witness has merely failed to testify as expected, without prejudice to the party calling him, or is confined to cases where the testimony of the witness has been prejudicial. This question, of course, cannot arise in jurisdictions where a party is never permitted to impeach a witness whom he has voluntarily made his own. See 40 Cyc. 2559, 2691.

no fact that would incriminate defendant, except to place him in position to commit the offense. The witness Louis Jones states he was passing Mr. Furrh's when he saw a man come out from between the smokehouse and the kitchen, and that the man had a bundle under his arm and one in his hand. That he took it to be defendant, and spoke to him, saying, "Is that you, Cleveland?" no answer being returned; that on Monday, after two negro women were arrested charged with the offense, this witness says defendant came to him and asked him if he had seen him, and witness told him that he had seen him between Mr. Furrh's smokehouse and kitchen, when defendant replied that it was not him. Witness says he saw somebody, and took it

to be defendant, because defendant worked at that place. The evidence further shows that defendant fled that night and went from Panola county to Rockwall county, where he was arrested some four or five months later. The witness Mollie Lefoff, in whose house the meat was found, the constable says, first told him that Nelson Adams had given it to her, but on the trial of this case the witness denies making such statement to the constable, and says that after defendant was arrested, and while out on bond, he had admitted to her he carried the meat to her house, and that he had gotten it out of the smokehouse. The court charged the jury that the witness Mollie Lefoff was an accomplice, and that the testimony other than hers must tend to

The rule is well settled that a party cannot impeach a witness whom he has voluntarily called or made his own, unless the witness has given affirmative testimony injurious to the party's case, and has not merely failed to testify to facts which the party sought to prove by him. *People v. Jacobs*, 49 Cal. 384; *People v. DeWitt*, 68 Cal. 584, 10 Pac. 212; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106; *Re Kennedy*, 104 Cal. 429, 38 Pac. 93; *People v. Crespi*, 115 Cal. 50, 46 Pac. 863; *People v. Creeks*, 141 Cal. 529, 75 Pac. 101; *Sylvester v. State*, 46 Fla. 166, 35 So. 142; *Brown v. State*, 47 Fla. 16, 36 So. 705; *Marugg v. Kells*, 146 Ill. App. 394; *Walkup v. Com.* 14 Ky. L. Rep. 337, 20 S. W. 221; *Pryor v. Warford*, 21 Ky. L. Rep. 1311, 54 S. W. 838; *Feltner v. Com.* 23 Ky. L. Rep. 1110, 64 S. W. 959; *Howe v. Skidmore*, 24 Ky. L. Rep. 2048, 72 S. W. 702; *Threlkeld v. Bond*, 29 Ky. L. Rep. 177, 92 S. W. 606; *State v. Stephens*, 116 La. 36, 40 So. 523; *Moore v. Chicago, St. L. & N. O. R. Co.* 59 Miss. 243; *Chism v. State*, 70 Miss. 742, 12 So. 852; *Mutual L. Ins. Co. v. Schmidt*, 6 Ohio Dec. Reprint, 901, affirmed on other points in 40 Ohio St. 112; *Sturgis v. State*, 2 Okla. Crim. Rep. 362, 102 Pac. 57; *Culpepper v. State*, 4 Okla. Crim. Rep. 103, 31 L.R.A. (N.S.) 1166, 140 Am. St. Rep. 668, 111 Pac. 679.

As said in *Mutual L. Ins. Co. v. Schmidt*, 6 Ohio Dec. Reprint, 901, to permit the party calling a witness who has merely failed to come up to his expectations, without testifying adversely to him, to introduce what the witness said upon another occasion, would give the party the opportunity of placing before the jury a statement or declaration having all the effect of independent substantive testimony not given under the sanction of an oath, and contradictory of nothing to which the witness has testified.

"As the only legitimate effect of impeaching evidence is to subtract from or overthrow the testimony of the witness, it follows that it is not to be permitted in cases in which there is nothing to subtract from or overthrow." *Moore v. Chicago, St. L. & N. O. R. Co.* 59 Miss. 243. 42 L.R.A. (N.S.)

And where the testimony of a witness is not prejudicial to the party calling him, "the credibility of the witness is immaterial, as he has done no damage." *Rickerson v. State*, 106 Ga. 391, 33 S. E. 639.

So, a witness who has given evidence purely of a negative character, favorable to neither party, cannot be impeached by the party calling him by showing contradictory statements made at other times, for, if he were impeached, the case would stand exactly as before. "It is only when the witness gives hostile evidence that a party may impeach him by showing contradictory statements made at other times." *People v. Godwin*, 123 Cal. 374, 55 Pac. 1059.

And as further said in *Marugg v. Kells*, 146 Ill. App. 394: "In states where the statute permits a party calling a witness to contradict him by showing that he had made statements different from his present testimony, the rule is that the statute does not apply to a case where the witness does not state any fact prejudicial to the party calling him, but only fails to prove facts favorable to such party."

Thus, although by statute, "a party may impeach a witness voluntarily called by him, where he can show to the court that he has been entrapped by the witness by a previous contradictory statement, yet this rule is not applicable where the testimony of the witness is not prejudicial to such party. . . . The mere failure of a witness to testify to facts supposed to be beneficial to the party introducing him, and which were expected to be proved by him, does not come within the reason or policy of the rule." *Rickerson v. State*, supra; *Nathan v. State*, 131 Ga. 48, 61 S. E. 994; *Beach v. State*, 138 Ga. 265, 75 S. E. 139.

And under a statute permitting the party producing a witness to show that he has made statements at other times inconsistent with his present testimony, a party cannot thus impeach his own witness who has not testified adversely to him regarding any material matter, but has merely failed to give any advantageous testimony. *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064.

As said in *State v. Steeves*, 29 Or. 85,

connect the defendant with the commission of the offense. The only circumstances connecting him with the offense, in addition to her testimony, is that of the witness Jones, who testifies that he saw a man coming from between the smokehouse and kitchen with a couple of bundles, and asked, "Is that you, Cleveland?" and that defendant came to him the following Monday, and asked him if he had seen him (defendant), and when the witness told him he had, defendant fled the county. While this testimony is not very convincing, yet the credibility of witnesses and the weight to be given the testimony under our law is for the jury, and where there is testimony authorizing their verdict, and no evidence

offered that it is not true, we are not disposed to disturb the verdict.

The state introduced the witness Louis Jones, and after the witness had testified as hereinbefore stated, the following proceedings were had, which were objected to in bill of exceptions No. 3: "Q. Go ahead and tell me what you told me in that room about that transaction? (Defendant: We object to that suggestion. Court overruled the objection.) "He said that they had arrested Mollie and Stella for getting Mr. Furrh's meat, and I told Cleveland. I been telling you all the year to let Stella alone, that she has been against you, and that if I was like you I would let her alone, and that if they get together they'll prove you got that meat, and they might send you to

43 Pac. 947, under the same statute: "The rule appears to be well settled that a party cannot impeach his own witness by showing he had made statements inconsistent with the testimony given at the trial, unless the testimony so given be material and prejudicial to the interest of the party calling him."

Likewise, under a statute providing that "the party producing a witness is not allowed to impeach his credit by evidence of bad character, unless," etc., "but he may contradict him by other evidence, and by showing that he has made statements different from his present testimony,"—a party may not prove that his own witness has made previous statements variant from his testimony on the trial, where the witness has not stated on the trial any fact prejudicial to the party calling him, but has only failed to prove facts supposed to be beneficial to the party. *Champ v. Com.* 2 Met. (Ky.) 17, 74 Am. Dec. 388.

And as said (*obiter*) in *Garrison v. Com.* 122 Ky. 882, 93 S. W. 594, under this Kentucky statute: "The rule may therefore be regarded as settled that where a witness does not state facts prejudicial to the party introducing him, but simply fails to prove facts supposed to be beneficial to him, he cannot prove by others that the witness had stated the facts sought to be proved. In other words, where the witness simply fails to prove a fact, the party introducing him cannot be allowed to show that he stated out of court that the fact existed."

So, also, under a similar statute providing that "the party producing a witness shall not be allowed to impeach his credit by evidence of bad character, unless," etc., "but he may, in all cases, contradict him by other evidence, and by showing that he has made statements different from his present testimony,"—a party cannot thus impeach his own witness by evidence of contradictory statements, unless the testimony of the witness has been prejudicial to him, since, his evidence being harmless, no reason exists for thus impeaching the witness. *Hull v. State*, 93 Ind. 128; *Conway v. State*, 42 L.R.A. (N.S.)

118 Ind. 482, 21 N. E. 285 (*obiter*); *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429, 27 N. E. 866; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, rehearing denied in 144 Ind. 482, 43 N. E. 560; *Walker v. State*, 165 Ind. 94, 74 N. E. 614 (*obiter*).

As said in *Hull v. State*, 93 Ind. 128: "Where a witness does not testify to anything prejudicial to the party calling him, there can be no object in impeaching him, and hence the statute cannot apply to such case. Nor can it apply to a case where a witness fails to testify to such facts as he is called to prove. Such testimony, though not beneficial, is not prejudicial, and therefore no reason exists for impeaching the witness. . . . This would, indeed, be an idle and useless ceremony. . . . No fact having been stated, none could be disproved."

And under a statutory provision that a party producing a witness may, "in case the witness prove adverse," prove that he has made at other times a statement inconsistent with his present testimony, a party cannot thus impeach his own witness who has merely failed to testify as he was expected to do, without giving any evidence that is at all prejudicial to the party producing him. "He must not only fail to give the beneficial evidence expected of him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him." *Adams v. State*, 34 Fla. 185, 15 So. 905; *Mercer v. State*, 41 Fla. 279, 26 So. 317.

So, in Texas, under a section of the Code of Criminal Procedure providing that "the rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness,"—it has been repeatedly and uniformly held that a party is not authorized to impeach his own witness who has simply failed to testify to a fact which the party expected to prove by him, or has testified differently from what

the penitentiary, and he says, 'Well, I didn't get it.' Q. To refresh your memory, didn't you tell me there in the room a while ago that he said that she was innocent of the transaction, and that if it was not for sending him to the pen he would tell the truth about that? 'He didn't tell me that.' Q. Didn't you state in the presence of Mr. Anderson and Mr. Furrh and me, in the room there the next day when you had the conversation with him about the arresting of the women, that he said his wife was innocent of the transaction, and that if it was not for sending him to the pen, he would tell the truth about it? 'That was not me that told you that.' Q. Didn't you tell me that you know that it was Cleveland on that night, and you were able to see that it was Cleveland coming out from between the smokehouse and the kitchen? 'I told you that when I was passing Mr. Furrh's I saw someone coming from between Mr. Furrh's house and the smokehouse, and

I taken it to be Cleveland, and hollered at him, but he didn't answer.' (Defendant: We are objecting to all this. He is trying to build a case on something that didn't happen in the presence of the defendant, and we object to the manner of the question and to the question, and it appears like he is trying to build a case by trying to impeach his own witness and get his own testimony before the jury when the witness has answered his question promptly. District attorney: I am not offering it as original testimony; I am laying a predicate for the purpose of impeachment. He tells me a tale now and told me a different tale in the room a while ago.)"

In his charge the court tells the jury not to consider this testimony, nor any reference thereto in the argument, but in a case like this, where the testimony is not very strong, will the withdrawal cure the error in admitting the testimony? Will its effect on the minds of the jury be thus removed?

the party calling him had reason to believe and did believe he would testify, but has not given any affirmative testimony favorable to the adverse party, or damaging or prejudicial to the cause of the party calling him. *Tyler v. State*, 13 Tex. App. 205 (*obiter*); *Thomas v. State*, 14 Tex. App. 70; *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527; *Erwin v. State*, 32 Tex. Crim. Rep. 519, 24 S. W. 904; *Shackelford v. State*, — Tex. Crim. Rep. —, 27 S. W. 8; *Gibson v. State*, — Tex. Crim. Rep. —, 29 S. W. 471; *Williford v. State*, 36 Tex. Crim. Rep. 414, 37 S. W. 761; *Gill v. State*, 36 Tex. Crim. Rep. 589, 38 S. W. 190; *Bailey v. State*, 37 Tex. Crim. Rep. 579, 40 S. W. 281; *Ross v. State*, — Tex. Crim. Rep. —, 45 S. W. 808; *Finley v. State*, — Tex. Crim. Rep. —, 47 S. W. 1015; *Gaines v. State*, — Tex. Crim. Rep. —, 53 S. W. 626; *Cooksey v. State*, — Tex. Crim. Rep. —, 58 S. W. 103; *Knight v. State*, — Tex. Crim. Rep. —, 65 S. W. 88; *Smith v. State*, 45 Tex. Crim. Rep. 520, 78 S. W. 519; *Hanna v. State*, 46 Tex. Crim. Rep. 5, 79 S. W. 544; *Owens v. State*, 46 Tex. Crim. Rep. 14, 79 S. W. 575; *Reyes v. State*, 48 Tex. Crim. Rep. 346, 88 S. W. 245; *Willis v. State*, 49 Tex. Crim. Rep. 139, 90 S. W. 1100; *Ware v. State*, 49 Tex. Crim. Rep. 413, 92 S. W. 1093; *Ozark v. State*, 51 Tex. Crim. Rep. 106, 100 S. W. 927; *Quinn v. State*, 51 Tex. Crim. Rep. 155, 101 S. W. 248; *Benson v. State*, 51 Tex. Crim. Rep. 367, 103 S. W. 911; *Price v. State*, — Tex. Crim. Rep. —, 147 S. W. 243.

And under this section of the Texas Code of Criminal Procedure, it seems that the state cannot impeach its prosecuting witness, where the latter has denied the facts relied upon for conviction, although such denial, of course, tends directly to exculpate the defendant. As said in *Skeen v. State*, 51 Tex. Crim. Rep. 39, 100 S. W. 770: "This 42 L.R.A. (N.S.)

[i. e., prosecuting witness's denial of the facts relied on by the state for a conviction] simply resulted in a failure to prove a fact, and such evidence [i. e., of prior contradictory statements] could not be introduced to show that the fact had been previously stated."

So, in *Dunagain v. State*, 38 Tex. Crim. Rep. 614, 44 S. W. 148, the court said: "That witnesses may be impeached is placed beyond question; but, because these propositions are true, it does not authorize the state to prove, as original testimony, its case by showing the witness made statements outside of court contradictory of those testified to on the trial. The state may contradict its witness when that witness has sworn to material evidence injurious to the state, but it cannot put the witness on the stand, and, having failed to make proof of a criminating fact, prove its case by the statement of the witness made off the witness stand at any other time and place. In this character of case it would be simply a failure of proof, and the state cannot supply that failure by showing that the witness made statements at other times or places which, if true, might establish the charge upon which the defendant was being tried." And to the same effect is *Dawson v. State*, — Tex. Crim. Rep. —, 74 S. W. 912.

But in Massachusetts it has been held that, under a statute allowing the party who produces a witness to impeach the latter's credibility by proving that he has made at other times statements inconsistent with his present testimony, while the testimony which it is proposed thus to contradict must be material to the issue on trial (*Force v. Martin*, 122 Mass. 5; *Batchelder v. Batchelder*, 139 Mass. 1, 29 N. E. 61), it need not necessarily be positive and adverse to the party (*Com. v. Donahoe*, 133 Mass. 407).

A. C. W.

The district attorney, in asking the questions in the form he does, states that the witness had so informed him, and states, when objected to: "I am not offering it as original testimony; I am laying a predicate for impeachment. He tells me a tale now, and told me a different tale in the room a while ago;" thus informing the jury that the witness had so told him. The witness had not testified to any fact that could or would surprise the district attorney, but had merely failed to testify to what he apparently expected him to testify, and, being his own witness, was it permissible to permit him to pay a predicate to impeach him, and thus get before the jury evidence otherwise inadmissible? In *Bailey v. State*, 37 Tex. Crim. Rep. 579, 40 S. W. 281, it is held a party can only impeach his own witness when such witness has testified to some damaging fact, and mere failure to testify does not give the right to impeach him. In *Williford v. State*, 36 Tex. Crim. Rep. 414, 37 S. W. 761, it is held where the state asked her own witness if the defendant did not make a certain declaration to the witness, which the witness denied or stated he did not remember, the answer of the witness is conclusive, and it is not competent for the state to show by other witnesses that the witness had so stated to others. And in *Thomas v. State*, 14 Tex. App. 70, it is said a party can impeach his own witness only when he has testified to facts injurious to his cause. A mere negative answer, when the party expected an affirmative answer, will not give the right to contradict the witness. See also *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875, 5 S. W. 527; *Erwin v. State*, 32 Tex. Crim. Rep. 519, 24 S. W. 904; *Kirk v. State*, 35 Tex. Crim. Rep. 224, 32 S. W. 1045; *Shackelford v. State*, — Tex. Crim. Rep. —, 27 S. W. 8; *Gibson v. State*, — Tex. Crim. Rep. —, 29 S. W. 471; and *Finley v. State*, — Tex. Crim. Rep. —, 47 S. W. 1015. Had the district attorney been satisfied with asking the question, and had accepted the answer of the witness, in view of the fact that the testimony was subsequently withdrawn, the error would not be such as we would feel called upon to reverse the case, but when he follows it up by stating in the presence of the jury, "I am laying a predicate for the purpose of impeachment. He tells me a tale now and told me a different tale in the room awhile ago,"—it was in effect the district attorney stating to the jury that the witness had told him in the room that defendant had admitted to the witness that he (defendant) had committed the offense for which he was being tried, and had told him the witness knew it was the defendant

he saw near the smokehouse with the bundles on the Saturday night in question. That withdrawal of improper testimony when of an immaterial nature will not be cause for a reversal has been frequently decided by this court; but when the testimony is of a material nature, its withdrawal will not cure the error, and especially as the court in his charge did not instruct the jury to disregard the comments of the district attorney objected to at the time. In a case wherein improper evidence had been admitted this court says, in *Clements v. State*, — Tex. Crim. Rep. —, 134 S. W. 729: "The court, however, in the charge to the jury, withdrew from their consideration this evidence. It was said in *Darnell v. State*, 58 Tex. Crim. Rep. 585, 126 S. W. 1122: 'The state had used this testimony both before the jury and in the argument of the case as the most damaging testimony against appellant attacking his theory of self-defense.' It was further said in the *Darnell Case*: 'We are of opinion that the withdrawal of it from the jury, under the circumstances, did not cure the error.' Quite a number of cases are cited in the *Darnell Case* in support of the ruling. In *McCandless v. State*, 42 Tex. Crim. Rep. 58, 57 S. W. 672, it was held that the admission of evidence of a material character calculated to influence the jury is not cured by subsequent withdrawal from their consideration. And in *Henard v. State*, 46 Tex. Crim. Rep. 90, 79 S. W. 810, this language was used: 'But it is said that the error of the court in admitting this testimony is cured by the subsequent exclusion thereof, and withdrawal by the court of said testimony from the consideration of the jury. This question has been before the courts of this state in a number of cases. See *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Miller v. State*, 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836, 21 S. W. 925. We think the true rule on this subject to be: If the testimony is not of a very material character, it may be withdrawn by the court, and the error thus cured; but if, on the contrary, the evidence was of a material character, and was calculated to influence or affect the jury, the withdrawal of the same from their consideration would not heal the vice of its admission.' This is the rule of this court, especially in those cases where the testimony showing guilt is weak, as in this case.

The fact that the defendant was a county convict and had been hired out on bond would not render inadmissible any statements he might make.

For the error herein pointed out, the judgment is reversed and the cause is remanded.

**UNITED STATES CIRCUIT COURT  
OF APPEALS, FIFTH CIRCUIT.**

UNITED STATES, Appt.,

v.

HENRY C. MILLS et al.

(111 C. C. A. 345, 190 Fed. 513.)

**Public land — suit to cancel patent.**

1. The United States may maintain an action to cancel a patent for public land which has been procured from it by fraud. Same — necessity of residence — statutory construction.

2. In view of the language of prior sections of the statute, residence upon land entered as a homestead is necessary to obtain a right to a patent thereto, notwithstanding U. S. Rev. Stat. § 2291, U. S.

Comp. Stat. 1901, p. 1390, provides for the issuance of a patent upon proof that claimant has "resided upon or cultivated" the land; and therefore no patent can be issued to one who, while residing in the vicinity of the land, cleared a small parcel, built a shack, placed tenants in possession, and slept there once every few months.

(October 2, 1911.)

**A** PPEAL by complainant from a decree of the Circuit Court for the United States for the Southern District of Alabama in defendants' favor in a suit to cancel a patent for public land. Reversed.

The facts are stated in the opinion.

Argued before Pardee, McCormick, and Shelby, Circuit Judges.

**Note. — Necessity of both residence and cultivation as a condition of a patent under a homestead entry under the Federal laws.**

The precise question forming the basis of contention in the reported case, *UNITED STATES v. MILLS*, whether residence as well as cultivation is essential to the acquirement of a patent under the homestead law, § 2291, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 1390, which requires of the claimant of the patent proof that he has "resided upon or cultivated the same for a period of five years," etc., appears not to have been expressly passed upon elsewhere, though it seems to have been uniformly assumed, in spite of the disjunctive "or," that both residence and cultivation for the prescribed period are necessary.

The following cases not passing upon the question, but in which expressions are used tending to uphold the contention that both residence and cultivation are necessary, are sufficiently set out in the reported case: *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. ed. 941, 28 Sup. Ct. Rep. 600; *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Adams v. Church*, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; *Bohall v. Dilla*, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *Shiver v. United States*, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; *McCune v. Essig*, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; *United States v. Collett*, 87 C. C. A. 460, 159 Fed. 932.

Like statements of other courts where the homestead law was involved, may be mentioned:

"It is necessary, to obtain a valid title under this law, that there shall have been an actual settlement on the land and a continuous residence and cultivation thereof for at least five years." *United States v. Perry*, 45 Fed. 759.

"In establishing a residence as required by the homestead law, there must be a combination of act and intent,—the act of occupying and living upon the claim, and the intention of making the same a home to 42 L.R.A. (N.S.)

the exclusion of a home elsewhere. Inhabitation must exist in good faith. It is not a compliance with the homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose to live there, with no intention of cultivating any part of it and acquiring it for a place to reside in." *United States v. Richards* (D. C. D. Neb.) 149 Fed. 443, affirmed in 99 C. C. A. 401, 175 Fed. 911. To same effect, *Whaley v. Northern P. R. Co.* (C. C. D. Mont.) 167 Fed. 664.

"The homestead law plainly confers the right of possession upon the entryman when the preliminary entry is made; for it makes actual settlement, followed by residence and cultivation for a period of five years, a condition to obtaining the title, and requires the applicant to make and file, with the application for the entry, an affidavit 'that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence, and cultivation, necessary to acquire title to the land applied for.'" *Stearns v. United States*, 82 C. C. A. 48, 152 Fed. 900.

"But his title is dependent on continued residence of himself or family. By the original entry, he acquires the inchoate but well-defined right to the land and its possession, which can only be perfected by continued residence, possession, and cultivation for five year." *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35 (affirming 5 McCrary, 155, 16 Fed. 221).

"[It [that the homestead claim had attached to the land] did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation." *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112, affirming 34 Minn. 538, 27 N. W. 69.

"Under § 2291 of the United States Revised Statute, U. S. Comp. Stat. 1901, p. 1390, a patent may issue to the person mak-



Messrs. William H. Armbrrecht and Alexander T. Howard, for appellant:

The United States may maintain an action to cancel a patent for public land which has been procured from it by fraud or mistake.

*Hughes v. United States*, 4 Wall. 232, 236, 18 L. ed. 303, 304; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; *United States v. Minor*, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; *Sanford v. Sanford*, 139 U. S. 642-647, 35 L. ed. 290-292, 11 Sup. Ct. Rep. 666; *United States v. Beebe*, 127 U. S. 338, 342, 32 L. ed. 121, 123, 8 Sup. Ct. Rep. 1083; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358-382, 35 L. ed. 766-774, 12 Sup. Ct. Rep. 13; *Germania Iron Co. v. United States*, 165 U. S.

379-385, 41 L. ed. 754-757, 17 Sup. Ct. Rep. 337; *Williams v. United States*, 138 U. S. 514-517, 34 L. ed. 1026-1028, 11 Sup. Ct. Rep. 457.

Residence, as well as cultivation, is a prerequisite of right to patent.

*Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Adams v. Church*, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; *Bohall v. Dilla*, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *Shiver v. United States*, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; *McCune v. Essig*, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. ed. 941, 28 Sup. Ct. Rep. 600; *United States v. Perry*, 45 Fed. 759; *United States v. Richards*, 149 Fed. 443.

ing the entry, upon proof of residence and cultivation for the period of five years and compliance with certain other conditions." *Thompson v. Basler*, 148 Cal. 646, 113 Am. St. Rep. 321, 84 Pac. 161.

"In 'Suggestions to Homesteaders' issued by the commissioner of the General Land Office March 9, 1908 (§ 27, p. 12) it is said: 'Actual residence on the lands entered must begin within six months from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in §§14 and 15, and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases thereafter mentioned; but all entrymen who actually reside upon and cultivate lands entered by them prior to making such entries may make final proof at any time after entry, when they can show five years' residence and cultivation.'" *McLemore v. Express Oil Co.* 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59.

"Actual settlement, cultivation, and improvement were also necessary conditions for an entry under the pre-emption law." *McCorkell v. Herron*, 128 Iowa, 324, 111 Am. St. Rep. 201, 103 N. W. 988.

"Residence is essential under both the pre-emption and homestead laws." *Ard v. Brandon*, 43 Kan. 425, 23 Pac. 648.

"To entitle a homesteader to a patent he must reside upon, cultivate, and improve his claim for five years, and within two years thereafter he must make final proofs of the fact," etc. *Hayes v. Carroll*, 74 Minn. 134, 76 N. W. 1017.

According to *Bolton v. La Camas Water Power Co.* 10 Wash. 246, 38 Pac. 1043, the legal title does not pass under the homestead law until proof of compliance with the statute; and the statute provides that any time within two years after the completion of five years' residence and cultivation, proof thereof may be made, and that thereafter a patent will issue.

Where one filed a homestead claim to 160 acres of land, built thereon a small cabin of logs, cleared away some brush, spaded some ground preparatory to raising

some crops, but raised none, erected no fences; visited the premises only once every six months, remaining thereon a day or two and living the balance of the time at his father's residence, about a mile distant,—it was held in *Sutherland v. Richardson*, 55 Or. 535, 106 Pac. 1017, that under the homestead law he acquired by such occupancy no title to the land.

In view of the dearth of cases passing directly upon the question indicated in the title of this note, a few cases are hereby referred to by way of illustration in which the right to substitute "and" for "or" has been passed upon in construction of statutes. Thus the court in *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665, quotes with approval from *Sutherland, Statutory Construction*, as follows: "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their accurate meaning is more readily departed from than that of other words, and one read in place of the other in deference to the context." Also from *Endlich, Interpretation of Statutes*: "To carry out the intention of the legislature it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other (indeed, these words are said to be convertible into each other, as the sense of the enactment and the necessity of harmonizing its provisions may require)." In this case the substitution of "and" for "or" in a statute empowering a city to "purchase or erect waterworks" was held necessary to carry out the intention of the legislature.

So, in holding that the word "or" before the word "remainder" in an act can have no other meaning than "and," it is said in *Ayers v. Chicago Title & T. Co.* 187 Ill. 42, 58 N. E. 318, to be well settled that the words "or" and "and" will not have their literal meaning when to give them their literal meaning renders the sense of a statutory enactment dubious. Their strict meaning is more readily departed from than that

Messrs. Joseph C. Rich and J. Gaillard Hamilton for appellees.

Shelby, Circuit Judge, delivered the opinion of the court:

This is a bill in equity by the United States seeking the cancelation of a patent issued to the defendant Henry C. Mills, and the cancelation of a deed made by Mills to Henry Brannan and Thomas H. Brannan. Mills, on November 15, 1897, made application to enter 160.66 acres of land in Mobile county, Alabama, under § 2289 of Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1388. On January 3, 1903, he made final proof of his entry, testifying that he had established actual residence on the land about January 15, 1898; that he had never been absent from the land more than a month or six weeks at a time, and that the land was cultivated each season. In further proof of the homestead claim, Henry Brannan testified that Mills settled upon the homestead in January, 1898, establishing his actual residence thereon, and that he had resided continuously on the

homestead since January, 1898, and that he had not been absent from the homestead except for two or three weeks at a time, when he was off at work. Similar proof was made by Julius Cooley. Upon this proof being made by affidavits signed before the clerk of the circuit court of Mobile county, Alabama, the patent was issued by the United States to Mills on March 19, 1904. After Mills obtained the patent, he conveyed the land to Henry Brannan and Thomas H. Brannan on June 16, 1904, for a recited consideration of \$80.

The bill alleges that the proof made by Mills was false and fraudulent; that, in fact, Mills never established his residence on the homestead and never lived on it, as testified to by him and by Henry Brannan and Julius Cooley; and that he never cultivated the land. It is also alleged that Mills did not act in good faith in making the entry; that he never lived on the land or intended to live on it; and that Henry Brannan, to whom Mills, subsequent to the entry, conveyed an interest in the land, was interested in the entry from the first. The

of other words, and one will be read in the place of the other where the meaning of the context requires it.

So, in *State v. Brandt*, 41 Iowa, 593, it is said to be well laid down as elemental that courts have interpreted the word "and" as a disjunctive and the word "or" as a conjunctive when the sense absolutely required, and this in extreme cases in criminal statutes against the accused.

In *State v. Mitchell*, 27 N. C. (5 Ired. L.) 350, "or" was construed to mean "and" in a statute providing for the punishment of any person who should wilfully or maliciously burn the state house, jail, etc.

So, the word "and" was substituted for "or" in a statute providing method for fixing valuation of franchises of corporations for purpose of taxation, under the rule that such a substitution is proper when necessary to make a statute express the true legislative intent. *James v. United States Fidelity & G. Co.* 133 Ky. 299, 117 S. W. 406.

So, in a statute directing the rate of taxation to be levied against corporations, and providing that the act "shall not apply to railway, canal, or banking corporations, or to savings banks, cemeteries, or religious corporations, or purely charitable or educational associations, or manufacturing or mining companies carrying on business in this state," the particle "or" is held in *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733, to be used in its copulative, and not in its disjunctive, sense.

So, in *Folmsbee v. Amsterdam*, 142 N. Y. 118, 36 N. E. 821, it is held that "and" should be substituted for "or" in a statute providing that the grade of an established street shall not be changed except upon 42 L.R.A. (N.S.)

petition of the abutting owners, or unless compensation be made to the owners injured.

So, in *Rolland v. Com.* 82 Pa. 306, 22 Am. Rep. 758, "or" was construed to mean "and" in a statute defining the crime of burglary as the breaking or entering of a dwelling house.

It was held in *State ex rel. Caldwell v. Hooker*, 22 Okla. 712, 98 Pac. 964, that § 8, art. 3, of the enforcing act, was evidently intended by the legislature to follow the language of § 30, art. 2, of the Constitution relative to search and seizure, and that the word "or" was inserted either by the framer of the act or by the copyist by inadvertence or clerical error; and that in order to carry out the evident legislative intent the same will be construed by substituting the conjunctive particle "and" in the place of the disjunctive "or." The court observed that when it is clear that either of the words "or" or "and" has been mistakenly used for the other, the word intended will be substituted for the one mistakenly used, so as to carry out the legislative intent, but it is not that "or" is read "and," for "or" never means "and," but when used by mistake for "and" should be substituted by "and," the legislative intent imperatively so requiring.

But it is held in *United States v. Ten Cases of Shawls*, 2 Paine, 162, Fed. Cas. No. 16,448, that "and" cannot be construed to mean "or" in a penal statute.

And it is held in *State v. Tiffany*, 44 Wash. 602, 87 Pac. 932, that the word "or" cannot be construed to mean "and," where the words "wilfully" or "wantonly" or "wilfully, maliciously, or wantonly" are used in defining crime.

J. D. C.

answers of Mills and the Brannans deny fraud, and allege the good faith of Mills in making the entry and of the Brannans in making the purchase from Mills.

The main question in the case is one of fact,—whether or not Mills entered the land in good faith and really established a residence on it and lived on it and cultivated it, as required by the homestead law and substantially as shown by his final proof of entry. But the case incidentally involves a construction of the homestead statutes.

The United States has the same remedy in a court of equity to set aside or annul a patent for land on the ground of fraud in procuring its issue that an individual would have in regard to his own deed procured under similar circumstances. *United States v. Minor*, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836. In fact, there are reasons why the government, in cases of this kind, should not be held to the same diligence in guarding against fraud and imposition as a private owner of real estate. The government owns immense tracts of land which are placed in the hands of officers of the government, subject to entry under the pre-emption and homestead laws, and usually, these officers are, from necessity, forced to act solely on the *ex parte* statements of the claimants and their witnesses. If the claimant obtains a patent by false and fraudulent statements or evidence, the government, by direct proceeding in equity, can have it annulled. And the same rule obtains where, by mistake or inadvertence of the officers of the land office, the claimant procures a patent. *Hughes v. United States*, 4 Wall. 232, 18 L. ed. 303; *Germania Iron Co. v. United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337. In cases where the allegations of the bill and the evidence point to fraud and wrong, and also point to inadvertence and mistake, the bill may be sustained upon the latter ground, if proved, although the proof fails to fully establish the first ground. *Williams v. United States*, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457. The bill in this case, with particularity, charges fraud on the part of the defendants,—that the claimant did not act in good faith; that he never intended to settle on and live on the land as his homestead; that he never lived on it, and that his evidence, on final proof to the contrary, was false and fraudulent. Besides, it is alleged that the patent was issued by the complainant, relying upon the good faith of this testimony and believing it to be true in fact.

The averments of the bill being denied, the burden of proof is, of course, on the complainant, and the patent will not be annulled unless the evidence clearly and fully

sustains the charges made. *Maxwell Land-Grant Case*, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015.

The evidence on which the case was tried below shows that after Mills' entry, about an acre and a half of the land was cleared and fenced, part in a garden and part in a lot, and that a building valued at from \$50 to \$150 was erected; that this building was occupied for several years by negroes placed in possession by Mills, and that they cultivated the garden and lot. It does not clearly appear on what terms the tenants occupied the land, further than that Mills furnished some fertilizers, and that the tenants were not charged rent but were to take care of the place. The evidence unquestionably shows that Mills never lived on the place. During the five years after application for entry, Mills lived with his uncle, Henry Brannan, either at Brannan's turpentine distillery or at Brannan's house. His own statements in evidence show this. His only acts tending to show an actual personal residence or personal occupancy of the homestead by him was that he would, about every four or five or six months, take some bedclothes with him and go to the homestead and spend the night, sleeping either on the porch or in the house, and the next day would take his bedclothes and go home. He would sometimes take a witness with him to prove that he did sleep on the homestead. His own testimony shows, we think, that his purpose was not to make a home for himself on the land, but merely to claim the place as a home and to obtain the title without actual residence on it. Shortly after obtaining the patent, he conveyed it to his kinsmen, who were cognizant of all the facts, and with one of whom he lived during the time he and one of the kinsmen both swore that he had an actual residence on the homestead. The evidence clearly shows that Mills never intended to live on the place during the five years succeeding his entry, and that he did not live on it; that he slept there one night in every four, five, or six months so as to "fulfil the law," as he expressed it to Cowart; and in that way he intended to obtain a patent to the land. If this constitutes residence on the land, he could have obtained in like manner a residence on a dozen other quarter sections at the same time.

The homestead act was passed May 20, 1862, and its purpose is indicated by its title,—“An Act to Secure Homesteads to Actual Settlers on the Public Domain.” Act May 20, 1862, chap. 75, 12 Stat. at L. 392. The portions of the act material to this case are found, as amended, in §§ 2289, 2290,

and 2291 of the Revised Statutes, U. S. Comp. Stat. 1901, pp. 1388-1390. For convenience of reference, they are copied in the margin.\* The first section cited provides that named persons are entitled to enter one quarter section, or a less quantity, of the unappropriated public lands. The last paragraph of the section provides that a person owning and residing on land may enter other land contiguous to his land, which shall not, with the land already owned by him, exceed 160 acres. The second section cited provides that the applicant shall file in the land office an affidavit stating that the application is made "for the purpose of actual settlement and cultivation," etc., and that the applicant "will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title," etc. The third section cited provides that no patent shall be issued for the land "until the expiration of five years from the date of such entry;" and it is required that the applicant shall prove by two witnesses that he has "resided upon or cultivated" the land for five years. It will be noted that the first section allows an entry,

first, by an applicant who owns no land; and, second, by an applicant who owns less than 160 acres and who is allowed to enter enough contiguous land to enlarge his homestead to 160 acres. The third section cited, standing alone, would indicate that both residence and cultivation were not required to obtain a patent, because the applicant is required to prove that he has "resided upon or cultivated" the land for which he seeks the patent. But the second section cited contains language—which we have quoted—which tends to show that "residence and cultivation" are necessary to acquire title. When the applicant is a person who, owning less than 160 acres, seeks to enlarge his homestead by an entry of other land, it is clear that he would not be required to move from the land owned by him to the contiguous land which he seeks to enter. In such case, residence on the land sought to be added to his homestead would not be necessary. Cultivation for the required length of time would be sufficient. But in the case at bar the entryman was not applying for an addition to land already owned by him, but, owning no land, he applied to enter a homestead of 160 acres. And the question is,

\*Sec. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or a less quantity, or unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than 160 acres of land in any state or territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate 160 acres.

Sec. 2290. That any person applying to enter land under the preceding section shall first make and subscribe before the proper officers and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; 42 L.R.A. (N.S.)

that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself or herself, and upon filing such affidavit with the register or receiver on payment of \$5 when the entry is of not more than 80 acres, and on payment of \$10 when the entry is for more than 80 acres, he or she shall thereupon be permitted to enter the amount of land specified.

Sec. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in § 2288, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law,

in such case, should the statute be so construed as to require him to show both residence and cultivation to entitle him to a patent?

It is contended by the claimant that his actual residence on or occupancy of the land was unnecessary,—that it was sufficient for him to have had part of it cultivated.

This contention is based mainly on § 2291 of the Revised Statutes. This section provides that “no certificate . . . shall be given, or patent issued therefor, until the expiration of five years from the date of such entry;” and that the claimant, to be entitled to a patent, shall prove by two credible witnesses that he has “resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit,” etc. Insistence is made on the disjunctive conjunction “or;” and the contention is made that it is unnecessary for the claimant to have resided on the land, if he cultivated it or caused it to be cultivated. The government contends that this statute should be construed *in pari materia* with other sections of the Revised Statutes, which, together, constitute the homestead law. Section 2290, the section immediately preceding the one just quoted, provides that the person seeking to make the entry under the homestead law shall make affidavit that his “application is honestly and in good faith made for the purpose of actual settlement and cultivation,” and that he “will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for,” etc. And, in stating the circumstances under which the entered homestead will revert to the government, it is provided that it will so revert when the claimant “has actually changed his residence, or abandoned the land for more than six months at any time.” U. S. Rev. Stat. § 2297, U. S. Comp. Stat. 1901, p. 1398. This language strongly indicates that the claimant is required to establish a home on the land, but that he may absent himself from it temporarily for as long as six months.

Again, § 2308, U. S. Comp. Stat. 1901, p. 1417, provides that where a soldier or sailor is actually enlisted and thus employed at the time of entry, his service shall be construed as equivalent “to a residence for the same length of time upon the tract so entered;” and if his entry has been canceled by reason of such absence and the tract has been disposed of, he may enter another tract, and his right to a patent therefor may be determined “by the proofs touching his residence and cultivation of the first tract.” Section 2305 (p. 1413) had 42 L.R.A. (N.S.)

already provided—referring to soldiers and sailors—that no patent shall issue unless the settler has “resided upon, improved, and cultivated his homestead” for at least a year; and this section also refers to certain acts as being equivalent to a performance of all requirements as to residence and cultivation for the full period of five years.

These sections, all found together in chapter 5, title 32, of the Revised Statutes, strongly indicate the legislative intention that both residence and cultivation of the land are required to entitle the entryman to a patent.

In laws passed subsequent to the homestead law Congress has uniformly referred to the latter as requiring of the entryman actual residence on the land.

In the act of January 19, 1895 (28 Stat. at L. 634, chap. 34, U. S. Comp. Stat. 1901, p. 1408), providing relief for settlers whose homesteads were destroyed by forest fires in Wisconsin, Minnesota, and Michigan, Congress, in extending two years’ additional time in which to make final proof, said that any temporary absence within two years from the date of the act “shall be deemed constructive possession and residence,” but shall not be deducted from the time required to make final proof.

The act of July 1, 1879 (21 Stat. at L. 48, chap. 63, U. S. Comp. Stat. 1901, p. 1399), provided for leave of absence where crops were injured by grasshoppers. Absence not exceeding one year was authorized under certain condition. This provision would have been useless had residence not been required.

And again, in the act of March 2, 1889 (25 Stat. at L. 854, chap. 381, § 3, U. S. Comp. Stat. 1901, p. 1400) leave of absence is provided for, when for good reason the settler cannot secure a support for himself and family “upon the lands settled upon.” A leave of absence not exceeding one year was authorized: “Provided, That the time of such actual absence shall not be deducted from the actual residence required by law.”

In the act of February 26, 1896 (29 Stat. at L. 16, chap. 31), absence for one year from settlements upon the Yankton Indian Reservation was authorized: “Provided, That the settler shall not receive credit upon the period of actual residence required by law,” for the time he was thus absent.

The act of March 3, 1879 (20 Stat. at L. 472, chap. 191, U. S. Comp. Stat. 1901, p. 1401), in granting additional rights to homestead settlers on public lands within railroad limits, provided that in cases of surrender of the original entry and re-entry under the conditions of the act:

“ . . . the residence and cultivation of

such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law."

The language is repeated in the act of July 1, 1879 (21 Stat. at L. 46, chap. 60, U. S. Comp. Stat. 1901, p. 1402).

Section 6 of the act of March 2, 1889 (25 Stat. at L. 854, chap. 381, U. S. Comp. Stat. 1901, p. 1404), uses the words, "shall have actually and in conformity with the homestead laws resided upon and cultivated the lands," etc.

Since its enactment, the homestead law has been consistently construed by the department charged with its administration, as requiring of the homesteaders actual residence, as well as cultivation, for the five-year period. This is shown by circulars issued by the department and by various decisions. Where parties made considerable improvements, but failed in residence, their rights as homestead claimants were held forfeited. 2 *Lester Land Laws, Regulations & Decisions*, 264. In holding that a homestead entry should be canceled, Secretary Schurz said (December 5, 1878) that the claimant is one of a class "who do not reside upon the land entered by them, but seek to keep up a residence thereon by going thereto and remaining over night once or twice in six months." *Byrne v. Catlin* (1882) 1 *Copp, Public Land Laws*, 406. In that case, it was shown that the entryman resided at his father's home, a few miles distant from the land he claimed as a homestead. The courts, except when there are strong reasons for a contrary course, will respect the construction of a statute upon which the department has uniformly proceeded in the administration of the public lands. *McMichael v. Murphy*, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 460.

No controlling case is cited in which the court was required to decide the question we are considering, but there are numerous cases in which expressions are used which tend to sustain the legislative and departmental construction.

In *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 31, 52 L. ed. 941, 945, 28 Sup. Ct. Rep. 600, Mr. Justice White observed: "By the homestead law, residence upon and cultivation of the land was required."

In *Anderson v. Carkins*, 135 U. S. 483, 487, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905, Mr. Justice Brewer said: "The law contemplates five years' continuous occupation by the homesteader."

In *Adams v. Church*, 193 U. S. 510, 516, 42 L.R.A.(N.S.),

48 L. ed. 769, 771, 24 Sup. Ct. Rep. 512, Mr. Justice Day said: "The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself."

In *Bohall v. Dilla*, 114 U. S. 47, 51, 29 L. ed. 61, 63, 5 Sup. Ct. Rep. 782, Mr. Justice Field said: "Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon. This implies a residence, both continuous and personal."

There are numerous other cases where observations are made to the same effect. *Shiver v. United States*, 159 U. S. 491, 497, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; *McCune v. Essig*, 199 U. S. 382, 389, 50 L. ed. 237, 240, 26 Sup. Ct. Rep. 78.

In *United States v. Collett*, 87 C. C. A. 460, 159 Fed. 932, 933, the court said: "The statute requires residence and cultivation in good faith for a period of five years by an entryman, to entitle him to a patent of a homestead."

We are of opinion that, by a proper construction of the statute, the entryman, in a case like this, is required to show residence on the land for five years to entitle him to a patent.

We concur fully in the contention of defendant's counsel that the statutes should not be construed strictly and harshly against the homesteader, but that the land laws should be administered liberally to fulfill their purpose. A temporary absence from the home, or delay in making improvements, or failure for unavoidable reasons to cultivate the land for a season, might ordinarily be excused. Possibly, failure for unavoidable reasons to reside on the land might, under some circumstances, be excused. But it was not intended that a patent should be granted when the entryman never lived on the land,—when he could have lived on it if he had wished to do so, and when, during the entire five years succeeding the filing of his claim, he had a home and residence elsewhere.

Technical considerations should not be allowed to defeat the claimant; but we cannot see how he could have justly claimed that he had established a home on the entered land, within the meaning of the statute, when he had never lived on the land before he obtained the patent, and when, at the time, he had a well-known and defined home elsewhere. He never kept his horse or his clothes, his bed or any personal property owned or used by him, on the

place. He swore to the contrary to obtain the patent; but the facts being substantially proved in this case by the government's witnesses, he admits that he had no actual residence on the land and that he kept no personal property on it. His mere thought that what he did was sufficient cannot override the law, which he is presumed to know. The claimant's testimony in this case, and that of Henry Brannan, is in direct conflict with their affidavits made to secure the patent. If the government had been cognizant of the facts, it is not to be presumed that the patent would have been issued. It was obtained by deceiving the government's officers as to the facts. The proof is quite sufficient to clearly establish this. Mills should not be permitted to hold the land, obtained by false affidavits, as against the government.

As found by the court below, there is no question of innocent purchaser in the case. Henry and Thomas H. Brannan, to whom Mills conveyed the land, were fully advised as to the facts proved on the trial. They both knew that Mills did not live on the land at any time, and that, in fact, he lived elsewhere for the five years immediately following the filing of his claim.

We are of the opinion that the complainant is entitled to relief as prayed for.

The decree of the Circuit Court is reversed, and the case remanded for further proceedings conforming to the opinion of this court.

#### NORTH CAROLINA SUPREME COURT.

W. B. HARDY et al.

v.

HINES BROTHERS LUMBER COMPANY,  
Appt.

(— N. C. —, 75 S. E. 855.)

**Fire — setting out — negligence of railroad company.**

1. Negligence may be found rendering a railroad company liable for injury to neigh-

*Note. — Proximate cause of damage resulting from fire as affected by time, distance, or intervening property.*

The general question as to liability for intentionally setting out on one's own premises a fire which spreads to the property of others is treated in the notes to *Brown v. Brooks*, 21 L.R.A. 255, and *Hawkins v. Collins*, 36 L.R.A. (N.S.) 194. Many cases otherwise within the scope of the present note are included in the former of those notes and are not repeated here. It will be observed that the present note covers cases 42 L.R.A. (N.S.)

boring property by fire, where the right of way was foul with inflammable material, its locomotive emitted sparks, and the fire was first seen on its right of way soon after the engine had passed.

**Proximate cause — fire — apparent extinguishment — effect.**

2. That a fire originating through the negligence of a railroad company on its right of way was apparently extinguished before reaching property afterwards consumed does not relieve the railroad company from liability for the loss, if the fire merely smoldered, so that the original fire was the proximate cause of the loss.

**Evidence — sufficiency — existence of right of way.**

3. Testimony that fire was seen on the right of way of a lumber company operating a railroad is sufficient to enable the jury to find that it had a right of way.

(September 25, 1912.)

**A**PPEAL by defendant from a judgment of the Superior Court for Greene County in plaintiffs' favor in an action brought to recover damages for injuries caused by fire alleged to have been negligently and carelessly set out by defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Paul Frizzelle, Loftin & Dawson, and Rouse & Land, for appellant:

There is no evidence of what right of way belonged to the defendant or was under its control.

*Craft v. Albemarle Timber Co.* 132 N. C. 157, 43 S. E. 597; *Maguire v. Seaboard Air Line R. Co.* 154 N. C. 384, 70 S. E. 737.

The true rule is such as a man of ordinary prudence would employ under the circumstances of the situation, and if, through his negligence, his property is consumed, or if such negligence was concurrent with the negligence of the other party, and approximately contributed to produce such result, he should not recover.

*St. Louis Southwestern R. Co. v. Crabb*, — Tex. Civ. App. —, 80 S. W. 408; *Cornwall v. Charlotte, C. & A. R. Co.* 97 N. C. 11, 2 S. E. 659; *Mast v. Sapp*, 140 N. C. 533, 5 L.R.A. (N.S.) 379, 111 Am. St. Rep. 864, 53 S. E. 350, 6 Ann. Cas. 384, 864; *Eller*

otherwise within its scope, whether the fire was started intentionally or accidentally. The effect upon the question of proximate cause of various conditions other than those here dealt with is discussed in other notes.

Thus, as to accumulation of inflammable material which aids the spread of fire originating on another's property, as proximate cause of destruction of property of third persons, see note to *Bowers v. East Tennessee & W. N. C. R. Co.* 12 L.R.A. (N.S.) 446.

As to negligently setting out fire as proximate cause of injury to one burned while seeking to protect his property, see note to

v. Carolina & N. W. R. Co. 140 N. C. 140, 3 L.R.A. (N.S.) 225, 52 S. E. 305, 6 Ann. Cas. 46; Cook v. Champlain Transp. Co. 1 Denio, 99; Marquette, H. & O. R. Co. v. Spear, 44 Mich. 169, 38 Am. Rep. 242, 6 N. W. 202; Rathbun v. Payne, 19 Wend. 399; Knowlton v. New York & N. E. R. Co. 147 Mass. 606, 1 L.R.A. 625, 18 N. E. 580; Trask v. Hartford & N. H. R. Co. 2 Allen, 331.

Defendant was not liable for the fire of June 23d, even though the fire of June 12th originated from its negligence.

Doggett v. Richmond & D. R. Co. 78 N. C. 305; 33 Cyc. 1345, note 52, 1346, 1347; Wharton, Neg. §§ 133, 134, 148-155.

Messrs. Langston & Allen, for appellees:

The evidence excludes all reasonable pos-

sibility of the fire originating from any other source than by a spark or coal from defendant's engine, and evidence from eye-witnesses that they actually saw sparks fall and ignite combustible matter is not required.

Deppe v. Atlantic Coast Line R. Co. 152 N. C. 79, 67 S. E. 262; Currie v. Seaboard Air Line R. Co. 156 N. C. 419, 72 S. E. 488; Williams v. Atlantic Coast Line R. Co. 140 N. C. 624, 53 S. E. 448; Phillips v. Durham & C. R. Co. 138 N. C. 12, 50 S. E. 462, 3 Ann. Cas. 384.

The remoteness in time or distance cannot affect the liability of defendant, if the primary cause be the efficient cause which set in motion the chain of circumstances leading up to the injury, and which in nat-

Illinois C. R. Co. v. Siler, 15 L.R.A. (N.S.) 819.

As to weather conditions as an independent, intervening, efficient cause, see note to Benedict Pineapple Co. v. Atlantic Coast Line R. Co. 20 L.R.A. (N.S.) 92.

As to discharging oil into stream or bay as proximate cause of fire resulting therefrom, see note to Societe Nouvelle D'Armenement v. United States S. S. Co. 30 L.R.A. (N.S.) 1210.

#### Effect of distance.

See also note in 21 L.R.A. 261.

The general rule seems to be that where the spread of a fire is continuous and there are no independent, intervening causes, the damage will be considered the proximate result of the first fire, irrespective of the distance traversed.

Thus, a fire negligently set out by a railroad company was the proximate cause of loss to property 1½ miles distant, to which the fire spread over intervening lands. Black v. Aberdeen & W. E. R. Co. 115 N. C. 667, 20 S. E. 713, 909.

And a railroad company which negligently set fire in pine woods, where the ground was covered with straw, grass, and other combustible material, was held liable for the destruction of property where the fire burned continuously, and the spreading was not occasioned by any intervening cause, though such property was situated more than 2 miles from the place where the fire originated. East Tennessee, V. & G. R. Co. v. Hesters, 90 Ga. 11, 15 S. E. 828; East Tennessee, V. & G. R. Co. v. Hall, 90 Ga. 17, 16 S. E. 91.

And the fact that property destroyed by fire was situated 3 or 4 miles from the place where it was negligently set out by a railroad company on its right of way was held not to relieve the railway company from liability for loss, though in spreading to the property it passed over several intervening farms and highways. Union P. R. Co. v. McCollum, 2 Kan. App. 319, 43 Pac. 97.

And, also, in Chicago, R. I. & P. R. Co. v. 42 L.R.A. (N.S.).

McBride, 54 Kan. 172, 37 Pac. 978, where a fire set out by sparks from an engine spread over a prairie for 10 miles and destroyed property, it was held that the damage done was the proximate result of the fire so set out.

And in Phillips v. Durham & C. R. Co. 138 N. C. 12, 50 S. E. 462, 3 Ann. Cas. 384, the property destroyed was 2½ miles from the starting point of the fire.

In St. Louis South Western R. Co. v. Gentry, — Tex. Civ. App. —, 80 S. W. 844, disapproving Hoffman v. King, 160 N. Y. 618, 46 L.R.A. 672, 73 Am. St. Rep. 715, 55 N. E. 401, where fire spread several hundred yards, the court said: "If the fire burns continuously, feeding upon materials of the same or similar kind throughout its course, without an intervening cause, loss occasioned thereby will be the proximate result of the company's negligence, although intervening tracts of land owned by different proprietors may have been traversed by the fire before such loss occurs. In such case the distance, and the fact that the fire burned over such intervening tracts of land, do not affect the question, except in so far as they bear on the probability of the intervening cause, and 'that no intelligent man could have apprehended injury as the result of the negligent act' which caused the fire."

And in Yankton F. Ins. Co. v. Fremont, E. & M. Valley R. Co. 7 S. D. 428, 64 N. W. 514, it was held that the jury was justified in finding that a fire negligently set out by a passing engine was the proximate cause of damage to property to which it spread 8½ miles distant.

And, also, in Illinois C. R. Co. v. Almon, 100 Ill. App. 530, setting out fire on a railroad right of way, by sparks from a passing engine, was held the proximate cause of loss of property, where the fire spread from the right of way to land adjacent thereto, covered by dry grass, and over the same for one quarter of a mile until it reached similar combustible material on land on which the property destroyed was situated.

But in Cook v. Minneapolis, St. P. & S. Ste. M. R. Co. 98 Wis. 624, 40 L.R.A. 457, 67 Am. St. Rep. 830, 74 N. W. 561, a fire negli-



ural and continuous sequence produced the injury.

Phillips v. Durham & C. R. Co. 138 N. C. 12, 50 S. E. 462, 3 Ann. Cas. 384; Black v. Aberdeen & W. E. R. Co. 115 N. C. 667, 20 S. E. 713, 909; Poepper v. Missouri, K. & T. R. Co. 67 Mo. 715, 29 Am. Rep. 518; Chicago, R. I. & P. R. Co. v. McBride, 54 Kan. 172, 37 Pac. 978.

And if there is an unbroken connection between defendant's wrongful act and plaintiffs' injury, so that the injury was a result naturally and reasonably to be expected, either as the sole consequence of that and other causes which might have been reasonably expected to be set in motion by it, or to act in concurrence with it, the defendant is liable.

gently set out was held not to be the proximate cause of the destruction of property where, after spreading for over 1 mile, it united with a fire of no responsible origin, and the union fire spread to property destroyed, for the reason that, inasmuch as either fire might, independently of the other, have caused the loss, neither one could be considered the proximate cause.

In Tyler v. Ricamore, 87 Va. 466, 12 S. E. 799, a railroad company which had negligently set out a fire from a passing locomotive, on a windy day, which spread over a large territory, was held liable for damage occurring at a considerable distance from the starting point, though the fire was carried by a high and unusual wind.

But in Bock v. Grooms, 2 Neb. (Unof.) 803, 92 N. W. 603, it was held that one who sets out a fire on his own land, and takes such precautions as a reasonable man would to guard against its spread, is not bound to anticipate and guard against a whirlwind or any extraordinary high wind that may ensue and carry the fire beyond his control, causing it to spread over a large extent of territory.

Whether a fire set out on one's land is the proximate cause of damage to property to which it spreads, one quarter of a mile distant, is a question of fact for the jury, where there is evidence tending to show that the intervening ground was covered with dry and inflammable grass and weeds, and there was a strong wind blowing. Nall v. Taylor, 247 Ill. 580, 93 N. E. 359.

#### Effect of time.

See also note in 21 L.R.A. 261.

In St. Louis & S. F. R. Co. v. League, 71 Kan. 79, 80 Pac. 46, in holding that a fire may be the proximate cause of damage though it is temporarily arrested, the court said: "In determining the proximate cause, no arbitrary limits can be fixed as to nearness in point of time, or as to distance from the original starting of the fire. Much more important are closeness of causal connection, the natural sequence of the original wrongful act, and whether the resulting loss

Burdick, Torts, p. 93; Harton v. Forest City Teleph. Co. 146 N. C. 429, 14 L.R.A. (N.S.) 956, 59 S. E. 1022, 14 Ann. Cas. 390; Harvell v. Weldon Lumber Co. 154 N. C. 262, 70 S. E. 389.

Mr. J. G. Anderson also for appellees.

Walker, J., delivered the opinion of the court:

These actions were brought by W. B. Hardy and B. T. Hardy against the defendant to recover damages for negligently burning their timber. The allegations as to the burning, they being substantially the same in the two cases, are that the defendant's locomotive engine set fire to combustible material on its track and right of way, which was covered with dry leaves, pine

was one which might reasonably have been anticipated. It is not necessary that the loss be the inevitable result of the setting of the fire, but if it is the natural consequence, one likely to result from starting the fire, then it should have been anticipated by the railroad company, and is the proximate result of its negligence."

And, so, in Union P. R. Co. v. McCollum, 2 Kan. App. 319, 43 Pac. 97, where a fire set out on the railroad right of way was communicated to a haystack, where it smoldered for sixteen or seventeen hours, when it was carried by a moderately strong, but not unusual or extraordinary, wind into prairie grass, and from thence to the property destroyed, it was held that the fire set out on the right of way was the proximate cause of the damage.

And the fact that two days intervened between the kindling of a fire and the time it spread to the premises destroyed did not, of necessity, break the causal connection between the negligence in setting out the fire and the destruction of the premises. Hawkins v. Collins, 89 Neb. 140, 36 L.R.A. (N.S.) 194, 131 N. W. 187.

Nor does the fact that a fire burns several days before it is finally subdued, being partially subdued several times and again breaking out, make it less the proximate cause of damage to property to which it eventually spreads. Chicago, St. L. & P. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696.

And in Lake Erie & W. R. Co. v. Keiser, 25 Ind. App. 417, 58 N. E. 505, where fire escaped from the railroad right of way to a pile of sawdust on the premises of a third person, and was apparently extinguished, but five days later sprang into new life and spread to the premises of plaintiff, destroying his buildings, the fire originally set out on the right of way was held to be the proximate cause of the damage.

And in Wick v. Tacoma Eastern R. Co. 40 Wash. 408, 82 Pac. 711, it was held that the destruction of property was traced with reasonable certainty to fire originating four days previous from a locomotive on defendant's road.

straw, and wood mold, and in a very foul condition, and that the fire spread to the adjoining land, burning over a considerable area; that an effort was made to extinguish the flames, plaintiffs taking some part in it, but that some days afterwards the fire, which had been left smoldering in the woods, broke out afresh, extending to the lands of plaintiffs and burning some of their timber. The cases, by consent of all parties, or rather without objection, were consolidated by order of the court and tried together, the facts being practically alike.

The fire, as testified by at least two of plaintiffs' witnesses, L. C. Turnage and W.

C. Carlyle, was first seen on the track and right of way just after the train had passed; and there was evidence that the smokestack of the engine was defectively constructed, so that large and live sparks could be emitted therefrom, and that the same engine had before caused fires along the track. It is true that there was evidence to the effect that the engine was properly constructed and supplied with an efficient spark arrester and a good ash pan, save when bad wood was used; but the facts we have stated were fully deducible from some of the evidence by the jury, and they seem, under a perfectly correct charge,

#### Effect of intervening land or buildings.

See also cases cited in note in 21 L.R.A. 260.

It seems to be a well-settled doctrine, according to the overwhelming weight of modern authority, that a fire set out may be the proximate cause of damage to property though such property is not on land adjoining that upon which the fire was set, and is reached by the fire only after it has burned its way across the land or buildings of another.

Fire originating on a railroad right of way has been held to be the proximate cause of damage though other lands intervened between the right of way and the land on which the property destroyed was situated. *Chicago, St. L. & P. R. Co. v. Williams*, supra; *Chicago & E. R. Co. v. Luddington*, 10 Ind. App. 636, 38 N. E. 342; *Smith v. Ogden & N. W. R. Co.* 33 Utah, 129, 93 Pac. 186; *Phillips v. Durham & C. R. Co.* 138 N. C. 12, 50 S. E. 462, 3 Ann. Cas. 384.

And in *Blue v. Aberdeen & W. E. R. Co.* 116 N. C. 955, 21 S. E. 299, the following charge to the jury was held to be correct: "If the jury find from the evidence that the defendant company permitted hay, grass, and straw, dried-up leaves, and an accumulation of combustible matter to exist on its right of way so near the track as to catch fire from the engine, and it did catch from the engine, and the fire spread across the lands of another person to plaintiff's lands, defendant company would be liable to plaintiff for damages sustained. There is no evidence of 'contributory negligence upon the part of plaintiff.'"

In *Florida East Coast R. Co. v. Welch*, 53 Fla. 145, 44 So. 250, 12 Ann. Cas. 210, and *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033, a fire set out on lands of third persons, by a spark from a passing engine, was held to be the proximate cause of damage, where it spread to adjacent lands and destroyed property thereon.

In *Alabama G. S. R. Co. v. Johnson*, 128 Ala. 283, 29 So. 771, it was held that the cause of loss of a building by fire was not remote because of the fact that it resulted from sparks blown from a pile of sawdust belonging to and on the premises of third persons, which had previously been set on

fire by sparks emitted from one of defendant's engines.

And, also, in *Alabama & V. R. Co. v. Barrett*, 78 Miss. 432, 28 So. 820, disapproving *Hoffman v. King*, 160 N. Y. 618, 46 L.R.A. 672, 73 Am. St. Rep. 715, 55 N. E. 401, it was held that a fire set out by sparks from an engine was the proximate cause of damage to buildings to which it spread across the lands of third persons.

Fire communicated by a railroad engine is the natural, direct, and proximate cause of the burning of property, where it is communicated to a building, and thence spreads to the property destroyed, through several buildings between it and the building to which the fire was first communicated. *Illinois C. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833.

And in *Martin v. New York & N. E. R. Co.* 62 Conn. 331, 25 Atl. 239, the railroad company was held liable for the destruction of a building by fire communicated from the railroad station, which had been set on fire by sparks from one of the company's engines.

And so, also, in *Kansas City, F. S. & M. R. Co. v. Blaker*, 68 Kan. 244, 64 L.R.A. 81, 75 Pac. 71, 1 Ann. Cas. 883, a fire negligently set out by sparks from an engine was held to be the proximate cause of damage to lumber not on the right of way, though it was communicated to buildings owned by plaintiff and not rightfully on the right of way, and thence communicated to the property not on the right of way.

And in *Bowers v. East Tennessee & W. N. C. R. Co.* 144 N. C. 684, 12 L.R.A. (N.S.) 446, 57 S. E. 453, where a fire which started in a building off defendant's right of way spread to several other buildings, from which it was communicated to a pile of lumber permitted by the company to be placed on its right of way, and thence communicated to and destroyed plaintiff's building, it was held that the negligence on the part of the railway company in permitting the lumber to be piled on its right of way was not the proximate cause of the damage to plaintiff.

In *St. Louis South Western R. Co. v. Eccles*, 53 Tex. Civ. App. 125, 115 S. W. 648, negligence in permitting sparks to escape from an engine, setting fire to grass, was

to have accepted them as proven to their satisfaction. It cannot be disputed that there was evidence sufficient to establish the charge of negligence in either of two aspects,—a defective engine and a foul and dangerous track and right of way,—either of which would constitute actionable negligence if it caused the fire in the beginning, and was the proximate cause of the damage. We said recently in *Kornegay v. Atlantic Coast Line R. Co.* 154 N. C. 389, 70 S. E. 731: "When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff made

out a prima facie case, entitling him to have the issue as to negligence submitted to the jury; and they were justified in finding negligence, unless they were satisfied, upon all the evidence in the case, that, in fact, there was no negligence, but that the defendant's engine was equipped with a proper spark arrester or ash pan, and otherwise to prevent the emission of sparks or fire, and had been operated in a careful or prudent manner." This was but a summary of what had been so often decided in former cases. *Williams v. Atlantic Coast Line R. Co.* 140 N. C. 623, 53 S. E. 448; *Craft v.*

held to be the proximate cause of loss of cotton loaded on cars, though the fire had been communicated to the cotton from a building to which it had spread.

So, also, where fire was set out on a railroad right of way by section men, and spread to a building on land adjoining, and thence was communicated to and destroyed property stored in cars standing on a track near such building. *Chicago & E. I. R. Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451.

—New York rule.

In New York, though there is a conflict of opinion, it seems to be the settled rule that an intervening building or the intervening lands of a third person will be considered an efficient cause to prevent a fire negligently set out being considered the proximate cause of the destruction of property to which the fire may spread. Thus, in *Hoffman v. King*, 160 N. Y. 618, 46 L.R.A. 672, 73 Am. St. Rep. 715, 55 N. E. 401, where the fire was negligently set out on the right of way, and spread 2 miles across lands of several intervening owners to the property destroyed, it was held that negligence in starting the fire was not the proximate cause of the destruction of the property on the lands to which the fire spread across the intervening lands. And *Hoffman v. King* was followed as authority in *Van Inwegen v. Port Jervis, M. & N. Y. R. Co.* 165 N. Y. 625, 58 N. E. 878, and *Dougherty v. King*, 165 N. Y. 657, 59 N. E. 1121.

In *McDonough v. New York C. & H. R. R. Co.* 124 App. Div. 38, 108 N. Y. Supp. 270, it was said that one is not liable for damage by fire which spread to property not next adjacent to his own, and so, where a fire set out by sparks from an engine spread over forest lands one-half mile, to the bank of a river, which it crossed, and then spread three quarters of a mile to the property destroyed, it was held that, irrespective of the question as to whether the lots into which the forest lands had been divided could be considered separate premises, the land on the side of the river crossed was not next adjacent premises to the property where the fire originated, and so the railroad company was not liable.

And in *Frace v. New York, L. E. & W. R. Co.* 143 N. Y. 182, 38 N. E. 102, where 42 L.R.A. (N.S.)

sparks from an engine set fire to a barn, and the fire was communicated to a hotel, it was held that a charge that, to justify a recovery for the damage to the hotel, the jury must find that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without assistance of other agencies, was not erroneous.

In *Hitchcock v. Riley*, 44 Misc. 260, 89 N. Y. Supp. 890, it was held that a fire negligently set out must be communicated directly to the property destroyed to be considered the proximate cause of damage, and so one who set out a fire on his own land, which spread over land of a third person, which was covered with combustible material, to land on which property was destroyed, was not liable for the loss, the combustible material on such intervening lot being an intervening agency. See also in this connection *Bowers v. East Tennessee & W. N. C. R. Co.* 12 L.R.A. (N.S.) 446, and note.

But in *Martin v. New York, O. & W. R. Co.* 62 Hun, 181, 41 N. Y. S. R. 217, 16 N. Y. Supp. 499, where sparks from a passing engine set out a fire on the right of way, which spread in a direct line to the property destroyed, crossing several tracts of land owned by third persons and also a river 97 feet wide, it was held that the fact that intervening lands of third persons were crossed by the fire before reaching the property destroyed was not material. The court said: "The damages are just as immediate a result of the defendant's negligence whether the land over which they extend belongs to one person or in severalty to two. The question of remoteness cannot depend on the title to the land. To hold otherwise would be absurd. A fire in such cases travels along from tree to tree, from brush to brush, from grass in one place to grass adjoining. The line which divides the ownership of the land neither stops the fire or carries it forward, so that the ownership is utterly immaterial when we are considering whether a certain result is the direct effect of the original fire. It might be material if there were a change of wind or if some new cause should intervene. There was none here." This case is in direct conflict with the other New York cases, and is not referred to in any of them. J. H. B.

Albemarle Timber Co. 132 N. C. 151, 43 S. E. 597; Knott v. Cape Fear & N. R. Co. 142 N. C. 238, 55 S. E. 150; Cox v. Aberdeen & A. R. Co. 149 N. C. 117, 62 S. E. 884; Deepe v. Atlantic Coast Line R. Co. 152 N. C. 79, 67 S. E. 262; Currie v. Seaboard Air Line R. Co. 156 N. C. 419, 72 S. E. 488. We early stated the proposition, which seems to be a clear, logical syllogism, that "when . . . [the plaintiff] shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a prima facie case of negligence, which cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless." *Ellis v. Portsmouth & P. R. Co.* 24 N. C. (2 Ired. L.) 138; *Chaffin v. Lawrence*, 50 N. C. (5 Jones, L.) 179; *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; and more recently in *Mizzell v. Branning Mfg. Co.* 150 N. C. 265, 73 S. E. 802. The rule may be justified, not only on the ground that negligence is a fair and reasonable deduction from the fact of casting the spark from the engine, as ordinarily, when care is exercised, such a result does not follow, but for the further reason that the proof of care can more easily be produced by the defendant, who has control of the engine and should know its true condition, than by the plaintiff, who may be ignorant of it. *Aycock v. Raleigh & A. Air Line R. Co.* supra. We do not say that there is no exception to or qualification of the rule; but it applies in this case, and that is sufficient for our purpose.

Referring to this subject in *Deppe v. Atlantic Coast Line R. Co.* 152 N. C. at page 82, 67 S. E. 263, Justice Manning thus states the rule applicable to the state of facts here presented: "In considering the origin of the fire, it is immaterial whether the fire caught on or off the right of way. The place of ignition is important on the second question. The second question presented is, Could the jury find from this primal fact that the plaintiff's property was negligently burned by the defendant? In 2 *Shearman & Redfield on Negligence*, § 676 the learned authors say: 'The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have already been mentioned as necessary.'" He adds that this is the common law of England, and has been followed in 42 L.R.A. (N.S.)

many states, several of which he names, and he cites the following cases decided by this court as sustaining it: *Ellis v. Portsmouth & R. R. Co.* 24 N. C. (2 Ired. L.) 138; *Hygienic Plate Ice Mfg. Co. v. Raleigh & G. R. Co.* 122 N. C. 881, 29 S. E. 575; *Raleigh Hosiery Co. v. Raleigh & G. R. Co.* 131 N. C. 238, 42 S. E. 602; *North Fork Lumber Co. v. Southern R. Co.* 143 N. C. 324, 55 S. E. 781.

The evidence in our case, though somewhat circumstantial, tends to show conclusively that the fire was ignited by live sparks or coals that fell from the defendant's engine. This being so, the roof is also clear that the track and right of way were foul with dry stubble, which readily caught from the spark or cinder, and that there and in that way the fire originated. If it caught off the right of way, there is equally strong evidence of negligence against defendant; and it was for the jury to find the fact. The question was fairly submitted to them. It was sufficient for them to find that the fire occurred in either one of the suggested ways; for it does not, in law, require two acts of negligence to make a wrong. *Knott v. Cape Fear & N. R. Co.* 142 N. C. 238, 55 S. E. 150.

But defendant contends that if the fire was negligently caused by the engine dropping a live spark from the smokestack, or a live cinder from the ash pan, it was apparently extinguished after burning over intervening land for some distance from its track; and, while it smoldered in the stumps, and, perhaps, in other places, it was several days before it broke out again and destroyed the plaintiffs' timber. The evidence is that on June 12, 1911, and at first, it burned timber on land next to the railroad track, before it reached the plaintiffs' timber on that day, a small portion of which was consumed, and that on June 23, 1911, it "sprang up" again, and spread to plaintiffs' other timber. The evidence also discloses the fact that plaintiffs assisted in the attempt to put out the fire; but it turns out that the combined efforts of all the neighbors failed to extinguish it. But it is argued from these facts, that the fire that destroyed the plaintiffs' woods on June 23, 1911, was not proximately caused by that which started on the defendant's right of way June 12, 1911. Neither the distance traversed by the fire, though lands of other parties intervened, nor the time elapsing between the initial fire and the final conflagration, which destroyed the plaintiffs' property, is conclusive against the existence of proximate cause; that is, that the second fire was proximately caused by the first. The connection of cause and

effect must be established; the breach of duty must not only be the cause, but the proximate cause, of the damage to the complaining party. We may thus illustrate and state the rule: The proximate cause of an event is understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which it would not have occurred. This is a general statement of the rule. 1 Shearm. & Redf. Neg. 5th ed. § 26. The learned authors add something which is peculiarly applicable to the facts of our case: "Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation." 1 Shearm. & Redf. Neg. 5th ed. p. 28.

While we do not say that the question of proximate cause may not sometimes, owing to the special facts of the case in hand, resolve itself into one of law, it has been said to be the general and true rule that what is the proximate cause of an injury is ordinarily a question for the jury; the court instructing them as to what the law requires to constitute it, and the jury applying the law to the facts. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd (Squib Case)* 2 W. Bl. 892, 3 Wils. K. B. 403. "The question always is: Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole; or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. What was said by Justice 42 L.R.A. (N.S.)

Strong in the *Kellogg Case* has generally been approved and adopted by the courts as an apt statement and explanation of the rule. *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 39, 50 S. E. 448.

Judge Cooley has given us three propositions which further illustrate the application of the general rule, and in which he states it a little differently, but with his usual accuracy. "1. In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. Here the wrong itself fixes the right of action. We need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. 2. When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause. 3. If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Cooley, *Torts* 3d ed. p. 75.

In substantial agreement with this view of Judge Cooley is the further observation of the court in the *Kellogg Case*, 94 U. S. at page 475, 24 L. ed. 259: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury. Here lies the difficulty."

Justice Strong adds that this difficulty must be met and the inquiry answered in accordance with common understanding as applied to the peculiar facts. What would be the proximate cause of an event under some circumstances might not be under other and different facts and surroundings; and our common sense, which is the essence of the law, must be brought into service.

We may now the more readily answer the objection of the defendant to the plaintiff's recovery, based upon the absence of any proximate cause for the last fire which can be referred to its original negligence. The intervention of time or distance between the two fires, as when seen, is not fatal to plaintiffs, but was proper to be considered by the jury on the question of proximate cause. *Phillips v. Durham & C. R. Co.* 138 N. C. 12, 50 S. E. 462, 3 Ann. Cas. 384; *Black v. Aberdeen & W. E. R. Co.* 115 N. C. 667, 20 S. E. 713, 909; *Poeppers v. Missouri, K. & T. R. Co.* 67 Mo. 715, 29 Am. Rep. 518; *Chicago, R. I. & P. R. Co. v. McBride*, 54 Kan. 172, 37 Pac. 978. If the continuity in sequence of the several events was not broken, and the causes operated together and in connection with each other, either successively or concurrently, each being a contributing cause to the final result, as the jury, by their verdict, evidently found to be the fact, the defendant's act in starting the fire would, in law, be said to have proximately caused the damage to the plaintiffs' lands, and a case of actionable negligence would then be presented. The court charged the jury, in substance, that the burden was on the plaintiff to satisfy them that the same fire which was started on June 12, 1911, burned the land of the plaintiffs on the 23d, and if they had failed to do so they were not entitled to recover; otherwise they would be. The fire might be so continuous as to form an unbroken chain of causation leading up to the last outbreak, which destroyed plaintiffs' trees, although there may have been a considerable interval of time elapsing between the first and the last fire. Its identity was not lost, because it died down and smoldered in the stumps and in other burnable matter, and finally was revived and broke out afresh by reason of the contact with the dry pine leaves, which carried it at once to plaintiffs' land.

But the defendant's counsel rely on the case of *Doggett v. Richmond & D. R. Co.* 78 N. C. 305, and it must be admitted that, at first blush, there is a seemingly close resemblance between the two cases; but upon further comparison it is found to be a similarity more apparent than real, and, besides, a critical examination of that case 42 L.R.A. (N.S.)

will discover that the two cases are essentially different. In this case the court instructed that they must not answer the issue in favor of plaintiffs, unless they were satisfied that the fire of the 12th was the same that burned the plaintiffs' woods on the 23d, it being one continuous fire from the start. There was evidence to support this charge; for the jury might well have inferred from the testimony of the witnesses Lindsay Brown and others, that the fire had never been extinguished, but continued to burn slowly, or to smolder, until Friday the 23d, when it reached plaintiffs' trees and destroyed them. In the *Doggett Case*, the very learned justice laid stress upon the negligence of the plaintiff, placing the burden upon him to show its absence, and also undertook to decide the question of plaintiff's negligence as matter of law. We know that, in both respects, the law of negligence has since undergone great change by statute and decisions of this court. Again, in that case, it was said: "The second burning did not necessarily follow the first, because of the intervening arrest of the progress of the fire. But even supposing that the progress of the flames had been continuous, if there was any intervening negligence in the effort to extinguish the fire, either by the intermediate owners of fences, or by the neighbors who assembled for that purpose, when their endeavors, properly exerted might have been successful, the entire weight of authority is that the plaintiff cannot recover." In our case there is no allegation of negligence on the part of the plaintiffs in the answer, and no issue as to it was submitted; nor, we believe, is there any suggestion that they did not do their best to stay the progress of the fire,—all that the law required of them. In the *Doggett Case*, as we have seen, in the words taken from the opinion, the "progress of the fire was arrested," while there is evidence in this record that the fire started on the 12th was not extinguished. If the defendant wished to rely upon plaintiffs' negligence, or desired any more definite instruction in regard to it, a specific request should have been made, based upon proper averment in the answer and upon the evidence. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225, and cases cited in note.

Conceding, only for the sake of argument, that the judge's charge was somewhat general in its terms, it was in itself correct; and if the defendant thought that some other view of the matter should be presented, or that it should be more pointed, or addressed more closely to the particular facts, he should have made his want known

to the court in the usual way. So we said, by Justice Hoke, in the apposite case of *Gay v. Mitchell*, 146 N. C. 509, 60 S. E. 426, when the question of proximate cause was likewise involved. The court might well have asked the jury in our case to inquire and find whether, in the exercise of care, the defendant could reasonably have foreseen that the injury to plaintiffs' property would be the natural and probable consequence of its negligence in dropping sparks in the right of way, and explained more fully the rule of proximate cause, in any view of the evidence presenting the question; but we cannot say that its omission to give the charge is positive or reversible error, in the absence of any special request to do so. The jury have evidently found that the fire was not extinguished, but continued in its progress, though very slowly at times, until the final catastrophe. It may be true that plaintiffs were under the duty to protect their property against a seen or known and threatened danger, and to prevent or minimize the danger by the use of proper care (2 Shearm. & Redf. Neg. 5th ed. § 679; *Hocutt v. Western U. Teleg. Co.* 147 N. C. 186, 60 S. E. 980), and that their failure to do so would exculpate defendant, or diminish the measure of its liability. But this question is not now before us, and we forbear to discuss it.

Nor need we determine whether there was any intervening or independent cause, or evidence of it, which, in law, or in the judgment of the jury acting under proper instructions from the court, would insulate the defendant's original negligence or affect its liability. Nor need we inquire as to the nature or intent of such an intervening cause, with respect to its sufficiency for the purpose of breaking or dis severing the sequence of events; that is, whether it should be itself a superseding, responsible, or culpable cause. Suffice it to say that proximity of cause has no necessary connection with contiguity of space or nearness in time. The negligent fire, in its foreseeable, natural, and probable course and progress, to be ascertained by attending circumstances, is regarded as a unity. *Cooley, Torts*, (1879) pp. 76, 77, and notes. The intervention of considerable time and space may be considered by the jury on the question of proximate cause; but it is not controlling. 2 Shearm. & Redf. Neg. 5th ed. § 686, and notes, especially 7 and 8. The pauses in the progress of the fire, and the lapse of time, while matters for the consideration of the jury in determining the continuity of effect, do not enable the court to say, as matter of law, that the causal connection between the defendant's negligence in firing

the right of way and the injury to the plaintiffs was broken. It was so said, substantially, in *Haverly v. State Line & S. R. Co.* 135 Pa. 50, 20 Am. St. Rep. 848, 19 Atl. 1013.

The damage, it is true, must be the legitimate sequence of the thing amiss, and if the negligent act and the resulting loss are not known by common experience to be naturally and usually in such sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the latter and the damage are not sufficiently conjoined or concatenated, as cause and effect, to constitute actionable negligence,—the element of proximate cause being absent. *Cooley, Torts*, 69. In this case the jury must have found that it was one and the same fire throughout its various stages, there being no complete cessation of it. With this fact before us, there does not appear to have been any intermediate efficient and adequate cause operating by itself to break the connection; and the primary wrong must be considered as reaching to the effect, and therefore as proximate to it. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259; *Aetna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395. We have declined to enter upon the wide field of investigation which would have opened up to us if we had attempted a critical review of the doctrine of proximate and remote cause, as it is discussed in cases without number, being admonished against the futility of such a course by the words of a wise judge, when discussing a similar question: "It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65. For the reason given, we do not regard the case of *Doggett v. Richmond & D. R. Co.* as controlling the decision in this case.

The question raised as to whether there was any evidence that defendant owned a right of way, and, if so, as to its extent, is answered by the language of the witnesses who testified, in so many words, that the fire was seen on the right of way and track,

which implies, necessarily, that there was a right of way, and, nothing else appearing, this is some evidence of the fact for the jury. A similar question was decided at this term. *Frank Hitch Lumber Co. v. Brown*, — N. C. —, 75 S. E. 714.

We find no error in the record.

### KANSAS SUPREME COURT.

STATE OF KANSAS  
v.

J. W. COTNER, Appt.

(87 Kan. 864, 127 Pac. 1.)

**Physician — absence of license — continuing penalty.**

The statute providing that any person who shall practise medicine in this state without having received and recorded a cer-

Headnote by BURCH, J.

*Note. — Physicians and surgeons; practising medicine, surgery, or dentistry without a license as a continuing offense.*

The few cases upon the question whether illegally practising medicine is a continuing offense or not are sharply divided pro and con. As the court says in *STATE v. COTNER*: "There are no specific rules which solve the problem to a certainty, and the legislative intention must be gained from all intrinsic and extrinsic indications which the law recognizes as helpful to correct interpretation."

The leading authority holding the offense a continuing one is *Apothecaries Co. v. Jones* [1893] 1 Q. B. 89, 5 Reports, 101, 67 L. T. N. S. 677, 41 Week. Rep. 267, 17 Cox, C. C. 588, 57 J. P. 58, which was followed in the dentistry case of *Wilson v. Com.* 119 Ky. 769, 82 S. W. 427, both of which are reviewed at length in the opinion in *STATE v. COTNER*. It will be noticed that the statute in the *Apothecaries Case* provided that the person acting or practising without a certificate should, "for every offense," forfeit £20. Likewise, that in the Kentucky case the person who should, without a certificate, practise dentistry or dental surgery, should be fined from \$50 to \$200 "for each offense."

In *Rex v. Raffenberg*, 15 Can. Crim. Cas. 295, the court, in convicting the defendant of the charge that on or about a certain day "she did, being a person not registered under the medical profession act, practise midwifery on Mrs. Moore, for hire, gain, or hope of reward, contrary" to the statute, stated that it was necessary that there should be a continuous series of acts in order to sustain the conviction, and found that there was such continuous series of acts, consisting of a course of attendance and treatment on Mrs. Moore, but added 42 L.R.A. (N.S.)

tificate from the state board of registration and examination shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than \$50 nor more than \$200 (Gen. Stats. 1909, § 8091), does not create a continuing offense involving a general course of customary conduct, but penalizes each specific act of practice defined in the preceding section (Gen. Stat. 1909, § 8090).

(October 12, 1912.)

**A** PPEAL by defendant from a judgment of the District Court for Smith County convicting him of practising medicine without having received and recorded a certificate from the board of medical registration and examination. Affirmed.

The facts are stated in the opinion.

Messrs. R. W. Turner, F. W. Mahin, and W. E. Mahin, for appellant:

The offense of practising medicine without a license is a continuing offense.

17 Am. & Eng. Enc. Law, 603; *Re Snow*,

that it was not necessary to show attendance on more than one patient.

So, in *Reg. v. Whalen*, 4 Can. Crim. Cas. 277, the court seems to have been of the opinion that practice of midwifery required more than a single isolated act.

And in *Rex v. Lee*, 4 Can. Crim. Cas. 416, the court said: "The single act of prescribing medicine to one person on one day will not amount to a practicing of medicine."

On the other hand, in *Reg. v. Howarth*, 24 Ont. Rep. 561, the court, without referring to the question, sustained a conviction for practising medicine when unregistered, where the defendant, who was a druggist, in a single instance, advised and prescribed for a person who came into his shop.

In this connection reference may be made to *State v. Martin*, 23 R. I. 143, 49 Atl. 497, where the defendant was indicted for practising dentistry without having received a certificate, under a statute providing that "any person who shall practise or attempt to practise dentistry in this state, in violation of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and shall be liable to indictment therefor, and upon conviction shall be fined not less than \$50 nor more than \$100 for each and every offense; and the opening and maintaining of a dentist's office, the displaying of a dentist's sign or doorplate, or the advertising a readiness to practise dentistry in this state in the public prints, or by cards, circulars, posters, or in any other manner, by any such person, shall be evidence of such violation." The defendant objected that the indictment did not inform him upon whom he practised. The court said: "Practising dentistry, however, is a general, and not a particular, offense. It may consist of several acts, and hence it is more like the charge of maintaining a nuisance. . . . The argument in this case is that, as the



120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *Re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612; *State v. Colgate*, 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346, 5 Am. Crim. Rep. 71; *United States v. Burch*, 1 Cranch, C. C. 36; *Fed. Cas. No. 14,682*; *Dixon v. Washington*, 4 Cranch, C. C. 114, *Fed. Cas. No. 3,935*; *Wilson v. State*, 45 Tex. 76, 23 Am. Rep. 602, 2 Am. Crim. Rep. 356; *Wilson v. Com.* 119 Ky. 769, 82 S. W. 427; *Com. v. Robinson*, 126 Mass. 259, 30 Am. Rep. 674, 3 Am. Crim. Rep. 143; *Parks v. Nashville, C. & St. L. R. Co.* 13 Lea, 1, 49 Am. Rep. 655; *Sturgis v. Spofford*, 45 N. Y. 446; *Apothecaries Co. v. Jones* [1893] 1 Q. B. 89, 5 Reports, 101, 87 L. T. N. S. 677, 41 Week. Rep. 267, 17 Cox, C. C. 588, 57 J. P. 56; *Cawein v. Com.* 110 Ky. 273, 61 S. W. 275; *Friedeborn v. Com.* 113 Pa. 242, 57 Am. St. Rep. 464, 6 Atl. 160; *Crepps*

statute specifies several acts which may be evidence of practising or attempting to practise dentistry, the defendant could be indicted for each act. Doubtless a person might be indicted under this law for practising dentistry on different days or in particular cases, as in gambling cases for dealing faro at different times (*State v. Melville*, 11 R. I. 417, 3 Am. Crim. Rep. 158); or several instances might be offered as proof of one continuous offense, as in cases for being a common gambler, or for keeping a nuisance or house of ill fame, different acts may be shown. It is well settled, however, that a prosecution for an offense which is a continuing one is a bar to a subsequent prosecution for the same offense charged to have been committed at any time previous to institution of the first prosecution. 17 Am. & Eng. Enc. Law, 2d ed. 603, 604, and cases cited; 1 Bishop, Crim. Proc. § 436. In this case, but one offense is charged. The indictment sets it out as the practice of dentistry without having received a certificate that the defendant had passed the required examination. The proof of the certificate by a defendant is a complete defense. The practice of dentistry without it is the offense set out in the statute and the offense charged."

In *STATE v. COTNER* it will be noticed that the court, in holding that the acts charged constituted separate offenses, is careful to point out that the statute defines "practice."

In *State v. VanBuren*, 86 S. C. 297, 68 S. E. 568, the defendant was indicted for practising medicine without the license required by the statute, the offense denounced by the statute being "to practise medicine" without complying with the law, and it was provided that "anyone violating the provisions of this act shall be declared guilty of a misdemeanor, and for each offense" upon conviction shall be fined or imprisoned. He 42 L.R.A. (N.S.)

*v. Durden*, Cowp. pt. 2, p. 640; *United States v. St. Louis & S. F. R. Co.* 107 Fed. 870.

Messrs. John S. Dawson, Attorney General, L. C. Uhl, Jr., and S. M. Hawkes for the State.

*Burch, J.*, delivered the opinion of the court:

The defendant was convicted of practising medicine without having received and recorded a certificate from the board of medical registration and examination. The information contained fifteen counts, and the defendant was found guilty upon eight of them. Of the eight, one was for opening an office for the reception and treatment of patients, placing a sign over the door indicating that the defendant was authorized to practise medicine, and thus advertising himself as qualified under the law to treat the sick and others afflicted with bodily infirmities. Two counts were for treating two persons on June 15, 1910. The

had formerly been indicted and acquitted of the same offense charged in two indictments, in one as committed on a date before, and in another as committed on a date after, the date alleged in the present indictment. The court, in holding that it was error to sustain the plea of former jeopardy and acquittal, said: "The statute contemplates that every violation of its provisions shall be a separate offense."

In *People v. Dudenhausen*, 130 App. Div. 760, 115 N. Y. Supp. 374, where the prisoner was indicted under a statute providing that "any person who shall practise medicine under a false or assumed name, or who shall falsely personate another practitioner of a like or different name, shall be guilty of a felony," the indictment alleged that he "did practise medicine under a false and assumed name, to wit, the name Doctor Dale, by then and there, under such false and assumed name, feloniously examining, treating, and prescribing for one Eliza Howard as a physician." The court, in holding that evidence that the defendant practised under the same assumed name as to other persons than Eliza Howard, or prescribed for them, or advised them under such name, was inadmissible, said: "There is no charge in the indictment that the defendant habitually practised medicine under an assumed name, or at any time except that specified in the indictment and in relation to the person there named. The defendant is charged with this one specific offense. If that act was a crime, his relations to the other two witnesses, one more than two months prior to the crime charged in the indictment, and one twelve days before, were each specific crimes for which the defendant could have been indicted and punished. These three offenses had no relation to each other, and the two offenses not named in the indictment could have no possible bearing upon the defendant's guilt in relation to the offense

remaining five counts were for treating different persons on different days between April 17, 1910, and January 15, 1911. The district court held, against objections seasonably made, that each count stated a separate offense, and sentenced the defendant to pay eight several fines. The question raised by this appeal is whether or not practising medicine without a license is a continuing offense, for which only a single penalty may be imposed for the entire time antedating the prosecution. This question is one of statutory interpretation.

The act relating to medical registration and examination (Laws 1901, chap. 254) establishes a standard of qualification to practise medicine and surgery, creates a board to ascertain the fitness of persons desiring to engage in such practice, and provides for the issuing and recording of certificates to applicants who are able to meet the statutory requirements. Section 6, as subsequently amended (Laws 1908, chap. 63, § 1), reads in part as follows: "Any person shall be regarded as practising medicine and surgery within the meaning of this act, who shall prescribe, or who shall recommend for a fee, for like use, any drug or medicine, or perform any surgical operation, of whatever nature, for the cure or relief of any wounds, fracture, or bodily injury, infirmity, or disease of another person, or who shall use the words or letters 'Dr.,' 'Doctor,' 'M.D.,' or any other title in connection with his name, which in any way represents him as engaged in the practice of medicine and surgery; or any person attempting to treat the sick or others afflicted with bodily or mental infirmities, or any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate he is authorized to or does practise medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily infirmities. . . . Nor shall anything in this act apply to the administration of domestic medicines, nor to prohibit gratuitous services." Gen. Stat. 1909, § 8090.

Section 7 reads as follows: "From and after the 1st day of September, 1901, any person who shall practise medicine and sur-

gery or osteopathy in the state of Kansas without having received and had recorded a certificate under the provisions of this act, or any person violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than \$50 nor more than \$200 for each offense, and in no case wherein this act shall have been violated shall any person so violating receive compensation for services rendered. It shall be the duty of the secretary of the state board of registration and examination to see that this act is enforced." Gen. Stat. 1909, § 8091.

It is elementary that a single offense cannot be divided into several parts, whether of time or of conduct, for the purpose of basing separate prosecutions upon the various divisions. A nuisance resulting from the execution of a single design will support but one conviction, although maintained for a number of days or weeks or months; and a single beating entails but one punishment, although the event includes the striking of a number of blows. But the question whether a statute is directed against a general course of conduct involving customary or habitual acts, or against the individual acts themselves, considered in isolation, is frequently quite difficult of determination. There are no specific rules which solve the problem to a certainty, and the legislative intention must be gained from all intrinsic and extrinsic indications which the law recognizes as helpful to correct interpretation. Some of the cases, however, yield to classification under general principles.

The act of 29 Car. II. chap. 7, § 1, 8 Stat. at L. p. 412, providing that "no tradesman or other person shall do or exercise any worldly labor, business, or work of their ordinary calling on the Lord's Day, works of necessity and charity only excepted," was violated but once by a baker who made six sales of "small hot loaves of bread, commonly called rolls," on a single Sunday. *Crepps v. Durden*, Cowp. pt. 2, p. 640. The opinion in this case, decided in 1777, was delivered by Lord Mansfield, who said: "If the act of Parliament gives authority to levy but one penalty, there is an end

charged, except the presumption that if a person had been engaged in practising under an assumed name with two other persons, it was probable that he was guilty of practising medicine with the person named in the indictment. The statute prohibits any person from falsely personating another practitioner of a like or different name. And if this evidence was accepted by the jury, the defendant did personate Dr. Dale at three distinct dates. Each act by which

one physician personates another constitutes a separate crime. If a physician personates another practitioner one month, and two months afterwards personates another or the same practitioner, he has committed two offenses, and the commission of one crime has no relation to or bearing upon the other." The date of the alleged offense with Eliza Howard was given in the indictment; the other interviews were prior to that time.

B. B. B.

of the question, for there is no penalty at common law. On the construction of the act of Parliament, the offense is 'exercising his ordinary trade upon the Lord's Day;' and that without any fractions of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration; so whether it consist of one or of a number of particular acts. The penalty incurred by this offense is 5 shillings. There is no idea conveyed by the act itself, that if a tailor sews on the Lord's Day, every stitch he takes is a separate offense; or if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day. Killing a single hare is an offense; but the killing ten more on the same day will not multiply the offense, or the penalty imposed by the statute for killing one. Here repeated offenses are not the object which the legislature had in view in making the statute; but singly to punish a man for exercising his ordinary trade and calling on a Sunday."

This decision has been generally accepted as correctly interpreting "Sunday laws" (see *Friedeborn v. Com.* 113 Pa. 242, 57 Am. Rep. 464, 6 Atl. 160, decided in 1886), and is manifestly sound. The statute of Charles was intended to prevent the desecration of the Sabbath as a day for religious practices and observances. In the United States such statutes are justified on broader grounds; but the purpose is to secure immunity for the first day of the week from the stress and turmoil of ordinary secular employments. The usual avocations of men are not condemned for any inherent unwholesomeness. They suffer no metamorphosis on Saturday night. The legislature looks to the protection of the day; and, no matter how the Sabbath breaker conducts himself on a given Sunday, he has merely done violence to the character of that day.

The keeping of forbidden places, such as gambling houses, disorderly houses, and places for the illegal sale of liquors, and maintenance of forbidden relations, such as unlawful cohabitation, constitute continuing offenses. The same is true of abandonment, the gist of which is the act of separation. *State v. Dunston*, 78 N. C. 419. In such cases the statutes usually concern themselves with the obnoxious place, or with the status created, and not with plurality of acts, occasions, or objects. The case of *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 42 L.R.A.(N.S.)

*Sup. Ct. Rep.* 556, belongs to this class. *Snow* was charged with unlawfully cohabiting with more than one woman in three indictments for separate periods, which, taken together, covered a continuous period of two years and eleven months. In the opinion the court said: "The offense of cohabiting with more than one woman, in the sense of the section of the statute on which the indictments were founded, may be committed by a man by living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world, by his language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them. The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is inherently a continuous offense, having duration, and not an offense consisting of an isolated act. . . . The division of the two years and eleven months is wholly arbitrary. On the same principle, there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen and one half years and fines amounting to \$10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to \$44,400; and so on, *ad infinitum*, for smaller periods of time. It is to prevent such an application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted. Here each indictment charged unlawful cohabitation with the same seven women. All the indictments were found at the same time, by the same grand jury, and on the testimony of the same witnesses, covering a continuous period of thirty-five months; and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five or one hundred and fifty-two, or even more." pp. 281, 282.

For nuisance cases, Wharton has made the very clarifying generalizations which conclude the following paragraph: "No matter how long a time an offense may take in its preparation, it continues but one offense. An explosive package, for instance, may be sent from Maine to California, and may take weeks in the transit; but the transmission is a single act. Difficult questions, indeed, may arise, to be hereafter

noticed, when gas or liquor is tapped by a pipe through which there is a continuous passage for days. But whatever may be the conclusion as to such cases, it is settled that nuisances, when distinct impulses are given at intermittent successive times, may be the object of successive prosecutions. The distinction is this: When the impulse is single, but one indictment lies; no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." 1 Wharton, Crim. Law, § 27, p. 35.

When penal statutes allow civil actions to recover smart money from wrongdoers, it is generally held that but one penalty can be imposed for all dependencies occurring prior to the institution of suit, unless the statute should expressly provide for a recovery for each offense. *Fisher v. New York C. & H. R. Co.*, 46 N. Y. 644 (penalty for charging more than legal fare); *Parks v. Nashville, C. & St. L. R. Co.* 13 Lea, 1, 49 Am. Rep. 655 (penalty for failure to announce stations); *Sturgis v. Spofford*, 45 N. Y. 446 (penalty for employing an unlicensed pilot).

The theory of such statutes is that action for penalties, often incurred inadvertently, or under a claim of right, or in matters of small individual consequence, will call attention to the improper acts or practices, give the parties prosecuted an opportunity to desist, and lead to discontinuance; and that their purpose would be thwarted, and they would be turned into measures of oppression, if informers were allowed to open books of account of penalties and delay prosecution until ruinous sums were aggregated. In the Tennessee case just cited a strong dissenting opinion was filed, and in the New York pilot case the hazard to every vessel piloted by an unqualified person was not referred to.

The act 11 & 12 Victoria, chap. 63, for the promotion of the public health (83 Stat. at L. 451, 479), authorized the inspector of nuisances to inspect meat shops and seize meat unfit for food and destroy it. The act further provided as follows: "And the person to whom such animal, carcass, meat, poultry, game, flesh, or fish belongs, or in whose custody the same is found, shall be liable to a penalty not exceeding £10 for every animal or carcass, fish, or piece of meat, flesh, or fish, or any poultry or game so found, which penalty may be recovered before two justices in the manner hereinafter provided with respect to penalties the recovery whereof is not expressly provided for."

In the case of *Re Hartley*, 31 L. J. Mag. 42 L.R.A. (N.S.)

Cas. (N. S.) 232, it was held, under this statute, that each exposure of a piece of bad meat constituted a separate offense, and that four prosecutions might be sustained for as many pieces of such meat found in the same stall on the same day.

The copyright act of 25 & 26 Victoria, chap. 68, § 6, 102 Stat. at L. p. 346, provided that every person not the proprietor of the copyright, who shall sell any copy or repetition of a copyrighted work, "for every such offense, shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10." In the case of *Ex parte Beal*, L. R. 3 Q. B. 386, 394 (1867-68), the statute was interpreted as follows: "The only other question is whether the offender is liable to a penalty for every copy sold, or only on each contract to sell. In point of fact twenty-six copies were sold; but they were sold in two parcels, thirteen copies in each; and it has been contended that there were but two offenses. . . . In the present case the words are, 'such person for every offense shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10.' It is quite clear that this imposes a penalty for every copy sold. A different construction would result in an absurdity, and defeat the intention of the legislature. . . . The legislature were dealing with an offense which was likely to be committed wholesale, and they have used words meaning that the sale of every copy shall be an offense; and if ten copies be sold at one time, ten offenses are committed, and the offender may be punished for each separately." p. 393.

In the case of *Deyo v. Rood*, 3 Hill, 527, overseers of the poor recovered several penalties for the violation of a statute providing that "whoever shall sell any strong or spirituous liquors, etc., without having a license, etc., shall forfeit \$25." It was held that the offense was not a continuing one, and that the penalty might be recovered for each sale.

In the case of *Com. v. Respass*, 21 Ky. L. Rep. 140, 50 S. W. 549, the principle stated by Wharton was applied. Four indictments were returned against Respass for four nuisances, committed by permitting persons to assemble in a house under his control and there bet on horse races. Each indictment was for one month's time, and the four covered a period from March to July. In the opinion the court said: "It appears in this case that appellee's business was only operated in the afternoon, from about 2 P. M. to 5 P. M. each day; that he had fifteen or twenty employees there daily to wait on the crowd;

and that about 175 or 200 people would meet every afternoon at appellee's house in this way, except on Sunday, and engage in betting on horse races. The court cannot see that this was the product of a single impulse, and, when the commonwealth elected to confine each indictment to certain limits of time, the proof should be confined to the period so specified; and a conviction under an indictment for one period is no bar to an indictment for a different period." p. 550.

It is not the purpose of this opinion to make an exhaustive review of the authorities. It is desired merely to illustrate the manner in which the subject under consideration has been dealt with. Perhaps that end has been sufficiently attained; but two additional cases, one English and one American, quite favorable to the defendant, should be noticed.

The apothecaries act (55 Geo. III. chap. 194, § 20, 55 Stat. at L. p. 1116) made provision for the examination and certifying of apothecaries, and enacted that, "if any person shall . . . act or practise as an apothecary in any part of England or Wales without having obtained such certificate as aforesaid, every person so offending shall, for every offense, forfeit and pay the sum of £20." The Apothecaries Company, having the right to recover penalties incurred under the act, sued the defendant in three actions for three penalties for three alleged offenses committed on the same day in attending, advising, and prescribing and supplying medicines to three different patients. The trial judge held that the act pointed to an habitual, or, at all events, to a continued, course of conduct, rather than to an isolated act, and consequently that but one offense had been committed. Judgment was given for but one penalty, and on appeal the judgment was sustained. *Apothecaries Co. v. Jones* [1893] 1 Q. B. 89, 5 Reports, 101, 67 L. T. N. S. 677, 41 Week. Rep. 267, 17 Cox, C. C. 588, 57 J. P. 56. Two opinions were delivered. Pollock, B., considered the case analogous to that of *Crepps v. Durden*, Cowp. pt. 2, p. 640. In response to the suggestion that administering medicine to different patients involved an offense against each one, and that such conduct could scarcely be compared to selling different rolls, it was said that, while the remark was of great force, and might afford ground for amending the act, the offense committed was identical with that of the Sunday trading act. *Hawkins, J.*, based his judgment largely on *Crepps v. Durden*. He further argued that to "practise" a calling does not mean to exercise it on an isolated occasion, but to

exercise it frequently, customarily, or habitually; and that it could not have been the intention to penalize one who should "act" occasionally as an apothecary more heavily than one who practised regularly.

The laws of Kentucky provided for the incorporation of the Kentucky State Dental Association, which was granted power to issue certificates to practise dentistry. The penal provision of the act reads as follows: "Any person who shall, in violation of this act, practise dentistry or dental surgery in the state of Kentucky, for fee or reward, shall be subject to indictment by the grand jury of the county in which the offense is committed; and, upon conviction, shall be fined in the sum of not less than \$50 nor more than \$200 for each offense." 2 Acts of Ky. 1885-86, chap. 1017, § 4, p. 524.

Under this act three indictments were returned against one Wilson, each covering the same period of time, but naming different patients. In *Wilson v. Com.* 119 Ky. 769, 82 S. W. 427, it was held that but one offense had been committed, and that but one penalty could be imposed. The court said: "The question presented is whether or not the offense denounced by the statute is of such continuous nature as to subject the violator to only one conviction for the whole period of time next before the institution of the prosecution; or is it of such a character as that each act of practice constitutes a separate offense? It is apparent, upon very slight consideration, that, if each time an unregistered dentist pulls a tooth, he is subject to a fine of from \$50 to \$200, in a short while these would aggregate so large a sum as to make payment impossible, and, as a result, the defendant might lie in jail a large part of his life. Such a conclusion is not to be reached, unless constrained by the very letter of the statute." p. 773. The remainder of the opinion is devoted to a presentation of the cases of *Apothecaries Co. v. Jones*, *Crepps v. Durden*, and *Re Snow*, which were regarded as of controlling authority. The fact that every time an unregistered dentist pulls a tooth the patient's life may be endangered by an unclean operation does not appear to have occurred to the court.

The act of this state, relating to medical registration and examination, is one of a series devoted to the conservation of the public health. Among them is the act creating boards of health, state and local, and conferring upon them extensive powers and duties, the pure food law, acts relating to vital statistics, epidemics, and quarantine, the analysis of food products, nuisances, water supply and sewage, tuberculosis,

and dangerous diseases, the pharmacy act, and some others. Several of these statutes make onerous requirements of the members of the medical profession in the interest, not of their patients for the time being, but of the public welfare; and it is a matter of general concern that the persons who are to be responsible for the discharge of these obligations should be known, and their qualifications to render the public service demanded of them should be ascertained. Beyond this, the state is especially interested in the protection of sick people from empiricism and from charlatantry; from the quack who is ignorant of healing, and the faker who is an adept at swindling. Consequently the legislature has provided that anyone proposing to practise medicine must apply to the state board of medical registration and examination for leave, prove his qualifications, obtain a certificate of authority, and register it in the county of his residence, before assuming the duties and exercising the privileges of a physician. Should he undertake to practise medicine without a certificate, he is guilty of a crime and liable to punishment. The subject is of such moment and gravity, and the legislature has dealt with it so carefully and so seriously, that a plea that the taking out of a certificate had been inadvertently overlooked would be an affront. Unless he be of weak mind, whoever ignores the statute does so wilfully, and without any reason to expect acquiescence or toleration on the part of the authorities. Enforcement of the law is not left to private initiative or the prompting of mercenary motives. That duty is expressly enjoined upon the secretary of the board of registration and examination, and all other law officers may be expected to co-operate, as in other cases of infractions of the criminal law. A prosecution is not a mere admonition to take out a certificate, or else desist from practice. Its purpose is punishment. Dilatoriness in the commencement of proceedings, to the extent that they may result in oppression, is not to be anticipated, and the argument of the Kentucky court in the dentist's case may be passed by.

Unlike the British apothecaries act, the statute has not remitted us to any general understanding of the meaning of the word "practise." By virtue of the legislative definition, to prescribe, for a fee, any drug for the relief of any disease of another person, is to practise medicine. It is not necessary that this be done frequently, customarily, or habitually. One isolated instance is sufficient, and the penalty is affixed to each offense. The same is true of surgical operations and other specific acts denounced by 42 L.R.A. (N.S.)

the statute. Besides this, any fair consideration of the mischief which the legislature sought to remedy leads to the conclusion that the state board of medical registration and examination was not created for the simple purpose of attaching its badge to professional careers. The life, health, and financial resources of individual men, women, and children were to be protected from ignorance and imposture. Every repetition is a new peril, and, instead of applying to a continuous course of conduct, the statute specifies and condemns each impulse, to the very end that it may not unite with others in swelling a common stream of action. This case, therefore, resembles the one in which the exposure of each piece of unwholesome meat was penalized, rather than the Apothecaries Case or Crepps v. Durden. If the statute be drastic, because the offense may be committed against each patient practised upon, the fact may, in the phrase of Baron Pollock, afford ground for amending the act.

The Snow Case—cohabitation with more than one woman—applies to the first count upon which the defendant was convicted. No matter how diverse or long continued Snow's criminal conduct might be, he merely created the status of plural cohabitation, and that status merely continued. Likewise, when the defendant opened an office with a doctor's sign over the door, he established a place, the criminal consequence of which merely persisted. Any attempt to split up this persistence into distinct periods of time would be purely arbitrary. But there is nothing arbitrary in taking separate account of the separate cases of the different individuals treated by the defendant on June 15th.

The judgment of the District Court is affirmed.

#### KENTUCKY COURT OF APPEALS.

O. R. KING et al., Doing Business as King & Metzger

v.

T. L. CASSELL et al.

(150 Ky. 537, 150 S. W. 682.)

**Landlord and tenant—duty to protect wall of building—adjoining excavation.**

1. A property owner who lets the different floors to different tenants is not under an

*Note.—Liability of landlord for damages to tenant in consequence of acts of third persons affecting the leased property.*

As to liability of landlord where tenant's property is damaged through interference

obligation to keep the foundations of the building in a safe condition which will render him liable for injury to the property of a tenant through the fall of a wall due to excavation by a stranger on adjoining property.

**Same — duty to public.**

2. The rule making it the duty of a property owner to keep it in such condition that it will not cause injury to the public does not apply to render him liable for injury to his tenant's property by the fall of the building due to a stranger's excavating on the adjoining property.

**Same — volunteering protection — liability.**

3. That a property owner took steps to shore up his building when excavation was begun along a part of it does not render him liable, as a volunteer, for injury to his

tenant's property by the fall of another part, if he did nothing with respect to it. **Same — promise to keep wall safe — liability.**

4. A landlord's promise in no way acted upon, to keep the wall of the building safe while excavation is going on on adjoining property, does not render him liable for injury to the tenant's property because of his failure to do so.

**Same — duty of tenant to repair — partial destruction of building.**

5. A partial destruction of a building is within the operation of a statute to the effect that no agreement of the lessee to repair shall have the effect of binding him to erect similar buildings, if, without his fault or negligence, the same are destroyed.

(November 13, 1912.)

with party wall by adjoining owner under agreement with landlord, see *Di Palma v. Weinman*, 24 L.R.A.(N.S.) 423, and note appended thereto.

And as to liability of landlord for injury done by one tenant to the goods of another through negligence in the maintenance of the leased property, see note to *Lebensburger v. Scofield*, 12 L.R.A.(N.S.) 1025.

As to liability of landlord for injuries from defective condition of foundations, walls, chimney, or roof of a building the different floors of which are rented to different tenants, see note to *Miles v. Tracey*, 4 L.R.A.(N.S.) 1142.

The general question of the liability of a landlord for injury to tenants from defects in premises is exhaustively treated in the notes to *Hines v. Willcox*, 34 L.R.A. 824, and *Walsh v. Schmidt*, 34 L.R.A.(N.S.) 798.

The general question, what acts of third parties will constitute an eviction so as to entitle the tenant to defend an action for rent, is not treated herein, only those cases being included in which an attempt has been made to hold the landlord liable in damages as for an eviction. Likewise cases which involve injuries arising from the acts of independent contractors in repairing or altering premises belonging to the landlord have been excluded as involving principles distinct from those involved herein.

It may be stated to be the well-settled rule of law that the landlord is not liable in damages to a tenant for injuries arising from the wrongful acts of third persons who do not claim by title paramount, which affect the leased property, at least in the absence of statute or express covenant or stipulation in the lease. Some exceptions and qualifications, however, have been made to this broad rule which will be hereinafter pointed out in connection with the cases.

**Under implied covenant for quiet enjoyment.**

The majority of the cases which fall within this note approach the question from the view point whether or not the acts complained of constitute a breach of the covenant. 42 L.R.A.(N.S.)

nant for quiet enjoyment. Thus, it is the generally accepted rule that an implied covenant for quiet enjoyment extends only to the landlord's acts, or the acts of those claiming under him or under a title paramount, and does not imply any warranty against the wrongful acts of strangers. *Abrams v. Watson*, 59 Ala. 524 (trespass); *Gazzolo v. Chambers*, 73 Ill. 75 (*dictum*); *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279 (pulling down party wall and diminishing lessee's possessions); *Sigmund v. Howard Bank*, 29 Md. 324 (third person in possession prevented lessee from entering); *Huggins v. Waters*, 154 N. C. 443, 70 S. E. 842 (wrongful interference with sewerage system by adjacent owner); *Hastings v. Burchfield*, 28 Pa. Super. Ct. 309 (road leading from demised premises wrongfully destroyed by third party); *Schuylkill & D. Improv. & R. Co. v. Schmoele*, 57 Pa. 271, 7 Mor. Min. Rep. 480 (eviction by tortfeasor); *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708 (adjacent owner tore down building, leaving partition of leased premises exposed to the weather); *Tucker v. Dupuy*, 210 Pa. 461, 60 Atl. 4 (trespass and interruption of quiet enjoyment by wrongful acts of stranger); *Sedberry v. Verplanck*, — Tex. Civ. App. —, 31 S. W. 242 (injunction which interfered with business wrongfully sued out by stranger). And in *Kiernan v. Bush Temple*, 229 Ill. 494, 82 N. E. 410, language of the lower court to the effect that an interruption of possession by city authorities acting under their police power, for a violation of an ordinance by the lessee, did not entitle him to recover damages sustained by reason of such interruption, as for a breach of an implied covenant for quiet enjoyment,—was approved.

**Under express covenants.**

And where the covenant for quiet enjoyment is express, the majority of courts adhere to the general rule that the lessor under such a covenant is not liable for the acts of third persons who are wrongdoers or trespassers, but is responsible only for

CROSS APPEALS from a judgment of the Circuit Court for Fayette County dismissing an action brought to recover damages for injury to plaintiffs' stock of goods and business from the fall of a wall; plaintiffs appealing from the judgment in defendants' favor and defendants appealing from the judgment dismissing their counterclaim for the recovery of damages to their building. Affirmed.

The facts are stated in the opinion.

Messrs. Charles Kerr and Allen & Duncan, for plaintiffs:

A landlord who leases separate portions of his building to different tenants retains possession of all portions of the building not expressly included in his leases, and unless he expressly parts with the control

of the basement, entrances, passageways, stairs, roofs, foundations, and walls, he retains possession and control of all such portions of his building, and is bound to exercise ordinary care to keep them in a reasonably safe condition.

Underhill, Land & T. §§ 489, 493; Hess v. Hinkson, 29 Ky. L. Rep. 762, 96 S. W. 436; Mills v. Cavanaugh, 29 Ky. L. Rep. 685, 94 S. W. 651; Watkins v. Goodall, 139 Mass. 533; Kirby v. Boylston Market Asso. 14 Gray, 249, 74 Am. Dec. 682; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Kansas Invest. Co. v. Carter, 160 Mass. 421, 36 N. E. 63; Bissell v. Lloyd, 100 Ill. 214; O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628; Sawyer v. McGillicuddy, 81 Me. 318, 3 L.R.A. 458, 10 Am. St. Rep. 260, 17 Atl.

his own acts and those claiming by title paramount to the lessee. Chestnut v. Tyson, 105 Ala. 149, 53 Am. St. Rep. 101, 16 So. 723 (eviction by stranger); Playter v. Cunningham, 21 Cal. 229 (lessee prevented from entering by a trespasser who was in possession); Stiger v. Monroe, 109 Ga. 457, 34 S. E. 595 (eviction by trespasser); Talbott v. English, 156 Ind. 299, 59 N. E. 857 (trespass); Kimball v. Grand Lodge, 131 Mass. 59 (trespass); Gardner v. Keteltas, 3 Hill, 330, 38 Am. Dec. 637 (tenant kept out of possession by strangers,—the court added to the rule, however, by saying, "Unless the covenant be full and express to the purpose"); Brown v. International Land Co. 29 Okla. 341, 116 Pac. 799 (intruder took and held possession from tenant); Hockersmith v. Sullivan —Waah.—, 128 Pac. 222 (street wrongfully cut down by public authority, thereby rendering demised premises useless); Underwood v. Birchard, 47 Vt. 305 (persons wrongfully in possession retain same as against lessee (Clarke v. Grand Trunk R. Co. 35 U. C. Q. B. 57 (entry and erection of fences by third person not having paramount title); Williams v. Gabriel [1906] 1 K. B. 155, 75 L. J. Q. B. N. S. 149, 94 L. T. N. S. 17, 54 Week. Rep. 379, 22 Times L. R. 217 (assignee of reversion tore down buildings pursuant to order of public authorities); Hayes v. Bickerstaff, Vaughan, 118 (wrongful entry and eviction by assignee of reversion); Tisdale v. Essex, Hobart, 34 (ejectment by wrongdoer). And in the following cases it was held that a landlord was not liable in damages, either directly or by way of counterclaim when suing for rent, under an ordinary covenant for quiet enjoyment as for interference with the enjoyment of the demised premises; Mortimer v. Brunner, 6 Bosw. 653 (enjoyment of premises interfered with by acts of tenant of another part of premises); Kressner v. Manganaro, 114 N. Y. Supp. 889 (excavations on adjoining premises); Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173 (entry and removal of fixtures); Hitchcock v. Bacon, 118 Pa. 272, 12 Atl. 352 (leased building razed and removed by city 42 L.R.A.(N.S.)

authorities as unlawful and dangerous,—rule not altered either by fact that the owner acquiesced, or by fact that he desired the eviction of the tenant); Jenkins v. Jackson, L. R. 40 Ch. Div. 71, 58 L. J. Ch. N. S. 124, 60 L. T. N. S. 105, 37 Week. Rep. 253 (annoyance and vibration from dancing on adjoining premises); Anonymous, Lofft. 460 (trespass by assignees in bankruptcy).

And it has been held that even where the covenant for quiet enjoyment expressly applies to the acts of "any person" whomsoever, it extends merely to the lessor and the acts of parties claiming by title, and not to the tortious acts of strangers which the lessor did not aid or abet. Branger v. Manciet, 30 Cal. 624 (buildings partially destroyed by fire set by incendiary); Surget v. Arighi, 11 Smedes & M. 87, 49 Am. Dec. 46 (forcible entry and eviction by mob); Goodrich v. Sanderson, 35 App. Div. 546, 55 N. Y. Supp. 881 (*dictum*); Frost v. Earnest, 4 Whart. 86 (street widened under act of legislature to injury of tenant); Foster v. Mapes, Cro. Eliz. pt. 1, p. 212 (*dictum*). Four reasons have been given for this rule; namely, that it would be unreasonable for a man to covenant against the tortious acts of strangers which he could not see or prevent; that the law gives the covenantee a remedy against the wrongdoer; that the covenantee would be prevented from having a double remedy and receiving a double compensation; and that it prevents the tenant from injuring the covenantor by colluding with a stranger to make a tortious entry. Hayes v. Bickerstaff, Vaughan, 118, Branger v. Manciet, *supra*.

But it has been said that such a covenant would protect even as against the tortious acts of strangers. Hastings v. Burchfield, 28 Pa. Super. Ct. 309. And see Chaplain v. Southgate, 10 Mod. 383.

And where the lessor covenanted against the acts of a particular person or persons, it has been held that the covenant protects against entry by such persons, either by right or tort. Foster v. Mapes, *supra*.

And the taking of a portion of demised premises in eminent domain proceedings does not breach a covenant for quiet en-



124; Lindsey v. Leighton, 150 Mass. 285, 15 Am. St. Rep. 199, 22 N. E. 901; Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481; Phillips v. Library Co. 55 N. J. L. 307, 27 Atl. 478; Eagle v. Swayze, 2 Daly, 140; Bold v. O'Brien, 12 Daly, 160; Canavan v. Stuyvesant, 7 Misc. 113, 27 N. Y. Supp. 413; Totten v. Phipps, 23 N. Y. 354; Peil v. Reinhart, 127 N. Y. 381, 12 L.R.A. 843, 27 N. E. 1077; Dollard v. Roberts, 130 N. Y. 269, 14 L.R.A. 238, 29 N. E. 104; Rauth v. Davenport, 60 Hun, 14 N. Y. Supp. 69; Phillips v. Ehrmann, 8 Misc. 39, 28 N. Y. Supp. 519; Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553.

The landlord is liable under the doctrine expressed in the maxim, *Sic utere tuo ut alienum non laedas*.

joyment, as the lessee's occupation is subject to the exercise of the right of eminent domain. Cornell-Andrews Smelting Co. v. Boston & P. R. Corp. 202 Mass. 585, 89 N. E. 118; Schuykill & D. Improv. & R. Co. v. Schmoele, 57 Pa. 271, 7 Mor. Min. Rep. 480 (*dictum*).

But in Pabst Brewing Co. v. Thorley, 76 C. C. A. 87, 145 Fed. 117, certiorari denied in 203 U. S. 597, 51 L. ed. 333, 27 Sup. Ct. Rep. 784, where a city had licensed the construction of a vault under a street, and the licensee covenanted for quiet enjoyment thereof during the term of a lease as against the lessor "or any other person," and the licensor evicted the tenant from the property, it was held that the lessee could maintain an action against his lessor for damages for breach of the covenant.

And in McLarren v. Spalding, 2 Cal. 510, where the lease was of a store and stands erected in the street, which latter were removed by the city during the term, it was held that the removal was no eviction which would entitle the tenant to counterclaim for damages when sued for rent, since the right leased was a mere privilege revocable at the pleasure of the city, and that the tenant held subject to such right of the city. The court intimated, however, that the lessee could have protected himself by covenants. In connection with this case, see Burke v. Tindale, 12 Misc. 31, 33 N. Y. Supp. 20, which tends to support the conclusion reached therein.

A number of other decisions which denied the lessee any relief have also intimated that, had there been proper covenants, recovery might have been had. Thus, in Eisenhart v. Ordean, 3 Colo. App. 162, 32 Pac. 495, it was held that tenants could not recover damages as for an eviction where the wall of the building fell because of the excavation of the adjoining lot by its owner; the tenant having covenanted to repair and there being no express covenant against such a happening. And in Brewster v. De Fremery, 33 Cal. 341, it was held that the lessor is not liable, at least in the absence of an express covenant to uphold and keep the premises in repair or in a habitable condition.

Rylands v. Fletcher, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235; Webb's Pollock, Torts, p. 638; Mitchell v. Brady, 124 Ky. 411, 13 L.R.A. (N.S.) 751, 124 Am. St. Rep. 408, 99 S. W. 266; Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346.

Even where the landlord does not retain possession and is under no duty to repair, yet if he assumes control and undertakes to repair he will be liable for negligence in making the repairs.

Underhill, Land. & T. § 518; Gregor v. Cady, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; Gill v. Middleton, 105 Mass. 477, 7 Am. Rep. 548; Shute v. Bills, 191 Mass. 433, 7 L.R.A. (N.S.) 965, 114 Am. St. Rep.

tion, for injuries caused by the fall of the walls of the demised building due to the undermining of the foundations by the excavating of the adjoining lot by strangers, even though he had notice of the excavations and did not adopt or attempt any preventive measures. So, in Sherwood v. Seaman, 2 Bosw. 127, it was held that the lessor is under no obligation to protect his lessee from damages resulting from lawful excavations by an adjoining owner upon his premises, at least in the absence of covenant so to do. And in Abrams v. Watson, 59 Ala. 524, it was held that the lessor, in the absence of an express covenant, was not liable for the acts of mere trespassers or wrongdoers which disturbed the tenant in the quiet enjoyment and possession of the premises, the court saying that the implied covenant for quiet enjoyment extends only to the landlord's acts or the acts of those claiming under him or under a title paramount.

In Espir v. Todd, 1 Cab. & El. 154, where premises were let as a jeweler's shop to be occupied during hours of business only, it was held that the landlord, in the absence of express stipulation for better protection, was not liable for loss occasioned by robbery during the night, even though the premises were insufficiently protected.

#### Without reference to covenant.

In cases in which no reference has been made to any covenant (either express or implied, it has been held that the landlord was not liable to the tenant for damages for trespass to the demised premises by a third party (Stevenson v. Lick, 1 Cal. 128; Blauvelt v. Powell, 59 Hun, 179, 13 N. Y. Supp. 439); nor for injuries caused by the fall of a wall which resulted from the negligence of third parties in excavating on adjoining premises (Ward v. Fagin, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738); nor for injuries resulting from the erection of a building on adjoining premises (Brown v. Curran, 53 How. Pr. 303); nor for personal injuries caused by being struck by falling articles,—at

631, 78 N. E. 96; Upham v. Head, 74 Kan. 17, 85 Pac. 1017; Mann v. Fuller, 63 Kan. 664, 66 Pac. 627; Little v. McAdaras, 38 Mo. App. 187; Rauth v. Davenport, 60 Hun, 70, 14 N. Y. Supp. 69; Smith v. Female Orphan Asylum, 1 La. 547; Lynch v. Ortlieb, — Tex. Civ. App. —, 28 S. W. 1017.

If the landlord directs, authorizes, or permits another to negligently throw down the wall of his building, causing damage to his tenant, he will be liable.

Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553; DePalma v. Weinman, 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782; Bickley v. Luce, 148 Mich. 233, 111 N. W. 752.

Messrs. Samuel M. Wilson and George S. Shanklin, for appellees:

It was the duty of the tenants, and not of the landlords, to protect the property.

24 Cyc. 1092; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Gulliver v. Fowler, 64 Conn. 556, 30 Atl. 852; Bedlow v. New York Floating Dry Dock Co. 112 N. Y. 263, 2 L.R.A. 629, 19 N. E. 800; White v. Meallo,

least in the absence of proof that the injury was due to the lessor's negligence (Kooperberg v. Sussman, 110 N. Y. Supp. 319); nor for the construction of a sub-way or tunnel by strangers to the lease, whereby the earth is caused to settle to the damage of the demised premises (Farnandis v. Great Northern R. Co. 41 Wash. 486, 5 L.R.A.(N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18); nor for an eviction by a wrongdoer (Schilling v. Holmes, 23 Cal. 227).

And in such a case it has been held that the landlord is not liable for the fall of a wall of the demised building resulting from excavating by strangers on adjoining premises, especially where the excavating was in violation of an injunction procured by the landlord. McCarthy v. Fagin, 42 Mo. App. 619.

And in Dunn v. Mellon, 147 Pa. 11, 30 Am. St. Rep. 706, 23 Atl. 210, where no reference was made to any covenant, it was held that a landlord who removed a part of a demised building under a mandatory order of the public authorities was not liable to the tenant for the interference of possession, although the statute under which the order of removal was made was afterwards declared unconstitutional.

And it was held in Huie v. Marx, 67 Mo. App. 418, which did not involve any question as to liability under a covenant, that the landlord was not liable in damages to the tenant for the effacing of advertisements placed by the latter upon walls leased for that purpose, the trespass having been committed by unknown persons.

But it has been held (Wade v. Herndl, 127 Wis. 544, 5 L.R.A.(N.S.) 855, 107 N. W. 4, 7 Ann. Cas. 591) that, where the interference with possession, as by render-

63 N. Y. 609; Smith v. Kerr, 108 N. Y. 31, 2 Am. St. Rep. 362, 15 N. E. 70; Wunder v. McLean, 134 Pa. 334, 19 Am. St. Rep. 702, 19 Atl. 749; Holzhauer v. Sheeny, 127 Ky. 28, 104 S. W. 1034; Thomas v. Conrad, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084; Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113, 78 S. W. 1112; Serio v. Murphy, 99 Md. 545, 105 Am. St. Rep. 316, 58 Atl. 435.

The fact that different floors are rented to different tenants does not bring the case under the rule applying to office buildings.

Miles v. Tracey, 28 Ky. L. Rep. 621, 4 L.R.A.(N.S.) 1142, 89 S. W. 1128; Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113, 78 S. W. 1112.

Appellees should recover on their counterclaim against the tenants.

2 Underhill, Land. & T. §§ 527, 530, 537, 546; Zigler v. McClellan, 15 Or. 499, 16 Pac. 179.

Any promise by landlord to repair was without consideration.

24 Cyc. 1085; Proctor v. Keith, 12 B.

ing the premises unfit for occupancy for the purpose for which they were leased by causing vibrations, is by a tenant of another portion of the demised premises, the landlord is liable in damages to the injured tenant, provided the use which caused the vibration was within the contemplation of the parties to the lease of that part of the premises upon which the acts causing the vibrations took place, and this notwithstanding the lease exempted the lessor from damages occasioned by "acts or neglects of cotenants," as such provision does not apply to acts permitted or authorized under the lease to such cotenants. And in the similar case of Jaeger v. Mansions Consolidated, 87 L. T. N. S. 690, 19 Times L. R. 145, where it was held that a landlord was not liable upon a covenant for quiet enjoyment for damages caused by a nuisance created in adjoining tenements, it was intimated that, had the lessor impliedly authorized and countenanced the creation and continuation of the nuisance, he would have been held liable to the tenant for the resulting injury.

In Maryland, where the courts apply the rule that the landlord is bound to protect his property upon due notice that excavations are to be made upon adjoining premises, it has been held that the landlord cannot be held liable at the suit of the tenant for damages to the demised building resulting from excavations, in the absence of proof that he was negligent in protecting the walls of the building. Serio v. Murphy, 99 Md. 545, 105 Am. St. Rep. 316, 58 Atl. 435.

And in Louisiana it has been held (Fox v. McKee, 31 La. Ann. 67) that a lessee cannot recover damages for disturbance of his possession by third parties, where he has not given personal formal notice to the

Mon. 253; *Altscheler v. Conrad*, 118 Ky. 649, 82 S. W. 257; *Eblin v. Miller*, 78 Ky. 371.

A license by the landlord to a contractor to enter to prop walls does not give right of recovery against the landlord.

*McKenzie v. Hatton*, 70 Hun, 142, 24 N. Y. Supp. 88, affirmed in 141 N. Y. 6, 35 N. E. 929.

Winn, J., delivered the opinion of the court:

In the years 1906 and 1907 the appellees were the owners of a brick business house on Main street in Lexington, Kentucky. The front part of the building was three stories high, dropping off in the back to two stories. There was a basement under the three-story part of the building only. The ground floor of this building, extending its entire length, was under written lease at the time to appellants, King & Metzger, jewelers. The second and third floors were reached by a stairway ascending from the street. The second floor was rented by the appellees to a tenant other than King & Metzger, and

the third floor to yet another tenant. The basement, which was reached by a stairway descending from the King & Metzger room and by an outside grating, was used by King & Metzger for their coal and their furnace. In the basement as well were the gas meters of the tenants of all three floors. Adjoining this property on the east side was a lot owned by the Third National Bank of Lexington. In the fall of 1906 the bank began to clear away its lot for the erecting of a new building. When the winter came on, the work was suspended. It was resumed in the spring of 1907. Then the bank began to excavate the earth in the rear part of its lot lying alongside that part of the Cassell building under which there was no basement. During the course of this excavation, the east wall of that part of the Cassell building fell. King & Metzger thereupon brought this action against their landlords, seeking to recover damages which they sustained in the injury to their stock of goods and business. Upon trial the court allowed defendants' motion for a peremp-

lessor and called the latter in warrant; the court saying that "by his neglect so to do he has lost his recourse" for the damages which result from the disturbance of the possession and enjoyment of the leased premises.

#### Effect of statutory regulation.

In a number of jurisdictions the question under discussion is affected by statutory regulation. Thus, under an ordinance requiring lessors as owners to preserve walls from injury from excavation on adjoining premises, it has been held that such lessors are liable in damages as for breach of a covenant for quiet enjoyment, where the building was rendered unsafe and had to be torn down because of the lessors' failure to fulfil the duty cast upon them by the ordinance, at least in the absence of a showing that it would have been impossible to have protected the premises. *Lindwall v. May*, 111 App. Div. 457, 97 N. Y. Supp. 821. And in *Kuhn v. Remmler*, 6 Ohio Dec. Reprint, 693, it was held under a statute requiring the owner to protect his walls as against certain excavations on adjoining lots, that a lessor was liable for injuries caused by the caving in of a building due to insufficient protection from an excavation on adjoining property, where the person employed by the lessor to protect the wall was found by the jury to have been negligent. But this decision was reversed by the supreme court on February 18, 1890, but without opinion. See 23 Ohio L. J. 139.

In Louisiana, where it is expressly provided by statute (Civil Code, article 2703) that "the lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises,

but in that case the lessee has a right of action against the person occasioning such disturbance," it has been held that the acts referred to are tortious acts of third persons, and that the landlord cannot be held liable on his covenant as for damages arising from a tort, such as excavating, pile driving, dynamiting, etc., by third persons on premises adjoining the leased property, to the damage of the tenancy. And in Canada it has been held that the trespasses of third persons not made under pretenses of title are not such as the lessors are by article 1616, Civil Code, bound to warrant against, and that therefore a tenant cannot recover damages for injuries so inflicted. *Fitzpatrick v. Lavallee*, Rap. Jud. Quebec 25 C. S. 298 (trespasser cut hay and hunted on demised premises).

The rule that a landlord is not liable to his tenant for damages arising from lawful excavations by an adjoining owner upon his premises has been held not to have been altered by a statute subjecting the person making the excavation to the expense of preserving from injury a contiguous wall on the adjoining lot where he is licensed to enter on the adjoining land for that purpose,—where no such license has been given, there being no duty upon the landlord to execute such a license, at least where not required by the tenant to do so. *Sherwood v. Seaman*, 2 Bosw. 127. And the landlord is not liable under such ordinance for the wrongful acts of the adjoining owner in entering without the lessee's consent, although the landlord gave such adjoining owner permission to enter. *McKenzie v. Hatton*, 141 N. Y. 6, 23 L.R.A. 97, 35 N. E. 929, affirming 70 Hun, 142, 24 N. Y. Supp. 88. G. J. C.

tory instruction in their favor. Plaintiffs' petition was thereupon dismissed, and they appeal here.

The general relation of the landlord to his tenant with respect to repairs is settled in Kentucky. In *Franklin v. Tracy*, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113, the rule is quoted from 18 Am. & Eng. Enc. Law, 2d ed. p. 215, thus: "At the common law it is a well-settled rule that, in the absence of any agreement between the parties, the landlord was under no obligations to his tenant to keep the demised premises in repair. The rule of *caveat emptor* applies in regard to leases, and the landlord is not even under an implied obligation to remedy defects in the demised premises existing at the time of the demise. It follows, therefore, that, in the absence of any agreement on the part of the landlord to repair, a tenant cannot recover from the landlord the cost of the repairs made by him; nor can the tenant recover from the landlord for injuries to his person or property, or the property or person of his family, caused by the defective condition of the demised premises." Counsel for appellants expressly admit that appellees were not under obligation to make repairs or keep the leased premises, the storeroom, in repair. They concede, too, that the wall in question was safe, and would have remained so but for the excavation on the bank lot. Then they propound the question as to whether a landlord who rents different portions of his building to different tenants is bound to keep the foundations of his building in reasonably safe condition. The answer to this question practically disposes of the case.

The authorities are not in accord that it is the duty of the landlord, leasing to different tenants, to keep in repair such parts of the building as are for the common use of all the tenants. Upon the broad statement of the proposition, Kentucky is upon the affirmative side. Chief Justice Hobson, writing, said for the court in *Hess v. Hinkson*, 29 Ky. L. Rep. 762, 96 S. W. 436: "Where, however, the landlord retains control of part of the premises, as where he rents flats or offices, he must use reasonable care to keep the parts of the premises in repair which are for the common use of all the tenants." We also recognize the principle in *Mills v. Cavanaugh*, 29 Ky. L. Rep. 685, 94 S. W. 651. The particular part of the building reserved for common use in the *Hess Case* was a water-closet. In the *Mills Case* it was a cistern. In the cases generally and in the text-books the portions of the building in common use to which the rule applies are stairways, entrances, hallways, and the like, to which the tenants 42 L.R.A. (N.S.)

generally have access, and through and over which they have easements incident to the several different portions of the building leased to the several tenants. The landlord is in possession of these commonly used portions of his building. He has not parted with dominion over them. He has right of access to them at all times, and the right to exclude the loitering public generally from them. In the case at bar no such place of common easement is involved. The appellants had rented the ground floor. They allege that they used the basement of the building, though it was not mentioned in their lease. Further back, where the wall fell, there was no basement. Yet, because the ground floor was occupied by one tenant,—the appellants,—and the second story by another, it is urged that the wall, an integral part of both floors, was impliedly reserved by the landlord for the common use of all the tenants, and that he was under a resulting obligation to keep it in safe and usable condition. Somewhat the same question was made in the case of *Miles v. Tracey*, 28 Ky. L. Rep. 621, 4 L.R.A. (N.S.) 1142, 89 S. W. 1128. There the plaintiff was the tenant of an upper story. The wall fell. She sued her landlord for her damage, alleging that he had let the lower floor to another, and had reserved and retained control and possession of the walls and foundations of the building. The effort of her pleading was to bring the case within the rule recognized in the *Hess Case*, supra. In denying her relief upon this somewhat fictitious position we said: "This case falls short of the doctrine relied on. Although it is stated that the landlords retained possession and control of the walls and foundation, the pleading shows the fact to be that the possession of the entire premises had been parted with. While, if the landlord had reserved, for example, a stairway for the common use of all of his tenants, it could not be said that any of them had exclusive control of it, or that all together had. It was then his duty to keep it in repair, not by reason of any implied covenant to that effect, but, as those using it were his licensees, he owed them the duty to keep the passway in reasonably safe and fit condition for their use. But here there could have been in fact no reservation of possession or control. The technical averment is an ideality, and inconsistent with the essential conditions resulting from the facts alleged in the petition." That case cannot be distinguished from the one at bar. It relieves appellees of any liability based upon their supposed obligation to maintain the wall.

Appellants next urge that, entirely apart from the relation of landlord and tenant,

the owner of property owes a general duty to the public to keep his property safe, and is under liability for injury for his failure to do so, that fundamental obligation of ownership which finds expression in the maxim, *Sic utere tuo ut alienum non laedas*; and that they—the tenants—are entitled to the protection of this rule, just as, to illustrate, would a stranger upon the street who might be injured from a falling cornice. As we will presently discover, the owners of the building did nothing affirmatively which brought on the injury complained of. They made no repairs; they made no use of any part of the premises; they caused no change in the condition of the building. It is to such cases that the maxim applies. One has no right, for instance, so to construct his building as to drain the water from it upon or otherwise injure his neighbor's property. He is bound to protect his neighbor against injury caused by his own structures, or resulting from his use of his own property; but there is no principle upon which he can be held bound to erect any structure for the purpose of protecting his neighbor, or to replace any structure upon his own premises which has been destroyed because while it existed it afforded such protection. Had the owners here undertaken this work of shoring up the wall, then they would have been using the wall. They would have been making a use of the property which, if done improperly or injuriously to another, would have made the owner liable. But that case is not here.

It is then urged that the landlords are liable as volunteers, in that it is said that they undertook the care of the wall, and that, having undertaken it, they are held to a sound execution of what they have undertaken. The facts are not with the appellants. When the work began in the fall of 1906, the owners of the building caused, at their own expense, braces to be put in between the front three-story part of the building across the bank lot and against the building on the east side of that lot. When the bank began to excavate in 1907 along the two-story part of the appellees' building, they did nothing. It is true that they stood by and saw the excavation being done. There is no evidence that they did more. As above indicated, they were under obligation to say and do no more. If they saw fit to take the chances of the collapse of their wall, they were strictly within their own rights in remaining inactive.

A good deal is made in the record of a supposed promise by the landlords to make the wall safe. We do not find evidence in the record to support such an undertaking; but, if there were such a promise estab-

lished, without any performance under it, the promise would have no binding effect as against the landlords. A mere promise of a landlord to repair premises already under lease is a promise without consideration upon which no rights will arise in favor of the promisee. *Proctor v. Keith*, 12 B. Mon. 252; *Eblin v. Miller*, 78 Ky. 371. In the case of *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108, relied upon by the appellants, the distinction is sharply drawn between a total omission to do an act which one gratuitously promises to do and a culpably negligent performance of the act when once he has entered upon doing it. Even though it be conceded, therefore, that the landlords promised to make the wall safe, without any additional consideration to them to support their performance, no liability attached to them for their failure to act. They did not act; and it cannot, therefore, be said that they acted negligently.

In conclusion it is well to point out that this wall fell, not because of any act of the landlords, but because of the excavation done on the adjoining lot. If that excavation was being done improperly, or if the method of shoring up the wall was insufficient, the tenants in the building—the appellants—had every right to judge of the character of the work and every facility for anticipating its probable results that their landlords had. Since the premises occupied by them were under lease to them, they could have done every act of prevention, by process of the court if need be, which their landlords could have done; and it is not right that their landlords should be held liable for a failure to do the very thing which they themselves might have done. We express no opinion upon the character of the work done by the bank. That question is not before us.

The appellees—the landlords below—sought to recover upon a counterclaim against the tenants, predicated upon a supposed obligation of the tenants to keep up the wall. The only covenant in the lease is that the tenants, upon vacating, should make good for all broken glass, locks, keys, bath tubs, closets, water connections, and the like. It contains the general undertaking that the tenants should, at the expiration of the lease, return the premises in as good condition as when received, ordinary wear and accidents by fire, the elements, and other unavoidable accidents excepted. Section 2297, Kentucky Statutes, provides in part as follows: "Unless the contrary be expressly provided for in the writing, no agreement of a lessee that he will repair or leave the premises in repair shall have the effect of binding him to erect similar buildings if, without his fault or neglect, the

same may be destroyed by fire or other casualty." This section of the statute suffices to relieve the tenant of any obligation to restore this wall, since there was no distinct provision in the lease for repair upon such a casualty. The rule applies as well to a partial as to a total destruction of the building. *Sun Ins. Office v. Varble*, 103 Ky. 758, 41 L.R.A. 792, 46 S. W. 486. See also *Thomas v. Conrad*, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084.

The judgment of the trial court is affirmed upon the original and cross appeals.

### SOUTH CAROLINA SUPREME COURT.

J. T. McGRATH et al., Doing Business as McGrath Brothers, Respts.,  
v.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Appt.

(91 S. C. 552, 75 S. E. 44.)

#### Carrier — injury to shipment — deduction of value — damage.

A consignee is not bound to receive steel shafting so injured in transportation as to be worthless except for old iron, and allow the value upon his claim against the carrier for the injury, if, upon deduct-

ing the cost of handling from its value as old iron, the net value becomes too insignificant to count in the practical administration of justice.

(June 12, 1912.)

**A**PPPEAL by defendant from a judgment of the Common Pleas Circuit Court for Abbeville County affirming a judgment of the Magistrate's Court in plaintiff's favor in an action brought to recover the value of a shafting alleged to have been lost by defendant and the statutory penalty for failure to adjust the claim. Affirmed.

The facts are stated in the opinion.

Mr. William P. Greene, for appellant:

A consignee of freight has no right to abandon the same because it is injured and he cannot use it, but it is his duty to accept the same when tendered, as long as it has a value, and sue for his damages.

*Miami Powder Co. v. Port Royal & W. C. R. Co.* 38 S. C. 89, 21 L.R.A. 123, 16 S. E. 339; *Shaw v. South Carolina R. Co.* 5 Rich. L. 462, 57 Am. Dec. 768; *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 639; *Nettles v. South Carolina R. Co.* 7 Rich. L. 190, 62 Am. Dec. 409; *Moody v. Southern R. Co.* 79 S. C. 300, 60 S. E. 711; *Cousar Mercantile Co. v. Southern R. Co.* 82 S. C. 307, 64 S. E. 391; *Bullock v. Charleston & W. C. R. Co.* 82 S. C. 377, 64 S. E. 234; *Stone v. Adams Exp.*

*Note.* — *Right of shipper or consignee, as against carrier, to refuse to accept goods damaged or delayed while in its hands.*

This note is supplementary to notes covering the same points appended to *Chesapeake & O. R. Co. v. Saulsberry*, 12 L.R.A. (N.S.) 431, and *Parsons v. United States Exp. Co.* 25 L.R.A. (N.S.) 842.

The authorities are in accord with the principal case that injury or damage to goods, so long as they retain a substantial value, will not authorize refusal to accept them by a consignee or shipper, and the recovery of their full value from the carrier; neither will mere delay afford a ground for refusal to accept.

#### Damage.

It was held in *Wilkins v. Atlantic Coast Line R. Co.* — N. C. —, 75 S. E. 1090, where a keg of syrup was so delayed while in the hands of the carrier that the syrup soured, and when tendered to the consignee had no value, except that the keg was worth possibly \$.25, that the consignee might refuse to accept the same, and recover the full value of the keg and syrup and the statutory penalty. It is said that under usual conditions the consignee must receive the goods and hold the carrier for the injury, but that the principle does not obtain when the "entire value of the goods

has been destroyed and the injury amounts practically to a total loss." The court says that the value of the keg was too small to be regarded. This action was brought, as in the principal case, under a statute providing that a penalty should be imposed if the claim against the carrier for loss or damages was not paid within a prescribed time, but that it could not be recovered unless the total amount of the claim was allowed; and the question as to whether it was the duty of the consignee to accept the goods arose from the contention of the carrier that he should have done so, and therefore that the claim was excessive and the penalty could not be recovered.

In *St. Louis, I. M. & S. R. Co. v. Cumbie*, — Ark. —, 141 S. W. 939, where an action was brought for damages to a shipment of peaches which the consignee refused to accept, claiming that they were worthless because of delay and failure of the carrier to ice the car, it was held that the consignee's refusal to accept would not bar his right to recover for the damages sustained, although in fact the shipment was not worthless, but was sold by the carrier for \$150. It is said that because the consignee failed to establish his contention that the shipment was damaged in its full value, as his agent concluded when he refused to accept it, it does not follow that he could not recover the damages he did prove; and that the amount for which the fruit had been sold should be regarded as belonging to the con-

Co. — Ky. —, 122 S. W. 200; Atchison, T. & S. F. R. Co. v. Smythe, 55 Tex. Civ. App. 557, 119 S. W. 893; Parsons v. United States Exp. Co. 144 Iowa, 745, 25 L.R.A. (N.S.) 842, 123 N. W. 776; Texas C. R. Co. v. Watson, 54 Tex. Civ. App. 509, 118 S. W. 175; Southern Exp. Co. v. Jacobs, 109 Va. 27, 63 S. E. 17; Henry J. Perkins Co. v. American Exp. Co. 199 Mass. 561, 85 N. E. 895; Michigan C. R. Co. v. Osmus, 129 Ill. App. 79; Berley v. Columbia, N. & L. R. Co. 82 S. C. 232, 64 S. E. 397.

Mr. William N. Graydon for respondents.

Woods, J., delivered the opinion of the court:

The plaintiffs, blacksmiths and wheelwrights at McCormick, South Carolina, purchased in Savannah, Georgia, two lengths of steel shafting and other hardware. The goods were shipped over the defendant's railroad, and, on arrival at McCormick, the shafting was found to be so bent as to be unfit for the use intended. The plaintiffs refused to receive the shafting from the carrier, and duly presented their claim for \$7.15, the entire value of the two pieces, and \$.77 freight. The defendant having failed to pay the claim, this action was brought in the magistrate's court for \$7.90 and \$50, the statutory penalty.

signee the same as if he had sold the shipment therefor, and that amount deducted from the damages he had sustained.

#### Delay.

The doctrine that mere delay, though unreasonable, will not authorize the consignee to refuse goods and recover their full value, has been applied in the following cases: Chicago, R. I. & P. R. Co. v. Pfeifer, 90 Ark. 524, 22 L.R.A. (N.S.) 1107, 119 S. W. 642; Chicago, R. I. & P. R. Co. v. Nuesch, 99 Ark. 568, 139 S. W. 679 (sweet potatoes shipped for Thanksgiving trade which arrived after Thanksgiving); Southern R. Co. v. Moody, 151 Ala. 374, 44 So. 94 (egg cases which arrived a few days after suit for their value was instituted); Cousar Mercantile Co. v. Southern R. Co. 82 S. C. 307, 64 S. E. 391 (winter dry goods which were delayed in shipment until after the middle of February); Gulf, C. & S. F. R. Co. v. Somerville Mercantile Agency, — Tex. Civ. App. —, 104 S. W. 1072 (Christmas goods which, on account of delay, did not reach destination until in January); Moody v. Southern R. Co. 79 S. C. 297, 60 S. E. 711 (flour which was delayed five months in transit); Southern Exp. Co. v. Hanaw, 134 Ga. 445, 137 Am. St. Rep. 227, 67 S. E. 944 (goods which remained in the hands of the express company at destination three months before being delivered); Bullock v. Charleston & W. C. R. Co. 82 S. C. 375, 64 S. E. 234 42 L.R.A. (N.S.)

The only witness in the case was J. T. McGrath, one of the plaintiffs, who testified that the bent shafting was of no use to the plaintiffs, but that it was worth 25 to 35 cents a hundred pounds as old iron.

Defendant's counsel asked the magistrate to instruct the jury to find a verdict for the plaintiffs for the amount of the claim, \$7.90, less 25 cents a hundred pounds, the value of the shafting as old iron. This request was refused, and defendant then requested the following charge: "That, because property is damaged in shipment, a person cannot abandon it as long as it has a value, but must receive the same, and, if he cannot use it, must sell for its market value at the nearest market, and the amount it brings or would bring must be deducted from the value or the cost of the article in estimating the damage." The magistrate refused this and other similar requests, and charged the jury "that, if the jury find that the shafting was of no value to the plaintiff, he had a right to refuse to accept it, and sue for the value." The jury found a verdict for \$57.92, the whole amount of the claim and the statutory penalty; and, on appeal, the judgment of the magistrate's court on the verdict was affirmed by the circuit court. We think the legal proposition relied on by defendant's counsel is sound and well established by authority in

(steel traps which were delayed four months until the consignee went out of business).

It was said in Southern Exp. Co. v. Hanaw, supra, that there might be a possible case where property has ceased to be of any value at all, such as wholly decayed perishable goods, but that otherwise mere delay does not amount to conversion, so as to authorize the consignee to reject the goods and sue for their full value; that his remedy is to sue for the damages he has sustained by reason of the delay.

In Gulf, C. & S. F. R. Co. v. Somerville Mercantile Agency, supra, the court said: "The delay of the carrier did not constitute a conversion of the goods, no matter how long continued, so as to render it liable for the value of the goods."

In Higgins v. United States Exp. Co. — N. J. L. —, 85 Atl. 450, where castings for a mill were shipped by express to the consignee for repair, but, owing to a delay of two months in reaching the consignee, the shipper was compelled to purchase the necessary parts for his mill, it was held that he could not refuse to accept the shipment upon its return to him. It is said that an unreasonable delay does not amount to a conversion; that the ownership remains in the bailor, and he is bound to receive the goods when tendered, however long the delay; and that the measure of damages is not the value of the goods, but the loss approximately caused by the delay. R. E. H.

this state and elsewhere. A carrier having goods in possession for transportation acquires no title to them. As the goods remain the property of the owner, his right of action against the carrier is for the entire value of the goods if lost or made entirely worthless by the carrier's default; and, in case of destruction of value, the recovery is not affected by the owner's acceptance or his refusal to accept the goods. On the other hand, if the value is merely impaired by actual injury in the hands of the carrier, or by delay in the carrier, the consignee is bound to receive the goods, and his right of action is limited to the impairment of value due to delay in carriage or injury to the goods. In *Nettles v. South Carolina R. Co.* 7 Rich. L. 190, 62 Am. Dec. 409, the action was for the value of a shipment of wool hats which were much injured by being boxed up for several months, when they should have been transported and delivered in a few days. The court held: "The goods, even after great delay in the carriage of them, belonged to the plaintiff. When they were tendered to him, he should have accepted them; and thereby the extreme measure of damages would have been reduced by deduction therefrom of the value of the goods, according to their condition at the time and place of tender." It will be observed that the point involved in that case was not loss resulting from mere delay in delivery, but from actual injury to the goods received in the course of transportation. Indeed, on the point under discussion, it is impossible to distinguish in principle between damage due to delay and damage due to impairment of value by physical injury to the goods. Neither the actual injury nor the delay in transportation amounts to conversion as long as the goods retain a substantial value.

The rule was applied to delayed freight in *Cousar Mercantile Co. v. Southern R. Co.* 82 S. C. 307, 64 S. E. 391, and in *Bullock v. Charleston & W. C. R. Co.* 82 S. C. 375, 64 S. E. 234. In *Shaw v. South Carolina R. Co.* 5 Rich. L. 462, 57 Am. Dec. 768, a considerable quantity of a shipment of molasses had leaked out because of injury to the casks in the course of transportation. The court, holding that the consignee must receive the molasses that was left and sue for the value of that which leaked out, quoted with approval the following statement of the principle made in *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 639: "If goods are wholly lost or destroyed, the owner is entitled to their full worth at the time of such loss or destruction. In trover the measure of damages is the value of the goods at the time and place of conversion, with interest, or, perhaps, at any time between that

and the trial. . . . And, upon the same principle, if the goods are partially injured, and the party seeks redress for the qualified damage, the measure should be in like proportion." The court recognized and applied the same principle in *Miami Powder Co. v. Port Royal & W. C. R. Co.* 38 S. C. 78, 21 L.R.A. 123, 16 S. E. 339, and in *Wall v. Atlantic Coast Line R. Co.* 71 S. C. 337, 51 S. E. 95. These cases are in accord with the authorities elsewhere. 3 *Hutchinson*, Carr. 1365, 1372; *Michigan S. & N. I. R. Co. v. Bivens*, 13 Ind. 263; *Gulf, C. & S. F. R. Co. v. Pitts*, 37 Tex. Civ. App. 212, 83 S. W. 727; *Gulf, C. & S. F. R. Co. v. Everett*, 37 Tex. Civ. App. 167, 83 S. W. 257; *Silverman v. St. Louis, I. M. & S. R. Co.* 51 La. Ann. 1785, 26 So. 447; *Dudley v. Chicago, M. & St. P. R. Co.* 58 W. Va. 604, 3 L.R.A.(N.S.) 1135, 112 Am. St. Rep. 1027, 52 S. E. 718; *Parsons v. United States Exp. Co.* 144 Iowa, 745, 25 L.R.A.(N.S.) 842, 123 N. W. 776. The case of *Berley v. Columbia, N. & L. R. Co.* 82 S. C. 232, 64 S. E. 397, was relied on by respondents' counsel as holding that a consignee could refuse to receive goods injured in transportation, but still having a substantial value, and recover the full value. It is perfectly obvious from the following language of the decree that the recovery was allowed on the ground that the evidence admitted of the inference that, when the goods arrived, they had no substantial value. "The defendant first submits the point that the plaintiff could not recover \$1.84, the entire amount of the claim, because the evidence for the plaintiff shows that the entire value of the piping was only \$1.84, that it was not lost but only injured, and that, after the injury, it was of some value. The plaintiff, Kyzer, testified the piping was so broken as to be of no value to him, though 'it might have been worth something to somebody.' This mere conjecture of value by the plaintiff does not warrant this court in holding there was no evidence to support the judgment of the magistrate that the piping was a complete loss, especially when it is considered that Hook, defendant's agent at Irmo, testified the defendant admitted and allowed the whole claim after investigation."

Still we do not think there should be a reversal in this case. While there can be no doubt that, if the shafting in its bent condition had a substantial value, the consignees were bound to receive it and give the carrier credit for the net amount realized from its due disposition, when the evidence is looked at in a practical way we think it shows that the shafting could not have had any appreciable net value in the hands of the consignees. According to the evidence, it had no value except as old iron, worth



from 55 to 77 cents. The actual outlay for handling and delivery to a purchaser would not have been much less than this small sum, so that the net value of the bent shafting in the hands of consignees, if anything at all, was too insignificant to count in the practical administration of justice. As the judgment must be affirmed on the undisputed evidence in the case, it is unnecessary to consider the exception charging error in the admission of testimony that the defendant offered to pay the claim without the penalty.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Watts, J., disqualified.

Petition for rehearing refused by formal order filed July 5, 1912.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

L. L. MOREY, Plff. in Err.,  
v.  
RHODA THYBO.

(— C. C. A. —, 199 Fed. 760.)

**Physician — co-operation — liability for other's acts.**

One of two physicians separately employed, who undertakes to administer the anesthetic while the other performs an operation, is not liable for the other's negligence and malpractice in doing the work, if he has no actual knowledge of it.

(April 23, 1912.)

**ERROR** to the Circuit Court of the United States for the Eastern District of Illinois to review a judgment in plaintiff's favor in an action brought to recover damages for injuries alleged to have resulted from malpractice. Reversed.

The facts are stated in the opinion.

Argued before Baker, Kohlsaat, and Mack, Circuit Judges.

Messrs. Chris P. Ellerbe, Linn R. Brokaw, and Dan McGlynn, for plaintiff in error:

A physician occupying the position such as defendant is not responsible for any act of commission or omission by any other physician who is called in by the patient or the patient's family, and who does not occupy the relation of assistant to or partner of the first physician.

22 Am. & Eng. Enc. Law, 2d ed. p. 805; Keller v. Lewis, 65 Ark. 578, 47 S. W. 755; Hitchcock v. Burgett, 38 Mich. 507; Myers v. Holborn, 58 N. J. L. 193, 30 L.R.A. 345, 55 Am. St. Rep. 606, 33 Atl. 389; Harris v. Fall, 27 L.R.A.(N.S.) 1174, 100 C. C. A. 497, 177 Fed. 79; Brown v. Bennett, 157 Mich. 654, 122 N. W. 305.

Messrs. Frank F. Noleman, June C. Smith, and William F. Bundy, for defendant in error:

If both the defendant and Dr. Rice had been separately called at the same time by

**Note. — Liability of physician or surgeon for acts of associate.**

The liability of operating surgeon for negligent acts of interne or hospital nurse in caring for patient is the subject of a note to Harris v. Fall, 27 L.R.A.(N.S.) 1175.

As to the liability of the proprietor of private sanatorium or hospital for the negligence of a nurse, see note to Stanley v. Schumpert, 6 L.R.A.(N.S.) 306.

A surgeon is not responsible for the negligence or want of skill of another surgeon in treating a patient during the former's absence, where there is no business relation between them, and the latter is employed under an independent contract. Keller v. Lewis, 65 Ark. 578, 47 S. W. 755.

So, a railway surgeon is not responsible for the negligence or want of skill of another surgeon not in his employ, whom he merely recommended to care for a patient during his absence from town. Hitchcock v. Burgett, 38 Mich. 501.

Nor is a physician who merely administered the anesthetic liable for the acts of physicians performing an operation contrary to his advice, and not subject to his control, he being not called upon to object

to nor protest against it; and hence no inference of approval of it could be drawn against him from his silence in that respect. Lawson v. Crane, 83 Vt. 115, 74 Atl. 641.

And a practising physician who advises a patient to submit to a surgical operation, to be performed, not by himself, but by some surgeon of reputation, skill, and experience, for which operation, with the consent of his patient, he makes the necessary arrangements, in performing which he assists the operating surgeon as directed or advised, is not jointly liable with the surgeon for neglect to remove a sponge from the wound. Brown v. Bennett, 157 Mich. 654, 122 N. W. 305.

In Myers v. Holburn, 58 N. J. L. 193, 30 L.R.A. 345, 55 Am. St. Rep. 606, 33 Atl. 389, the defendant, a practising physician, who had promised to attend plaintiff's wife at her confinement, but sent in his stead another practising physician with whom he had no business connection except that the latter attended his patients while he was temporarily absent, was held not liable for the substitute's lack of skill or negligence resulting in the death of the child and the consequent impairment of the mother's health and damage to the plaintiff. The court was of the opinion that the sub-

plaintiff, and had undertaken the treatment of her, and had co-operated with each other, they would both be liable, or either one of them would be liable for the wrongful acts committed by himself, his associate, or by both of them, during the time they acted in concert in the treatment.

*Harris v. Fall*, 27 L.R.A.(N.S.) 1174, 100 C. C. A. 497, 177 Fed. 79; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596; *Nordhaus v. Vandalia R. Co.* 242 Ill. 166, 89 N. E. 974; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799; *Economy Light & P. Co. v. Hiller*, 203 Ill. 518, 68 N. E. 72; *Nelson v. Harrington*, 72 Wis. 591, 1 L.R.A. 721, 7 Am. St. Rep. 900, 40 N. W. 228; *McNevins v. Lowe*, 40 Ill. 210; *DuBois v. Decker*, 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. Rep. 529, 29 N. E. 313.

stitute, being engaged in a distinct and independent occupation of his own, was not the servant or agent of the defendant in the matter, and the latter was therefore not responsible for his acts. The court said, however, that even if it had reached the conclusion that the substitute was the agent of the defendant, there could have been no recovery in the case, since the gravamen of the plaintiff's action was the death of the child, and the conditions of the statutory action for death did not exist in this case.

It is negligence in a surgeon to employ an unskilful assistant to dress and treat an injured limb, and the surgeon and assistant are jointly responsible for the latter's unskilful or negligent services. *Tish v. Welker*, 5 Ohio S. & C. P. Dec. 725, 7 Ohio N. P. 472.

A surgeon is responsible for an injury done to a patient through the want of proper skill in his apprentice, but plaintiff must show that the injury was produced by such want of skill; it cannot be inferred. *Hancke v. Hooper*, 7 Car. & P. 81.

#### Liability of physician for acts of partner.

In affirming a judgment against two physicians as partners, where the negligence alleged was in the treatment of the plaintiff's arm by one of the firm, the court in *Hyrne v. Erwin*, 23 S. C. 226, 55 Am. Rep. 15, laid down the rule that when two or more physicians are practising their profession in partnership, all are liable to a patient for injury resulting from the negligence of one of the partners, within the scope of the partnership business; but for an injury resulting from an act of one partner outside of the common business, the partner causing the injury alone is responsible. In the first instance, his act being within the scope of the business, he acts both for himself and as agent of the others; 42 L.R.A.(N.S.)

*Baker*, Circuit Judge, delivered the opinion of the court:

Morey, plaintiff in error, a physician and surgeon, seeks to reverse a judgment against him for malpractice.

Three counts were in the declaration. Two were broad enough to cover every act of Morey's throughout the case. In the third, Mrs. Thybo alleged that Morey, "together with one Rice, another physician and surgeon whom the defendant then and there called in to assist him and for consultation," negligently tore and lacerated her vagina and uterus in delivering her of a child, failed to remove all of the afterbirth, and used unsterilized instruments, in consequence of which blood poisoning developed.

At the close of the evidence Morey asked for a directed verdict, and separately moved that the third count be withdrawn from the jury.

Undisputed facts are that Morey alone

in the other, being beyond and outside of the scope of the business, he acts for himself.

So, in *Haase v. Morton*, 138 Iowa, 205, 115 N. W. 921, 16 Ann. Cas. 350, upon the principle that each partner is the agent of the firm while engaged in the partnership business, and the firm is liable for the negligence of each committed within the scope of the agency, it was held that any negligence of one member of a firm of physicians while assisting in removing a patient from the operating room is chargeable to both, the court saying against the contention that the plaintiff's removal was not within the ordinary business of the firm, that, while neither of the defendants owned or controlled the hospital, they made all arrangements for plaintiff's stay there, and a jury would be justified in finding that defendants, as part of their employment, undertook to care for plaintiff from the time she entered the hospital until she was ready for discharge therefrom.

Where a person employed the professional services of a firm of physicians and surgeons, and one member of the firm, while acting under this employment, failed to exercise proper professional skill and care, it is held in *Whittaker v. Collins*, 34 Minn. 299, 57 Am. Rep. 55, 25 N. W. 632, that an action by the patient for damages for such failure is one on contract, the breach of which is the foundation of the action, and hence all the members of the copartnership must be joined as defendants.

Although an action against two physicians as partners for damages for unskilful treatment will not survive against the personal representative of one of them after death (*Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519, 3 N. E. 151), the action does not abate as to the surviving partner (*Heas v. Lowrey*, 122 Ind. 225, 7 L.R.A. 90, 17 Am. St. Rep. 355, 23 N. E. 156).

J. D. C.

was first employed; that from June 5th, when the amniotic sac broke, until 10 P. M. of June 11th, Morey was in sole charge; that Morey had no business relation, or even acquaintance, with Rice; that Mrs. Thybo and Rice were old-time friends; that in the afternoon of the 11th, Mr. Thybo, the husband, telephoned to Rice to come from St. Louis to the Thybo home at Vandalia, Illinois; that after Rice's arrival at 10 P. M. he concluded from his examination that delivery was impossible without the use of instruments; that, by agreement of Rice and Morey, Rice was to use the instruments and Morey to administer the anesthetic; that this division of service was known to Mrs. Thybo and her husband, and not objected to; that deliveries of the child and of the placenta, Morey and Rice each doing his part, were effected during the early hours of the 12th; that Morey left at 2 A. M., and Rice returned to St. Louis at 4 A. M.; and that subsequent treatment was by Morey.

Throughout the giving of testimony it clearly appears that Morey was contending, first, that his own conduct, both before Rice came in and after Rice had left, and also while Rice was present, was without fault; and, second, that he was in no wise responsible for any of Rice's malpractices. Inasmuch as every act of Morey's for which he would be immediately responsible was within the first two counts, the question presented by the motion to ignore the third count was whether, under all the evidence, there was any legal basis for charging Morey with Rice's acts or omissions.

If the pleader meant to hold Morey on the principle of *respondeat superior*, the above-recited facts show that the attempt was vain. Rice's only contractual relation was with the Thybos.

Two physicians, independently engaged by the patient and serving together by mutual consent, necessarily have the right, in the absence of instructions to the contrary, to make such a division of service as, in their honest judgment, the circumstances may require. Each must not only bring to the case the ordinary knowledge and skill of the profession, but also give his best personal attention and care. *Harris v. Fall*, 27 L.R.A.(N.S.) 1174, 100 C. C. A. 497, 177 Fed. 79. Each, in serving with the other, is rightly held answerable for his own conduct, and as well for all the wrongful acts or omissions of the other which he observes and lets go on without objection, or which, in the exercise of reasonable diligence under the circumstances, he should have observed. Beyond this, his liability does not extend. *Ibid*; *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Hitchcock v. Burgett*, 38 Mich. 42 L.R.A.(N.S.)

501; *Brown v. Bennett*, 157 Mich. 654, 122 N. W. 305.

By the court's charge to the jury the somewhat vague allegations of the third count, respecting the theory on which Morey was sought to be held for Rice's malpractice, were construed in accordance with the foregoing principles. Is there any evidence to sustain that theory of liability?

Using unsterilized forceps, not removing all of the afterbirth, and leaving the patient so badly torn that sewing was necessary, without performing the operation himself or giving notice of the condition, were the alleged wrongful acts and omissions on the part of Rice.

Whether the forceps were sterilized or not was a matter of sharp dispute; but, of course, the jury's finding that they were not must be accepted. We have carefully read the entire bill of exceptions, and we find the following situation established without conflict: Rice brought his own instruments. After his examination and decision to use forceps, Morey went into the bedroom and got ready to administer the anesthetic. Mrs. Thybo was lying crosswise on the bed. Morey was at her head. After Morey was in that position, he did not see Rice until he came into the bedroom attired in surgeon's garb and with the instruments in his hands. There was no testimony, disregarding the testimony that the instruments were sterilized with boiling water in the kitchen, that Morey saw the instruments before Rice brought them into the bedroom. Their location prior to that was given by one witness. They were in their case on a table against the wall in the sitting room at a point beyond the range of vision of anyone in the bedroom. Consequently no basis was afforded by the evidence for a finding that Morey knew of and acquiesced in the use of unsterilized forceps. By the exercise of reasonable diligence, under the circumstances, should he have known? Not unless, while attentively engaged in his own part of the service, he ought gratuitously to have entertained a suspicion that an apparently learned and skilful surgeon was about to commit a gross medical offense, and to have followed up the suspicion by inquiring whether his brother had forgotten to sterilize his hands and his instruments. No such unreasonable burden is imposed by the law.

When the afterbirth was delivered, Rice examined it, found it to be entire, and at once had it disposed of. Morey, from across the bed, looked at it, and to him it appeared to be intact. Nothing in the record warrants a finding that Morey knew that Rice had not removed all of the afterbirth. And here, too, Morey was not bound to assume.

in the absence of observable indicia, that Rice was incompetent.

Similarly, with respect to lacerations, Morey, from his position, could not know of them for himself; and from Rice's silence he was not negligent in inferring that no lacerations requiring repair operations had been inflicted. If Morey, in his subsequent visits, negligently failed to discover promptly and to treat properly the lacerations and the blood poisoning, those were matters of his own direct responsibility.

For the error in submitting the third count to the jury, the judgment is reversed, and the cause is remanded, with the direction to grant a new trial.

### SOUTH DAKOTA SUPREME COURT.

STATE OF SOUTH DAKOTA EX REL. T. H. NULL

v.

SAMUEL C. POLLEY, Secretary of State.

(— S. D. —, 138 N. W. 300.)

**Judge — interest — right to pass on question.**

1. The supreme court will not refuse to pass on an application to restrain the certifying of nominees for the office of judge of that court at a coming election, because the term of a majority of the members may be affected by the result of the decision, where that is the only court which has au-

*Note. — Right of judge who may be affected by the result to hear election cases.*

STATE EX REL. NULL v. POLLEY finds support in O'Connor v. Smithers, 45 Colo. 23, 99 Pac. 46, the only other reported case found where, as in STATE EX REL. NULL v. POLLEY, the protested judge was a member of the supreme court. This was a hearing of the petition to review the judgment of a judge of a district court in proceedings to test the validity of a certain ticket; three members of the court who were candidates for re-election were protested because of the fact that they had been placed in nomination on such ticket, though they had declined the nomination. Although the principal opinion, that the judges were not disqualified, was based on the fact that they had declined the nomination on such ticket, and so had no personal interest in the controversy, there was a strong concurring opinion by Helm, J., in which it was argued that, inasmuch as the failure of the three protested judges to sit would leave the petitioner without any forum in which to be heard, there being no constitutional or statutory provision, as in cases of district judges, for any substitutes for judges in the supreme court, their refusal to par-

thority to pass upon the question, and there is no provision for substituting others for the interested judges.

**Legislature — power — exhaustion by exercise.**

2. The power of the legislature is not exhausted by one exercise of it under a constitutional provision that it may provide for the election of judges on a different day from that on which an election is held for other purposes, and may, for such purpose, extend or abridge an existing term not more than six months.

**Voters — time of election — unconstitutionality of provision in statute — effect.**

3. The unconstitutionality of a provision in a statute which fixes the time for electing judges, extending two succeeding constitutional terms for a period of six months each, will not prevent the holding of an election at the time fixed at the end of the second term, since the time for the election being fixed and the terms having been served, the question of the unconstitutionality of the extension becomes immaterial.

(October 25, 1912.)

**MOTION** to dismiss proceedings and to vacate and discharge an order to show cause why a writ of prohibition should not issue restraining defendant as secretary of state from certifying the nomination of candidates for the office of supreme court judge to be voted for at the general election. **Granted.**

The facts are stated in the opinion.

participate in the decision under consideration would be little less than criminal.

But where the judge protested against is a judge of an inferior court, and there is provision for substitution of judges or a change of venue, the authorities are unanimous in holding that a judge who may be affected by the result of the decision is disqualified from sitting in the cause.

Thus, in Phillips v. Curley, 28 Colo. 34, 62 Pac. 837, where there was a protest against filing with the county clerk a list of nominations for county officers under a certain party name, it was held that a district judge who had been nominated under the same party name, and his nomination filed with the secretary of state, was disqualified to try the protest, though the validity of his nomination under such party name was not directly affected, as it did involve a determination of a question which, if raised in the proper tribunal, would determine the validity of his nomination on that ticket, and so, as was said, it was apparent that he was personally interested in the judgment which might be rendered.

And in MacMillan v. Spencer, 28 Colo. 80, 62 Pac. 849, a district judge who was a regular nominee of the Republican party was held to be disqualified to try a protest against the filing of a list of nomina-

Messrs. Perry F. Loucks and Royal C. Johnson, Attorney General, for defendant:

Prohibition will not lie to restrain a public officer from performing purely ministerial duties, and the writ of prohibition is not a proper remedy in this case.

32 Cyc. 602, 622; State ex rel. Scharnikow v. Hogan, 24 Mont. 379, 51 L.R.A. 958, 62 Pac. 493; People ex rel. Taylor v. Election Comrs. 54 Cal. 404; Maurer v. Mitchell, 53 Cal. 289; Camron v. Kenfield, 57 Cal. 550; Coronado v. San Diego, 97 Cal. 440, 32 Pac. 518; Miller v. Davenport, 8 Idaho, 593, 70 Pac. 610; Williamson v. County Court, 3 Ann. Cas. 357, note; 23 Cyc. 599; Haile v. Superior Court, 78 Cal. 418, 20 Pac. 878; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Harris v. Recorder's Court, 15 Cal. App. 103, 113 Pac. 687; State ex rel. Ochsenreiter v. Blegen, 26 S. D. 106, 128 N. W. 488; Lodge v. Fletcher, 184 Mass. 238, 68 N. E. 204; State ex rel. White v. State Land Comrs. 23 Wash. 700, 63 Pac. 532.

The court had no jurisdiction to try the case because of disqualification.

First Nat. Bank v. McGuire, 12 S. D. 226, 47 L.R.A. 413, 76 Am. St. Rep. 598, 80 N. W. 1074; Ferrell v. Keel, — Ark. —, 146 S. W. 494; State v. Ham, 24 S. D. 639, 124 N. W. 955, Ann. Cas. 1912 A, 1070; 12 Current Law, 405; State ex rel. Barnard v. Board of Education, 19 Wash. 8, 40 L.R.A. 317, 67 Am. St. Rep. 706, 52 Pac. 317; Re Ryers, 72 N. Y. 10, 28 Am. Rep. 88; Jar-

reau v. Choppin, 6 La. 134; State, Winans, Prosecutor, v. Crane, 36 N. J. L. 394; Wilcox v. Supreme Council, R. A. 66 Misc. 253, 123 N. Y. Supp. 83.

The act in question should be sustained as constitutional.

Re Construction of Constitution, 3 S. D. 552, 19 L.R.A. 575, 54 N. W. 650; State ex rel. McGee v. Gardner, 3 S. D. 558, 54 N. W. 606; Re Supreme Court Vacancy, 4 S. D. 532, 57 N. W. 495; Jones v. Roberts County, 27 S. D. 519, 34 L.R.A. (N.S.) 1170, 131 N. W. 863; Hagerty v. Arnold, 13 Kan. 367; Jordan v. Bailey, 37 Minn. 174, 33 N. W. 778; State ex rel. Poole v. Nuchols, 18 N. D. 233, 20 L.R.A. (N.S.) 413, 119 N. W. 632; State ex rel. Loring v. Benedict, 15 Minn. 199, Gil. 153; Wayt v. Glasgow, 106 Va. 110, 55 S. E. 536; 15 Cyc. 343; State ex rel. Harrison v. Menaugh, 151 Ind. 260, 43 L.R.A. 408, 51 N. E. 117, 357; Larned v. Elliott, 155 Ind. 702, 57 N. E. 901; Sipe v. People, 26 Colo. 127, 56 Pac. 571; Wilson v. Clark, 63 Kan. 505, 65 Pac. 705; Re County Treasurers, 9 Colo. 631, 21 Pac. 474; State ex rel. Wagner v. Compson, 34 Or. 25, 54 Pac. 349; Sprague v. Brown, 40 Wis. 612; People ex rel. Lynch v. La Salle County, 100 Ill. 495; State ex rel. Atty. Gen. v. Ranson, 73 Mo. 89; State ex rel. Atty. Gen. v. McGovney, 92 Mo. 428, 3 S. W. 867; Scott v. State, 151 Ind. 556, 52 N. E. 163; State ex rel. Barton v. McCracken, 51 Ohio St. 123, 36 N. E. 941.

tions by petition under the name of the "Republican ticket," and the refusal of such judge to accept a nomination by petition did not remove the disqualification. The court said: "The refusal of the judge to accept the nomination by petition did not remove his disqualification arising from the fact that he was a candidate of the Republican party. Being a candidate of the latter, he was certainly interested in the result, for the reason that the list of nominations in controversy in this case, if awarded a place upon the official ballot, would be inimical to the interests of the party of which he was a candidate, and therefore hostile to his. Parties to a controversy are entitled to have it determined before a judge who has no personal interest in the result, and when it is made to appear he has, he is disqualified from acting in such case."

And also in Cowie v. Means, 39 Colo. 1, 88 Pac. 485, it was held that in proceedings to review the action of the secretary of state in refusing to accept and file two alleged vacancies in nomination upon the "Lindsey ticket" for representatives, a district judge who was a candidate for re-election upon such ticket erred in sitting in the case, and in refusing to grant a change of venue. The court said: "The judge, being a candidate upon the same ticket, was pre-

sumably interested in the success or failure of that ticket at the polls. If that ticket went before the people half made up, it would not command the respect, nor secure the support, which a complete ticket would command or secure. That which would tend to weaken the entire ticket would be detrimental to the interests of each candidate upon it; consequently the interests of the trial judge in the result of the litigation was apparent, and to none more than to the judge himself." And it was further said that in this instance the error was the more flagrant, inasmuch as the court had in two cases, Phillips v. Curley and Mac-Millan v. Spencer, supra, determined that under similar circumstances the trial judge was disqualified to act.

And in Medlin v. Taylor, 101 Ala. 239, 13 So. 310, where a contest of the election of a tax collector was instituted before a probate judge whose own election was, upon the same grounds, being contested before a judge of the circuit court, it was held that the probate judge was justified in declining to hear and determine the same, as, though not disqualified by constitutional or statutory provisions, he, under the doctrines of the common law, had such a personal interest in the questions involved as to disqualify him because of bias. J. H. B.

Messrs. Null & Royhl, for plaintiff:

Where the Constitution prescribes the tenure of a certain office, the legislature is without power to abridge or extend such tenure.

State ex rel. Hamilton v. Krez, 88 Wis. 135, 59 N. W. 593; People ex rel. Eldred v. Palmer, 154 N. Y. 133, 47 N. E. 1084; State ex rel. Perry v. Arrington, 18 Nev. 412, 4 Pac. 735; Mechem, Pub. Off. 387; 29 Cyc. 1396.

Smith, J., delivered the opinion of the court:

Order to show cause why a writ of prohibition should not issue restraining defendant as secretary of state from certifying to the county auditors of the several counties in the state, the nomination of candidates for the officer of supreme judge, to be voted for at the general election to be held in November, 1912. The attorney general, Royal C. Johnson, consents to, and in effect joins in, the application for the writ in behalf of the state of South Dakota, on the ground that the questions involved are of great public interest and importance. The writ was returnable on the 16th day of September, 1912, at which time defendant Polley, as secretary of state, appeared by the attorney general and Perry F. Loucks, his counsel, and filed objections to further proceedings herein, and a motion to dismiss the same, and to vacate and discharge the order to show cause, upon the ground that three of the judges of this court, namely, Judges Corson, Haney, and Whiting, are directly interested in the determination thereof, for the reason that they are incumbents of the office of judge of the supreme court, that their current terms of office may be extended by the effect of the decision, and that Judge Whiting is the Republican nominee for re-election.

The objection thus interposed that a majority of the judges of this court are disqualified to act in this proceeding presents a question embarrassing in its nature, but which must be decided and determined in this proceeding. It is elementary that no man may sit in judgment upon his own cause, and no citation of authorities is necessary to demonstrate the law. It is, however, almost universally held that the rule is one which must yield to necessity. In 23 Cyc. 581 (f), it is said: "The rule as to the disqualification of judges must yield to the demands of necessity, where disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought, and thus effectually bars the door of justice. The disqualified judge is bound to hear and decide the cause." The same rule

is stated in 17 Am. & Eng. Enc. Law, 2d ed. 744 (8b).

It was suggested in argument by defendant's counsel that the rule as stated in 23 Cyc., supra, is not sustained by the authorities there cited. In this contention defendant's counsel are in error. In the recent case of Galey v. Montgomery County, 174 Ind. 181, 91 N. E. 593, Ann. Cas. 1912 C, 1090, the supreme court of Indiana adopted and laid down the rule as stated in Philadelphia v. Fox, 64 Pa. 170, where the court, speaking by Mr. Justice Sharswood, says: "The true rule unquestionably is that wherever it becomes necessary for a judge to sit, even where he has an interest, where no provision is made for calling another in, or where no one else can take his place, it is his duty to hear and decide, however disagreeable it may be." See also Re Ryers, 72 N. Y. 1, 28 Am. Rep. 88." In State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964, the court held as stated in the syllabus: "All common-law rules as to the disqualification of judges give way to the stern rule of necessity, permitting one to act judicially, though he would be disqualified otherwise, if, were he not to act, there would be no tribunal to furnish a remedy for the case in hand." In Bliss v. Caille Bros. Co. 149 Mich. 601, 113 N. W. 317, 12 Ann. Cas. 513, the court says: "It is well established that the rule of disqualification of judges must yield to the demands of necessity, as, for example, in cases where applied it would destroy the only tribunal in which relief could be had. See the cases collected in 23 Cyc. 581, note 76." In Philadelphia v. Fox, supra, Justice Sharswood says: "My brother Hare and myself were both members of the society, and would gladly have excused ourselves from taking any part in the decision, but it was impossible. Without one of us, at least, there could have been no court. We heard and decided the case in favor of the society, and that judgment was affirmed by this court. . . . The true rule unquestionably is that wherever it becomes necessary for a judge to sit, even where he has an interest, where no provision is made for calling another in, or where no one else can take his place, it is his duty to hear and decide, however disagreeable it may be. The rights of the other party require it." The same rule obtains in the English courts. Dimes v. Grand Junction Canal Co. 3 H. L. Cas. 759, 17 Jur. 73; Thelluson v. Rendlesham, 7 H. L. Cas. 429. Decisions of other states might be cited sustaining the rule as stated above, but we deem it unnecessary. The objection to the qualification of three of the judges of this court to act in this case, if sustained,

would disqualify a majority of the court. Section 7, art. 5, of the Constitution of this state, declares: "A majority of the judges of the supreme court shall be necessary to form a quorum, or to pronounce a decision, but one or more of said judges may adjourn the court from day to day or to a day certain." If three of the judges of this court are disqualified, the remaining two are powerless to pronounce a decision upon the rights of the parties in this case. Neither the Constitution nor any law of this state provides for the calling in of a judge of another court or member of the bar to act in the place of a disqualified member of this court. A clearer case of absolute necessity on the part of the judges to act could hardly be conceived. Under any other rule, the parties to this controversy would be without a forum in which their respective rights could be determined. Every circuit judge of the state is equally interested with the members of this court in the question of pending judicial elections. In view of the conclusion reached, the question under discussion becomes of little importance to the defendant, who enters the objection. But, even if our conclusion had been the reverse, the rule of necessity would have been the same, and we should have felt compelled to disregard the objections and render a decision. Had we declined to act in such case, plaintiff would have been without a remedy, and defendant, whether his proposed acts were legal or illegal, would be out of reach of the law, and would be a law unto himself. In such cases the rule of disqualification of judges is deemed of less importance than the denial of the constitutional right to a forum in which rights may be adjudicated. And, however embarrassing the situation may be to us, we are unanimously of opinion that this court should not abdicate its functions and duties in any case, where such action would, in effect, deprive the citizen of his constitutional rights.

The only question presented upon the merits is whether a judicial election should be held under the Constitution and laws of this state in the month of November, 1912. It is plaintiff's contention that, under the Constitution of this state, no judicial election can be held except at a time provided by legislative enactment, and this court so held in *State ex rel. McGee v. Gardner*, 3 S. D. 553, 54 N. W. 606. Section 24 of the enabling act provides: "That the constitutional conventions may by ordinance provide for the election of officers for full state governments, including members of the legislatures and Representatives in the Fifty-42 L.R.A. (N.S.)

First Congress, . . . and when such state is admitted into the Union . . . the officers of the state governments formed in pursuance of said Constitutions . . . shall proceed to exercise all the functions of such state officers." Section 19, art. 28, of the Schedule and Ordinance adopted by the constitutional convention, provides: "The judges of the supreme court and circuit courts shall hold their offices until the first Tuesday after the first Monday in January A. D. 1894, at 12 o'clock M., and until their successors are elected and qualified, subject to the provisions of § 26 of art. 5 of the Constitution." Section 26, art. 5, of the Constitution provides: "Judges of the supreme court, circuit courts, and county courts shall be chosen at the first election held under the provisions of this Constitution, and thereafter, as provided by law, and the legislature may provide for the election of such officers on a different day from that on which an election is held for any other purpose, and may, for the purpose of making such provision, extend or abridge the term of office for any of such judges then holding, but not in any case more than six months." Plaintiff's counsel contends that § 19, art. 26, of the Schedule and Ordinance, relates exclusively to the terms of officers chosen at the first election under the Constitution; that this first term of judicial office alone is subject to the provisions of § 26, which provides that the legislature may "extend or abridge the term of office for any of such judges then holding, but not in any case more than six months," and should be held to confer upon the legislature constitutional authority to extend or abridge the term of office of the judges chosen at the first election held under the Constitution, and none others. Counsel further contends that, after the expiration of the terms of the first judges elected under the Constitution, the legislature was without power to act under this clause of the Constitution, and that the terms of office of judges thereafter elected can neither be extended nor abridged by legislative enactment. The decision of this court in *State ex rel. McGee v. Gardner*, supra, was handed down February 24, 1893, in which it was held that, until the legislature had made provision for judicial election, none could be legally held. Thereupon the legislative assembly, being then in session, enacted chapter 84, Laws of 1893, approved March 4, 1893, authorizing the next judicial election to be held in November, 1893, and every six years thereafter, and providing that the judges so elected should qualify and enter upon their duties in January, 1894. This

enactment fixing the time of judicial elections did not attempt to extend or abridge judicial terms of office, but the act did fix the judicial election at a time other than that on which general elections were held in the state. It appears to be counsel's contention that the legislature having once acted under this provision of the Constitution authorizing the fixing of the judicial election at a time other than the general election, the specific legislative power thus granted has been exhausted, and may not again be exercised. In this we think counsel are clearly in error. The rule that a constitutional term of office may neither be extended nor abridged by legislative enactment must be presumed to have been known and acted upon by the constitutional convention itself. The constitutional convention in its wisdom saw fit to authorize a specific departure from this rule to accomplish a specific purpose named.

The particular thing the legislature could not have done without this authority was to extend or abridge the constitutional term of judicial office, and it is clear to our minds that the purpose of the latter clause of § 26, art. 5, was not to authorize the fixing of the date of judicial elections, but to authorize the legislature to lengthen or shorten a judicial term, should they deem it expedient so to do, to accomplish the purpose of fixing a date for judicial elections different from that on which an election is held for any other purpose. The preceding portion of § 26, art. 5, prescribes the time of judicial election as "the first election held under this Constitution," and thereafter, "as provided by law, . . . as provided in the following clauses of this section." The power to "provide by law," and to determine when judicial elections shall be held, is thus vested in the legislature with no limitations except such as may be found in the Constitution itself, and we find none. It follows that the power to fix the time of judicial elections is a continuing one, and may be exercised as, in the wisdom of the legislature, may seem best for the public good.

In an attempted exercise of this power, the legislature enacted chapter 118, Laws of 1901, which provides: "Sec. 1. At the general election in 1904, the judges of the supreme court and circuit courts shall be chosen for the term next succeeding the term for which the said judges are then serving. The term of the supreme judges elected in 1899 shall be six years and six months, and the term of their successors shall be six years and six months, . . .

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and the election of the supreme . . . judges thereafter shall be held at the time of the general election next preceding the expiration of their respective terms of office. . . ." It is plaintiff's contention that this act is unconstitutional, in that it attempts to fix the terms of the judges then serving and of their successors to be elected at the election to be held in 1904, each as six years and six months. It seems clear to our minds that the main purpose of this enactment was to fix the date of judicial elections thereafter to be held, and the attempted extension of the constitutional term of office was incidental to that purpose. That the legislature intended to fix a date for judicial elections is apparent beyond controversy. It is the duty of the court, if possible, to ascertain and give effect to the intent and purpose existing in the legislative mind. At what time, and in what year, did the legislative assembly understand and intend that judicial elections should be held? In seeking to ascertain this thought and this purpose, it seems to us wholly immaterial whether that part of the act attempting to extend the constitutional term to six years and six months be held constitutional or unconstitutional. The two periods of six years and six months each may at least serve to fix and to ascertain and determine the particular year in which the legislature understood and declared that such election should be held. This legislative enactment declares, in effect, that thirteen years after the election of 1899, a judicial election shall be held, with an intervening election to be held in 1904. And, even conceding that the legislature is without power to enlarge the constitutional term of office, the result is the same. The members of the court elected in 1899 have served for six years and six months. Their successors who were duly elected in 1904 have served six years, and are legal incumbents of the office, whose places can in no event be filled, except at a judicial election provided by law. It follows that the question of the constitutionality of those provisions of the act which attempt to extend the terms of office becomes wholly immaterial, and need not be further considered in this case. We are firmly persuaded that by this enactment it was the purpose and intent of the legislature to provide for a judicial election to be held at the general election in 1912.

For the reasons stated, the demurrer to the petition is sustained, and the motion to quash the proceeding is granted.



## ILLINOIS SUPREME COURT.

ROTHSCHILD &amp; COMPANY

v.

STEGE &amp; SONS PIANO MANUFACTURING COMPANY et al.

WALTER C. NEWMAN' et al., Appts.

(256 Ill. 196, 99 N. E. 920.)

**Contempt — civil — imprisonment by state court.**

1. A state court may impose a fine and imprisonment for a definite term for contempt in violating a prohibitory injunction of a civil nature where the fine in such cases is regarded as a penalty inuring to the public, although the Supreme Court of

**Note. — Is proceeding for contempt for violation of injunction civil or criminal.**

The earlier cases upon this question are compiled and discussed in notes to *Walter Mfg. Co. v. Humphrey*, 13 L.R.A.(N.S.) 591, and *Gompers v. Buck's Stove & Range Co.* 34 L.R.A.(N.S.) 874, the present annotation being merely supplementary thereto.

As is pointed out in the previous notes there is a decided conflict of authority as to whether contempt proceedings in the class of cases under discussion are civil or criminal. That the decision of the United States Supreme Court in the *Gompers Case* has not settled the question so far as the state courts are concerned is apparent from the refusal of the court in *ROTHSCHILD & Co. v. STEGE & SONS PIANO MFG. Co.* to follow that decision.

In *S. Anargyros v. Anargyros & Co.* 191 Fed. 208, it was said that where a contempt proceedings for violation of an injunction is instituted for the relief and benefit of the complainant, it is civil and remedial in character; but that, on the other hand, if the proceeding is intended as one of a punitive character, and purely in vindication of the authority of the court and to sustain the majesty of the law, the violation is in its nature a distinct criminal offense, and must be pleaded and proved as such.

So, in *Kreplik v. Couch Patents Co.* 111 C. C. A. 381, 190 Fed. 565, the court adhered to the United States rule that the process of contempt for violation of an injunction has two distinct aspects,—one criminal, to punish disobedience; and the other remedial and civil, to enforce a decree of the court and to compensate private persons,—holding that the imposing of a compensatory fine did not exclude punishment of the defendant when the contempt also has a criminal aspect; and that where the proceeding was brought and regarded as a criminal one, but both the civil and criminal aspects of the case were considered, the court could in the same proceeding impose both a compensatory fine and a

the United States has ruled that a contempt proceeding in such case was a mere private remedy for which imprisonment for a definite term cannot be imposed.

**Constitutional law — due process — refusal to follow Federal decision.**

2. One imprisoned by a state court for contempt in disobeying an injunction in a civil suit is not denied due process of law because, under the decisions of the Supreme Court of the United States, such punishment is not proper in that class of cases.

(October 26, 1912.)

**A** PPEAL by Walter C. Newman et al. from a judgment of the Circuit Court for Cook County finding them guilty of contempt in violating a prohibitory injunction

sentence of imprisonment as a punishment.

In *Re Merchants' Stock & Grain Co.* 223 U. S. 639, 56 L. ed. 584, 32 Sup. Ct. Rep. 339, it was held that a judgment finding defendants in a pending suit in equity guilty of contempt of the court's authority, in violating an interlocutory injunction previously granted in a suit for the benefit of the complainant, and ordering the payment of specified fines, part of which were to compensate the complainant and the remainder a fine payable to the United States,—was reviewable in the circuit court of appeals by writ of error without awaiting the final decree in the suit in equity and appealing therefrom; the ground being that the judgment being in part in the nature of a fine was punitive, instead of remedial, and therefore permitted a review by writ of error.

And in *Broom v. Godwin*, 17 Ont. Week. Rep. 629, 2 Ont. Week. N. 321, appeal dismissed without opinion 18 Ont. Week. Rep. 92, 2 Ont. Week. N. 566, the court seems to have regarded a contempt of an injunction as of a criminal nature, since, after saying that the defendant should not escape some punishment for contempt, it imposed a fine to be collected as a debt due the Crown for public use. And the same is true of *State ex rel. Curtiss v. Erickson*, 67 Wash. 639, 120 Pac. 104, wherein the court upheld the imposition of a fine and imprisonment upon conviction and proof of violation of an injunction.

But in *Chicago, B. & Q. R. Co. v. Gildersleeve*, 165 Mo. App. 370, 147 S. W. 836, it was held that an appeal from a judgment adjudging one guilty of contempt for violating an injunction, although sentencing him to jail, presented a civil controversy ancillary to the main case in equity, and that therefore the statutes authorizing appeals in civil cases warranted an appeal therefrom. And in *Fiedler v. Bambrick Bros.* Constr. Co. 162 Mo. App. 528, 142 S. W. 1111, it was held that the violation of an injunction is a "constructive" or civil, and not a criminal, contempt, and that in a proceeding ancillary to the main action to punish therefor the court could impose

restraining them from using plaintiff's trademark. Affirmed.

The facts are stated in the opinion.

Messrs. Carpenter & Barnhardt for appellants Newman et al.

Messrs. Frederick Mains and Wesley H. Mains, for other appellants:

Said judgment amounts to a complete denial of due process of law, in that there is a complete departure and fatal variance between the prior procedure adopted in said contempt proceedings, which were of a civil nature, and the judgment rendered, which is penal in character and appropriate to criminal procedure only.

Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 35 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; People ex rel. Deneed v. O'Brien, 196 Ill. 250, 63 N. E. 667; People ex rel. Beattie v. Kavanagh, 220 Ill. 49, 110 Am. St. Rep. 223, 77 N. E. 107; Walter Cabinet Co. v. Russell, 250 Ill. 416, 95 N. E. 462.

Messrs. Judah, Willard, Wolf, & Reichmann and Alvin W. Wise, for appellee:

Appellant was not deprived of liberty or property without due process of law if, in its course of procedure upon the contempt hearing, the court below observed the rules established in Illinois and administered general law, in its regular course, conformable to the fundamental rules of right, in accordance with the forms of procedure prevailing in the state of Illinois.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed.

678; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22, 25 L. ed. 989; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

Punishment by imprisonment or fine is proper procedure in a civil contempt proceeding for the violation of a prohibitory as well as of a mandatory injunction issued by a court of chancery.

Flannery v. People, 225 Ill. 62, 80 N. E. 60; O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; Franklin Union v. People, 220 Ill. 355, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; Loven v. People, 158 Ill. 159, 42 N. E. 82; People v. Apfelbaum, 251 Ill. 18, 95 N. E. 995; Crook v. People, 16 Ill. 534.

A remedial award or fine, payable to the complainant, as punishment for a civil contempt, is not proper procedure in Illinois, but is a course of procedure forbidden by the law of that state.

Crook v. People, 16 Ill. 534; Franklin Union v. People, 220 Ill. 355, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; Barnes v. Chicago Typographical Union, 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932; John L. Nelson &

either a fine or imprisonment. But in discussing another phase of the question in Chicago, B. & Q. R. Co. v. Gildersleeve, supra, the court more nearly approaches the rule as laid down in Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 35 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492, when, in holding that the contempt is civil where a party in a civil action violates an injunction issued therein, and the sentence of imprisonment is imposed for the purpose of compelling compliance with the order, but that where a sentence is imposed for a definite time the punishment is purely criminal in nature, arising from a legal wrong, to vindicate the authority of the court, the court said: "It is said, the test by which the character of the punishment, whether criminal or civil, is to be determined in such cases, is to ascertain whether the contemnor may undo his wrongful act by proceeding to comply with the order of the court, or whether his wrongful act is a past event affirmatively violating an order forbidding such conduct, which he may not undo if he would. For instance, where the court orders one to do a particular thing and he nevertheless declines or refuses, the contempt is regarded as a civil one when a sentence of imprisonment is had; that is, the punishment is regarded as civil in char- 42 L.R.A.(N.S.)

acter, for it is only coercive to the end of rendering compliance with the order. In such cases the contemnor 'carries the keys of his prison in his own pocket' and may be released upon complying with the order. On the other hand, if the defendant does that which he has been commanded not to do, as was done by Gildersleeve here, the disobedience of the court's order is a thing accomplished. Where the defendant in injunction goes forward and does that which the court has expressly ordered him not to do, as by making sales of railroad tickets which were forbidden and affirmative wrong appears against the majesty of the law as declared by the court. A sentence of imprisonment for a definite time without more for such affirmative wrong is solely punitive in character, and certainly involves a criminal element which arises from the wilful wrong."

ROTHSCHILD & Co. v. STEGER & SONS PIANO MFG. Co. seems to be the only case in which the point as to whether or not the decision of the United States Supreme Court in the Gompers Case is controlling upon the state courts has been discussed, but there seems to be no valid ground upon which to base a contention that that decision is binding as regards state courts.

G. J. C.

Bro. Co. v. London Guarantee & Acci. Co.  
132 Ill. App. 10.

Vickers, J., delivered the opinion of the court:

Rothschild & Company, a corporation engaged in the department store business in Chicago, among other things, did an extensive retail business in pianos. It is alleged that since May 15, 1906, the company has used in its piano business the word "Meister" as a trademark for pianos handled by it; that said Meister pianos had become well known all over the United States as high-grade, low-priced pianos, and acquired great popularity; that said company had expended large sums of money in advertising said Meister pianos and built up a profitable trade, and that said tradename, and good will connected therewith, had become a valuable asset in the company's business; that said company had caused said trademark to be registered. Rothschild & Company filed a bill in equity in the circuit court of Cook county, alleging the foregoing facts, and charging that the Steger & Sons Piano Manufacturing Company was using the name "Meister" in the exhibition and sale of pianos, to the injury and damage of the complainant's business, and secured a temporary injunction restraining said Steger & Sons Piano Manufacturing Company, its agents, and servants from using the name "Meister" in advertising and selling pianos. The order for an injunction was entered November 29, 1911, and commands said defendants, and each of them, their agents, attorneys, solicitors, salesmen, and servants, to absolutely desist and refrain from directly or indirectly selling and delivering to any persons, or advertising or offering for sale, pianos having thereon the name "Meister," or the name "Rothschild & Co.," or any name similar thereto, or any pianos advertised, represented, or stated by defendants or their employees to be Meister pianos, or pianos made for sale as Meister pianos. After the injunctive order had been entered, the complainant filed a petition, entitled in the original cause, reciting the filing of the bill, the issuance of the injunction and service thereof on the several defendants, and also on the S. E. Moist Piano Company and Walter C. Newman, who were alleged, on information and belief, to be agents of said Steger & Sons Piano Manufacturing Company, charging said defendants with a violation of the injunction, and praying that a rule be entered requiring the defendants to show cause, within a reasonable time, why an attachment should not issue against them, and that they be severally attached for contempt of the order, and injunction of the 42 L.R.A.(N.S.)

court entered in said cause. The rule to show cause was entered on December 7, 1911. On December 12, 1911, the Steger & Sons Piano Manufacturing Company, and other defendants, filed a joint and several answer to the original bill. Defendants also filed an answer to the petition, charging a violation of the injunction, in which the answer to the original bill is referred to and by reference made a part of the answer to the petition. A hearing was had before the court upon the petition and answer, and affidavits were submitted by the respective parties. The court found the defendants guilty of a contempt of court as charged, and assessed a fine against each of the corporations and a fine and a definite jail sentence against each of the other defendants. A separate judgment was entered against each of the seven defendants below, from which they have prosecuted separate appeals to this court. The controlling questions being the same in each case, the causes were consolidated and taken as one case in this court.

There is no serious controversy as to the facts. In all of these cases the appellants contend that this contempt proceeding belongs to the civil or remedial class, and that under the authority of *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492, the court had no power to enter a judgment inflicting a fine and fixing a definite term of imprisonment for the violation of a prohibitory injunction in the class of cases to which these proceedings belong. It is also the contention of appellants that the entry of such judgments as were entered in these cases deprives appellants of their liberty and property without due process of law. The constitutional question thus raised gives this court jurisdiction by a direct appeal from the trial court.

The distinction between criminal and civil contempt has been recognized in this jurisdiction ever since the decision in *Crook v. People*, 16 Ill. 534, which was decided in 1855. Since that time a large number of cases have been determined in this court involving the application of the rules of law relating to civil contempts to the various situations presented by the different cases. Among the cases heretofore determined in this court, the following may be cited: *Leopold v. People*, 140 Ill. 552, 30 N. E. 348; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; *Loven v. People*, 158 Ill. 159, 42 N. E. 82; *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; *Franklin Union v. People*, 220 Ill. 355, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 248,

77 N. E. 176; *Flannery v. People*, 225 Ill. 62, 80 N. E. 60; *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 14 L.R.A. (N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932; *Hake v. People*, 230 Ill. 174, 82 N. E. 561.

In the case last above cited, many of the previous decisions in this state were reviewed, and we sought to make the distinction between criminal and remedial contempts clear. In the early case of *Crook v. People*, supra, the rule was announced that in a civil contempt the court would hear proofs to contradict the answer of the party charged with the contempt, while in a proceeding at law for a criminal contempt the law is otherwise. In such cases, if the party purges himself of the alleged contempt by his answer, he is discharged. This distinction has been maintained in all of the subsequent cases. None of the cases in this state recognize any difference in the power of the court in respect to the character of the judgment to be entered in the two classes of contempts. Fine and imprisonment in the county jail for a definite term—either one or both, in the discretion of the court—have uniformly been recognized as a proper judgment for the violation of a prohibitory injunction of a civil nature, as well as a proper means of punishment in a criminal contempt instituted to vindicate the authority of the court. Undoubtedly, if a party were charged with a contempt in refusing to pay alimony, or to surrender property to a receiver, or to make a conveyance, or to deliver possession in accordance with a decree of a competent court, it would be proper to commit him until he complied with the order. The order in such case is not made solely to vindicate the authority of the court, but is remedial, and is intended to compel the performance of the thing required by the decree of the court for the benefit of the party complainant. As said by the court in *Re Nevitt*, 54 C. C. A. 622, 117 Fed. 451, in such case "he carries the key to his prison in his own pocket." A compliance with the requirements of the order will entitle the party in contempt to his discharge, and he may be held indefinitely, or so long as he refuses to obey the court's order. But even in this class of remedial contempts, if the court should assess a fine or enter a judgment for a definite term of imprisonment, the court having jurisdiction of the subject-matter and of the person of the defendant, its judgment would not be void, but at most only erroneous.

But appellants insist that the United States Supreme Court, in *Gompers v. Buck's Stove & Range Co.*, supra, has announced a different rule, under which the judgments 42 L.R.A. (N.S.)

in the cases at bar must be reversed. We agree with appellants' contention that the rule announced in the *Gompers* Case is different, in some important respects, from that established by the decisions of this court; and if the decision in that case is a binding precedent in the sense that it is our judicial duty to follow it, it will require a reversal of these judgments, even though in so doing we are compelled to overrule any number of previous decisions of this court to the contrary. *Black, Judicial Precedents*, § 109. To determine the extent to which that decision is binding on a state court, it will be necessary to understand the nature of the proceeding, how the questions arose, and the final conclusions reached by the court.

The supreme court of the District of Columbia is a court of original chancery and common-law jurisdiction. The *Buck's Stove & Range Company* filed an original bill in the supreme court of the District of Columbia against the American Federation of Labor, Samuel Gompers, Frank Morrison, John Mitchell, and others, and obtained a temporary injunction restraining and enjoining the defendants from conspiring, agreeing, or combining in any manner to obstruct or destroy the business of the complainant, or from declaring or threatening any boycott against the complainant or its business or the product of its factory, and from abetting, aiding, or assisting in any such boycott, and from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copy or copies of the *American Federationist* or other newspaper which contains the name of the *Buck's Stove & Range Company* on the "We Don't Patronize" or the "Unfair" list. Some months later the complainant filed a petition in the original cause, alleging that Samuel Gompers, John Mitchell, and Frank Morrison had disobeyed the injunction by publishing statements which, either directly or indirectly, called attention to the fact that the *Buck's Stove & Range Company* was on the "Unfair" list, and that the said defendants had thereby continued the boycott which had been enjoined. The defendants answered the petition, and a hearing was had, resulting in a finding that Gompers, Mitchell, and Morrison were guilty of contempt of court in making certain publications prohibited by the injunction, and they were sentenced to imprisonment for twelve, nine, and six months, respectively. To obtain a review of these judgments, the defendants prosecuted an appeal to the court of appeals, where the judgments below, after some slight modifications, were affirmed. Section 234 of the Code of the District of Columbia provides: "In any case

heretofore made final in the court of appeals, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court." [31 Stat. at L. 1227, chap. 854]. Under the above section the defendants obtained a certiorari from the Supreme Court of the United States, and the cause was thereby removed to that tribunal for review.

The power of the United States Supreme Court to award a certiorari to the court of appeals of the District of Columbia does not appear to depend either upon the amount in controversy or the character of the questions involved. By another section of the Code, it is provided that the judgment of the court of appeals shall be final in all cases wherein the amount in controversy is less than \$5,000. The section of the Code we have quoted above seems to authorize the Supreme Court of the United States to issue a certiorari in any case wherein the amount involved is less than \$5,000, and this is the construction which the United States Supreme Court has given § 234 of the District Code. *Sinclair v. District of Columbia*, 192 U. S. 16, 48 L. ed. 322, 24 Sup. Ct. Rep. 212. The allowance of a writ of certiorari by the Supreme Court of the United States to the court of appeals of the District of Columbia does not indicate that the court considered that there was a Federal question involved, such as would be necessary to warrant the court in awarding a writ of error to a state court. It does not appear that the defendants in that case raised the question that the judgment deprived them of their liberty without due process of law. If any such question was argued, it was not noticed in the opinion of the court. The only constitutional question that seems to have been presented in that case was the contention that the injunction was issued in violation of the 1st Amendment of the Constitution of the United States, relating to freedom of the press; and this question was brushed aside by the court with the remark that "we will not enter upon a discussion of the constitutional question raised, for the general provisions of the injunction did not, in terms, restrain any form of publication." The principal question considered and decided by the court was in respect to the character of the judgment that had been entered by the court. It was contended by the appellants that the proceeding was a civil or remedial contempt, and that contention was sustained by the court. It was also contend-

ed that the proper judgment to be entered in a civil contempt proceeding for the violation of a prohibitory injunction was a fine, to be inflicted for the benefit of the complainant, which should be graduated to the nature and extent of the injury inflicted by the violation of the injunction; and this contention was sustained. The court in that case held that the fine, when collected in such case, was to be paid over to the complainant as compensation for the alleged injury. It was further held that, while imprisonment to coerce the performance of an act required by the order of a court was proper, still imprisonment for a definite term, or indefinitely, would not be proper for the violation of a prohibitory injunction, since such imprisonment could not be of any benefit to the complainant; and the judgment was reversed and the cause remanded, without prejudice to the right of the supreme court of the District of Columbia to punish the defendants for a criminal contempt based upon a proper proceeding for that purpose. The opinion of the court proceeds on the theory that a civil contempt proceeding for the violation of a prohibitory injunction is a mere private remedy afforded to complainant, in which the dignity of the court and the public is not concerned.

As we have attempted already to show, in this jurisdiction a well-defined distinction has been made between civil and criminal contempts; but this court has never gone to the extent of holding that a civil contempt was purely a private right of action in the party at whose instance the injunction was awarded. The law is well settled in this state that the fine imposed in such cases is so far regarded as a penalty that it is treated as other fines, and paid over, when collected, not to the complainant in the equity proceeding, but to the public. It has always been the practice in this state to impose a fine or a jail sentence for the violation of a civil or remedial injunction. The difference between the established practice in this state and the rule laid down by the United States Supreme Court in the *Gompers Case* is apparent.

The appellants in the case at bar strenuously insist that, since there is a clear conflict between the decision of the United States Supreme Court in the case cited and the decisions of this court, it is our duty, under the law, to overrule our own decisions and follow the rule laid down by the Federal Supreme Court. The decisions of that court are always entitled to great consideration, and this court has never grudgingly yielded to them the deference which is due to so distinguished a tribunal; still,

when its decisions conflict with those of this court upon questions over which this court has complete and final jurisdiction, it is our plain duty, under the law, to adhere to our own decisions. The Constitution of the United States, the laws of Congress made in pursuance thereof, and treaties made under the authority of the United States, are, by paragraph 2 of article 6 of the Constitution of the United States, made the "supreme law of the land," and are binding upon all the courts of all the states, anything to the contrary in the Constitution or laws of a state notwithstanding. It follows necessarily from this constitutional provision that, where a suit in the state court involves a question arising under the Constitution, laws, or treaties of the United States, or, in other words, what is commonly called a "Federal question," a decision of the United States Supreme Court upon the point at issue is to be regarded as absolutely binding and authoritative, and in such case, if the supreme court of a state should entertain a different view, it will follow the Federal Supreme Court, reversing and overruling, if necessary, its own previous decisions to the contrary. *United Land Asso. v. Abrahams*, 208 U. S. 614, 52 L. ed. 645, 28 Sup. Ct. Rep. 569; *Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294; *Opinion of Justices*, 207 Mass. 601, 34 L.R.A. (N.S.) 604, 94 N. E. 558; *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720; *Pennsylvania R. Co. v. Duncan*, 111 Pa. 352, 5 Atl. 742; *McInhill v. Odell*, 62 Ill. 169; *Black v. Lusk*, 69 Ill. 70. A decision of the Supreme Court of the United States in a case taken to it on a writ of error from a state court, because of a Federal question being involved, is a binding precedent for the state courts, not only in the case presented, but in any subsequent case based on essentially the same facts and involving the same question. *Black, Judicial Precedents*, 354. But, aside from questions arising under the Constitution, laws, or treaties of the United States, and in the field of general jurisprudence relating to the rights of persons and property, the jurisdiction and procedure of the courts, and the general principles for the administration of justice at common law and in equity, the decisions of the United States Supreme Court, while entitled to the highest and most respectful consideration as the pronouncements of a most eminent and learned tribunal, are, as regards all such matters, only to be considered by the state courts as persuasive authority. In respect to questions of general law, the state courts are required to follow the decisions of the highest court of the state, and are not bound by the authority of the Supreme

Court of the United States; and particularly is this true where it would be necessary to overrule previous state decisions in order to conform to the views of the Federal court. *Black, Judicial Precedents*, 359, and cases there cited. The case at bar involves merely a matter of procedure and the character of the judgment to be entered in a civil or remedial contempt matter, and belongs to that class of cases in which the established rules of the state courts are final and conclusive.

It does not follow, because there is a difference between the procedure approved by the Federal Supreme Court and that which exists in this state, that judgments entered in accordance with the established law and practice of the state courts are a denial of due process of law, merely because the decisions of the Supreme Court of the United States would require a different procedure and the rendition of judgments in a different form. The due process clauses of the Federal Constitution do not require that every judgment rendered by a state tribunal under which one may be deprived of life, liberty, or property shall be in accord with the decisions of the Supreme Court of the United States, except in those cases wherein that court, under the Constitution, is charged with the duty of declaring and expounding "the supreme law of the land." If the converse of this proposition be conceded, it would destroy at once the independence of the state courts, and leave them without final jurisdiction in any matter wherein life, liberty, or property was involved. "Due process of law" refers to that law of the land in each state which derives its authority from the inherent and reserved power of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions; and its greatest security lies in the right of the people to make their own laws and alter them at their pleasure. Any legal proceeding which provides for notice and a hearing, whether that proceeding owes its existence to ancient and uniform custom in the state wherein it is administered, or to some legislative act passed, in the discretion of the legislative power, in furtherance of the public good, which regards and preserves those principles of liberty and justice, must be held to be due process of law. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

Appellants' contention that they have been deprived of due process of law seems to be based on a misapprehension as to what constitutes due process of law under the state and Federal Constitutions. Here the court had jurisdiction of the subject-mat-

ter. The alleged violation of the injunction was brought to the attention of the court by the filing of a petition, in which the facts were fully stated. Appellants were notified, and appeared and had a hearing touching the matters alleged, in the usual and ordinary manner in which such matters have uniformly been heard and disposed of under the established practice in this state. As was well said by this court in *Flannery v. People*, supra, on page 72 of 225 Ill.: "The trial was under the ordinary and usual forms of law. The contempt proceeding was instituted in conformity with the practice in such cases, and was in the only court which had the power to hear and punish appellants for the violation of its judgment and decree. Every element of due process of law is here shown. Perhaps the simplest definition of due process of law is that it means in the due process of legal proceedings according to those rules and forms which have been established for the protection of private rights; and under this definition it cannot be seriously contended, it seems to us, that appellants were deprived of their constitutional rights." The language above quoted applies with conclusive force to the contention of appellants in the cases at bar.

We find no error in these records, and the judgments in the several cases will accordingly be affirmed.

Judgments affirmed.

Petition for rehearing withdrawn December 5, 1912.

### MICHIGAN SUPREME COURT.

CALVIN H. HILL et al., Appts.,  
v.

FRANK P. TOWN et al.

(— Mich. —, 138 N. W. 334.)

#### Corporation — stockholders' meeting — quorum.

A majority of all the stock of the corporation must be represented to enable a stockholders' meeting to transact business,

*Note. — What constitutes a quorum for a meeting of stockholders.*

The earlier cases involving this question are collected in a note to *Morrill v. Little Falls Mfg. Co.* 21 L.R.A. 174:

What constitutes a majority or unanimous vote at a duly constituted corporate meeting is discussed in *Tidewater Southern R. Co. v. Jordan*, 41 L.R.A.(N.S.) 130, and the note thereto.

As to the effect of the withdrawal of stockholders from a meeting to break a quorum, see *Com. ex rel. Sheip v. Vandewater*, 42 L.R.A.(N.S.)

under a statute providing that the "stockholders holding a majority of the stock at any meeting of the stockholders shall be capable of transacting the business of the meeting."

(November 8, 1912.)

**A**PPEAL by relators from a judgment of Circuit Court for Eaton County in respondents' favor in a proceeding in the nature of a quo warranto to determine by what right they assume to act as directors of a certain corporation. Reversed.

The facts are stated in the opinion.

Messrs. Butterfield & Keeney, for appellants:

The statute plainly declares the rule to be that the majority should control the corporation, and that a majority of the stock is necessary to corporate action, except in case of adjournment, or when otherwise expressly provided.

Re *Rapid Transit Ferry Co.* 19 Misc. 409, 43 N. Y. Supp. 538; *Star Line v. VanVliet*, 43 Mich. 365, 5 N. W. 418.

Mr. Garry C. Fox also for appellants.

Messrs. Elmer N. Peters, James M. Powers, and L. H. McCall, for appellees.

At common law those stockholders who actually assemble at a regularly convened meeting of stockholders could transact the business of that meeting regardless of whether a majority of the stock was in actual attendance, and that of those who did attend, the majority ruled.

*Cook, Corp.* 6th ed. § 607; *Thomp. Corp.* §§ 849, 850; *Morawetz, Priv. Corp.* 2d ed. 476; 2 *Kent, Com.* 293; *Re Argus Printing Co.* 1 N. D. 434, 12 L.R.A. 781, 26 Am. St. Rep. 639, 48 N. W. 347; *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 562, 25 L. ed. 983; *Gilchrist v. Collopy*, 119 Ky. 110, 82 S. W. 1018; *Craig v. First Presby. Church*, 88 Pa. 42, 32 Am. Rep. 417; *Brown v. Pacific Mail S. S. Co.* 5 Blatchf. 525, Fed. Cas. No. 2,025; *Field v. Field*, 9 Wend. 394; *Morrill v. Little Falls Mfg. Co.* 53 Minn. 371, 21 L.R.A. 177, 55 N. W. 547; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53.

*grift*, 36 L.R.A.(N.S.) 45, and the note appended thereto.

As to whether the basis for a quorum shall be the stock according to value, or the stockholders according to number, it was held in *State ex rel. Mitchell v. Horan*, 22 Wash. 197, 60 Pac. 135, that a statute providing for certain action by "two thirds of the stockholders of any corporation" organized under it required such proportion of the shares of stock, instead of the stockholders.

And in *Weinburgh v. Union Street R. Advertising Co.* 55 N. J. Eq. 640, 37 Atl.

McAlvay, J., delivered the opinion of the court:

In the circuit court for the county of Eaton relators, on October 5, 1911, asked and were given leave to file an information in the nature of a quo warranto against respondents, to determine by what right they assumed to act as directors of the Duplex-Power Car Company, a Michigan corporation, relators claiming that they were the lawful directors of such corporation, and that respondents unlawfully assumed such rights and authority as directors, and unlawfully used, held, and retained the factory, offices, and all the personal property of said corporation. A demurrer to this information was interposed by defendants, but, before a hearing was had thereon, relators discontinued as to one of the respondents, and filed an amended information. To this information, as amended, respondents entered a plea, in substance averring that they were the duly and lawfully elected directors of said corporation, admitting that relators were duly elected directors of said corporation at the annual stockholders' meeting held on August 6,

1910; that their said election was for the term of one year and until their successors should be elected; that the annual meeting for the following year, of which due notice was given to the stockholders of the corporation, was called to be held on August 5, 1911, and an adjournment was had to September 19, 1911; that at such adjourned meeting the respondents were regularly elected directors by a majority vote of the stockholders and stock present at such adjourned meeting, and that therefore relators ceased to be such directors, and respondents, by virtue of the said election, became and still continue to be the lawfully elected and qualified directors of said corporation, and that by reason thereof they are rightfully and lawfully acting as such directors. To this plea the relators filed a replication November 22, 1911, the material parts of which are as follows: That act No. 232 of the Public Acts of 1903, and amendments thereof, require stockholders holding a majority of the stock in corporations incorporated thereunder to be present, either in person or by proxy, in order to lawfully do business at any meeting of said stockhold-

1026, a provision as to special meetings that "a majority of all the stockholders of record shall alone constitute a quorum" was held to mean a majority in interest, not in numbers.

As to whether the basis for determining whether a quorum is present is the stock authorized or that actually issued, it is held in *Castner v. Twitchell-Champlin Co.* 91 Me. 524, 40 Atl. 558, under a by-law providing that "at all legal meetings of the company, there must be present at least one third of the stockholders, holding at least one third of the shares of stock, to constitute a quorum to do business," that one third of the stockholders holding one third of the stock actually issued was sufficient to constitute a quorum.

Upon the question whether a majority of all the stock or of the stockholders is necessary to constitute a quorum, it was held in *Gilchrist v. Collopy*, 119 Ky. 110, 82 S. W. 1018, that, in the absence of statutory or corporate provision, less than a majority of the shares of the corporation may constitute a quorum.

In *Eagle Iron Co. v. Colyar*, 87 C. C. A. 388, 156 Fed. 954, it is held that the stockholders present at a validly called meeting, though less than a majority of all, could elect directors.

In *Clark v. Wild*, — Vt. —, 81 Atl. 536, it was held that a by-law of a corporation which provided that a majority of the stock was necessary to a quorum was invalid, under a statute providing that a majority of the stock represented at a meeting should be a quorum.

In *Darrin v. Hoff*, 99 Md. 491, 58 Atl. 196, under a statutory provision that the 42 L.R.A. (N.S.)

election of directors of a corporation shall be made "by such of the stockholders . . . who shall attend for that purpose, either in person or by attorney," it was held that an election by such stockholders as were present at an annual meeting was valid, though the statute made a share of stock the voting unit, and considerably less than a majority of the stock was present at the meeting.

And in *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166, a provision that the charter of the corporation "may be amended by a vote of two thirds at any regular or special meeting of the company" was held to mean two thirds of those present at the meeting, not two thirds of the whole.

In this connection also see *Re Rapid-Transit Ferry Co.* 19 Misc. 409, 43 N. Y. Supp. 538, modified in 15 App. Div. 530, 44 N. Y. Supp. 539, and *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440, 10 Atl. 250, which are discussed sufficiently in *HILL v. Town*.

In *New York Electrical Workers' Union v. Sullivan*, 122 App. Div. 764, 107 N. Y. Supp. 886, involving the validity of the action of a body organized under the membership corporations law, which provided that a quorum should be not less than one third of the members, unless the by-laws specifically provided that, if one third be nine or more, it should be not less than nine, and the by-laws did not contain such a provision, but contained two inconsistent provisions, one third of the membership was held to be necessary to constitute a quorum, and a meeting of 20 out of 1,200 members was invalid.

R. L. S.



ers; that at the annual meeting of this corporation, which is incorporated under this act, held on August 5, 1911, there were not present stockholders, either in person or by proxy, holding a majority of such stock, and not a sufficient representation of stock to constitute a lawful quorum for the transaction of business, except that of adjournment to a future day, as provided by said act; that the adjourned meeting held September 19, 1911, was not a lawful meeting of the stockholders, for the reason that a lawful quorum was not present, as provided by said act, to transact any business other than to adjourn said meeting; that said act requires that all voting at such meetings of stockholders shall be by shares of stock, one vote for each share; that the total shares of stock of the said corporation was at that time and still is 10,000 shares, and that at such adjourned meeting there were less than 1,100 shares represented by said stockholders present, either in person or by proxy; that the election of respondents at said meeting was therefore unlawful, and they were without right to exercise and enjoy the offices of directors in the corporation, or to use, hold, and retain its property. Respondents filed a rejoinder to this replication, denying the construction given to this act by relators. To this rejoinder relators filed a surrejoinder. Said cause was tried before a jury demanded by respondents to determine the disputed facts raised by the pleadings.

The findings of the jury are included in the opinion of the court. Of these findings it is only necessary to say it appears that the jury upon the first issue found that only 3,968 shares of stock of the corporation were represented by stockholders present and by proxies at the annual stockholders' meeting held August 5, 1911; and upon the second issue that no by-law providing as to what should constitute a quorum at any meeting of the stockholders was ever enacted.

It is admitted in the case that at the adjourned stockholders' meeting at which respondents claim to have been elected directors, held September 19, 1911, not more than 1,100 shares of stock were represented by stockholders present and by proxies. In the opinion of the court in this case, which has been stipulated to be considered as the findings of the court herein, it was held that the respondents were legally chosen as directors of this corporation, and were not usurping such offices, and should not be ousted; that the information in the case was not supported by the proofs, and that the relief asked by relators should be denied, and a judgment of nonouster in the usual

form, with costs to be taxed, was entered in said cause. From this judgment the case is before this court for review upon a case made.

For the purpose of a better understanding of the errors assigned, it will be necessary to quote the following material portions of the findings of the court: "This is a proceeding to test the right of respondents to hold and exercise the offices of directors of the Duplex-Power Car Company, a corporation doing business in the city of Charlotte, Michigan. The capital stock of said company is \$100,000, divided into 10,000 shares of \$10 each. The company was organized under act No. 232 of the Public Acts of 1903. The vital question at issue is whether a minority of the stockholders in interest can elect a board of directors. The relators contend that the respondents, having been elected at a meeting of the stockholders having a minority of the stock of the company, were not legally elected, and are not the lawful directors, and that the relators, having been elected prior thereto, are the lawful directors of said corporation. It is not disputed that the relators were duly and regularly chosen as the directors of said company on August 6, 1910, and it is conceded that if the respondents were not legally elected on September 19, 1911, the relators would hold over, and would now be the legal officers of said corporation and should have a judgment of ouster against respondents. The respondents, if elected, were elected at an adjourned meeting on September 19, 1911. It is admitted in the case that the annual stockholders' meeting was legally called and held on the 5th day of August, 1911, and legally continued by adjournment to September 19, 1911. It is admitted that at the adjourned meeting of September 19, 1911, about 1,100 shares of stock were represented by stockholders present and by proxy, and that at that meeting each of the respondents received nearly if not the unanimous vote of all the shares present. The issues are practically framed by the pleadings. A jury was asked for, and called to determine certain issues of fact. These issues of fact were prepared and submitted to the jury by the court." Then follow the issues submitted to the jury, including the questions and answers thereto, the substance of which has already been given. The court proceeds: "I do not regard the first issue as important in the determination of this case. The determination of the second issue is important. It is conceded that there were present at the adjourned meeting at which respondents were elected only about 1,100 shares of stock. The answer of the jury to the ques-

tion constituting the second issue being in the negative, the rights of relators and respondents are dependent upon the construction given § 10 of act No. 232 of the Public Acts of 1903, the act under which the Duplex-Power Car Company was brought into existence. Section 10 reads as follows: 'A majority of the directors of every manufacturing or mercantile corporation convened according to the by-laws shall constitute a quorum for the transaction of business; and the stockholders holding a majority of the stock at any meeting of the stockholders shall be capable of transacting the business of that meeting, except as herein otherwise provided; and at all meetings of such stockholders, each share shall be entitled to one vote. Stockholders may appear and vote in person or by proxy duly filed.' I am not in doubt as to what should be the interpretation of this statute. It is a self-evident proposition that the owners of a majority of the stock of any corporation have the power to control its affairs by electing a greater number of the board of directors. To do this, however, they must attend the meeting of the stockholders and care for their rights, and, if they neglect to do this, they are bound by the action of those who do attend. That is conceded to be the common-law rule, and it is a rule well founded in right and common sense. In this case there is no claim that there was any fraud or any action on the part of the minority stockholders, in interest or on the part of respondents, by which the relators, or the majority stockholders in interest, were in any way deceived or misled as to the time to which the annual meeting was adjourned. 'The stockholders holding a majority of the stock at any (this) meeting of the stockholders' can transact the business of the meeting. That was what was done at the meeting of this corporation September 19, 1911, and I think it should be held as a matter of justice, and must be held as a matter of law, that the stockholders present at that meeting cannot be restricted in or denied their right to attend to the business for which the meeting was called, because of the absence of other stockholders. It is the judgment of the court that the respondents are not usurping the offices of directors of said corporation, but that they were legally chosen as directors and should not be ousted, and that the information in the nature of a quo warranto, filed in this case, is not supported by the proof, and that the relief asked for by relators should be denied. Such an order will be entered with costs to the respondents. Dated February 28, 1912."

The question involved in the case is a  
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single one. It arises on the construction of § 10 of act No. 232 of the Public Acts of 1903, quoted above in the findings of the court. A reading of the findings of the court shows that the construction given to this section was that it in no way changed the common-law rule, and that it authorized the transaction of business at any stockholder's meeting by those stockholders present, without reference to the amount of stock of the corporation they represented in person or by proxy, and that the only requirement to make any action valid was that it received the votes of a majority of the stock present. Relators contend that in so holding the court was in error; that a fair construction of this section requires this court to hold that, to authorize the stockholders at any meeting of the stockholders of such a corporation to transact business, there must be represented in person or by proxy a majority of all the stock of such corporation. This provision has existed as a part of the law of this state for more than fifty years, and appears in all of the compilations of our statutes since 1853. The exact question is one of first impression in this court. In the case of *Star Line v. Van Vliet*, 43 Mich. 364, 5 N. W. 418, it is indicated that the court accepted the construction claimed by relators in the instant case. The dispute in that case arose over the claimed want of authority of a committee appointed by the stockholders of the corporation (the affairs of which the stockholders were investigating) to bind the corporation by the employment of expert accountants. The court said: "Generally, no doubt, a stockholders' meeting would not be authorized to contract on such subjects, the ordinary management being with the directors; but, as the purpose here was, in part at least, to investigate what had been done under the superintendence of the directors, it was competent for the holders of a majority of the stock to do what was done. Comp. Laws 1871, § 2682. There is no ground on which the corporation can urge an intentment against the validity of the resolution, and arbitrarily deny its regularity and force. In view of the facts presented, every presumption is the other way. There was no offer of proof that the stockholders present at the meeting did not hold a majority of the stock." Section 2682 of the Compiled Laws of 1871, referred to by the court, contained in an act to authorize the formation of corporations for the purpose of engaging in commerce or navigation, is identical in all respects with the section now under consideration. This is the only case where any reference has been made to the question by this court.

In the state of New York the question here involved was passed upon by the supreme court, at special term, as follows: "By general law the stockholders present in person or by proxy at a meeting of stockholders constitute a quorum. The general corporation law [Laws 1892, chap. 687], however, allows the directors to change this by by-law, and fix the amount of stock which must be represented in order to make a quorum. § 11. In this company the following by-law was passed, viz.: 'A majority of the stock present in person or by proxy at any meeting of the stockholders shall constitute a quorum.' It is without any punctuation marks. Unless to establish a quorum different to that which the general law makes, this by-law could have had no object. It cannot be construed as meaning that a 'majority' of the stock actually represented at a meeting should be a quorum, for that would be unlawful. A majority cannot separate itself from the minority, and be a quorum. All present are the quorum. It must therefore mean that it is necessary that a majority of the stock of the company shall be present in person or by proxy to make a quorum." *Re Rapid Transit Ferry Co.* 19 Misc. 409, 43 N. Y. Supp. 538. Upon a hearing before the appellate division of the supreme court of that state, it approved of the construction given to this by-law by the lower court, but held that by reason of the statute making provision for the election of directors of corporations, that the by-law did not apply. *Re Rapid Transit Ferry Co.* 15 App. Div. 530, 532, 44 N. Y. Supp. 539. The construction of the following by-law of a corporation was before the supreme court of Maine: "No business shall be transacted at any meeting of the stockholders unless a majority of the stock is represented, except to organize the meeting and adjourn to some future time." The court said: "What should constitute a quorum for the transaction of business at their meetings was a question which the stockholders had a right to determine (Rev. Stat. chap. 46, § 6), and this they did by the adoption of the foregoing by-law, providing that, unless a majority of the stock was represented, no business should be transacted at any meeting, except to organize and adjourn to some future time. At the annual meeting of June 8, 1885, at which it is claimed the new board was elected, 138 shares of the capital stock were represented, and no more. Was there a majority of the stock represented at that meeting? If not, there could be no legal election of officers at that meeting. We think a fair and reasonable, as well as proper, construction of the by-laws, 42 L.R.A. (N.S.)

leaves no room for doubt as to what was intended by a 'majority' of the stock. It was divided into 400 shares and it would take 201 shares to constitute a majority of that stock. The language of the by-law is plain and susceptible of no ambiguity. . . . But inasmuch as there was not, in fact, a majority of stock represented at that meeting, there could be no legal business transacted, except to organize and adjourn to some future time. Such was the language as well as the evident intent and meaning of the by-law duly adopted for the government of the corporation. Consequently, it was not in the power of a minority to do that which only a majority could legally accomplish. Hence, it cannot be held that the board which now represents this plaintiff corporation, and which claims the right to commence and prosecute this suit, was legally elected. The consequence is that the old board of directors, about whose election no question is raised, continued in office by virtue of the by-laws of the company, and were the only legal board of directors at the time this suit was commenced." *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440, 443, 10 Atl. 250, 251. The authorities above cited favor the construction contended for by relators, and are all the authorities we have been able to find after a somewhat extended search. It is clear that the legislature, by this section under consideration, intended to establish a quorum for all stockholders' meetings of corporations organized under this act, and the fact that the construction of an exactly similar statutory provision indicated by this court in *Star Line v. Van Vliet*, supra, has never been questioned, shows that such construction has been accepted. The construction which the respondents insist upon, as appears from the decision of the trial court and their brief in this court, is, as already stated, that the only requisite to the validity of business transacted at a stockholders' meeting is that a majority of the stock present voted in its favor, without reference to the number of shares of stock represented at such meeting. Such a contention, reduced to its lowest terms, would authorize a meeting held by two stockholders, one representing one share of stock and the other representing two shares of stock, to lawfully transact business and elect a board of directors by two votes. We scarcely think that such can seriously be contended to have been the intention of the legislature in enacting this law. The reasonable construction of this section is, as contended by relators, that, in order to hold a lawful meeting of stockholders for the transaction of business, a majority of all the stock of

the corporation must be represented in person or by proxy, to constitute a statutory quorum, and that, the majority of the stock being so represented, the meeting could then lawfully proceed, and business could be transacted lawfully by a vote of the majority of such quorum. Such construction does not require that a majority of all the stock of a corporation must vote in favor of every proposition before such meeting, but only a majority of the quorum. In the findings of the court it is said: "The vital question at issue is whether a minority of the stockholders in interest can elect a board of directors." This statement does not state the issue. The vital question at issue is whether this section fixes the quorum required to authorize the transaction of business at a meeting of stockholders, and what constitutes such quorum. As was said in *Re Rapid Transit Ferry Co.* supra: "A majority cannot separate itself from the minority, and be a quorum. All present are the quorum." And a majority of the statutory quorum controls in such meeting.

All of the authorities agree that the requirements of a statutory quorum are mandatory. It is urged that, under such a construction, a majority of the stockholders may absent themselves from meetings and prevent the transaction of any business by the stockholders, and continue indefinitely their control of corporate affairs. This is met by the reply that there could be no reason or inducement why a majority in interest of the stockholders should absent themselves from such meetings when, by their presence and voting their stock, they could control the affairs. And a conclusive answer is that a minority of the stockholders would have the right to enforce the attendance of stockholders sufficient to make the required quorum necessary to transact business, and to permit a minority to exercise the right of cumulative voting, by proper proceedings upon a sufficient showing in a court of competent jurisdiction. The court below was in error, and should have granted relators the relief prayed for. Under the undisputed facts in this case, it appears that the respondents were unlawfully usurping the offices of directors in this corporation, and that relators, having been duly and regularly elected as such directors, and no successors having been legally elected, continued to hold such offices, and are now the lawful directors of such corporation.

Therefore the judgment of the Circuit Court is reversed, and no new trial will be granted. A judgment of ouster against said respondents, and in favor of the relators, 42 L.R.A.(N.S.)

will be entered in this court, with costs of both courts to be taxed.

## SOUTH DAKOTA SUPREME COURT.

STATE OF SOUTH DAKOTA, Resp't.,  
v.

CENTRAL LUMBER COMPANY, Appt.:  
(Two cases.)

(24 S. D. 136, 123 N. W. 504.)

### Crime — statutory punishment — prohibition.

1. Prescribing a punishment for an act forbids it, within the meaning of a statute providing that a crime is an act forbidden by law and to which is annexed upon conviction a punishment.

### Monopoly — unfair competition — statutory prohibition.

2. A statute forbidding discrimination in prices in different sections of the state, for the purpose of driving competitors out of business, is within the purview of a constitutional provision that monopolies shall never be allowed in the state.

### Police power — stifling competition — prohibition.

3. The police power extends to forbidding discrimination in prices in different sections of the state, for the purpose of driving competitors out of business.

### Monopoly — stifling competition — unreasonable classification.

4. A statute forbidding discrimination in prices in different sections of the state, for the purpose of driving out of business a competitor at one point, is not invalid for making an unreasonable classification, because it permits persons to sell at unreasonably low prices, where they make no

*Note. — Forbidding the sale of a commodity in a particular locality at a lower rate than elsewhere, for the purpose of stifling competition.*

As to the constitutionality of a statute forbidding the payment of a higher price for a commodity in a particular community than is paid elsewhere, for the purpose of stifling competition, see the note to *State v. Fairmont Creamery Co.* post. 821.

*STATE V. CENTRAL LUMBER CO.*, which presents the subject of the instant note, and sustains the constitutionality of such a statute, was affirmed by the Supreme Court of the United States in 226 U. S. 157, 57 L. ed. —, 33 Sup. Ct. Rep. 66, on the ground that the statute in question does not deny the equal protection of the laws, because it affects only those selling goods in two or more places in the state, nor because the protection of the statute is not extended to those making only a transitory incursion into the business. Upon the first point Mr. Justice Holmes says: "If the legislature

attempt at discrimination, since there can be no unconstitutional classification as to acts which will constitute a crime.

**Corporation — discrimination in punishment — privileges and immunities.**

5. The constitutional privileges and immunities of corporations are not infringed by a statute providing for the dissolution of domestic corporations and the banishment of foreign ones, in addition to the imposing of a fine, for the commission of certain acts tending to establish a monopoly, while individuals committing the same acts are merely fined,—at least where the Constitution authorizes forfeiture of franchises of corporations guilty of monopoly.

**Same — discrimination in acts — validity.**

6. A corporation cannot question the constitutionality of a statute merely because it provides a forfeiture of its franchises for certain acts constituting a misuse thereof, while not providing such penalty for other acts of misuse.

shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us, that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive, and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other states." Upon the point that the statute does not affect those "making a transitory incursion into the business," the same learned justice says: "What we have said makes it unnecessary to add much on the second point, if open, that the law is made in favor of regular established dealers, but the short answer is simply to read the law. It extends on its face also to those who intend to become such dealers. If it saw fit not to grant the same degree of protection to parties making a transitory incursion into the business, we see no objection. But the supreme court says that the statute is aimed at preventing the creation of a monopoly." 42 L.R.A. (N.S.)

**Evidence — production of books — civil proceeding.**

7. The legislature may require a corporation to produce its books and documents in evidence in a civil proceeding to forfeit its franchises for misuse thereof.

**Freedom of contract — denial of — monopoly.**

8. The constitutional right to freedom of contract is not infringed by a statute forbidding discrimination in prices in different sections of the state, for the purpose of driving competitors out of business.

(December 1, 1909.)

**A**PPEAL by defendant from a judgment of the Circuit Court for McPherson County in a criminal action convicting it of unfair discrimination in violation of statute, and from orders denying a new trial of the action, and overruling a demurrer to the complaint in a civil action brought to forfeit its right to do business

monopoly by means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods." The Supreme Court was also of the opinion that the liberty to contract was not abridged by the South Dakota statute in question.

State v. Drayton, 82 Neb. 254, 23 L.R.A. (N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768, which is another case upholding the validity of a statute almost exactly like the one in STATE v. CENTRAL LUMBER CO., both of which statutes are directed against the use and sale of one's property for the purpose of destroying the business of a competitor, is cited and quoted in the latter case to show that such an act is clearly within the police power of the state, that the classification adopted is not arbitrary, but reasonable,—resting upon a substantial basis,—and that such an act does not interfere with the freedom to contract.

And in answering the objection made in State v. Drayton, supra, "that by the provisions of the law an act which is of itself lawful may be rendered unlawful by reason of the mind or purpose of the individual accused, and that such mental condition or purpose would be impossible of proof," the court said: "This is not a question which inheres in the subject before us. The presence or absence of a criminal purpose may or may not be easily ascertained, but with that we now have nothing to do. Each prosecution under the act will have to depend upon its own proved facts. The existence or nonexistence of what is known in criminal law as the criminal mind would be a question for a trial jury under the facts established by the evidence submitted."

In State ex rel. Young v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527, a statute forbidding discriminations in the prices charged for "petroleum or any of its prod-

in the state for an alleged violation of the same statute. Affirmed.

The facts are stated in the opinion.

Messrs. **Sears & Potter, Brown, Abbott, & Somsen, and Seward & McFarland**, for appellant:

No offense is created by this statute, because, while it defines unfair discrimination, which is in itself no offense, it nowhere forbids it so as to make it a crime.

**Hadden v. The Collector** (Hadden v. Barney) 5 Wall. 110, 18 L. ed. 519; **Bishop, Statutory Offenses**, 3d ed. § 46; **Todd v. United States**, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; **People v. Phye**, 136 N. Y. 558, 19 L.R.A. 141, 32 N. E. 978; **Minnehaha County v. Thornè**, 6 S. D. 449, 61 N. W. 688; **Kirby v. Western U. Teleg. Co.** 4 S. D. 463, 57 N. W. 202; **State v. Lovell**, 23 Iowa, 305; **Hanks v. Brown**, 79 Iowa, 560, 44 N. W. 811; **State v. Woodruff**, 68 N. J. L. 89, 52 Atl. 204; **Ex parte McNulty**, 77 Cal. 164, 11 Am. St. Rep. 260, 19 Pac. 237.

acts," under which the defendant was charged with discrimination in the selling price of kerosene oil, was held to be a valid police regulation, and not unconstitutional. In the trial court the judge declared the statute invalid, and sustained a demurrer to the complaint for the following reason: "The vice in the law is that it singles out producers, manufacturers, and distributors of 'petroleum or any of its products,' and makes it a crime for such producers, manufacturers, and distributors to, for the purpose of creating a monopoly, discriminate between different sections or cities by selling petroleum or any of its products at a different price in different sections or cities of the state, while producers, manufacturers, and distributors of all other commodities may still, for the purpose of creating a monopoly, discriminate between different sections or cities. It is worthy of note that the law applies to 'petroleum or any of its products;' that is, not only to crude petroleum, but to the refined oils, and to the hundreds of articles of common use that are products of petroleum, manufactured by different concerns, and distributed by every grocer and druggist in the state. . .

. . . I fail to see any distinction or any reason, except a purely fanciful and illusory one, for such a classification as is made by this law. It therefore follows that the act is void, as special or class legislation." But the supreme court of Minnesota, in arriving at its decision, as stated, said: "In determining the validity of the statute, we have to consider whether petroleum and its products possess, in themselves, or in the manner in which they may be placed upon the market as articles of commerce, any peculiar characteristics which furnish a legitimate reason for singling them out for the purpose of regulation, to the exclusion of other articles used for similar purposes. In determining this question, we judicially

The act, by reason of arbitrary classification, denies the defendant equality under the law, and is for that reason violative of the Constitutions, both state and Federal.

**State v. Scougal**, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; **Gulf, C. & S. F. R. Co. v. Ellis**, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; **State v. Loomis**, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; **Connolly v. Union Sewer Pipe Co.** 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; **Cotting v. Kansas City Stock Yards Co.** (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; **Vanzant v. Waddel**, 2 Yerg. 260; **Lavallee v. St. Paul, M. & M. R. Co.** 40 Minn. 249, 41 N. W. 974; **State ex rel. Wyatt v. Ashbrook**, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765. 55 S. W. 627; **Cooley, Const. Lim.** 7th ed. 559; **Consolidated Coal Co. v. Illinois**, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; **McLean v. Arkansas**, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; **Mugler v.**

note all facts of common knowledge presumably considered by the legislature when the law was enacted, and inquire whether there existed, at the time of and before the act was passed, practices in this class which were inimical to the public welfare and properly the subject of remedial legislation. We have no difficulty upon this question. Petroleum is taken from the earth in a manner peculiar to itself. The refined oil is handled as no other product. Its production and distribution have caused more legislative investigations, and been the subject of greater legal combats, in recent years, than any other article of commerce. We think it is more unique, and justifies special regulation much more, than many of the other articles as to which legislation was sustained in the cases above cited. The public policy, not only of Minnesota, but of all the states and the Federal government, is to restrain monopolies and to encourage competition. Everywhere are found laws prohibiting pools and combinations in restraint of trade. Here we have one of the principal products of petroleum, kerosene, which it is claimed in the complaint can be so handled by a powerful corporation that competition can be stifled without resort to either pool or combination. The complaint charges defendant discriminates in its prices for the purpose of destroying the business of its competitors, and has and does prevent legitimate competition. We are advised of no other product or article of commerce, except other petroleum oils, as to which such a practice prevails. The demurrer admits these allegations. All these conditions were before the legislature and furnished the motive for the legislation. The classification was neither fanciful nor arbitrary, but proper and necessary to meet the peculiar conditions surrounding the distribution of these primary products of petroleum."

E. M. S.

Kansas City, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Webb v. Downes*, 93 Minn. 457, 101 N. W. 966; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Imboden v. People*, 40 Colo. 142, 90 Pac. 623; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313; *Ozan Lumber Co. v. Union County Nat. Bank*, 76 C. C. A. 218, 145 Fed. 344, 7 Ann. Cas. 390; *Peonage Cases*, 123 Fed. 671; *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119; *McKinster v. Sager*, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; *Lappin v. District of Columbia*, 22 App. D. C. 68; *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468; *Ex parte Jentzsch*, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803; *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; *Montgomery v. Kelly*, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; *Re Aubrey*, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 Ann. Cas. 927; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N. Y. Supp. 497; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691; *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; *Smiley v. MacDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *Luman v. Hitchens Bros. Co.* 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; *Huber v. Merkel*, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354; *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

The act is invalid because the classification of corporations by § 2, and the procedure therein provided for, are violative of the Constitutions, both state and Federal.

*Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 22, 31, 25 L. ed. 989, 992; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 559, 46 L. ed. 689, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Phipps v. Wisconsin C. R. Co.* 133 Wis. 153, 113 N. W. 456; *Re Davies*, 168 N. Y. 89, 56 L.R.A. 855, 61 N. E. 118.

42 L.R.A. (N.S.)

The act interferes with freedom to contract.

*Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 757, 28 L. ed. 585, 591, 4 Sup. Ct. Rep. 652; *Ex parte Virginia*, 100 U. S. 339, 366, 25 L. ed. 676, 686; *Powell v. Pennsylvania*, 127 U. S. 678, 691, 32 L. ed. 253, 258, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Humes v. Little Rock*, 138 Fed. 929; *Ex parte Hutchinson*, 137 Fed. 949; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Long v. State*, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 716; *Ex parte Drexel*, 147 Cal. 763, 2 L.R.A. (N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; *State v. Dalton*, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; *People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N. Y. Supp. 111; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N. Y. Supp. 497; *Young v. Com.* 101 Va. 853, 45 S. E. 327; *Com. v. Moorhead*, 7 Pa. Co. Ct. 513; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; *Montgomery v. Kelly*, 142 Ala. 552, 110 Am. St. Rep. 43, 38 So. 67; *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559; *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385; *Winston v. Beeson*, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; *Hewin v. Atlanta*, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Slaughter House Cases*, 16 Wall. 106, 21 L. ed. 418; *San Francisco Lumber Co. v. Bibb*, 139 Cal. 325, 73 Pac. 864; *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150; *Ex parte Quarg*, 149 Cal. 79, 5 L.R.A. (N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; *Cody v. De apsey*, 86 App. Div. 335, 83 N. Y. Supp. 899; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Ex parte Dickey*, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark.

407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; State v. Missouri Tie & Timber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 550; Shaver v. Pennsylvania Co. 71 Fed. 931; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798.

Messrs. S. W. Clark, Attorney General, Theodore J. P. Gledt, and James M. Brown, for respondent:

The statute creates an offense.

State v. Shevlin-Carpenter Co. 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; State v. Dorman, 9 S. D. 528, 70 N. W. 848; Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; State v. Pierce, 123 N. C. 745, 31 S. E. 847; State v. Marshall, 64 N. H. 549, 1 L.R.A. 51, 15 Atl. 210; State ex rel. Weideman v. Horgan, 55 Minn. 183, 56 N. W. 688; State v. Ostwalt, 118 N. C. 1208, 32 L.R.A. 396, 24 S. E. 660; Dyer v. Placer County, 97 Cal. 276, 27 Pac. 197.

The act is not violative of the state and Federal Constitutions.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Tinsley v. Anderson, 171 U. S. 106, 43 L. ed. 96, 18 Sup. Ct. Rep. 805; Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 325, 46 L. ed. 932, 22 Sup. Ct. Rep. 662; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Tenement House Dept. v. Moeschel, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; Bachtel v. Wilson, 204 U. S. 41, 51 L. ed. 359, 27 Sup. Ct. Rep. 243; Heath & M. Mfg. Co. v. Worst, 207 U. S. 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 114; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; Orient Ins. Co. v. Daggs, 172 U. S. 561, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Bacon v. Walker, 204 U. S. 318, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; Globe Elevator Co. v. Andrew, 144 Fed. 879; 42 L.R.A.(N.S.)

Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Re Paulis, 144 Fed. 472; St. George v. Hardie, 147 N. C. 88, 60 S. E. 921; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; Holden v. Hardy, 169 U. S. 397, 42 L. ed. 792, 18 Sup. Ct. Rep. 383; National Cotton Oil Co. v. Texas, 197 U. S. 130, 49 L. ed. 694, 25 Sup. Ct. Rep. 379; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

The act does not interfere with the freedom of contract.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Moore v. American Transp. Co. 24 How. 39, 16 L. ed. 681; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 210, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Com. v. Strauss, 191 Mass. 550, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; Greer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Sands v. Manistee River Improv. Co. 123 U. S. 295, 31 L. ed. 151, 8 Sup. Ct. Rep. 113; Water-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936; Spurr v. Travis, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 Ann. Cas. 250; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; Walp v. Moorar, 76 Conn. 515, 57 Atl. 277; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 378, 15 Ann. Cas. 645.

Whiting, J., delivered the opinion of the court:

Chapter 131, p. 196, Sess. Laws S. D. for the year of 1907, is in words as follows:

"An Act to Define and Prohibit Unfair Competition and Discrimination, and to Define the Powers and Duties of the Attorney General in Regard Thereto.

"Be it enacted by the Legislature of the State of South Dakota:

"Section 1. Unlawful discrimination.—Any person, firm, or corporation, foreign or domestic, doing business in the state of South Dakota, and engaged in the production, manufacture, or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer



in such commodity, or to prevent the competition of any person who, in good faith, intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section, community, or city, or any portion thereof, than such person, firm, or corporation, foreign or domestic, charges for such commodity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution, and freight rates therefrom, shall be deemed guilty of unfair discrimination.

"Sec. 2. Duty of attorney general.—If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination as defined by this act, he shall investigate such complaint, and for that purpose he may subpoena witnesses, administer oaths, take testimony, and require the production of book or other documents, and, if in his opinion sufficient grounds exist therefor, he may prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state; and if in such action the court shall find that such corporation is guilty of unfair discrimination as defined by this act, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

"Sec. 3. Violation—penalty.—Any person, firm, or corporation violating the provisions of section one (1) of this act shall, upon conviction thereof, be fined not less than \$200 nor more than \$10,000 for each offense.

"Sec. 4. Remedies cumulative.—Nothing in this act shall be construed as repealing any other act or part of an act, but the remedies herein provided shall be cumulative to all other remedies provided by law."

The state brought two actions in the circuit court, one criminal, charging defendant with having broken the above statute, the other civil, seeking under § 2 thereof to forfeit the right of defendant to do business in this state. Demurrers were interposed to both the criminal information and civil complaint, said demurrers attacking such information and complaint solely upon the ground that they did not allege facts sufficient, in one case, to constitute a public offense, and in the other case, to state a cause of action; each demurrer being based solely upon the alleged unconstitutionality of the above statute. The demurrers were both overruled. In the civil case the defend-

ant appealed from the order overruling such demurrer. In the criminal case trial was had, and verdict of guilty rendered, judgment entered, motion for new trial made and overruled. The defendant at all times saved his rights by timely objections and motions raising the questions of constitutionality of the said statute, and duly appealed from the judgment of conviction and order denying new trial. It is admitted by the appellant that the only question raised by either appeal is the said constitutional questions, and they are the only ones saved by assignments of error. The question involved in the two cases on appeal being therefore necessarily largely, if not entirely, the same, by agreement of parties and consent of this court, the two causes have been presented together, and will be so decided.

The appellant in its brief has discussed the issues under the following headings: "(1) The statute in question is criminal in its nature and penal in its provisions, and must be strictly construed. (2) No offense is created by this statute, because, while it defines unfair discrimination, which is in itself no offense, it nowhere forbids it so as to make it a crime. (3) This law cannot be upheld upon the theory that its purpose and effect is to prevent the establishment of a monopoly. (4) The act, by reason of arbitrary classification, denies the defendant equality under the law, and is for that reason violative of the Constitutions, both state and Federal. (5) The act is invalid because the classification of corporations by § 2, and the procedure therein provided for, is violative of the Constitutions, both state and Federal. (6) Whether the act can be severed, and some parts saved, while others are condemned. (7) The act interferes with freedom to contract."

The briefs on both sides are very full and exhaustive, and are a credit even to the eminent counsel engaged in this case. It will be impossible for us, within the limits of this decision, to discuss, in detail, the authorities cited, though we have given them careful consideration. For convenience we will take up the questions raised in the order in which they are treated in the appellant's brief.

The appellant, under the first heading, has gone into an exhaustive discussion of the rules of construction applicable to criminal statutes, for the purpose of showing, under the second heading, that the courts cannot read into the statute words so that such statute can be held to create an offense under § 3 of the Penal Code, which provides: "A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments: . . . (3) Fine,"

—the point made by appellant being that said statute in question nowhere “forbids” the acts that constitute the offense, and that therefore, under said § 3, Penal Code, there is no offense stated. The state had given this point careful consideration, answering fully the brief of appellant, and calling attention further to the fact that this is not a question going to the constitutionality of the statute, and therefore not properly before us. The state is right in this contention, but, inasmuch as the point has been fully discussed, and is a matter vital to the people of this state, we consider ourselves justified in considering and passing on the same. We have just recently affirmed a judgment imposing the death penalty for murder, and, if appellant is right in its contention, we have no such crime as murder in this state, the statute relating thereto containing no specific words forbidding the acts constituting the offense; and under § 2 of our Penal Code, no act or omission is a crime except as prescribed by some statute of this state. In fact, if appellant was right, there would be scarcely a criminal offense provided for by our Code, and our jails and state’s prison should be emptied of the persons confined therein. Nevertheless, it is true that, if there is nothing in the body of the statute before us that forbids the doing of the acts set forth in § 1 thereof, appellant is right, and has not committed any criminal offense.

Conceding, for the purposes of this discussion, that no reference can be made to the word “prohibit” found in the title, to aid in upholding the law, and conceding likewise that nothing can be read into this statute in aid thereof, and that we must look to the plain language of the statute for the prohibition of the said acts, and even disregarding § 10 of our Penal Code, providing: “The rule of the common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and promote justice.”—still, does not § 3 of said statute plainly prohibit the acts set forth in § 1 by prescribing a punishment therefor? It certainly does. One man might say to his child: “To break Mr. Jones’s windows is wrong, and I forbid your doing it.” Another man says to his child: “To break Mr. Jones’s windows is wrong, and if you do it, I will whip you.” Does it need any legal research or extended study of statutory construction for the second child to determine that he, as well as the other child, is forbidden to do the acts constituting the wrong? We think the second child would have a clear comprehension of the law of his home on this subject, 42 L.R.A. (N.S.)

and would hardly be in a position, after having broken the windows, to say to his father, “I did not know you forbade me to break the windows; you did not use the word ‘forbid.’” In fact, if these two children were of very tender years, might it not well be that the first child, not knowing the meaning of the word “forbid,” could well plead innocence, while, if his father had used the language of the other parent, he could not have so pleaded, because he then would have known the fact that he was forbidden, while not knowing the meaning of the word “forbid?” Lawmakers should certainly be free, in the preparation of criminal statutes designed to control the actions of persons who have reached the age of criminal responsibility, to use the simple method of conveying an idea or thought which would be applicable in conveying such idea or thought to a child of tender years. Our legislature has universally followed this common-sense method.

In *State v. Ostwalt*, 118 N. C. 1212, 32 L.R.A. 396, 24 S. E. 661, the court said: “It seems never before to have been doubted that the legislature creates a criminal offense whenever it prescribes that a certain act shall be punishable either by fine or imprisonment, or forbids it generally, and by implication empowers the courts to impose either fine or imprisonment.” Section 15 of the Penal Code of California is in substance the same as § 3 of our Penal Code; it reading as follows: “A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: . . . 3. Fine.” In the case of *Dyer v. Placer County*, 90 Cal. 276, 27 Pac. 197, the court was called upon to determine whether, in the light of such section, a public offense was created by a statute reading as follows: “Every person who shall fraudulently evade, or attempt to evade, the payment of his fare for traveling on any railroad, shall be fined not less than five nor more than twenty dollars.” The court, after quoting § 15 of their Penal Code, *supra*, well said: “To hold that a law which makes it a finable offense to fraudulently evade the payment of railroad fare does not make such evasion a public offense would, we think, be going but skin-deep into its meanings. *Qui hæret in litera, hæret in cortice.*”

Before taking up the consideration of those questions raised by appellant which involve the constitutionality of the law before us, it may be proper to consider briefly the purpose in the minds of the legislators in framing the law in question, and, in connection therewith, the evil sought to be cured, and, finally, whether such evil

brings the remedy within that great body of laws known as "police regulations." The great and only excusable reason for the prescribing of any rule of conduct is to promote justice between man and his fellows in their relations as members of a social or political body. As was well said by Webster: "Justice is the greatest thing on earth." Law may be defined as the aggregate of those rules and principles of conduct promulgated by the legislative authority or established by local custom, and our laws are the resultant derived from a combination of the divine or moral laws, the laws of nature, and human experience, as such resultant has been evolved by human intellect, influenced by the virtues of the ages. Human laws must therefore of necessity continually change as human experience shall prove the necessity of new laws to meet new evils, or evils which have taken upon themselves new forms, or as the public conscience shall change, thus viewing matters from a different moral view point.

The effort to promote and effectuate justice by means of human laws has been a continuous fight against human selfishness, especially human avarice and greed, a continual effort to protect the weak against the strong. It is the boast of our law that it protects its wards in the full and free enjoyment of their lives, their liberties, and their property; and the cry that is always heard when any law is attacked on constitutional grounds is that it has, in some manner and to some degree, wrongfully deprived some one of equal protection in those cherished rights of life, liberty, and property. Yet common sense, as well as experience, has taught us that only through restraint can there be liberty; that as members of one great social order, we can only be protected in our most treasured rights by at the same time being restrained in the use of the same so as not to deprive our fellow man of the equal enjoyment of such rights. Thus men have often been deprived of property, liberty, and even life, taken by the strong arm of law as a forfeit, a penalty, for having infringed on the rights of their fellows.

Among those things which human experience and the public conscience early recognized as essential and necessary to the highest welfare of all was the right of free and equal competition in the struggles of life, not the right of freedom to crush one's fellows by force of brute strength, or the equal brute force of greater wealth or power, but the right to have brute force, wealth, and power so restrained as to place the weakest, poorest, and lowliest on a free equality, before the law, with the strongest, richest, and most powerful. From an early date

there have been laws against contracts and combinations in restraint of trade, and such laws became a part of the common law of this country. While practices in conflict with such laws have, at all times, been more or less frequent, yet, owing to industrial conditions existing up to the past fifty years, such practices had never become any serious menace to the rights of mankind; but with the wonderful advance in industrial pursuits, and the vast accumulations of wealth during the past half century, there came new methods of business, including vast combinations to control the articles of commerce, bringing an awakening of the public conscience to the evils thereof, and, as a result, many statutes were enacted, and even amendments to Constitutions adopted, aiming to the restoration of freedom and equality in commerce. The evils experienced being almost entirely those flowing from monopolies created through combinations, there were enacted what are known as the "anti-monopoly statutes," not merely making such combinations in restraint of trade unlawful from a civil point of view, but making such combinations criminal. Thus, this state passed its Laws of 1890, 1893, 1897, and 1899, and adopted in 1896, § 20, art. 17, of the Constitution, which section provides as follows: "Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any copartnership or association of persons, or in any manner whatever to fix the prices, limit the production, or regulate the transportation of any product or commodity so as to prevent competition in such prices, production, or transportation, or to establish excessive prices therefor. The legislature shall pass laws for the enforcement of this section by adequate penalties, and, in the case of incorporated companies, if necessary for that purpose, may, as a penalty, declare a forfeiture of their franchises."

The statutes of most states, up to very recent years, were aimed only at monopolies brought about through combinations, so that, in treating of the subject of monopoly, both text-book writers and judges have spoken of them as though monopoly and combination were one and the same, thus causing many to consider that there could be no monopoly except there was combination, while, as a matter of fact, combination is simply a means, and but one of many means, by which a monopoly is acquired; monopoly being the end sought, combination

a means therefor. It is well to consider the definition of monopoly as given by Webster: "1. The exclusive power, right, or privilege of selling a commodity; the exclusive power, right, or privilege of dealing in some article, or of trading in some market; sole command of the traffic in anything, however obtained; as, the proprietor of a patented article is given a monopoly of its sale for a limited time; . . . a combination of traders may get a monopoly of a particular product."

A glance at the above-quoted provision of our Constitution will show that it is aimed at all monopolies, while it calls attention particularly to those acquired through the then prevalent method. While our lawmakers and courts were busy trying to cure the evil of monopoly by destroying combinations created therefor, human ingenuity, prompted by avarice and greed, was also busy devising methods of evading the law and creating a monopoly without combination, and the brains at the head of the most powerful corporations known to mankind soon discovered a way. Every person of mature years well knows the success that has attended their efforts along this line, and the result thereof.

To get rid of competition, and thus acquire a monopoly, the man, firm, or corporation possessed of, or controlling, large capital, no longer said to his competitor: "Let us combine, and thus obtain a monopoly of the business we are engaged in, and by so doing increase our profits by raising prices to the consumer." No, that would be criminal, and might lead to trouble, and, too, it was a crude way of acquiring the thing sought. Now he says to a competitor, if such competitor be weaker than he: "Get out of my way. Sell me your business, or I will destroy it by unfair competition,"—or in many cases, without giving his victim a chance to sell to him the business he has, he sets about destroying it, and by a method as certain as the passing of time,—a method that need bring to him not even an immediate financial loss. He puts the price of the commodity handled so low, at the point where his victim is in business, as to make it impossible to meet such price except at a loss, and, to offset what loss he suffers at that point, he raises prices at one or more other points. As soon as this practice became quite prevalent, the public realized that an old evil was being brought upon them by a new method; a method that not only tended as its natural and necessary result to place a monopoly into the hands of the strong, but did not, as before, permit the competitor to share in the fruits of the wrong,—an evil bringing loss to the public and wrong and in-

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justice to the weak tradesman. Again human experience, recognizing the laws of God and nature, controlled and guided by an aroused public conscience, evolved a new law, and placed it upon the statute books of this and many other states, a law aimed at monopolies obtained through unfair competition. The question before this court, as it was before the court, in case of *State v. Drayton*, 82 Neb. 254, 23 L.R.A. (N.S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768, is, Are these laws constitutional as being within the scope of the police powers, or is the state helpless to grapple with and destroy this new evil, because, in so doing, it will take from the wrongdoer the full enjoyment of right to life, liberty, and property? We have no hesitancy in saying that this class of legislation comes directly within the intendment of § 20, art. 17, of our Constitution, and that there is nothing in the third point raised by appellant that "this law cannot be upheld upon the theory that its purpose and effect is to prevent the establishment of a monopoly."

We not only believe it can be upheld upon the above theory, but also that it comes under the scope of proper police regulation as recognized by the authorities, and this, not only because it is intended, and would naturally tend, to prevent a wrong to the public, but because we believe it is inherent in the powers of the state to protect one citizen against "unfair competition" of another citizen, where such unfair competition is used as a means to, and with the intent to, deprive such other of his rightful enjoyment of property or the use thereof. Can it be held that this evil, which threaten the very foundations of our economic system, and through it the very foundations of a free government, cannot be reached for the reason, forsooth, that it interferes with the right of free contract on the part of the individual guilty of the wrongful practice? Bear in mind at all times that this law is aimed only at persons who resort to such "unfair" methods with the "intent" to destroy the business of their competitors.

The legislature recognized the evil, and acted with full knowledge of the necessity confronting it, and shall we say that it has exceeded its powers in passing a law of this nature? As said by the court in *State v. Drayton*, supra: "At the beginning of our investigations we are confronted with the oft-repeated and well-settled doctrine that no act of the lawmaking power of the state can be held unconstitutional, unless it is clearly violative of the provisions of the Constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further

met with another well-known rule that what is known as the police power is inherent in every government, and does not depend upon legislative grants or limitations; that unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised. From a careful reading and study of the act in question, we are driven to the conclusion that it is not subject to attack upon either of the grounds named." In the above case the court quotes from the words of the judge in *Yick Wo v. Hopkins*, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1071, words which are as true as they are burning: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." And again in the *Nebraska* case we find quoted the following words, also coming to us from that great tribunal in the decision of the *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. . . . The power which the legislature has to promote the general welfare is very great, and the discretion which that part of the government has in the employment of means to that end is very large."

Many attempts have been made to define the term "police power" as applied to legislation. Justice Shaw, in the case of *Com. v. Alger*, 7 Cush. 53, said: "It is much easier to perceive and realize the existence and source of this power than to mark its boundaries, or prescribe limits to its exercise." However, in the same case this great jurist gave what is perhaps the best definition ever attempted, defining it as "the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

The law books are full of cases where parties have been restrained from unfair competition, or have been mulcted in damages

for such unfair competition in the use of another's trademark or tradename, or in the use of trademarks and tradenames similar to those which had been in use and established by another, and even where the tradename was the name of the party trying to use same. *International Silver Co. v. William H. Rogers Corp.* 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 Ann. Cas. 804. And most of the states have passed statutes regulating the use of such tradenames or trademarks, some even going so far as to make the wrongful use of same criminal, and such statutes are constitutional. The supreme court of California in the case of *Weinstock, L. & Co. v. Marks*, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142, held a mandatory injunction proper to prevent a party from continuing a store which he was conducting in a building built by the side of a competitor's place of business, it appearing that he had built it to nearly or quite resemble the other in appearance, and was using on the outside a trademark which had been adopted previously by the other store, and was failing in any manner to designate his store from his competitors; it further appearing that this was being done with intent to draw trade from the competitor. The court said: "It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the trademan's business, by unlawful competition."

The law in question is certainly constitutional, unless it in some manner conflicts with some express provision of our Constitution or that of the United States; and this brings us to the fourth point suggested by appellant, that "the act, by reason of arbitrary classification, denies the defendant equality under the law, and is for that reason violative of the Constitutions, both state and Federal." It is the claim of appellant that the law in question violates § 1, art. 14, of the Federal Constitution and §§ 2 and 18, art. 6, of the Constitution of this state; said sections of the state Constitution being in substance the counterpart of the provisions found in the Federal Constitution. Appellant has argued at great length, and cited numerous authorities upon, the question of what constitutes proper classification in criminal statutes; but under the view which we take of the statute now before us, it is unnecessary to determine what the proper rules for such classification are, and attempt to apply them to the provisions of this statute, for the reason that it appears clear to us that there is absolutely no attempt at classification in this statute.

The *Nebraska* statute was attacked upon this same ground in the *Drayton Case* above mentioned, and like arguments were pre-

sented to that court as are presented to us. That court, in answer to the claim that there was an arbitrary classification directed against the man having stores in more than one place, and in favor of the single storekeeper, said: "To this we must be permitted to say that we are unable to find any provision in the act which is susceptible of the construction contended for." That court then proceeded quite briefly to draw illustrations in support of its conclusions. The appellant herein, referring in its brief to the Drayton Case, says: "The Nebraska court does not seem to have seriously considered the question of classification involved there and here." While we believe the reasoning in the Drayton Case is sound, and that we might rest this decision, as regards this feature of the case, upon a mere approval of the Drayton Case, yet we feel justified in attempting, somewhat more fully than did the Nebraska court, to show the weakness of appellant's contention.

Appellant says that the following persons are without the law: "(a) Persons who sell at one place only; (b) persons who sell at two or more places, but who, with the intent and purpose of destroying a competitor at one of such places, make the same low prices which are necessary so to do at both places; (c) persons who sell at two or more places, and who, with the intent and purpose of destroying a competitor at each place, make the necessary low prices at all places." A complete answer to this contention is that the persons above specified are without the law, not because they are left out by any classification created by such law, but rather because in each of said cases there would be lacking one of the elements going to make up the particular criminal act created by this statute, to wit, discrimination between two points. As we have said, there is no attempt at classification by this act. The only classification claimed by appellant is a classification as to persons, yet this law applies to every existing person, partnership, or corporation, without regard to wealth, age, situation, color, or any other method of distinction. In the determination of whether a crime has been committed, there are always these two things at least to be considered: First, the persons committing the offense; and, second, the acts constituting the offense. As to the first, there may be such a classification by the statute as will render such statute unconstitutional, but not so as regards any restriction or limitations as to the acts constituting the offense. Let us illustrate. While the legislature could not make some particular class of persons guilty of murder, when such persons killed their fellow men by some peculiar method or means, and at the same time ex-

empt another class of persons from punishment for killing their fellow men by the same method or means, unless the attempted classification had some logical or natural relation to the nature of the method or means employed; yet it would be clearly within the power of the legislature to make such killing, by such peculiar method or means, murder, even if the legislature should utterly fail to pass any law whatsoever making killing by any other means or method a crime.

The appellant in its brief says: "This law, in order to be sustained, must be brought within the principle that no man ought to be allowed to use his own property, or conduct his own business, so as to destroy the property or business of his neighbor. If such were the scope of the act, the only question would then be whether it was an unwarranted restraint upon the liberty of contract. The evil, if any, which this law is aimed at, is not discrimination between places, but ruthless competition, with the purpose, on the part of one competitor, to utterly destroy the business of another." In this the appellant is only in part correct. The object of this law is not only the protection of the competitor, while this is without question one of the objects the legislature had in mind, yet undoubtedly the prime object was the protection of the public against monopoly.

At another place in its brief the appellant, after referring to the principle of law that courts are not bound by the mere form or pretense of a statute, but that it should look at the substance thereof to see whether the same is really what it purports to be, and whether, while purporting to be within some constitutional limitation, as within the police power, it is not in fact an invasion of some constitutional provision, says: "Applying this principle, we are warranted in saying that the aiming of this statute at the so-called unjust discrimination is a shallow pretense, and that the so-called unjust discrimination relates to the persons, and not to the act, and is in fact a classification of such persons; that the act of discrimination cannot of itself be within the prohibitive police power of the state, and that the act of malicious competition, if it be a violation of the principle that every citizen must so exercise his own right as not to injure another, is nevertheless an evil under all circumstances, and that if the legislature may prohibit at all, it must do so by a statute which is not void by reason of arbitrary and unreasonable classification of the persons upon whom it operates." Again it seems to us that the appellant is shooting wide of the mark. It is resting on an alleged arbitrary classification of persons, based upon their

conditions, and yet, in the words above quoted, it will be seen that what it is now complaining of is not that the law does not reach all persons, but rather that the law does not reach all the means which may be used to bring about the wrong aimed at.

It may be well again to revert to the history and origin of this legislation. Legislation of this class, including as it does the so-called anti-monopoly laws, is all directed to the prevention of monopoly. Monopoly and competition being the exact opposites, anything tending to destroy competition tends toward monopoly. As we have stated, at the time the statutes against unlawful combinations in restraint of trade were passed, that was the only means or method of creating monopolies that had come into such common use as to be recognized as a public menace. While those statutes forbid "combinations and contracts" of certain kinds, they were forbidden not because "combinations and contracts" were in themselves subjects for police regulation, but were forbidden merely as they might be used as a method or means of creating a monopoly, laws against monopolies being within the scope of police regulation. So it is in the case of the statute before us. Mere discrimination is not the thing aimed at, nor even unfair competition, but the evil sought to be prevented is monopoly, and the legislature is merely condemning that class of discrimination and competition which experience had taught the public tended to bring about monopoly, and which was then being frequently resorted to for that purpose, and had become a public menace. But appellant says that malicious competition, if an evil, is such under all circumstances, and if it is to be prohibited at all, it must be by statutes reaching all methods, thus reaching all who are guilty of malicious competition; that otherwise there is an arbitrary and unreasonable classification of persons upon whom the law operates. If such position is sound, then the laws enacted against combinations and trusts are unconstitutional for the same reason, and the same plea could be raised against them, that they did not reach all who were guilty, that, inasmuch as the object of such laws was to prevent monopolies, and there being many other means by which monopolies could be created,—such as the different kinds of unfair competition,—such laws are unconstitutional; it being arbitrary classification to attempt to say to the man who enters into a combination in restraint of trade, "You are guilty of seeking to obtain a monopoly," while at the same time saying of the man who crushes his competitor, and thus obtains a monopoly, "You may go free, as you are guilty of no offense."

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It is not for the courts to say whether the legislature has passed a wise law, or whether they should have made it more broad. With shrewd advisers to point out to their clients new methods by which monopolies may be obtained without breach of existing laws, it may happen that the legislatures will soon see the necessity of passing new legislation reaching the conditions suggested by appellant in illustrations a, b, and c, above referred to. That is for the legislature to determine. Experience, so far, has taught us that, while such acts set forth in b and c may be morally wrong, there is no great public menace from the same, for the reason that parties do not so frequently resort thereto under the circumstances suggested, owing, perhaps, to the certainty of immediate loss and the uncertainty of the parties being able to recoup such loss. Legislatures therefore have disregarded any public danger from such conditions, and have left the individuals to their remedy on the civil side of the courts.

Human experience taught that there was much greater danger to the public when three or more persons acted together in the unlawful use of force and violence than when only one or two committed the same acts. The result was that the legislature passed the statute prescribing what constituted a riot. Under the provisions of our statute, if three or more persons acting together and carrying deadly weapons should commit an assault, they could be punished by ten years' imprisonment, and this, even though the weapons were not used in making the assault; yet, if one or even two persons carrying such weapons committed an assault identical in nature, they could only be punished by a fine of \$100 or thirty days in jail, or both. Was it wise to draw the line at three men, and make such a distinction? The legislature thought it was, and could any defendant charged with riot say that the law was unconstitutional; that there was an arbitrary classification in that it made it a greater crime for one to act with two or more, than for one to act alone or with one other? Again there can be no conspiracy without there are two or more engaged therein, but would our statutes defining criminal conspiracy have necessarily provided that when two conspire to do a wrongful act, it should be a crime, or could not the lawmakers, if they had thought best, have placed the number at three or four, or any other number? It seems to us perfectly clear that the same legal proposition is involved in the statute at bar and in statutes such as those relating to riot and conspiracy. There is no classification as to persons, but rather a limitation and specification of the elements and acts, surroundings or con-

ditions, with the wisdom or propriety of which courts have nothing whatever to do.

The plea of appellant in its final analysis is: "I am guilty of the acts condemned by your lawmakers, but there are other rascals who do these same things by other means, and you cannot punish me unless you punish them." The acts condemned by this statute do not reach the sole dealer mentioned in appellant's illustration a, because it would be impossible for him to commit the offense; it does not reach those mentioned in b and c, because, fortunately perhaps for them, whether wisely or not, the legislature has not barred at least one door through which wrong may enter, though such bars as it has erected bar all alike.

This brings us to the next point raised in appellant's brief, to wit: "The act is invalid because the classification of corporations by § 2, and the procedure therein provided for, is violative of the Constitution, both state and Federal." The appellant has argued at great length that the law cannot punish the corporation differently than it punishes an individual, and contends that this law before us attempts so to do. It seems to be very much wrought up over the alleged fact that upon domestic corporations there is imposed the death penalty, and upon foreign corporations banishment, in addition to the punishment provided against individuals. Again, it seems to us, the appellant has entirely failed to recognize the questions of law involved herein. What it claims to be an additional penalty imposed against the corporation is really the voluntary forfeiture by it of its franchise or permit, the statute containing a provision for the determination by the proper court whether, in any case, the implied contract existing between it and the state has been broken and its right to existence forfeited. Let it not be understood that this court admits that there can be no different punishment for a criminal offense imposed against a corporation than that imposed against an individual. We are of the opinion that there can be such a classification of punishment, the same as there can be different punishments imposed as against different individuals, if such distinction in punishment is based upon reasonable grounds having relation to the crime and nature and condition of parties. *People ex rel. Duntz v. Coon*, 67 Hun, 523, 22 N. Y. Supp. 865.

A complete answer to appellant's contention regarding forfeiture being an additional punishment and unconstitutional is found in § 20, art. 17, of the Constitution of this state, hereinbefore quoted in full. An examination of such section will show that, in the class of cases covered by such section 42 L.R.A. (N.S.)

tion, the legislature is not only fully authorized to enact a law like § 2 of the statute before us, but it is directed to do so in certain cases; and whether or not the wrongful acts set forth in § 1 of this statute are sufficient to justify the legislature, under said constitutional provision, in the enactment of § 2 of this statute, is certainly a matter peculiarly within the right of the legislature to determine; and having, by the passage of this section, determined that the doing of the acts forbidden is sufficient to warrant the forfeiture of the franchises and permits of corporations, there is nothing left to the court but the absolute duty to enforce such provisions of said section.

But, regardless of said § 20 of article 17 of the Constitution of this state, there can be no question of the constitutionality of the section now before us. While it is true that corporations are entitled to the equal protection of the law, yet there is one thing that we should never lose sight of,—the inherent rights of a corporation are entirely separate and distinct from those of a natural person. A natural person does not seek entry into this world, and he is born into the world with all of the inalienable rights of a man, rights not given him by any earthly power, but by his Creator; which rights he retains undiminished, except in so far as he may surrender them for the good of the public, and which rights governments are instituted to secure. A corporation comes into existence through its own volition and upon its own seeking; it has not even the right of existence inherent in itself; it has only such rights as man gives to it. As was said by Justice Brown in *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370: "Upon the other hand, the corporation is the creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter." In brief, man was not created for corporations, but corporations were created for man; and the only excuse that can ever justify the creation of this artificial person is that through it the public shall receive some benefit. As was said by Justice Weaver in *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 367, 33 L.R.A. (N.S.) 706, 108 N. W. 911: "The distinction between them is fundamental and ineradicable. The natural person has certain inalienable rights for which he is not indebted to organized society. He is born to them. The Constitution and laws recognize them, and provide safeguards for them, but do not create them. The corporate person has no rights except those with which



it is endowed by the lawmaking power, and the power of creation necessarily implies the power of regulation."

At the creation of every corporation, in consideration of the rights and powers given to it by the state, there is the implied covenant or agreement on the part of such corporation, that it will use the powers given it to the benefit of the public; and, as an incident to such implied agreement, there is attached the condition that, in case of a serious breach of such implied covenant and agreement, the corporation shall forfeit its right to exist, it having ceased to be of public benefit. So by the common law it was early recognized that corporations may forfeit their charters by the misuser thereof. It was also a part of the common law that, while corporations so forfeit their charters, such question of forfeiture could not be raised collaterally, and that, in order to make such forfeiture effective against the corporation, it was necessary for some court to adjudge the forfeiture. Angell & A. Priv. Corp. 10th ed. § 774; 2 Kent, Com. \*\* 306, 313; Lumbard v. Stearns, 4 Cush. 60; Mumma v. Potomac Co. 8 Pet. 287, 8 L. ed. 948; State ex rel. Hahn v. Minnesota C. R. Co. 36 Minn. 246, 30 N. W. 816. This forfeiture under the common law could arise only in case of some wrongdoing affecting the public, but it was not necessarily such a wrong as constituted a crime. The states recognized this right of forfeiture, and many, if not all, have passed statutes similar to that found in chapter 26 of the Code of Civil Procedure of this state. Section 571 of such Code, being one of the sections of said chapter 26, provides for an action by the state's attorney, in the nature of quo warranto, to annul the charter of a corporation upon certain grounds, among which is whenever such corporation shall violate "the provisions of any law, by which such corporation shall have forfeited its charter or articles of incorporation, by abuse of its power." Under such a section it will be found that the courts have frequently adjudged forfeiture of franchises, and that even in cases where the wrongful conduct of the corporation did not amount to a criminal offense.

An illustrative case is that of People v. North River Sugar Ref. Co., which was tried at special term before Justice Barrett, who rendered an elaborate opinion therein. The defendant entered into a combination which, under the present law of this state, would be a crime, but does not appear to have been criminal under the then statutes of New York. It was clearly a combination in restraint of trade. An action was brought to have declared forfeited the charter of such corporation, such action being brought 42 L.R.A. (N.S.)

under § 1798 of the then Code of Civil Procedure of New York (said section being similar to our Code, above referred to), the state claiming under two provisions thereof, to wit: First, because defendant had abused its powers; and, second, because it had exercised privileges or franchises not conferred upon it by law. In passing, it is well to note that we have a statutory provision covering this second ground. The opinion at special term is found in 54 Hun, 355 note, 2 L.R.A. 33, 3 N. Y. Supp. 401. The court found that the corporation had forfeited its charter, and among other things said: "Mr. Morawetz states the rule with precision (2 Morawetz, Priv. Corp. § 1024): 'A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter, or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient ground of forfeiture.' The same rule is laid down in Kent, Taylor, Waterman, Kyd, Angell & Ames, and Green's Brice. 2 Kent, 312; Taylor §§ 289, 457, 459; Waterman, § 427; Kyd, §§ 479 et seq.; Angell & Ames, §§ 774, 776; Green's Brice, 708, 709; Id. 3d ed. 787. Waterman says that 'The state is not required to prove an actual injury; it is sufficient cause of forfeiture if the act be such as in the nature of things is calculated to produce injury.' The cases all hold the same doctrine, laying down the general rule that the corporate franchises are granted upon a trust or condition that the corporate privileges shall not be abused; that the corporation undertakes and agrees, upon condition of forfeiture, that it will so manage and conduct its affairs that it shall not become dangerous or hazardous to the safety of the state or community in and with which it transacts business (Ward v. Farwell, 97 Ill. 593); and that the franchise may be forfeited and the corporation dissolved for acts *ultra vires*, or for a breach of the trust condition and perversion of the objects of the grant (Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; People v. Dispensary & H. Soc. 7 Lans. 306; People ex rel. M'Kinch v. Bristol & R. Turnp. Road, 23 Wend. 235; People v. Fishkill & B. Pl. Road Co. 27 Barb. 447; State ex rel. Atty. Gen. v. Milwaukee, L. S. & W. R. Co. 45 Wis. 590; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 1, 106, 121. These rules rest upon the inherent right of sovereignty. The franchises, whether resulting from general or special laws, are grants from the sovereignty of the people. Benefit to the country at large, from the objects for which

the corporations are created, constitutes the consideration, and in most cases the sole consideration, of the grant. Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheat. 518, 637, 4 L. ed. 629, 650. It, therefore, follows logically that when those objects are perverted, when the country suffers injury instead of receiving benefit, the state, because of such misuser, may withdraw the privileges and resume its franchises." This case came before the full supreme court of New York, wherein the decision was rendered by Justice Daniels, and is found in 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406; which decision in all things affirms that at special term. It was then appealed, and in 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834, is the opinion of the appellate court, affirming the decision of the supreme court, basing its affirmance solely upon the second ground set forth in the information, and in no manner passing upon the question of misuse.

Several of the states, in passing laws against combinations in restraint of trade, have specifically provided that the state's attorney or attorney general should have power, and it should be his duty, to bring action for annulment of corporate franchises where the corporations are charged with doing the acts forbidden, thus putting those statutes exactly upon the same standing as the statute at bar; and the discussions found in the decisions of these cases all show that the remedy thus provided for is purely civil in its nature; that it is not in the least in the way of a penalty or punishment for a crime, but merely that the courts may adjudicate whether or not the corporation has forfeited its right to exist. *Distilling & Cattle Feeding Co. v. People*, 166 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; *State v. Shippers' Compress & Warehouse Co.* 95 Tex. 603, 69 S. W. 58; *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 938, 22 Sup. Ct. Rep. 691; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *State v. Standard Oil Co.* 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413.

We would call special attention to the case of *State ex rel. Kohler v. Cincinnati, W. & B. R. Co.* found in 47 Ohio St. 130, 7 L.R.A. 319, 23 N. E. 928, the act complained of not appearing to be a crime, but it being charged that there was a misuse of the franchise. The act complained of was the giving by a railroad company to one shipper of crude oil a different rate than was given to another, by the providing of a certain rate where oil was shipped in

a tank car, and a greatly different rate per gallon where oil was shipped in carload lots in barrels. We desire to quote briefly from this case, as it bears directly upon a point hereinbefore discussed in this opinion, to wit, that there is more than one way of creating a monopoly; that it is not essential that there be any combination between individuals or corporations. The court says: "The justification interposed is that this was not done pursuant to any confederacy with the favored shipper, or with any purpose to inflict injury on their competitors, but in order that the railroad companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of the difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the interests of others; but we do hold that they cannot be permitted to foster or create a monopoly by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made, and upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law."

We think, therefore, that it will readily be seen, and must be admitted, that provisions such as § 2 of this act are constitutional, because if not, then our general statute providing for actions to declare forfeiture of franchises would be unconstitutional, in that it would have to be held that such statutes also add a penalty for a crime committed by a corporation other than that provided in case the defendant is a natural person. It must be conceded that, if it is within the legislative power to enact such statutes separate and distinct from the criminal statutes, there can be no grounds for claiming that it is unconstitutional simply to combine them in the same statutes under separate sections, as has been done by so many of the states under their statutes regulating trusts and combinations. We might suggest that this ground of unconstitutionality now under discussion seems never to have been raised in any of the cases we have cited arising under these anti-trust statutes, from which we conclude that the fact that these provisions are constitutional is universally conceded. Such a

provision is found in the statute under consideration in the case of *State v. Drayton*, and in that case the question now before us was not raised.

Sections 1 and 3 of this act, if standing alone, would make a complete penal statute; and if § 2 had been omitted, there is no doubt but that the remedy provided for by § 2 could have been obtained under the general statute providing for actions to annul charters, at least against domestic corporations, and if such general statute is not broad enough to provide for action against foreign corporations, there can be no question but under the common law such action could have been brought, and this regardless of the fact that defendant had not been convicted under § 3. How, then, can it be held that § 2 is unconstitutional, when no one will claim the general statute not to be constitutional? It is therefore clear that the legislature had every power to declare the forfeiture, and to direct the attorney general to bring this class of actions. The legislature also would have the power to provide the method of procedure set forth in § 2 for all cases under any of the grounds specified in the general statute above referred to; and if, therefore, for any reason, the legislature has seen fit to provide such procedure, applying it to cases where the corporations are charged with some particular misuse of their franchise rights, such corporations surely cannot claim that such peculiar procedure, because applying only to that particular misuse, is for that reason unconstitutional, especially if, as in case of the procedure provided for in § 2, it is peculiarly applicable to the conditions confronting the investigation of such alleged misuse. It will be noted that the only power given to the attorney general in investigating a complaint under such § 2 is to subpoena witnesses, administer oaths, take testimony, and require a production of books or other documents. It does not specifically provide that he can require the accused to produce its books or documents or give testimony, and if such requirements, if contained in the statute, would be unconstitutional, it would then be our duty to so construe the statute at bar to limit this right to the production of other books and documents and the calling of other witnesses. But it is clearly within the power of the legislature to provide that a defendant may be required, under proper penalties, to produce its books and documents, for the reason, as hereinbefore stated, that this proceeding is purely civil in its nature.

The appellant has cited the case of *Phipps v. Wisconsin C. R. Co.* 133 Wis. 153, 113 N. W. 456, contending that said case is an authority in support of its position; that 42 L.R.A. (N.S.)

the provisions in § 2 as to procedure are unconstitutional, in that they apply only to corporations, and not to persons or partnerships. A reading of said case will show that it has no bearing on the point involved herein, for the reasons that, as the action provided for in § 2 is an action against a corporation, and it would be impossible for there to be a proceeding for like purpose against a natural person, there is no infringement of any constitutional right providing such procedure. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645. This last case was similar in nature to an action to annul the charter of a corporation; it being brought under a statute providing for recovery, in a civil action, of a penalty for violation of an anti-trust act of the state of Arkansas. This act has most elaborate provisions in relation to matters of procedure, which provisions, as applied to corporations, were as drastic as can be found in the statute of any state. We will not undertake to state the provisions of such statute, nor to quote from such decision, but will say that, to our mind, it covers fully the questions here raised by appellant, based upon the provisions in § 2 relating to method of procedure.

In closing this branch of the case we refer again to the case of *State v. Standard Oil Co.* 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413, which involved the construction of an anti-trust statute. The 1st section of such statute defined a trust; the 2d prescribed a punishment therefor; the 3d declared a violation of the statute by a corporation to work a forfeiture of its charter, and that it might be ousted by quo warranto; the 4th provided that all foreign corporations or persons not resident of the state violating the act should forfeit their right of doing business within the state, and that it should be the duty of the attorney general and county attorney to enforce such provision by injunction, or by other proper proceedings. This act was attacked as unconstitutional, and the court said: "In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality. If §§ 3 and 4 provide penalties for crime, they violate the Constitution, and are absolutely void, for they deny the right of trial by jury (Const. art. 1, §§ 6, 11; *State ex rel. Broatch v. Moores*, 56 Neb. 1, 76 N. W. 530), and the right to a trial on an indictment or information (Const. art. 1, § 10). Furthermore, a corporation can violate the law only by transgressing § 2. That section declares

the penal consequences of the transgression, and it would not be competent for the legislature to add another penalty and enforce each by a separate action. Const. art. 1, § 12. The true construction of §§ 3 and 4 is that they are merely declaratory of the common law, and that they provide for ousting corporations by civil action from the exercise of powers and privileges which have been abused. The action is no more criminal than is an action for damages resulting from the commission of a crime. *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936. Section 4, so far as it relates to citizens of other states, is an unlawful discrimination in favor of the citizens of this state, and invalid in any view of the case. There is another reason why the motion should be sustained. Foreign corporations do business here, not by right, but by comity. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Western U. Tele. Co. v. Mayer*, 28 Ohio St. 521. The state grants them a privilege which it may revoke at pleasure. When they exercise their franchises in contravention of our laws, the privilege is revoked; and, that fact being ascertained, judgment may be rendered excluding them from the state. The revocation of the permission given a foreign corporation to do business here is not the infliction of a penalty; it is not the deprivation of a right. The privilege is like any other license, and the withdrawal or cancellation of it, in consequence of the commission of a crime, is not punishment in a legal sense. *Martin v. State*, 23 Neb. 371, 36 N. W. 554; *Miles v. State*, 53 Neb. 305, 73 N. W. 678; *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531."

The views herein expressed in relation to the constitutional questions raised render it unnecessary for us to discuss the next point raised by appellant, to wit, "whether the act can be severed, and some parts saved, while others are condemned."

The last contention made by appellant is that "the act interferes with freedom of contract." Counsel for appellant frankly state that they avail themselves largely of the reasonings and authorities in the briefs filed in the *Drayton Case*, and we would feel fully justified in resting our decision solely upon the reasoning of the court in the said case, and upon what has been hereinbefore stated which tends to bear upon this question. It will be seen by a study of this statute that it in no manner restrains the defendant from the making of any contract that is morally right and just. It does not even forbid the defendant from fixing prices for the express purpose of destroying competition, providing the defendant fails to discriminate between different

points. When the permit was given to this corporation to do business within this state, the state did not surrender its lawful police authority, and therefore the corporation took this right or franchise subject to the same restrictions imposed upon natural persons, and was thus required, and it impliedly agreed, to exercise its franchise in conformity with such police regulations as might at any time be lawfully adopted. In the case of *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033, the court said: "In further refutation of the mistaken assumption that every citizen has an unrestricted right to acquire and dispose of property by such contract as he may choose to make, we quote from the Supreme Court of the United States as follows: 'It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non laedas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power.' *Orient Ins. Co. v. Daggs*, 172 U. S. 566, 43 L. ed. 555, 19 Sup. Ct. Rep. 281."

Before closing we wish to add a few words to what we have already said in relation to the point that the acts forbidden tend toward the creation of a monopoly, and that for that reason the statute comes within § 20, art. 17, of our Constitution. Human experience certainly teaches that men are usually controlled by some motive, either laudable or otherwise, in their business transactions with their fellow men; and when the public, as in the case at bar, sees any person or corporation establishing a radically different price at a point of competition from that fixed at another point, it is the natural conclusion, based upon human experience, that such party has some ulterior motive, that he is not fixing such prices out of any feeling of kindness toward the people of such community, but that he expects eventually to obtain benefit therefrom; and it is therefore the conclusion of the public that is the motive of such wrongdoer to drive the competitor out of business, and thereafter recoup such loss as he may have suffered during said process of destruction by an increase in price after a monopoly has been acquired. As was well said by the supreme court in *People v. North River Sugar Ref. Co.* 54 Hun. 354, 5 L.R.A. 386, 7 N. Y. Supp. 406: "And after putting forth the efforts necessary to secure that end, it would not only be idle, but absurd, to indulge in the supposition that it was not intended to wield the authority in this manner secured, for the pecuniary

advantage of the associates. And the direct and usual way in which that is accomplished, following out the common impulses of practical business men, is by the advancement of the prices of the commodities manufactured and sold, in the course of the business whose control may be in this way secured. When the opportunity to do that is provided, human selfishness is sure to turn it to a profitable account." Surely it cannot be successfully contended that the state has not the power to prevent the consummation of such wrongful motive, simply because, by so doing, it would impair the constitutional rights of any person, natural or artificial, to freely contract.

Summarizing all we have said herein: The lawmakers of this state, taking notice of a business practice known to all men, and which had grown in rapid strides during past years, until it was threatening the welfare and liberties of a free people by its tendency to create monopolies in the articles of commerce, thus leaving the consumers the helpless prey to the avarice of the holders of such monopolies, passed the law in question to cure the above-mentioned evil; the law is sufficient in form as a criminal statute, as it set out clearly the acts condemned as wrongful, and forbade the same by providing a penalty for the doing of such acts; it is also sufficient in form as a civil statute designed to declare a forfeiture of corporation franchises and licenses in case of misuse of such franchises and licenses by the doing of the wrong condemned; it provides a method of procedure to have such forfeiture adjudicated, practical and consonant with the end in view; it brings under the purview of the criminal provisions every person, partnership, and corporation in existence, and under the civil provisions every corporation, domestic and foreign, and is therefore free from any attempt at classification of persons covered thereby; its civil provisions are in no sense a penalty for the crime, but a provision directing the proper tribunal to determine whether the corporation had broken its contract with the state, and they therefore do not impose a greater punishment upon corporations than upon natural persons; it in no manner interferes with full freedom of contract, except in so far as is proper and necessary to prevent wrong to the state and its subjects.

The order of the trial court sustaining the demurrer in the civil case is affirmed, as is the judgment of said court and order denying a new trial in the criminal case.

Affirmed by the Supreme Court of the United States, December 2, 1912, 226 U. S. 157, 57 L. ed. —, 33 Sup. Ct. Rep. 66. 42 L.R.D.(N.S.)

## IOWA SUPREME COURT.

STATE OF IOWA, Appt.,

v.

FAIRMONT CREAMERY COMPANY OF NEBRASKA.

(153 Iowa, 702, 133 N. W. 895.)

### Constitutional law — special privileges — discrimination against particular trade.

1. A statute providing for the punishment only of persons who, in buying milk, cream, or butter fat for manufacture, or butter, eggs, or grain for sale or storage, discriminate between localities by paying a higher price in one than in another for the purpose of creating a monopoly or destroying the business of a competitor, does not unconstitutionally grant privileges and immunities to some classes of citizens which are withheld from others.

### Statute — title — sufficiency — amendment — change of scope.

2. A title, "an act to amend" a particular section of a law relating to unfair discrimination between localities in the buying of produce, is not insufficient to cover provisions relating to discrimination in dairy and farm products, because the original act was limited to petroleum products.

### Appeal — questions raised by appellee.

3. An accused cannot secure an affirmation of a ruling dismissing the indictment because of insufficiency upon appeal by the state, which attempts to support the constitutionality of the statute upon which it was founded, since he will not be directly affected by rulings upon the particular questions presented by the state.

(December 18, 1911.)

**A** PPEAL by the State from a judgment of the District Court for Buena Vista County dismissing an indictment charging defendant with unfair discrimination in the

*Note. — Forbidding the payment of a higher price for a commodity in a particular community than elsewhere, for the purpose of stifling competition.*

As to the constitutionality of statute forbidding the sale of a commodity in a particular locality at a lower rate than obtains elsewhere for the purpose of stifling competition, see the note to State v. Central Lumber Co. ante, 804.

But one case in addition to STATE v. FAIRMONT CREAMERY Co. has been found upon the precise point presented in the instant note: In State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, it was held that an act "to prevent unlawful discrimination in the sale of milk, cream, and butter fat" does not violate the equality provision of either the state or Federal Consti-

purchase of dairy products in violation of statute. Reversed.

Statement by Evans, J.:

The defendant was indicted in Buena Vista county, under the provisions of § 5028b, Code Supplement, as amended by chapter 222 of Acts 33d Gen. Assem. Upon motion of the defendant at the close of the state's evidence, the trial court dismissed the indictment and discharged the defendant. The state has appealed.

Mr. George Cosson, Attorney General, for the State:

The title to the act is sufficiently specific.

Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; State ex rel. Weir v. County Judge, 2 Iowa, 280; Morford v. Unger, 8 Iowa, 82;

tution as to special legislation. The court in reaching its conclusion that the classification adopted was not arbitrary, and that the act is therefore constitutional, said: "The classification in the act is limited to those engaged in the business of buying milk, cream, or butter fat for the purpose of manufacture, with the intention of creating a monopoly or destroying the business of a competitor. This by necessary implication excludes those engaged in the business of buying such commodities for any purpose other than for manufacture. The reasons urged in support of the claim that this classification is arbitrary are concisely stated by counsel for the defendant in these words: 'There is nothing peculiar about the common articles,—milk, cream, and butter fat,—either in the things themselves or in the manner in which they are "put upon the market," to justify a classification for them; nor is there any reason for a subdivision of such an arbitrary selection into those who buy and those who sell; and still further, there is not the slightest excuse for a subdivision separating those who buy for a certain purpose, in itself lawful, from those who buy for another purpose, equally as lawful.' If this be true, then the classification is an arbitrary one, and the act unconstitutional. There is, however, a strong presumption that there were reasons, arising from the volume and methods of the business of purchasing such commodities for manufacture, its extent, and the motives and facilities offered for creating a monopoly, which justified the legislature in making the classification it did. Such presumption must prevail, and the classification held to be a permissible one, unless it is manifest that there could have been no fair reasons therefor. Our consideration of the subject has led us to the conclusion that the business of buying milk, cream, and butter fat for the purpose of manufacture, when carried on by parties controlling ample capital, with large central plants and local purchasing points extending over wide territory, affords special facilities and motives for the creation of monopolies by the temporary maintenance 42 L.R.A. (N.S.)

Davis v. Woolnough, 9 Iowa, 104; Porter v. Thomson, 22 Iowa, 391; Martin v. Blatter, 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244, 6 Am. Crim. Rep. 148; Christie v. Life Indemnity & Invest. Co. 82 Iowa, 360, 48 N. W. 94; Iowa Sav. & L. Assn. v. Selby, 111 Iowa, 402, 82 N. W. 968; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902.

"The law does not prohibit the cautious advance of step by step," and if all within a class are subjected to like terms and conditions, it does not offend against the 14th Amendment of the Federal Constitution.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902; Williams v. Arkansas, 217

of artificial prices at competitive local points; and, further, that there is in this respect a substantial distinction between the purchase of milk, cream, and butter fat for manufacture, and their purchase for resale or consumption. The business of buying such commodities for resale or consumption is not one easily susceptible to monopolistic control. . . . The payment relatively of a higher price for milk, cream, and butter fat in one locality than in another is not forbidden by our statute; for it is only when such discrimination is made with the intention of creating a monopoly or destroying the business of a competitor."

And to the claim made that the subject of the act is not expressed in its title and that the act is invalid for that reason, the court said: "The argument in support of the claim is this: 'The act in question is "An Act to Prevent Unlawful Discrimination in the Sale of Milk, Cream, Butter Fat, and to Provide a Punishment for the Same." Nothing whatever is said in the title of this act about the purchase of, or business of, buying milk, cream, or butter fat for the purpose of manufacture, while the substance of the act provides and applies solely and only to those engaged in the business of buying milk, cream, or butter fat. Neither the business of selling nor the word "sale" is even suggested in the substance of the act.' It is sufficient if the title of an act is fairly suggestive of its subject, and every fair doubt should be resolved in favor of the sufficiency of the title. While the title of the act in question is not a model one, yet it is obviously sufficient within the rule stated, for it is fairly suggestive of the subject of the act. It is true that the subject expressed in the title is the prevention of discrimination in the sale of the commodities named, and that the subject dealt with in the body of the act is the prevention of discrimination in the purchase of the same commodities. But purchase and sale are correlative terms, and there can be no sale without a purchase; hence, if discrimination in the purchase of an article is prevented, there can be none in its sale."

E. M. S.

U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Noble State Bank v. Haskell, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Holden v. Hardy, 169 U. S. 397, 42 L. ed. 792, 18 Sup. Ct. Rep. 383; Otis v. Parker, 187 U. S. 668, 47 L. ed. 327, 23 Sup. Ct. Rep. 168; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66, 125 Fed. 121; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 553, 19 Sup. Ct. Rep. 281; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Western U. Teleg. Co. v. Commercial Milling Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A. (N.S.) 220, 31 Sup. Ct. Rep. 69, 21 Ann. Cas. 815; Kentucky Union Co. v. Kentucky, 219 U. S. 141, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; Griffith v. Kentucky, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Shelvin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 Sup. Ct. Rep. 663.

Mr. E. C. Edson also for the State.

Messrs. Faville & Whitney and Hainer & Smith, for appellee:

The title of the act is insufficient.

State v. Bristow, 131 Iowa, 664, 109 N. W. 199; Rex Lumber Co. v. Reed, 107 Iowa, 111, 77 N. W. 572; Beary v. Narrau, 113 La. 1034, 37 So. 961; State v. American Sugar Ref. Co. 106 La. 553, 31 So. 181; Dolese v. Pierce, 124 Ill. 140, 16 N. E. 218; Ryno v. State, 58 N. J. L. 238, 33 Atl. 219; Re Snyder, 108 Mich. 48, 65 N. W. 562; Johnson v. Asbury Park, 60 N. J. L. 427, 39 Atl. 693; Clark v. Wallace County, 54 Kan. 634, 39 Pac. 225; Lewis v. Dunne, 134 Cal. 291, 55 L.R.A. 833, 86 Am. St. Rep. 257, 66 Pac. 478.

The act is a violation of the 14th Amendment to the Federal Constitution and of 42 L.R.A. (N.S.)

the Constitution of Iowa, which guarantees equal protection of the law and prohibits class legislation.

Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; State v. Garbroski, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; State ex rel. Bump v. Omaha & C. B. R. & Bridge Co. 113 Iowa, 30, 52 L.R.A. 315, 86 Am. St. Rep. 357, 84 N. W. 983; Pacific Junction v. Dyer, 64 Iowa, 38, 19 N. W. 862; Connolly v. Union Sewer Pipe Co. 184 U. S. 540-562, 46 L. ed. 679-690, 22 Sup. Ct. Rep. 431; State v. Cudahy Packing Co. 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703; State v. Miksicek, 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; Re Grice, 79 Fed. 627; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; State ex rel. McCue v. Ramsey County, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; Darcy v. San Jose, 104 Cal. 642, 38 Pac. 500; Cincinnati v. Steinkamp, 54 Ohio St. 284, 43 N. E. 490; Chicago, M. & St. P. R. Co. v. Westby, — L.R.A. (N.S.) —, 102 C. C. A. 65, 178 Fed. 619; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; State v. Cadigan, 73 Vt. 245, 57 L.R.A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079.

Evans, J., delivered the opinion of the court:

The discharge of the defendant in the trial court is final and cannot be disturbed by us on this appeal. The state has taken an appeal for the purpose of obtaining a review of the holding of the trial court as to the constitutionality of the statute upon which the indictment is based. The statute in question purports to be an amendment to § 5028b of the Code Supplement, and is as follows: "Any person, firm, company, association, or corporation foreign or

domestic, doing business in the state of Iowa and engaged in the business of buying milk, cream, or butter fat for the purpose of manufacture, or of buying poultry, eggs, or grain for the purpose of sale or storage, that shall for the purpose of creating a monopoly or destroying the business of a competitor discriminate between different sections, localities, communities, cities, or towns of this state by purchasing such commodity or commodities at a higher price or rate in one section, locality, community, city, or town than is paid for the same commodity by said person, firm, company, association, or corporation in another section, locality, community, city, or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale, or storage, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful, but prices made to meet competition in such locality shall not be in violation of this act; and any person, firm, company, association, or corporation or any officer, agent, receiver, or member of any such firm, company, association, or corporation found guilty of unfair discrimination as defined herein, shall be punished as provided in § five thousand twenty-eight c (5028c) of the Supplement to the Code, 1907."

This statute was assailed in the court below as unconstitutional on two grounds, namely: (1) That it was in violation of §§ 1, 6, and 9 of article 1, and of § 30 of article 3, of the Constitution of Iowa, and of § 1 of the 14th Amendment to the Constitution of the United States. (2) That it was in violation of § 29, article 3 of the Constitution of Iowa, in that the subject of the act was not expressed in the title, as required by such section of the Constitution. The trial court sustained both grounds of the attack upon the constitutionality of the statute, and we are required to review such holding. The questions thus presented will be considered in the order stated.

Section 6 of article 1 of the Constitution of Iowa is as follows: "Laws uniform. Sec. 6. All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." We need not quote the other provisions of the Constitution above referred to, because all must be tested by the same considerations so far as they relate to the first ground of attack, 42 L.R.A. (N.S.)

and we shall have no need to discuss them separately.

It is urged by appellee that the act is discriminatory and arbitrary in its classification. Not only is the act limited in its application to the business of buying milk, cream, butter fat, poultry, eggs, and grain, but it is further limited to particular methods of pursuing the same. It operates upon the business of buying milk, cream, and butter fat only when such articles are bought for the purpose of manufacture, and it operates upon the business of buying poultry, eggs, and grain only when the same are bought "for the purpose of sale or storage." The argument directed against the statute is not without its cogency. If it were presented to a legislative committee, it might properly cause hesitation as to the particular form of the proposed legislation; but the courts have neither advisory nor veto powers over legislation as such. And even though the court may entertain great doubt as to the constitutionality of a particular legislative act, it may not interpose such mere doubt against the legislative prerogative. It is only when the violation of the Constitution is "clear and palpable" that the court is justified in rendering nugatory a legislative act.

To speak accurately, the constitutionality of an act is not dependent upon an affirmative holding to that effect by the court. It is the province of the court only to determine whether a legislative act in question is or is not "clearly, plainly, and palpably" unconstitutional. The legislative and executive departments of government are under the same responsibility to observe and protect the Constitution as is the judicial department. This responsibility is always present in the enactment by the legislature, and approval by the executive, of all legislation. The constitutionality of all proposed legislation must be determined in the first instance by such co-ordinate branches of the government. Within the zone of doubt and fair debate such determination is necessarily conclusive. For the court to enter that zone would of itself be an offense against the Constitution. But when a legislative act is clearly and unmistakably unconstitutional, then the court must so declare. By common consent such a declaration is not deemed as usurpation by the court, but as a protest against usurpation already done. In such a case the court furnishes the only means of authoritative protest possible to the body politic. The responsibility which thus falls upon the judicial branch is an extraordinary one. It is the duty of the court to meet it fully and fairly and without evasion. On the



other hand, it performs the duty with scrupulous regard for the prerogatives of the co-ordinate branches of the government and without lust of power. Hence the rule which obtained in an early day, and which has been adhered to strictly ever since, that the court will declare a law unconstitutional only when it is "clearly, plainly, and palpably so." See *Morrison v. Springer*, 15 Iowa, 304. In *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487, it was said that the case presented must be "clear, decisive, and unavoidable." To the same effect are *Stewart v. Polk County*, 30 Iowa, 14, 1 Am. Rep. 238; *Sisson v. Buena Vista County*, 128 Iowa, 464, 70 L.R.A. 440, 104 N. W. 454; *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902; *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912 B, 822.

In the last cited case we said: "It is well settled that the courts will not declare unconstitutional an enactment of the legislature unless it is clearly and palpably so. The power of the courts to nullify the act of a co-ordinate branch of the government is one of great importance. Its exercise has always been recognized by all the departments of government as essential to the well-being of the body politic. But the power is one which the courts exercise with great caution and with the highest regard for the prerogatives of the legislative department. With the wisdom or the advisability of the legislation the courts have nothing to do. That question must be argued before the legislative tribunal."

The previous utterances of this court in that regard are in harmony with those of the Supreme Court of the United States. *Booth v. Illinois*, 184 U. S. 431, 46 L. ed. 626, 22 Sup. Ct. Rep. 425; *Atkin v. Kansas*, 191 U. S. 223, 48 L. ed. 158, 24 Sup. Ct. Rep. 124; *Holden v. Hardy*, 169 U. S. 397, 42 L. ed. 792, 18 Sup. Ct. Rep. 383.

Obedient to this rule, we pass to a consideration of the main question.

Does the act in question offend against the Constitution in that its operation is not uniform, or in that it grants immunities to some classes of citizens which are withheld from others?

That the act constitutes special legislation, and that its practical application will be limited to comparatively few persons, must be conceded. But this is not sufficient to condemn. A very large part of all legislation is subject to this characterization. *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

It is urged by appellee that the classi-

fication adopted in the act is purely arbitrary and unreasonable, and that it rests upon no natural basis. No very definite rule has ever been laid down whereby the reasonableness of a statutory classification may be determined. In the very nature of the case no definite rule is possible for such purpose. Generally speaking, classification must be based upon substantial distinction which makes one class so different from another as to suggest the necessity of different legislation with respect to it. It must be natural and reasonable, and not arbitrary or capricious. The legislation must extend to and embrace accurately all persons who are or may be in like circumstances. For a collation of the utterances of the courts on this question, see *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912 B, 822.

The act under present consideration applies only to persons engaged in the business of buying milk, cream, poultry, eggs, and grain. Is this classification arbitrary and capricious, or does it arise fairly out of existing conditions? Has the statute fairly aimed at a particular evil, whether real or apparent, and is the classification as comprehensive as the supposed evil practice which is sought to be restrained? Professedly, the act undertakes to promote fair competition in the purchase of the commodities enumerated therein.

For the purpose of the consideration of the reasonableness of the classification in question, we must take note of matters of common knowledge and of common report. *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340, 33 L.R.A. (N.S.) 706, 108 N. W. 902; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

One of the great legislative problems of the day is to protect fair competition in the business world without unduly interfering with the freedom of contract. We may properly presume that the problem is greater in some lines of business than in others. In the purchase of commodities, the methods of business adopted are quite as various as the different commodities. Methods are adopted which are peculiar and limited to dealings in a certain commodity. Evil practices, therefore, may arise in the business methods pertaining to one commodity, which do not obtain at all in relation to other commodities. Practices may obtain which contravene no statute, and which, nevertheless, would be deemed as morally dishonest and detrimental to the public interest. If it be true that large corporations enter the creamery business and cover a large territory, including many purchasing

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points, and if it be true that they resort to methods which would be deemed morally dishonest and unjust in order to obtain a monopoly of the creamery business in the territory which they so occupy, then a situation is presented which fairly calls for legislative attention. The legislative problem thus presented is manifestly a difficult one. The resulting legislation may not be the best. But a legislative act which is directed against such particular evil ought not, for that reason alone, to be regarded as capricious and arbitrary in its classification. The particular methods which are condemned by the legislative act under consideration are set forth therein. It is quite manifest that a company sufficiently large in its capital and in the scope of its business could obtain a monopoly for itself in what ever territory it chose, by adopting the methods which are enumerated and prohibited in the statute. The temporary maintenance of artificial prices for the sole purpose of destroying a weaker competitor and creating a monopoly is one of the modern evil inventions. All that is required for its sure success is that there be great inequality of financial resources in favor of the offending party. A multitude of people buy milk and cream for immediate consumption. Comparatively few buy milk and cream "for the purpose of manufacture." To the multitude who buy for immediate consumption, a monopoly would be quite impossible, and its attempt quite absurd. But those who buy milk and cream "for the purpose of manufacture" sustain a distinctly different relation to the trade and to the community in which they operate. The magnitude of their operations is limited only by the magnitude of their resources. The motive to monopolize is present, as well as the ability to reap its fruits when acquired. In the nature of the case, the discriminations which are condemned in the legislative act are practicable as a practice only to those who engage in the business on a large scale. We are impressed, therefore, that the classification adopted is one which arises quite naturally, and that it rests upon a substantial and practical distinction. Substantially the same reasoning is applicable to those persons who "buy poultry, eggs, and grain for storage." The argument may require modification in its detailed application to the latter class; but we will not dwell longer upon it.

The Constitution was intended to announce certain basic principles to serve as the perpetual foundation of the state. It was not intended to be a limitation upon its healthful development, nor to be an obstruction to its progress. New days bring new

problems. Legislation must meet these problems as they come; otherwise our plan of government must prove inadequate. Manifestly, we ought not to be swift to adopt such a technical or strained construction of the Constitution as would unduly impair the efficiency of the legislature to meet its unavoidable responsibilities.

Turning to our own previous cases, great liberality has always been indulged in the matter of classification. In *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338, the rule is stated as follows: "These laws are general and uniform, not because they operate upon every person in the state, . . . but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation."

From *McGuire v. Chicago, B. & Q. R. Co.* supra, we quote as follows: "But the reasonable classification of persons for the purposes of legislation according to occupation, business, or other circumstances, by which one class or portion of the people is differentiated from other portions or classes, has often been held not to be a violation of this constitutional guaranty. The mere fact that legislation is special, and made to apply to certain persons and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions."

To the same effect is *Hubbell v. Higgins*, supra. *Shaw v. Marshalltown*, 131 Iowa, 128, 10 L.R.A. (N.S.) 825, 104 N. W. 1121, 9 Ann. Cas. 1039; *Mumford v. Chicago, R. I. & P. R. Co.* 128 Iowa, 685, 104 N. W. 1135. These cases are in harmony with the overwhelming weight of other authority. No court, perhaps, has spoken more frequently upon this particular subject than the Supreme Court of the United States. Its utterances are quite conclusive on the contention that the act under consideration was a violation of the 14th Amendment to the Constitution of the United States. From *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, we quote as follows: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless

the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

From *Carroll v. Greenwich Ins. Co.* 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66, a case involving an Iowa statute, we quote as follows: "In view of these cases further discussion is unnecessary; but we will add a few words. While we need not affirm that in no instance could a distinction be taken, ordinarily, if an act of Congress is valid under the 5th Amendment, it would be hard to say that a state law in like terms was void under the 14th. . . . Many state laws which limit the freedom of contract have been sustained by this court, and therefore an objection to this law on the general ground that it limits that freedom cannot be upheld. . . . At the argument before us more special reasons were assigned. It was pressed that there is no justification for the particular selection of fire insurance companies for the prohibitions discussed. . . . If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis v. Parker*, 187 U. S. 606, 610, 611, 47 L. ed. 323, 23 Sup. Ct. Rep. 168. And if this be true, then, in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what legislatures have approved. If the legislature of the state of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662. See also *Missouri P. R. Co. v. Mackey*, 127 U. S. 205 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; 42 L.R.A.(N.S.)

*Home L. Ins. Co. v. Fisher*, 188 U. S. 726, 727, 47 L. ed. 667, 23 Sup. Ct. Rep. 380." See also *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; *Western U. Tele. Co. v. Commercial Milling Co.* 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; *Griffith v. Connecticut*, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; *Kentucky Union Co. v. Kentucky*, 219 U. S. 141, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; *Williams v. Arkansas*, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865. See also *State ex rel. Young v. Standard Oil Co.* 111 Minn. 85, 126 N. W. 527. Appellee relies upon *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. That was a case involving a legislative act wherein certain persons or classes were expressly exempted from its provisions. The legislation was held invalid because of such exemption. If there is any inconsistency between such holding and that of the later cases of the same court, such fact does not aid the position of the appellee; the later cases being clearly against its contention. It is our conclusion at this point that it cannot be said that the act under consideration is a clear and palpable violation of the constitutional provisions heretofore specified.

2. It is also urged that the act is unconstitutional as in violation of § 29, art. 3, of the Constitution of Iowa. This section provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." The contention here is that the title of the act fails to express the subject. The act in question is concededly amendatory. The title to the original act (chapter 169, 31st Gen. Assem.) is as follows: "An Act to Prohibit Unfair Commercial Discrimination between Different Sections, Communities, or Localities, or Unfair Competition, and Providing Penalties Therefor." The title to the amendatory act under consideration is as follows: "An Act to Amend the Law as It Appears in Section Five Thousand Twenty-eight b (5028b) of the Supplement to the Code, 1907, Relating to Unfair Discrimination between Different Sections, Communities, or Localities, Defining the Same and Providing Penalties for Persons Found Guilty thereof." It is argued that the original act referred to "petroleum and its products" as the only commodity affected thereby, and that there is nothing in the title to the amendatory

act to indicate in any way that other commodities would be included. This argument rests upon the assumption that the commodities referred to in the act constitute its subject; whereas the contention of the appellant is that the essential subject of the act was "commercial discrimination," etc. It is doubtless true that both entered into the subject-matter of the legislation. Appellant contends, however, that the latter is the more comprehensive, and that the former is more in the nature of detail.

It is not necessary that the details of the subject-matter be set forth in the title. It is sufficient if the title affords a fair "key" to the contents of the act. *Sisson v. Buena Vista County*, 128 Iowa, 464, 70 L.R.A. 440, 104 N. W. 454; *State v. Edmunds*, 127 Iowa, 339, 101 N. W. 431. Appellee relies upon *State v. Bristow*, 131 Iowa, 664, 109 N. W. 199, wherein the title was held fatally defective. The title in that case was "An Act to Repeal the Law as It Appears in Section Thirteen Hundred and Forty-seven 'a' (1347-a) of the Supplement of the Code Relating to the Vocation of Peddlers and to Enact a Substitute Therefor." Acts 30th Gen. Assem. chap. 48. It will be noted that the legislation involved in that case was to repeal and to substitute. The title stated the subject of the law to be repealed, but was entirely silent as to the subject of the proposed substitute. In the case before us a subject is stated in the title. The question of dispute is whether the subject so stated is appropriate to the body of the bill. The question is not wholly free from doubt. It is our conclusion that the title is sufficient for the purpose of an amendatory act to forbid our interference on the ground of unconstitutionality.

The insufficiency of the indictment was laid as a ground of dismissal in the court below, and was sustained by the ruling of the court. This ground is still urged by appellee in support of the ruling of the court. The state is the appellant. The defendant cannot be affected directly by a reversal. The purpose of the appeal by the state is to obtain a review on particular questions of law. In such a case the state may select the rulings of the trial court which it desires to present for review. In its opening argument, the only questions pressed for our consideration by the state are those relating to the constitutionality of the legislative act. We will not, therefore, consider the question of the sufficiency of this particular indictment.

Appellee filed a motion to dismiss the appeal, and such motion was submitted with the case. Since the filing of the motion, the grounds thereof have been cured by amend- 42 L.R.A. (N.S.).

ment to the abstract. It is therefore overruled.

In holding the statute to be unconstitutional, we think the trial court erred. Its judgment must therefore be reversed.

Petition for rehearing denied.

## CONNECTICUT SUPREME COURT OF ERRORS.

JOHN S. BRADLEY, Appt.,  
v.

HERBERT W. OVIATT.

(86 Conn. 63, 84 Atl. 321.)

**Fraud — stating price of property — liability.**

1. One employed to sell property at the best price obtainable is not guilty of fraud in stating that a named price is the lowest which the owner will take for the property, if he does not know at the time that a lower price would be acceptable, although after the sale he settles with the owner at a lower figure.

**Same — misrepresentations — nonreliance upon — effect.**

2. A purchaser of real estate cannot recover damages from the broker for fraudulent representations as to its value, if he makes a personal investigation and relies upon his own judgment with respect to that matter.

(July 26, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for New Haven County in defendant's favor in an action brought to recover damages for alleged false representations in connection with a sale of real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Newton, Church, & Hewitt, for appellant:

The damage to plaintiff is the difference between what he paid, and what he would have paid if defendant had truly told him what he asked for,—the bank's lowest price; or in other words, the price the bank agreed to receive.

*Sutherland, Damages*, 1165; *Grant v. Hardy*, 33 Wis. 668; *Bergeron v. Miles*, 88 Wis. 397, 43 Am. St. Rep. 911, 60 N. W. 783; *Johnson v. Gavitt*, 114 Iowa, 183, 86 N. W.

**Note.**—As to liability of real estate broker who overstates to the purchaser the owner's minimum price, see *Ripy v. Cronan*, 21 L.R.A. (N.S.) 305, and note. For false statement as to cost, selling or market price of property, or offers therefor, as fraud, see note to *Kohl v. Taylor*, 35 L.R.A. (N. S.) 175.

256; Kice v. Porter, 21 Ky. L. Rep. 871, 53 S. W. 285.

Mr. Carl A. Mears, for appellee:

A statement by an agent that a certain price is his principal's price, even if untrue, is not actionable.

Tiffany, Sales, 114; 20 Cyc. 17; Kimball v. Bangs, 144 Mass. 324, 11 N. E. 113; Jackson v. Collins, 39 Mich. 557.

Roraback, J., delivered the opinion of the court:

The complaint describes two distinct causes of action in two counts. The first count alleges that the defendant made false representations to the plaintiff in connection with the sale of land in West Haven, hereinafter called "the first piece." The second count sets forth an alleged cause of action of a similar character, founded upon the sale of another tract of land in West Haven, designated as "the second piece." These sales were made on different dates.

The facts of the case, as far as necessary to present the questions involved, are as follows: In September, 1909, the plaintiff, a retired business man, was well acquainted with the defendant and had confidence in his statements. The defendant was a real estate broker in the city of New Haven. This land, which was owned by the Union Savings Bank of Danbury, was placed with the defendant for sale "at the best price obtainable." The ordinary commission for the sale of property of this kind was 5 per cent. The plaintiff made a careful examination of the property, and was told by the defendant that \$5,000 was the price of the first piece. Later the plaintiff asked the defendant if \$5,000 was the lowest price for the first piece, and the defendant said it was. At that time the lowest price had not been fixed by the owner. The fair market value of the first piece at this time was about \$4,500. It was in fact Oviatt's opinion that he could get \$5,000 for the property. The broker then wired the bank that the first piece had been sold for \$4,000 net to the bank. The bank ratified the sale, and it was consummated on these terms. Oviatt retained \$1,000 as his commission in connection with this sale. In the meantime, the plaintiff was considering the purchase of the second piece at \$7,000. The defendant, without communicating with the bank, informed the plaintiff that the lowest price for this property was \$7,000. The plaintiff then offered \$7,000 for the second piece, and the defendant accepted the offer. The broker then informed the bank that he had sold the second piece for \$5,750 net. The bank accepted the offer, and the defendant retained for his own use \$1,250 on account of the sale of the second piece.

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The market value of the second piece in 1909 was about \$6,000. The plaintiff first learned the amount the defendant had personally received out of these sales in the fall of 1911. The bank at this time first ascertained the facts as to these transactions. Oviatt believed that the plaintiff would pay \$7,000 for the second piece, and did not ask the bank to state its lowest price, but stated to Bradley that \$7,000 was the bank's lowest price. "Mr. Bradley had ample time and opportunity to examine the premises, and did examine them thoroughly; and he had ample time and opportunity to examine as to their market value. He was an experienced and successful business man, and accustomed to dealing in real estate with a view to reselling it, and owned some real estate in West Haven; and he relied upon his own judgment as to the value of the land, and believed it was worth what he paid, basing his judgment on such investigation as he cared to make."

The alleged false representations set forth in the first count upon which the plaintiff relies were as follows: "The representations that a cash offer of \$4,750 had been made for said land, and that there was a ready sale for said land at an advance over \$5,000, and that the lowest price of said the Union Savings Bank of Danbury for said land was \$5,000, were each of them untrue, and were known to the defendant to be untrue, were made as statements of fact, and were made with intent to deceive plaintiff, and to induce him to purchase said land at the price of \$5,000; and plaintiff was thereby induced to act to his injury, as hereinafter appears."

In the second count the plaintiff in part based his cause of action upon the following allegations: "Said representations that the lowest price at which said the Union Savings Bank of Danbury would sell said land was \$7,000, and that there was a ready sale of said land at an advance over \$7,000, were each of them untrue, and were known to the defendant to be untrue, were made as statements of fact, and were made with intent to deceive plaintiff, and to induce him to purchase said property at the price of \$7,000; and plaintiff was thereby induced to act to his injury."

None of the specifications of fraud, as set forth in the complaint, are found to be true, except the one relating to the lowest market price that the bank would take for its property.

Upon the facts found, the trial court held that the plaintiff had no cause of action against the defendant. The plaintiff appeals. There is but one question fairly presented by the appeal, which relates to

the representations set forth in both counts of the complaint as to the lowest prices which the bank would take for the two pieces of land.

To justify an allegation of fraud in making these statements, it was necessary for the plaintiff to show that the defendant had knowledge at the time that these statements were made that they were untrue. From the facts and circumstances appearing in the record, it is apparent that such knowledge was impossible. The defendant did not know, at the time the representations were made, the ultimatum of the bank as to the "lowest prices" it would take. This could not be ascertained until further investigation. Until then, statements made by the defendant would have been entirely speculative and conjectural. His instructions were to sell the property "at the best price obtainable." As an agent of the bank, it was his duty to get all that he could for the property. If, by subsequent developments, it appeared that he obtained the best prices obtainable, and then deceived the bank and wrongfully retained a portion of the price, this is a matter which concerned the bank, and not the plaintiff.

It is plain that this property would not have been worth any more if the alleged representations of the defendant as to the lowest price which the bank would take for its property were true. The representations can only be taken as expressions of the vendor's estimate of the value of its property. The law does not fasten responsibility upon one for expression of opinion as to matters which, in their nature, are contingent and uncertain. *People's Sav. Bank v. James*, 178 Mass. 322, 323, 59 N. E. 807; *Randall v. Farnum*, 52 Vt. 539, 542.

The essential elements required to sustain an action for deceit and false representation are that the representation was made as a statement of fact; that it was untrue, and known to be untrue by the party making it; that it was made for the purpose of inducing the other party to act upon it; and that the party to whom the representation was made was in fact induced thereby to act to his injury. All of these ingredients must be found to exist; and the absence of any one of them is fatal to a recovery. *Barnes v. Starr*, 64 Conn. 136, 150, 28 Atl. 980.

The superior court, after finding specifically as to the various facts surrounding these sales, in substance finds that the plaintiff did not rely upon the statements of the defendant in making the purchase of this real estate, but "relied upon his own judgment as to the value of the land, and 42 L.R.A. (N.S.)

believed it was worth what he paid, basing his judgment on such investigations as he cared to make." Under such circumstances, the defendant's alleged deceptions never influenced the plaintiff to purchase.

There is no error. The other Judges concur.

## KANSAS SUPREME COURT.

ALICE LEHNEN

v.

E. J. HINES et al., Appts.

](— Kan. —, 127 Pac. 612.)

**Trial — special interrogatories — time for presentation.**

1. It is competent for a court to make reasonable rules regulating the time within which parties desiring the submission of special interrogatories shall present them to the court. Ordinarily they should be presented early enough to enable the court to revise and the opposing party to examine them before the jury is charged or the argument by counsel is begun; and under the circumstances of the present case it is held that the refusal of the court to submit the special interrogatories when they were requested was not an abuse of discretion or prejudicial error.

**Innkeeper — correlative duties.**

2. Where a person is received in a hotel as a guest, the law implies a contract between the proprietor and the guest that the proprietor, by himself and his servants and agents, will exercise reasonable care for the safety, convenience, and comfort of the guest, and that the guest, on his part, will observe the recognized proprieties of life and refrain from any boisterous or other conduct offensive to other guests, or which would bring the hotel into disrepute.

Headnotes by JOHNSTON, Ch. J.

**Note. — Innkeepers: liability for rejecting guests.**

As to liability of innkeeper or restaurant keeper for assault by his servant upon a patron, see notes in 69 L.R.A. 642, and 12 L.R.A. (N.S.) 1155.

As to right of innkeeper to transfer guest from the room to which he was assigned, see *Hervey v. Hart*, 9 L.R.A. (N.S.) 213, and note thereto.

As to constitutional right to equal accommodation, see note in 14 L.R.A. 579.

As to duty of innkeeper to receive and entertain traveler, see note to *Browne v. Brandt*, 2 B. R. C. 684.

An innkeeper may lawfully eject a guest for refusal to pay his bill upon reasonable demand. *Doyle v. Walker*, 26 U. C. Q. B. 502.

And one who has been received as a traveler or guest may be required to leave upon reasonable notice where he has lost the character of traveler by becoming a resi-

**Same — acts of servants — liability.**

3. A hotel keeper is responsible to a guest for the acts of his servants in charge of a hotel, whether the particular acts were expressly authorized or not, providing the servant was acting in behalf of the proprietor at the time, and within the general scope of his employment.

**Same — arrest of guest — liability.**

4. A night clerk left in charge of a hotel, with authority to receive guests, assign them to rooms, preserve order, and generally look after the hotel during the night, has the implied authority to eject guests from their rooms in order to preserve peace and order; and if the clerk undertakes to eject a guest from his or her room, and uses force and violent language, and summons the police, and directs the police to make an arrest and place the guest in jail, such

action on the part of the night clerk will be held in law to be the act of the employer of such clerk, or the proprietor of the hotel, and for the right or wrong of which the hotel proprietor must be held responsible.

**Damages — wrongful arrest — excess.**

5. Under the circumstances of the case, it cannot be held that an award of \$4,000 as damages is so excessive as to indicate passion or prejudice of the jury.

(November 9, 1912.)

**A** PPEAL by defendants from a judgment of the District Court for Montgomery County in plaintiff's favor in an action brought to recover damages for personal

dent. *Lamond v. Richard*, [1897] 1 Q. B. 541, 66 L. J. Q. B. N. S. 315, 76 L. T. N. S. 141, 61 J. P. 260, 45 Week. Rep. 289; *Whiting v. Mills*, 7 U. C. Q. B. 450 (which held, however, that the mere fact that one who had been received as a traveler remained six weeks, paying board by the week two days in advance, does not show that the relation of guest has terminated, so that the innkeeper can abruptly dismiss him without cause,—though it was said that if he had rented a certain apartment as a tenant for a certain term, he would have been no longer a guest).

So, a guest may lawfully be ejected because his conduct or condition is such as to annoy the other guests, where he refuses upon request to leave. *Howell v. Jackson*, 6 Car. & P. 723 (loud noises, riotous conduct); *Holden v. Carraher*, 195 Mass. 392, 81 N. E. 261, 11 Ann. Cas. 724; *McHugh v. Schlosser*, 159 Pa. 480, 23 L.R.A. 574, 39 Am. St. Rep. 699, 28 Atl. 291 (*obiter*) (voluntary intoxication); *State v. Steele*, 106 N. C. 766, 8 L.R.A. 516, 19 Am. St. Rep. 573, 11 S. E. 478; *Jencks v. Coleman*, 2 Sumn. 224, Fed. Cas. No. 7,258 (*obiter*) (by soliciting custom); *Pidgeon v. Legge*, 5 Week. Rep. 649 (unfit condition to be in an inn,—as a chimney sweeper in his working clothes).

But where he is sick and the disturbances caused by him were due to his sickness, he must be treated with the consideration due to a sick man. *McHugh v. Schlosser*, 159 Pa. 480, 23 L.R.A. 574, 39 Am. St. Rep. 699, 28 Atl. 291 (which held that an innkeeper is liable for the death of a person who, while sick, is driven out into the storm, without adequate covering, and left for about half an hour in a stream of melting ice and snow, where he falls from inability to stand on his feet, if it was reasonable to suppose that death might follow such sudden exposure in his condition).

And where a guest is taken ill with a contagious disease he may be removed, in a proper manner and at an appropriate hour, to a hospital or place of safety, after notice to leave, if it can be done without 42 L.R.A. (N.S.)

endangering the life of the guest; but the innkeeper may be liable for negligence or for the abuse of authority, if he exercises this right in an unbecoming manner or at an improper time. *Levy v. Corey*, 1 N. Y. City Ct. Rep. Supp. 57.

An innkeeper is liable in compensatory damages to a woman guest in case his servant forcibly enters her room against her protest when she is in scant attire, and, in the presence of a stranger, accuses her of immoral conduct, and orders her and her brother, who is at the time in the room, to depart from the inn. *DeWolf v. Ford*, 193 N. Y. 397, 21 L.R.A. (N.S.) 860, 127 Am. St. Rep. 969, 86 N. E. 527. The court said: "As a guest for hire in the inn of the defendants, the plaintiff was entitled to the exclusive and peaceable possession of the room assigned to her, subject only to such proper intrusions by the defendants and their servants as may have been necessary in the regular and orderly conduct of the inn, or under some commanding emergency." After announcing the rule as to entry into the room of a guest in case of an emergency, the court continued: "But for all other purposes, their occasional or regular entries into the plaintiff's room were subject to the fundamental consideration that it was, for the time being, her room, and that she was entitled to respectful and considerate treatment at their hands. Such treatment necessarily implied an observance by the defendants of the proprieties as to the time and manner of entering the plaintiff's room, and of civil deportment towards her when such an entry was either necessary or proper."

Exemplary damages may be recovered by a guest where he has been improperly ejected with abusive and insulting language. *McCarthy v. Niskern*, 22 Minn. 90.

And in *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586, it was held that a guest who has been wrongfully ejected may recover exemplary damages where it is shown that he has also suffered actual damages, as where he was wrongfully debarred from his room and denied access to and use of his personal effects. A. L. R.

injuries sustained by her while a guest at defendant's hotel. Affirmed.

The facts are stated in the opinion.

Messrs. Charles D. Welch and S. H. Piper, for appellants:

Defendants were not liable for the act of their servant.

Cooley, Torts, 535 et seq.; Clancy v. Barker, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 163; Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148; Patrick v. Springs, 154 N. C. 270, 70 S. E. 395, Ann. Cas. 1912 A, 1209; Goodwin v. Greenwood, 16 Okla. 489, 85 Pac. 1115; Chase v. Knabel, 46 Wash. 484, 12 L.R.A.(N.S.) 1155, 90 Pac. 642; Creely v. Missouri & K. Teleph. Co. 84 Kan. 21, 33 L.R.A.(N.S.) 328, 113 Pac. 386; Hudson v. Missouri, K. & T. R. Co. 16 Kan. 475; Mirick v. Suchy, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 386; Ritchie v. Waller, 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29; Stephenson v. Southern P. Co. 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234.

The damages awarded plaintiff were given under the influence of passion and prejudice.

Chicago, R. I. & P. R. Co. v. Frazier, 66 Kan. 427, 71 Pac. 831; Lonergan v. Small, 81 Kan. 56, 25 L.R.A.(N.S.) 976, 105 Pac. 27; Snyder v. Wheeler, 81 Kan. 508, 106 Pac. 462; Arnold v. Atchison, T. & S. F. R. Co. 81 Kan. 402, 105 Pac. 541; Sundgren v. Stevens, 86 Kan. 158, 39 L.R.A.(N.S.) 487, 119 Pac. 322; Troyer v. Beedy, 79 Kan. 502, 100 Pac. 476; Hurt v. Illinois C. R. Co. 145 Ky. 475, 140 S. W. 650; Atchison, T. & S. F. R. Co. v. Rowe, 56 Kan. 412, 43 Pac. 683.

A party is entitled, as a matter of right, to have submitted to the jury special questions, where the fact is involved in the issues and is material to the controversy; and the trial court has no discretion in the matter, but must submit the questions and require the jury to answer.

Bent v. Philbrick, 16 Kan. 190; Wichita & W. R. Co. v. Feckheimer, 36 Kan. 40, 12 Pac. 362; Topeka v. Boutwell, 53 Kan. 29, 27 L.R.A. 593, 35 Pac. 819.

Messrs. W. H. Sproul, W. N. Banks, and Monroe, Roark, & Taylor, for appellee:

Defendants were liable for the act of their servant.

Creely v. Missouri & K. Teleph. Co. 84 Kan. 21, 33 L.R.A.(N.S.) 328, 113 Pac. 386; 7 Thomp. Neg. § 6674; Clancy v. Barker, 71 Neb. 83, 69 L.R.A. 642, 115 Am. St. Rep. 559, 98 N. W. 440, 103 N. W. 446, 8 Ann. Cas. 682; Rommel v. Schambacher, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779; Pittsburg & C. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Wood, Mast. & S. 42 L.R.A.(N.S.)

2d ed. § 309; Beale, Innkeepers and Hotels, § 172; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; De Wolf v. Ford, 193 N. Y. 397, 21 L.R.A.(N.S.) 860, 127 Am. St. Rep. 969, 86 N. E. 527; Stewart v. Brooklyn & C. T. R. Co. 90 N. Y. 588, 43 Am. Rep. 185; Campbell v. Pullman Palace-Car Co. 42 Fed. 484; Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 720, 29 L.R.A. 465, 41 Pac. 952.

The verdict for \$4,000 was not excessive.

Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12; Newell, Malicious Prosecution, p. 545; Gilbert v. Burtenshaw, Cowp. pt. 1, p. 230; Drumm v. Cessnum, 61 Kan. 467, 59 Pac. 1078; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Gulf, C. & S. F. R. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744; Clarke v. American Dock & Improv. Co. 35 Fed. 478; Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127; Fotheringham v. Adams Exp. Co. 1 L.R.A. 474, 36 Fed. 252; Harris v. Louisville, N. O. & T. R. Co. 35 Fed. 116; Wheeler & W. Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; Atchison, T. & S. F. R. Co. v. Henry, 55 Kan. 720, 29 L.R.A. 465, 41 Pac. 952.

The court did not err in refusing to submit to the jury special questions, the request having been made fifteen hours after the expiration of the time fixed therefor by the rule of the court.

Le Roy & W. R. Co. v. Crum, 39 Kan. 642, 18 Pac. 944; Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; Missouri P. R. Co. v. Holley, 30 Kan. 465, 1 Pac. 130, 554; Elliott, Gen. Pr. § 913; Ollam v. Shaw, 27 Ind. 388; Malady v. McEnary, 30 Ind. 273; Redman v. State, 28 Ind. 205; Topeka v. Boutwell, 53 Kan. 29, 27 L.R.A. 593, 35 Pac. 819.

Johnston, Ch. J., delivered the opinion of the court:

This was an action brought by the appellee, Alice Lehnen, against the appellants, E. J. Hines & Company, to recover damages for injuries sustained by her while she was a guest at the Mecca, the appellants' hotel, at Coffeyville, Kansas. She alleged and offered proof tending to show that she came as a guest to appellants' hotel on the evening of August 27, 1910, when she registered and was assigned to a room, which she and her companion, Miss Edna Smith, occupied, and that at about 2 or 3 o'clock on the following morning, when she and her companion were asleep in the room, a knock was heard at her door, and upon arising she found Atwood, the clerk then in charge of the hotel, there, asking to be admitted to the room, and that when ad-



mission was refused he forced the opening of the door and entered the room in an intoxicated condition, and that when she tried to reach the manager of the hotel by telephone to report the intrusion he became angry and called a policeman to arrest the appellee and to eject her from the hotel; that she protested and declined to leave the hotel, and insisted on finding the manager and invoking protection from him; that Atwood called appellee vile names, and when she refused to leave the hotel struck her several blows on the face and knocked her against the wall. There were averments to the effect that she and Miss Smith were arrested in their night clothes, and that Atwood and the officer undertook to take them out of the hotel before they were dressed; and that when appellee insisted on dressing the officer refused to step outside the room, and remained there while they dressed themselves. During the controversy appellee says she went to the manager's room and reported the invasion of her own room and asked for protection, but that he did not respond for some time and when he came to her room he declined to interfere in their behalf and directed the officer to take them out of the hotel to the jail. They were taken to the jail, which, it is claimed, was in an unsanitary condition, and incarcerated with negro women, where they were held for a day or more before they could secure a release. She alleged that as a consequence of the ill treatment and injuries she suffered damages in the sum of \$10,000. The appellants alleged and claimed that the appellee and her companion were drinking intoxicating liquors and smoking cigarettes in the room, and were making a boisterous noise likely to disturb the other guests of the hotel; and that Atwood, without authority from the appellants, undertook to quiet her, and failing to accomplish it called the policemen, who on their own responsibility arrested the parties and placed them in jail. At the trial she recovered a judgment of \$4,000 against appellants, from which they appeal and assign numerous errors.

Although there is complaint that the allegations of the petition are indefinite, and also of the refusal of the court to grant a continuance of the case when it was amended two days before the trial by changing the name of the plaintiff from Alice Burles to Alice Lehnem, we find nothing substantial in either objection. The petition was sufficiently definite, and the amendment as to the name was not so material as to require a continuance of the cause. The limitation on the cross-examination of appellee, of which complaint is made, is not a good ground for reversal of the judgment.

There may be some ground for complaint of the testimony of what happened at the Carl-Leon Hotel in Independence; but it appears that the greater part of it was finally stricken out by the court. Appellee and Miss Smith first went to the Carl-Leon Hotel, conducted by appellants at Independence; and in the course of the trial appellee was permitted to testify that, after going to her room in that hotel, a porter came into the room and inquired if they had noticed the white-haired gentleman in the lobby when they entered the hotel. Appellee replied that she had not, and asked the reason for the inquiry. The porter replied that the person referred to was the proprietor of the hotel, and was quite a ladies' man, and had his eyes on appellee and Miss Smith. Appellee stated that this inquiry gave her offense, and she paid their bill and left the hotel, going to the Mecca, at Coffeyville. In reply to a question whether Mr. Hines had not tried to induce them to return to the Carl-Leon that night, she stated that Mr. Hines did not, but his clerk did follow them to the station and asked them to come back, saying that Mr. Hines would not harm them. Some of the challenged testimony was received without objection, and the only objection to a part of it was that it was hearsay; but in the end the principal part of it was stricken out by the court. Under the circumstances the rulings are not deemed to be material errors, and only such errors warrant a reversal.

Error was assigned on the refusal of the court to submit fifty-two special questions which appellants requested, and which the court refused, because the request came too late. There is a rule in force in that district, with which counsel was familiar, which provides that parties who desire the submission of special questions to the jury shall present them to the court as soon as the testimony is concluded. In this case the testimony was concluded at 6 o'clock on a certain day, and the judge then announced a meeting with counsel at 8 P. M. of that day, when he would submit to counsel for the parties the instructions he proposed to give to the jury. At that hour counsel met with the judge, and the proposed instructions were examined, discussed, and certain modifications were suggested, which the court took under advisement until the following morning. There was no request for the submission of special questions during this time, nor even when the court convened at 9 o'clock the next morning. At the convening of court, rulings were made on requests for and objections to proposed instructions, and then the charge was read to the jury. After the court had instructed the jury, and counsel

were about to proceed with their argument, appellants requested the submission of special questions of fact in writing; but the court refused to stop the proceedings for that purpose, holding that the request had not been made in good time.

It is competent for courts to make and enforce reasonable rules regulating the practice in cases pending before them. The rules must, of course, harmonize with statutory provisions, and the times fixed by statute within which steps are to be taken cannot be shortened by rules. The statute (Civ. Code, § 294 [Gen. Stat. 1909, § 5888]) does not expressly provide when the request for special findings shall be made; and, in the absence of such provision, a rule is not unreasonable which requires those desiring special findings to make application for them before the argument is begun. In *Wilcox v. Byington*, 36 Kan. 212, 12 Pac. 826, a case tried without a jury, it was said that the general practice in that class of cases was to request findings just before or at the close of the argument. In *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662, it was held that "the district courts have authority to make necessary and reasonable rules governing the transaction of business therein; and a rule requiring that parties who desire the court to state in writing its findings of fact separately from its conclusions of law shall request the same at the commencement of the trial is not unreasonable or illegal." Syllabus, ¶ 4.

In the recent case of *Marquis v. Ireland*, 86 Kan. 416, at page 419, 121 Pac. 486, which was tried by the court alone, it was said that "it would seem that in fairness to the trial court the request ought to be made before the argument is begun, and, indeed, before the evidence is introduced, in order that attention may be given to this aspect of the matter as the evidence goes in."

It is quite important, it would seem, that the special interrogatories should be presented early enough, so that the court might have the opportunity to revise and the opposing party to examine them before the jury is charged or the argument by counsel is begun. Some of the questions submitted were important and might well have been submitted, even at that late time; but that was a matter within the discretion of the court, and its refusal to stop the proceedings at the time the request was made and enter upon the task of revising fifty-two special questions, thus unnecessarily delaying the trial, cannot be regarded as an abuse of discretion.

The principal dispute between the parties is in regard to the duty of innkeepers towards their guests, and their liability for 42 L.R.A. (N.S.)

the wilful misconduct of their servants. These questions are raised by the demurrer to the petition of appellee, and also by the rulings of the court in instructing the jury. It is insisted that the action of Atwood, the clerk of the hotel, in entering the room of appellee and in assaulting her, was not taken in the performance of any duty which he owed to appellants, and that appellants cannot be held as insurers of the safety of their guests as against the wilful acts of Atwood, who, they claim, was acting for himself alone, and to serve his own purposes. It is conceded that appellants were proprietors of the hotel; that appellee was registered there as a guest and had been assigned to the room which she occupied; that Atwood was left in charge of the hotel on the night in question; and that, among other things, he was authorized to "room guests" and keep order. It was well established by the evidence that, while clothed with this authority, he entered appellee's room, charged her with being disorderly and unworthy of hospitality, called her vile names, ordered her to leave the hotel, and that when she refused to leave he assaulted her, beat her, and then caused her to be arrested and taken to jail. Appellants insist, however, that by the instructions they were virtually held to be insurers of the safety of the guest against the assault and wilful misconduct of their servant, while acting outside the scope of his employment. It is evident that the court did not try the case upon that theory. In defining the duty of a hotel keeper, the court, in effect, instructed the jury that when a person is received in a hotel as a guest the law implies a contract between the proprietor and the guest that the proprietor, by himself and through his servants and agents, will exercise reasonable care for the safety and comfort of the guest, and that the guest, on her part, will act in a proper manner and refrain from any boisterous conduct, and from doing anything calculated to disturb other guests.

Speaking of the implied obligation of the hotel keeper to protect guests against third persons, as well as against the wrongs of servants, it has been said, in *Beale on Innkeepers & Hotels*, § 172, that an injury inflicted by a servant negligently or intentionally is a breach of the duty of the hotel keeper; and it is added that "the innkeeper's duty, the breach of which by his servant causes the injury, is not the negative duty not to assault the guest, but the affirmative duty to protect him from assault. The servant, in assaulting the guest, is committing the tort for himself; but he is [also] breaking the obligation of protection which rests on the innkeeper, and which

the servant has himself been employed to carry out."

The jury was likewise advised that when a guest is assigned to a room for her exclusive use it is hers for all proper purposes until she surrenders it, except that the proprietor and his servants shall have access to and may enter it at all reasonable times, in order to keep the house in condition, and so that he may perform his implied obligation to minister to the convenience and comfort of the guest. The jury was instructed, too, that under the contract "the guest has a right to insist upon respectful and decent treatment at the hands of the hotel keeper and his servants and employees; and this implies the obligation on the part of the hotel keeper and his servants and employees that they will not abuse or insult the guest, or indulge in any conduct or speech that may unnecessarily bring upon the guest physical discomfort, distress of mind, or imperil the guest's safety."

Special complaint is made of instruction 10, which, it is contended, leaves out of consideration the element of whether the clerk was acting within the scope of his employment. It reads: "You are instructed that if you find and believe from the evidence in the case that the plaintiff, on the night in question, while a guest of the hotel, was assaulted by the clerk and beaten, and was by him, or by defendants' manager, or by both such clerk and manager, wrongfully caused to be arrested and forcibly taken from said hotel by the police officers and placed in jail, it would be your duty in that case to find for the plaintiff, and assess her damages at such sum as will, in your judgment, under all the evidence, fairly compensate her for the physical pain and mental suffering directly and proximately due to such treatment." This instruction, however, is only a part of a lengthy charge, and is to be considered in connection with others that were given, and in which the liability of appellants was made to depend upon the qualification that the servant was acting within the scope of his employment. In the first part of the sixth instruction, it was said: "A hotel keeper is responsible to a guest for the acts of his servants in charge of the hotel, whether such acts were expressly authorized by the proprietor or not, or even if he forbade and disapproved them, providing that the servant and employee was acting within his duties as such servant or employee."

The court then defined the duty of the clerk, who was left in charge of the hotel, using the following language: "A night clerk left in charge of a hotel, with authority to receive guests, assign them to

rooms, preserve order, and generally look after the hotel during the night, has the implied authority to eject guests from their rooms in order to preserve peace and order; and if the clerk undertakes to eject a guest from his or her room, and uses force and violent language, and summons the police, and directs the police to make an arrest and place the guest in jail, such action on the part of the night clerk will be held in law to be the act of the employer of such clerk, or the proprietor of the hotel, and for the right or wrong of which the hotel proprietor must be held responsible." This is a correct statement of the rule as applied to a case where a hotel is left in charge of the clerk, vested with the authority which, it is conceded, Atwood had. When he entered the room and undertook to eject appellee, he was acting for the proprietors and within the apparent scope of his authority. To make the appellants responsible for Atwood's actions, it is not necessary that they should have expressly authorized him to do the particular acts of which complaint is made. It is enough that they intrusted him with authority to manage the business in which he was engaged when the wrong was committed. They cannot be excused from liability because Atwood, while conducting the business, abused his authority, or even disobeyed the express directions which they had given him. They placed him in authority as to the assignment and occupancy of the rooms, and as to maintenance of order by the guests in the rooms; and they cannot escape liability where, in exercising his authority, he may have deviated from instructions, and because of a loss of temper or lack of sense and discretion he inflicted an unjustifiable injury upon a guest.

It is argued that *Crelly v. Missouri & K. Teleph. Co.* 84 Kan. 19, at page 21, 33 L.R.A.(N.S.) 328, 113 Pac. 386, is an authority against the rule applied in this case. There the one who committed the assault was acting outside the scope of his employment, and the assault did not grow out of the service he was employed to perform. In that case it was said: "The general rule is that the master is responsible for the acts of his servants done in the execution of the master's business and within the scope of his employment. It is not enough to exempt the master that the act is wilful or malicious, or in excess of the authority expressly conferred. If the tortious act is done while the servant is acting in behalf of his master and within the scope of his employment, the master will be responsible, although the act may be wilful and wanton."

The parties have debated at considerable length whether hotel keepers are responsi-

ble to the extent that common carriers of passengers are for the injuries inflicted by their servants while not engaged in rendering any service to the hotel keeper, and while acting outside the scope of their employment. *Clancy v. Barker*, 71 Neb. 83, 69 L.R.A. 642, 115 Am. St. Rep. 559, 98 N. W. 440, 103 N. W. 446, 8 Ann. Cas. 682, is an example of the cases placing hotel keepers and common carriers on the same level of liability; while *Clancy v. Barker*, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161, is an example of those holding to the opposite theory. It is unnecessary to determine that question in this case, as the clerk was engaged in doing the proprietors' business when the wrongs complained of were done; and this is so manifest that nice distinctions need not be drawn in fixing the line where the proprietors' liability for Atwood's acts begins and ends. Indeed, it is stated in appellants' answer that Atwood was acting as night clerk, and that one of his duties was to attend to the calls and wants of guests, and that in response to a call he went to appellee's room to ascertain her wants, and found her under the influence of intoxicating liquors, making a loud and boisterous noise likely to disturb the other guests of the hotel. The wrongs were committed while Atwood was performing this duty and attending to his masters' business.

There may be assaults upon a guest by outsiders without responsibility by the proprietor, and it may also be that the duties of some servants may be such as that an assault by one of them upon a guest might not subject the proprietor to liability; but certainly he cannot be regarded as exempt from liability where the assault is committed by a night clerk left in charge of the hotel and its guests. As was said in *De Wolf v. Ford*, 193 N. Y. 397, at page 406, 21 L.R.A. (N.S.) 860, 127 Am. St. Rep. 969, 86 N. E. 527: "There may, doubtless, be many conditions under which a guest at an inn may be assaulted or insulted by another guest, or by an outsider, without subjecting the innkeeper to liability; but if it ever was thought to be the law that an innkeeper and his servants have the right to wilfully assault, abuse, or maltreat a guest we think the time has arrived when it may very properly and safely be changed to accord with a more modern conception of the relation of innkeeper and guest."

There was, as has been stated, a charge that appellee was a woman addicted to the use of intoxicating liquors and cigarettes, and that she was under the influence of intoxicating liquors and cigarettes on the night of the assault, and was acting in a way that would be offensive to other guests; 42 L.R.A. (N.S.)

but this charge has been negatived by the verdict of the jury. It was competent, of course, for the hotel keeper to enforce rules for the maintenance of order within the hotel; and if appellee was guilty of misconduct which was offensive to other guests, or would bring the hotel into disrepute, he could cause the removal of the guests, using only such means and force as was reasonably necessary to accomplish the purpose.

It was not improper to submit to the jury the matter of the arrest and imprisonment of appellee, caused by Atwood, and which appears to have had the sanction of *St. Clair*, the manager of the hotel. In *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609, the company was held liable for the acts of its agent in causing the arrest and detention of another done in the execution of the company's business. In *Atchison, T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, it was expressly ruled that a railroad company carrying passengers was liable for the illegal arrest and imprisonment of a passenger, caused by the conductor in charge of the train, while acting in the line of his employment.

There is a claim, too, that the award of \$4,000 as damages is excessive; but considering the view taken by the jury as to the behavior and standing of appellee, and the brutal manner in which she was treated, we cannot say that the award is so excessive as to indicate passion or prejudice of the jury.

Finding no material error, the judgment of the District Court is affirmed.

All the Justices concur.

Petition for rehearing denied.

#### KENTUCKY COURT OF APPEALS.

BREATHITT COUNTY et al., Appts.,

v.

J. H. HAMMONS et al.

(150 Ky. 502, 150 S. W. 661.)

County — power to collect tolls — cost of bridge.

1. A county has no inherent power to collect tolls for the use of a bridge which it has erected, even to defray the expense of the erection.

*Note.* — *Right of county, municipality, or town to rent, or collect tolls for use of, bridge or highway.*

Generally, as to right of municipal corporation to engage in enterprises usually regarded as of a private character, see

**Estoppel — collection of tolls — acquiescence.**

2. The public is not, on the theory of estoppel, barred from contesting the collection of tolls on a county bridge, by long acquiescence therein.

(November 12, 1912.)

**A**PPEAL by defendants from a judgment of the Circuit Court for Breathitt County in plaintiffs' favor in an action to enjoin the defendants county from collecting tolls for the use of a county bridge. Affirmed.

The facts are stated in the opinion.

Mr. Lewis McQuown, for appellants:

The appellees are barred from recovery by laches and acquiescence, which constitute an equitable estoppel.

2 Pom. Eq. Jur. § 817; 28 Am. & Eng.

note to *Holton v. Camilla*, 31 L.R.A. (N.S.) 116. As to power of municipal corporation to grant or lease space on street or sidewalk for business purposes, see note to *Chapman v. Lincoln*, 25 L.R.A. (N.S.) 400.

As to right in general to take tolls without a franchise, see note to *Virginia Cañon Toll Road Co. v. People*, 37 L.R.A. 711.

#### General rule.

Generally speaking, a county, municipality, or town cannot erect a toll bridge or build a toll road, or make any charge to the traveling public for the use of its roads or bridges, unless specifically so authorized by its charter or by legislative grant, or unless authority to do so can be reasonably implied from the powers specifically granted.

Thus, in *Clark v. Des Moines*, 19 Iowa, 223, 87 Am. Dec. 423, Judge Dillon, in writing the opinion of the court, says that no person or corporation can erect a toll bridge and levy and collect tolls, any more than a person or corporation can set up a ferry and levy and collect ferriage, unless this be authorized by the law of the state, quoting *De Jure Maris*, chap. III., where Sir Matthew Hale says: "No man can take a settled or constant toll even in his own private land for a common passage, without the King's license."

To prevent municipal corporations from engaging in private enterprises, or in aiding the citizens in any scheme essentially private, it is necessary to keep the corporation's wings clipped down to the legal standard, *i. e.*, to give effect to those checks and limitations which were designed to protect and secure the inhabitants against the dangers of speculative and extra-municipal projects. *Ibid.*

There is a marked difference between the building of a bridge as a necessary improvement of a street, and dedicating it to the public as a common highway or eas-

Enc. Law, 98; *Mackall v. Casilear*, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; *Predestinarian Baptist Church v. United Baptist Church*, 139 Ky. 110, 129 S. W. 546; *Badger v. Badger*, 2 Wall. 94, 17 L. ed. 838; *Boswell v. Coakes*, L. R. 27 Ch. Div. 456; *Adams v. Bosworth*, 126 Ky. 81, 10 L.R.A. (N.S.) 1184, 102 S. W. 861; *Nagel v. Bosworth*, 148 Ky. 809, 147 S. W. 940; *Ferguson v. Landram*, 5 Bush, 230, 96 Am. Dec. 350.

Messrs. Calloway Howard, W. H. Blanton, and Byrd & Howard also for appellants.

Messrs. J. J. C. Bach, Grannis Bach, and G. W. Fleenor for appellees.

Nunn, J., delivered the opinion of the court:

In 1898 the town of Jackson undertook

ment, and the erection of a toll bridge on the same street for the purposes of pecuniary profit. The one is legitimate, the other outside of the corporate powers. Not so distinctly, perhaps, as the establishment of a foundry or the erection of a mill, and taking toll for grinding, yet somewhat similar in principle, and embarking in a business which does not fall within the necessary objects of a municipal corporation, and which had better be left to private enterprise. . . . It has the appearance of a business operation, and it is but the part of wisdom to confine the town, not only to proper municipal objects, but to the employment of lawful means in effectuating these objects." *Mullarky v. Cedar Falls*, 19 Iowa, 25.

In *Brand v. Multnomah County*, 38 Or. 79, 50 L.R.A. 389, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209, turning on another point, it is said that "primarily, the state has paramount control over all the highways within its borders, including public streets and highways within the confines of municipalities. Whatever authority a municipality may enjoy or possess, pertaining to its streets and highways, must be derived from the legislative assembly through its franchise or charter; and such a corporation acts, if at all, through a delegated power emanating from the initial source."

In *Re People*, 70 Misc. 72, 128 N. Y. Supp. 29, a case concerned chiefly with another point, it is said that toll cannot be exacted in the highway, except by authority of the legislature, and only a corporation organized in compliance with the statute applicable can exact toll; an individual cannot be so authorized.

In *Colton v. Hanchett*, 13 Ill. 615, it is said that under art. 22, act of 1851, town commissioners of highways or supervisors have no more authority to erect toll bridges or to aid an individual in their erection, than they have to put up gates and charge toll on any of the ordinary highways of

to build a bridge across the fork of the Kentucky river, which passes through the town. It was unable to float its bond for the purpose of obtaining the money with which to build the bridge, and it then induced the fiscal court of Breathitt county to build it. The fiscal court erected the bridge, and collected tolls from those using it for several years. The bridge became defective, and the fiscal court employed another bridge company to replace it with a new one at the price of \$14,500, and this new bridge has continuously been, and is now, used as a toll bridge. The bridge originally across the river was removed and placed across Quicksand creek at a point near where it flows into the river. The tolls received from the bridges have been used to reduce the bonded indebtedness of the county to \$10,000, and to build other bridges in the county. This action was instituted in the name of the commonwealth and nine citizens of the county who possibly cross this bridge more than anyone else. The action seeks to enjoin the county from continuing to use the bridge as a toll bridge. Breathitt county, the fiscal court, and the keeper of the bridge were made defendants. They answered, in substance, setting forth the benefits to the county from the tolls received from the bridge, and asked that they be al-

lowed to continue the bridge as before. The lower court concluded that the county could not legally collect tolls, and directed the issue of the injunction prayed for.

Appellants refer to the case of *Jackson v. Breathitt County*, 32 Ky. L. Rep. 199, 105 S. W. 376, and claim that authorized the county to collect tolls from the bridge. In that case the town of Jackson sought to recover the bridge from the Breathitt fiscal court, claiming that the town had the right to the bridge, as it had only turned it over to the county under an agreement that it should erect the bridge and collect tolls enough to reimburse it in the amount it expended in erecting the bridge, and that it had several times over collected that amount; and the town claimed that the county could not hold the bridge, as it had no franchise, but that the town did. In the opinion in that case this court said that the privilege to erect the bridge was not a franchise within the meaning of the Constitution, and continued as follows: "The bridge was necessary for the use of the public generally, and for their benefit the county, with the consent of the town, constructed it. Its erection was as essential for the use of the citizens of the county as those of the town. It has none of the elements of a franchise such as is contemplated by the

the county, "which it will not be pretended that they have authority to do."

In *Virginia Cañon Toll Road Co. v. People*, 22 Colo. 429, 37 L.R.A. 711, 45 Pac. 398, it is said that the right of a corporation or of an individual to exact tolls is not of common right, and in this country does not exist in the absence of a grant from the legislature.

#### Application of the rule.

A city authorized by charter "to improve sidewalks, alleys, and streets," and "to make by-laws necessary and proper for the good regulation, safety, and health of the city," is not thereby authorized to erect or aid in the erection of a toll bridge by a loan of corporate credit. *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423.

And an incorporated town has no power to convey a bridge erected by it to trustees, with a stipulation for the collection of tolls to be applied upon the debt created by its construction, and with a provision that in case of final default the bridge and its franchise shall be sold, thereby not only hazarding the title thereto, but rendering the town liable to lose all jurisdiction and control over it as an important part of one of its streets. *Mullarky v. Cedar Falls*, supra.

Likewise, a city has no authority to lease a street, wharf, or highway dedicated to the public use, to a private individual or corporation such as a boat club, to be used by the members of the latter in going to and

from their boats; and this rule is not affected by the fact that the city has had trouble in policing the river front along which the land in question lies, and that the attempted private lease for a nominal consideration is supposed to relieve the city of its duty to police the land leased, and might rid it of undesirable shanty boats and trespassers. *Clarke v. Evansville Boat Club*, 44 Ind. App. 426, 88 N. E. 100.

Nor has a city any power to lease to an individual for a term of years the exclusive use of its highway, and thus divert to the use, benefit, and control of private persons for private enterprises and business that which it holds solely for the use of the public. *Lowery v. Pekin*, 210 Ill. 575, 71 N. E. 626.

In *Becker v. La Crosse*, 99 Wis. 414, 40 L.R.A. 829, 67 Am. St. Rep. 874, 75 N. W. 84, it was held that a city in one state is without authority to accept a grant from another state, to operate a toll road beyond its limits and the limits of its own state, so as to be responsible for defects in such road, although the toll road connects with a city toll bridge constructed under lawful authority by the city.

And, under the general rule laid down above, although a city or parish may not have express power to erect a toll bridge, yet where the power to establish a toll ferry has been granted to such city or parish, that grant by necessary implication includes power to establish as a substitute

Constitution. The fact that the county collects toll on the bridge or rents it out does not affect the question of its right to erect or maintain the bridge." With reference to the question now before us, the court said: "The question of the right of the county to rent the bridge out or collect tolls thereon is not before us in this case; the allegations of the petition are not sufficient to present this question, and hence we express no opinion as to the right of the town or any citizen of the county to institute such proceedings as might be necessary to inquire into the right of the county to exact tolls from persons using this bridge."

Thus we see that the court in that opinion expressly declined to pass upon the county's right to collect tolls from the bridge. It is a general rule, and has often been decided by this court, that a county has no right to do anything or engage in any business that is not expressly authorized by the statutes. We have searched diligently and have been unable to find any statute expressly or impliedly authorizing a county to collect tolls on a bridge in a county, nor have we been referred to any such authority. From the facts presented in this case it appears to have been a valuable business for the county as a corporate body, but it was some-

what expensive, annoying, and inconvenient to many of its citizens. To say that a county may go into the business of erecting bridges and collecting tolls on them, under the statutes that exist, would be equal to holding that a county may engage in the mercantile business or any other lawful enterprise. It may be best for the counties to have power to erect bridges and collect tolls, at least until they are paid for, but until the legislature passes a law giving them such a power, they have no right to do so.

It is claimed in one of the briefs for appellants that, as the bridge has been so long in use as a toll bridge, appellees are barred from the relief sought by laches and acquiescence, which constitute an equitable estoppel. This plea cannot be made to apply to uses of public property. All the people of the county are interested in this matter, and their failure to stop such use of the bridge in the past cannot be used against them in this action. It might, however, be used against them or anyone asserting an individual right growing out of the improper use of the bridge. This action is for the use of the public, and appellees' interests are only incidental.

For these reasons, the judgment of the lower court is affirmed.

for a toll ferry a toll bridge, and thus to enter into a contract with a railroad company which is about to build a railroad bridge across a river, whereby, for a certain consideration and in order to furnish better and safer means of crossing said river, the bridge is to be so constructed as to be made available not only for railroad, but also for ferry purposes; and such city may then charge toll for the crossing. *Oliff v. Shreveport*, 52 La. Ann. 1203, 27 So. 688.

In *Newport v. Newport & C. Bridge Co.* 90 Ky. 193, 8 L.R.A. 484, 13 S. W. 720, it is said that where an ordinance was passed by the city council, granting to the bridge company the use of a portion of a city street for purposes of a bridge, in consideration whereof the rates of toll over the same should be as therein set out, and its terms accepted by the company, an enforceable contract was created.

And where the state by its governor granted to a city all its interests in certain land owned in fee, which had been a canal bed, and the city, after occupying portions of this land as a public highway for some time, leased the land to a railroad company, reserving the right to use the same for street purposes, the lease was held valid. *Cleveland Terminal & Valley R. Co. v. State*, 85 Ohio St. 251, 39 L.R.A.(N.S.) 1219, 97 N. E. 967.

And although a city may not have power to build a toll bridge, yet after the issuance of scrip to aid in the building of a free 42 L.R.A.(N.S.)

bridge, which is within the power of the city, such scrip is not invalidated by the subsequent action of the city council declaring the bridge a toll bridge. *Dively v. Cedar Falls*, 27 Iowa, 227.

#### Under statute.

Authority to build a toll bridge may, however, be given by the legislature to a city or other political subdivision of a state.

Thus, under the provisions of chaps. 84 and 179, Acts 13th General Assembly, the city of Des Moines was authorized to erect and maintain either free or toll bridges, and after purchasing a toll bridge and franchise from an individual, and maintaining it for some time as a free bridge, and after it became unsafe for public travel, such city could erect in its place a new bridge, for the use of which toll was to be paid. *Scott v. Des Moines*, 34 Iowa, 552.

In Louisiana, the police juries of the parishes, except Orleans, have the exclusive privilege of establishing ferries and toll bridges within their respective limits, and fixing rates. Act No. 202, p. 391, 1902. *Blanchard v. Abraham*, 115 La. 989, 40 So. 379; *Lafourche v. Robichaux*, 116 La. 286, 40 So. 705.

The city of St. Louis has been expressly authorized to construct a bridge, free or toll, across the Mississippi river. *Haeussler v. St. Louis*, 205 Mo. 656, 103 S. W. 1034.

H. C. Sh.

## MINNESOTA SUPREME COURT.

ABRAHAM JUNTTI, for Benefit of his  
Minor Son, Resp.,  
v.

OLIVER IRON MINING COMPANY, Appt.

(119 Minn. 518, 138 N. W. 673.)

**Negligence — dangerous substance — injury — liability.**

The complaint alleges in effect that the defendant left unguarded large quantities of carbide, a dangerous substance and attractive to children of tender years, on its premises near a public street, knowing that such children were accustomed to pick up the carbide, pour water upon it, whereby gas was generated, and then explode it by

Headnote by START, Ch. J.

*Note. — Liability for injury to children from explosives left accessible to them.*

The earlier cases on this subject will be found in notes in 14 L.R.A.(N.S.) 586, and 24 L.R.A.(N.S.) 1257. See also note in 23 L.R.A.(N.S.) 249, as to proximate cause where act of a child intervenes.

One who stores fuse caps in a tool house which is kept locked will be liable to a six-year-old boy injured in exploding a cap which he had picked up on the ground near the tool house, though it had been dropped by other boys who had obtained the caps by entering the building through a hole in the foundation. *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33. The court considered that the case fell within the well-established exception to the rule that the owner or occupant of premises owes no duty of care to a trespasser, be he infant or adult, except the duty to refrain from wilfully or wantonly injuring him, and was of the opinion that the doctrine of the so-called "turntable cases" was applicable. The court also considered unsound the contention that defendant's negligence was not the proximate cause of the injury, and that the act of the boys other than plaintiff, in taking the caps out of the tool house and scattering them on the ground, was an intervening independent cause, because, as it was defendant's duty to anticipate an accident such as happened, its negligence in leaving the caps where it did without taking any steps to prevent the boys from playing on the premises or from entering through the hole in the foundation, though the evidence showed that this entrance had existed for several months, was the proximate cause of the injury.

And in *Olson v. Gill Home Invest Co.* 58 Wash. 151, 27 L.R.A.(N.S.) 884, 108 Pac. 140, one who, in violation of a municipal ordinance, stored sticks of dynamite in an unlocked shanty on a vacant city lot which, to his knowledge, was used as a playground by children, was held liable for injury to a boy who carried away one of the sticks and exploded the same. 42 L.R.A.(N.S.)

applying a light; that the plaintiff's son, five years old, secured some of the carbide so left by defendant, put it in a can, poured water on it, and in attempting to light the gas an explosion followed, whereby he was seriously injured. Held, that the complaint states facts sufficient to constitute a cause of action.

(December 6, 1912.)

**A**PPEAL by defendant from an order of the District Court for St. Louis County overruling a demurrer to the complaint in an action brought to recover damages for injuries to plaintiff's minor son, alleged to have been caused by defendant's negligence. **Affirmed.**

The facts are stated in the opinion.

It was held that, as the dynamite was stored needlessly, without guard, in an unlocked building in a vacant city lot where boys were known to trespass, the fact that the boys were trespassers did not relieve him from liability. Nor did the fact that the boys stole and attempted to explode the dynamite, as a matter of law, constitute such intervening cause as to relieve the owner from liability, where the boy might have been found from his age, experience, and knowledge of right and wrong to have been governed by unreasoning and natural impulses.

But in *Carpenter v. John M. Miller & Son*, 232 Pa. 362, 36 L.R.A.(N.S.) 932, 81 Atl. 439, a deposit by the owner of exploded fireworks on a public dumping ground was held not to be the proximate cause of injury to a boy who picked up some of the fireworks from the dump and carried them to his home, and was injured by an explosion following the lighting of the same.

And in *Bennett v. Odell Mfg. Co.* 76 N. H. 180, 80 Atl. 642, it was held that the fact that one maintains a nuisance on his own land by making an unlawful use thereof in storing explosives thereon had no connection with an injury to a boy nine years of age who, finding the door of the building in which the explosives were stored open, and no one inside, entered and carried away some of the explosives, and was injured in exploding them.

So, in *Jacobs v. New York, N. H. & H. R. Co.* 212 Mass. 96, 40 L.R.A.(N.S.) 41, 98 N. E. 688, a railroad company was held not liable where a torpedo which had been carelessly ejected from the baggage car of a train standing at the station was immediately picked up and carried away by boys who were rightfully on the station premises, and later exploded by them, resulting in the death of one of them. The court said that, while if, from the impact of the fall of the torpedo or from the innocent intermeddling of bystanders whose presence might have been anticipated, an explosion had followed, the company would have been liable, yet it was not bound to



Mr. Paul H. Welch, for appellant:

Negligence cannot be predicated upon the act of the defendant in placing the carbide where it did, and the negligence of the defendant, if any, was not the proximate cause of the injury.

Ryan v. Towar, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; Lynch v. Nurdin, 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Saverio-Cella v. Brooklyn Union Elev. R. Co. 55 App. Div. 98, 66 N. Y. Supp. 1021; San Antonio & A. P. R. Co. v. Morgan, 92 Tex. 98, 46 S. W. 28; Driscoll v. Clark, 32 Mont. 172, 80 Pac. 1,373; Harris v. Cowles, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537; Simonton v. Citizens' Electric Light & P. Co. 28 Tex. Civ. App. 374, 67 S. W. 530; Paolino v. McKendall, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268; Chaddock v. Plummer, 88 Mich. 225, 14 L.R.A. 675, 26 Am. St. Rep. 283, 50 N. W. 135; Arkansas Valley Trust Co. v. McIlroy, 97 Ark. 160, 31 L.R.A.(N.S.) 1020, 133 S. W. 816; Twist v. Winona & St. P. R. Co. 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402; Stendal v. Boyd, 73 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735; Haesley v. Winona & St. P. R. Co. 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023; Erickson v. Great Northern R. Co. 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 462; Fezler v. Willmar & S. F. R. Co. 85

Minn. 252, 88 N. W. 746; Ellington v. Great Northern R. Co. 96 Minn. 176, 104 N. W. 827; Fitzgerald v. Rodgers, 58 App. Div. 298, 68 N. Y. Supp. 946; Gay v. Essex Electric Street R. Co. 169 Mass. 242, 34 N. E. 258.

Messrs. William E. Culkin and John E. Samuelson, for respondent:

One must respond in damages for permitting dangerous explosives to lie exposed on his own land or elsewhere in such a way that a child *non sui juris* may gain access to same and be injured thereby.

Iamurri v. Saginaw City Gas Co. 148 Mich. 27, 111 N. W. 884; Cahill v. Stone, 153 Cal. 571, 19 L.R.A.(N.S.) 1904, 96 Pac. 84; Finkbeiner v. Solomon, 225 Pa. 333, 24 L.R.A.(N.S.) 1257, 74 Atl. 170; Mattson v. Minnesota & N. W. R. Co. 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498; Peirce v. Lyden, 85 C. C. A. 312, 157 Fed. 552; Wiita v. Interstate Iron Co. 103 Minn. 303, 16 L.R.A.(N.S.) 128, 115 N. W. 169; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Decker v. Itasca Paper Co. 111 Minn. 439, 127 N. W. 183.

Start, Ch. J., delivered the opinion of the court:

This is an appeal from an order of the district court of the county of St. Louis overruling the defendant's demurrer to the complaint. The action was brought by the plaintiff, for the benefit of his minor son,

foresee that one of intestate's companions, actuated doubtless by a boy's impulse and curiosity in which the injured boy apparently shared, would almost immediately remove the torpedo and experiment with it after a lapse of several days. The wrongful asportation was considered the proximate cause of the accident.

In St. Louis & S. F. R. Co. v. Williams, 98 Ark. 72, 33 L.R.A.(N.S.) 94, 135 S. W. 804, where a torpedo placed to warn approaching trains that another train was standing at the station was picked up by young boys before the expected train had passed, and exploded by them, injuring one of the boys, it was held that as it was necessary for the safety of trains to use such torpedoes at the time and place mentioned, and no negligence was shown in the method of using them, and it did not appear that they were left unguarded after the necessity for their use ceased, the company was not liable, though it knew that boys were accustomed to play at the place where the torpedo was set.

In Crabb v. Wilkins, 59 Wash. 302, 109 Pac. 807, boys found some dynamite caps on the ground within 25 feet of a well drilling outfit, and in exploding the same one of them was injured. It appeared that the well digger carried on his operations within a few feet of the usual and cus-

tomary route taken by children on their way from the schoolhouse to the postoffice, and that he kept the caps in a tool chest, only taking out such numbers as he desired to use when preparing for an explosion. It further appeared that defendant's workmen were not instructed as to where to keep the caps, or how to use them, and that they were frequently used when defendant was not present. It was held that such facts presented a question for the jury as to the negligence of defendant, and so the granting of a nonsuit was erroneous.

In Tibbits v. Spokane, 64 Wash. 670, 117 Pac. 397, where some boys aged from nine to thirteen years found dynamite caps and fuse left accessible by a city near excavations being made by it, it was held that the question as to whether such caps were attractive to children, and also the question as to whether boys between the ages of nine and thirteen could be guilty of contributory negligence, were for the jury.

And in Olson v. Gill Home Invest. Co. supra, it was held that where there is nothing to show that he had any knowledge that such a proceeding would cause an explosion, a thirteen-year-old boy cannot be said to be negligent, as matter of law, in attempting to pry a cap off a dynamite stick, which causes an explosion, to his injury.

J. H. B.

who, at the time of his injury by the alleged negligence of the defendant, was between five and six years old. The complaint, so far as here material, alleges in substance that at the times therein stated the defendant was engaged in the mining of iron ore at the city of Eveleth, this state, and used, for the purpose of artificial lighting, a substance known as carbide, which, when used in connection with water, produces vapors and gases of a highly inflammable character, and, when brought in contact with fire in any way, will explode, and is a highly and extremely dangerous substance. It is also, by reason of the gases and vapors that form from it when coming in contact with water, and the fact that, when fire is communicated to such gases in any way, it will burn and explode, highly attractive, alluring, and tempting to children of tender years, and extremely dangerous to them. Such children were in the habit of picking up the carbide so left exposed and unguarded, which they would place in cans, and pour water upon it for the purpose of producing gases, to the end that fire might be communicated to it, whereby explosions would be created, all of which was well known to the defendant prior to the injury of the plaintiff's minor son. On and prior to October 6, 1911, the defendant carelessly and negligently allowed large quantities of carbide to be thrown and left by its employees upon its premises, and also in, upon, and near a public street of the city, wholly exposed and accessible to children of tender years, without guard of any kind, which was easily observed by them when in the street for play. On October 6, 1911, the plaintiff's minor son and a comrade of about his own age were playing in the street, and picked up a sheet iron can which they there found, placed therein a quantity of the carbide so left exposed and unguarded by the defendant, and poured water into the can. As the water came in contact with the carbide, gases and vapors were generated, and, for the purpose of seeing the flame that would be produced, and of hearing the noise from the explosion which would be produced, by igniting such vapors and gases, and by reason of the youth and inexperience and want of judgment of plaintiff's minor son, he lit a match and attempted to light the gases, when suddenly a terrific explosion followed, throwing him into the air, burning his head, face, hands, and body, and otherwise injuring him.

The defendant here urges in support of its demurrer that the complaint fails to show any negligence on the part of the defendant, or any act on its part which was the proximate cause of the injury of plaintiff's son, and, further, that the complaint 42 L.R.A.(N.S.)

affirmatively shows that the plaintiff was guilty of contributory negligence. It is claimed in this connection, in effect, that the defendant's alleged acts in allowing large quantities of carbide to be thrown and left exposed and unguarded upon the premises, and on and near the public street, were neither negligent nor the proximate cause of the injury to the child, because it appears from the allegations of the complaint that carbide is only dangerous when gases are formed by the action of water thereon, and when brought in contact with flame, and that the proximate cause of the injury was not any act of the defendant, but that of the child in pouring water upon the carbide and attempting to light the gases thereby generated.

This claim must be considered in connection with the allegation of the complaint to the effect that the defendant knew, prior to the accident, that children were accustomed to pick up the exposed carbide, pour water upon it, and explode the gas by lighting it. It is quite obvious that the defendant was guilty of negligence, if the allegations of the complaint be true, in leaving large quantities of carbide exposed and unguarded, for it is clear from such allegations that it ought, in the exercise of ordinary care, to have anticipated that children of tender years were liable to be injured thereby, especially so in view of its actual knowledge in the premises. We are unable to discern any difference in principle between the case made by the allegations of the complaint herein and the cases of *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, and *Vills v. Cloquet*, 119 Minn. 277, 138 N. W. 33. In the last case cited the defendant was charged with negligence in storing explosive fuse caps, without taking sufficient precautions to prevent children from getting possession of them. The plaintiff's son, a child of tender years, got possession of one of the caps and proceeded to hammer it with a stone to flatten it out, when it exploded and injured him. It was held that the alleged negligence of the defendant and the proximate cause of the child's injuries were questions for the jury. See also *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A.(N.S.) 190, 116 N. W. 470, and *Froberg v. Smith*, 106 Minn. 72, 118 N. W. 57.

It is obvious that the complaint in this action does not show, as a matter of law, that the plaintiff or his child was guilty of contributory negligence. It follows that the complaint states facts sufficient to constitute a cause of action.

Order affirmed.

## MICHIGAN SUPREME COURT.

PEERLESS PATTERN COMPANY

v.

GAUNTLETT DRY GOODS COMPANY,  
Appt.

(— Mich. —, 136 N. W. 1113.)

**Injunction — breach of contract — remedy at law.**

1. Injunction will lie to prevent violation of a contract by a merchant who has contracted to handle the product of the other party to the contract exclusively during a specified period of time.

**Contract — exclusive trade relations — public policy.**

2. A contract by a merchant to handle the product of a certain manufacturer exclusively in his business for a specified term is not against public policy.

(July 12, 1912.)

**Note. — Validity of agreement to patronize particular concern exclusively.**

As to the validity of a contract giving one an exclusive right to handle goods in a given locality, see note to *Walter A. Wood Mowing & Reaping Mach. Co. v. Greenwood Hardware Co.* 9 L.R.A. (N.S.) 501.

For other notes in relation to contract in restraint of trade, see Index to Notes under title, Contracts, subdivision, Restraint of trade, and Monopolies.

Under some statutes, agreements to patronize a particular concern exclusively seem to be invalid and unenforceable. Thus, under the laws of Texas, defining trusts and conspiracies against trade, and prohibiting two or more persons, etc., from uniting or associating their otherwise independent, separate, and possibly competing capital, skill, or acts, for one or more of the five purposes therein specified, it has been held that a contract by which one is to have the exclusive right to sell any and all goods manufactured or kept in stock by the other party to the contract, and is not to sell any line of goods of the same class other than those furnished by the latter, is in restraint of trade, and not enforceable. *S. S. White Dental Mfg. Co. v. Hertzberg*, — Tex. Civ. App. —, 51 S. W. 355.

And in *Pope-Turnbo v. Bedford*, 147 Mo. App. 692, 127 S. W. 426, it was held that an agreement unlimited in respect of territory or time, by one receiving instruction in a certain method of treatment of the scalp and hair, and in the use and application of the instructor's remedies and hair applications, not to use any remedies but those of the instructor while treating patients by said method, which is a common one, to which the instructor has no exclusive right,—is in restraint of trade and fosters monopoly, and is both unreasonable at common law and in contravention of 42 L.R.A. (N.S.).

**A** PPEAL by defendant from a decree of the Circuit Court for Washtenaw County, in Chancery, overruling a demurrer to a bill filed to enjoin defendant from violating its contract to handle plaintiff's patterns exclusively, and for specific performance of the contract. Affirmed.

The facts are stated in the opinion.

Messrs. George S. Wright and A. J. Sawyer for appellant.

Mr. Edward B. Benscoe, for appellee:

Injunction will lie to prevent violation of defendant's contract.

*Standard Fashion Co. v. Siegel-Cooper Co.* 157 N. Y. 60, 43 L.R.A. 854, 68 Am. St. Rep. 749, 51 N. E. 408; *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 533, 74 Atl. 680; *Goddard v. American Queen*, 44 App. Div. 454, 61 N. Y. Supp. 133; *McCall Co. v. Wright*, 198 N. Y. 143, 31 L.R.A. (N.S.) 249, 91 N. E. 516; *St. Regis Paper Co. v. Santa Clara Lumber Co.* 173 N. Y. 160, 65 N. E. 967; *Philadel-*

*tion of a statute declaring all agreements to be against public policy and void, which tend to lessen full and free competition in the manufacture and sale of any article, or under the terms of which persons doing business in the state shall sell or offer for sale any particular article or commodity, and shall not sell or offer for sale any competing commodity.*

But an agreement with the manufacturer by an agent for the sale of certain patent windmills, in certain counties, for one year, not to sell or keep in stock during that time any other windmill, is not in violation of the Texas statute, though "if the title to the windmills had passed by the contract and shipment, thus establishing the relation of vendor and vendee, instead of principal and agent, between the parties thereto, a different result might have been reached." *Welch v. Phelps & B. Wind Mill Co.* 89 Tex. 653, 36 S. W. 71.

An agreement by an agent for the sale of certain goods for a certain term and within a certain territory, not to sell or deal in any such goods other than those manufactured by the other party to the agreement, is not in restraint of trade. *Weiboldt v. Standard Fashion Co.* 80 Ill. App. 87.

And in the absence of statute, "the law is . . . well settled that an agreement to buy from one person only is not in restraint of trade when made for a limited time and confined to one locality." *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057.

"There is no violation of law or of public policy in an agreement between two traders that one should sell to the other all its commodities, and the other buy from the former corporation alone." *Live Stock Asso. v. Levy*, 22 Jones & S. 32.

Thus, a contract by which one corporation binds itself to buy all its raw materials from, and to sell all its manufactured prod-

phia Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; Lumley v. Wagner, 1 DeG. M. & G. 604, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652; Singer Sewing Mach. Co. v. Union Buttonhole & E. Co. Holmes, 253, Fed. Cas. No. 12,904; Buckhout v. Witter, 157 Mich. 406, 23 L.R.A.(N.S.) 506, 122 N. W. 184; Powell v. Dwyer, 149 Mich. 145, 11 L.R.A.(N.S.) 978, 112 N. W. 499; Joseph Schlitz Brewing Co. v. Nielsen, 77 Neb. 868, 8 L.R.A.(N.S.) 494, 110 N. W. 746; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; Voight Brewery Co. v. Holtz, 168 Mich. 352, 134 N. W. 19; Hardy v. Allegan Circuit, Judge, 147 Mich. 598, 10 L.R.A.(N.S.) 474, 118 Am. St. Rep. 557, 111 N. W. 166; Newell v. Sass, 142 Ill. 104, 31 N. E. 176.

There is nothing in the contract that is contrary to public policy and in restraint of trade.

Fairbank v. Leary, 40 Wis. 644; Heavenridge v. Mondy, 34 Ind. 29; Artistic Porcelain Co. v. Boch, 76 N. J. Eq. 533, 74 Atl. 680; Ft. Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S. W. 975; Engles v. Morgenstern, 85 Neb. 51, 122 N. W. 688; Mutual L. Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295; Grand Union Tea Co. v. Lewitsky, 153 Mich. 244, 116

N. W. 1090; Osius v. Hinchman, 150 Mich. 603, 16 L.R.A.(N.S.) 393, 114 N. W. 402; Welch v. Phelps & B. Wind Mill Co. 89 Tex. 653, 36 S. W. 71.

Moore, Ch. J., delivered the opinion of the court:

This is an injunction bill and one for specific performance of a contract. A demurrer was interposed to the bill of complaint. It was overruled, which action is sought to be reviewed here.

The complaint is the maker of paper patterns. The defendant is the proprietor of a large dry goods store. A written contract was made between the parties, the material parts of which are as follows:

State, Mich.

The Peerless Pattern Company,  
192½ to 200 Greene Street, New York City:—

(1) Please send us an assortment of Peerless patterns including the May, 1911, issue, amounting to \$200 at 5 cents each pattern, payable as follows: \$100 in thirty days, and the balance \$100 to remain as a standing debit during the term of this agreement at 4 per cent interest per annum, payable semiannually. . . . (5) We will

ucts to, another corporation, is not, by itself, illegal and void as one in restraint of trade, or in violation of the anti-trust laws. Heimbuecher v. Goff, 119 Ill. App. 373.

Nor are agreements void as in restraint of trade, whereby dealers are to handle exclusively in their territory a certain make of goods sold by the other party, and to purchase their supply of him (Brown v. Rounsavell, 78 Ill. 589); or the promisors are to give the promisees all their freighting up and down a certain river, at the customary freight, and are to aid them in their business of boating, and not to "promote any other boatman to compete with them in the business" (Palmer v. Stebbins, 3 Pick. 188, 15 Am. Dec. 204).

Likewise, a by-law of a press association providing that no member of the association shall receive or publish the regular news despatches of any other news association covering a like territory, and organized for a like purpose, is not illegal and void as tending improperly to restrain trade and competition and to create a monopoly. Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; Bleistein v. Associated Press, 136 N. Y. 662, 32 N. E. 981.

And an agreement by the owners of certain iron ore lands and a smelting furnace, and by a railroad company about to build a road therefrom, to give to another and connecting railroad, in consideration of the 42 L.R.A.(N.S.)

latter's aid in developing the iron business, all the traffic to and from the property, mines and furnaces, and the railroad therefrom, at reasonable rates, is neither in restraint of trade nor against public policy, nor in violation of constitutional provisions that all railroads shall carry each other's traffic without discrimination, that all individuals shall have equal rights for transportation without discrimination, or that parallel and competing roads shall not consolidate. Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239.

Nor is an agreement by a physician to send all his prescriptions to be filled by a certain person unlawful as a part of the consideration for the latter's purchase of a drug store and drug and prescription business owned by the physician. Ward v. Hogan, 11 Abb. N. C. 478.

Where a cattle dealer who had been merely receiving his cattle from the railroads at certain stock yards, and taking them at once to other yards for further handling in connection with his business, claimed that certain fixed charges exacted from him by the lessees of the stock yards on all cattle received there were unjust and illegal, as no accommodations had been furnished him, and the landing in their yards was the landing for delivery by the railroad companies, an agreement made by him, upon their paying him the money which he claimed they had improperly exacted, to carry on his

reorder at least once each week, all patterns that we sell, so as to keep our assortment complete. We will offer and display the patterns for sale on the main floor. We will not handle directly or indirectly any other make of pattern. We will pay for all goods on or before the 10th day of the month following the month of shipment, and will pay all transportation charges to and from your New York office. (6) It is understood that you are to exchange at full purchase price all patterns in our stock that you discard in January and July for other patterns to be reordered by us thereafter. After the return by us of such discarded patterns, if our remaining stock exceeds the amount of our original assortment, we may return to you the excess of such sum in Peerless patterns purchased from you to be selected out of our stock by us; such return excess patterns to be credited to our exchange account at full purchase price.

. . . (7) This order is to take effect on acceptance by you, and to remain in force for a term of five years from the date of the first shipment to us from term to term thereafter, unless either party shall give notice of desire to cancel in writing within thirty days before the expiration of any term. If such notice is given by us, we will continue the agreement for four months

thereafter, in order to give you an opportunity to transfer the account. . . .

Purchaser's Name,

The Gauntlett Dry Goods Co.

Date, March 2, 1910.

Accepted: The Peerless Pattern Co.

by E. L. Genth.

The bill of complaint, after the formal part thereof, set out the making of the contract. It avers that complainant entered upon the performance thereof; that defendant failed and refuses to perform its part thereof; that it began selling the patterns of a rival concern, and prayed: "(2) That the said defendant, the Gauntlett Dry Goods Company, its attorneys, agents, and servants, may be restrained by an injunction of this honorable court from selling or handling, directly or indirectly, during the term of said contract or agreement, any make of pattern other than that of your orator. (3) That the said defendant, the Gauntlett Dry Goods Company, its attorneys, agents, and servants, may be decreed specifically to perform all and singular the terms, conditions, and stipulations of said agreement, by it to be performed, and it be compelled to order and buy from your orator and expose for sale, as by said agreement stipulated, the said patterns of your orator, your orator being ready, willing, and able, and

regular business for one year at their yards exclusively, whereby he will become subject to the charges for handling, feeding, and slaughtering cattle, from which the profits of their business are derived,—is not in unreasonable restraint of trade, but "the restrictions as to time and place are reasonable and founded upon a sufficient consideration," and the agreement is valid and binding. *Fuller v. Hope*, 163 Pa. 62, 29 Atl. 779.

A stipulation in a contract for the sale of beer, that the vendee shall not sell or be interested in the sale of any beer not manufactured by the vendor, does not render the contract to pay for the beer sold therein void as contrary to public policy. *Fuqua v. Pabst Brewing Co.* — Tex. Civ. App. —, 36 S. W. 479.

And a covenant in a conveyance of land in fee, that the grantor, a brewer, shall have the exclusive right of supplying all ale, beer, and porter which may be consumed at any inn, public house, or beer shop which shall be erected and opened on the premises, is not void as being an unreasonable restraint of trade. *Catt v. Tourle*, L. R. 4 Ch. 654, 38 L. J. Ch. N. S. 665, 21 L. T. N. S. 188, 17 Week. Rep. 939.

Nor is an agreement by a saloon keeper leasing a saloon from a brewing company, as a part of the consideration for the leased premises, to deal exclusively in beer manufactured by the lessor, and not in any manner to sell or expose for sale in the leased

premises any beer not manufactured by the lessor, during the term of the lease, void as in restraint of trade and against public policy, or as in violation of the anti-trust laws of Ohio. *Christ Diehl Brewing Co. v. Konst*, 30 Ohio C. C. 782.

But in *Muller v. Bohringer*, 3 Pa. Co. Ct. 144, it was held that a condition in the lease of a saloon that no other beer than that of the lessor shall be sold on the leased premises is, in the absence of a covenant by the lessor to furnish beer to the lessee, in restraint of trade and against public policy; and the lessee cannot be ejected for violation of the condition if he buys other beer, upon the lessor's failure to supply him owing to a strike among his help.

And in *Huebner-Toledo Breweries Co. v. Singlar*, 28 Ohio C. C. 329, it was held that a covenant in the lease of a saloon owned by a brewing company, that during the term of the lease the lessee will not sell any beer except that manufactured by the lessor, is, in the absence of a covenant by the lessor to furnish such beer to the lessee, against public policy and void, as tending to restrict individual effort and industry.

And a covenant in the lease of a saloon owned by a brewing company, that during the term of the lease the lessee will not sell on the premises or within 1 mile thereof any beer except that manufactured by the lessor, is contrary to public policy and void, unless coupled with a conveyance of good will. *Ibid.*

A. C. W.

hereby offering specifically, to perform said contract or agreement as on its part stipulated to be performed. (4) That your orator may be decreed to recover from the said Gauntlett Dry Goods Company, the said defendant, for the price and value of goods, patterns, fashion guides, and fashion books prepared for the defendant and shipped to it, amounting in the neighborhood of \$300." A prayer for general relief followed.

It is claimed the demurrer should have been sustained because: First. It appears from the allegations in the bill of complaint that the complainant has a full, adequate, and complete remedy at law. That if the allegations therein contained are true, the only relief to which the complainant is entitled is a moneyed judgment at law for damages. Second. It appears from the contract for which suit was commenced, and which contract is made a part of the bill of complaint, that the defendant was prohibited from entering into any such contract for the reason that all such contracts are declared to be against public policy, illegal, and void.

We consider the questions in the order stated:

First. In support of this contention counsel cite *Grandchamp v. McCormick*, 150 Mich. 232, 114 N. W. 80, *Detroit Trust Co. v. Old Nat. Bank*, 155 Mich. 61, 118 N. W. 729, and many other cases. An examination of these cases will show they are not controlling in this case. The case at bar is more like *Standard Fashion Co. v. Siegel-Cooper Co.* 157 N. Y. 60, 43 L.R.A. 854, 68 Am. St. Rep. 749, 51 N. E. 408, where, among other things, it is said: "But even if upon a trial of the action, specific performance of the contract in its entirety were refused as impracticable, still the bill should be retained as one permitting an injunction, in the sound discretion of the court, to restrain the defendants from violating the negative and severable covenant of the Siegel-Cooper Company, that it would not 'sell, or allow to be sold, on its premises, during the duration of this (the) contract, any other make of paper patterns' than those of the plaintiff. The learned appellate division, one of the judges dissenting, overruled the demurrers on this ground, holding that the court should extend its remedy as far as it is able, and thus prevent principal defendant not only from making money by breaking its agreement, but from inflicting a double wrong upon the plaintiff by depriving it of the right to sell, and con-

firming that right on a business competitor. We think this is a sound and just conclusion, because it will compel the Siegel-Cooper Company to either perform its agreement or lose all benefit from breaking it, and at the same time will shield the plaintiff from part of the loss caused by the breach, if persisted in. *Lumley v. Wagner*, 1 De G. M. & G. 604, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652; *Donnell v. Bennett*, L. R. 22 Ch. Div. 835, 52 L. J. Ch. N. S. 414, 48 L. T. N. S. 68, 31 Week. Rep. 316; *Montague v. Flockton*, L. R. 16 Eq. 189, 42 L. J. Ch. N. S. 677, 28 L. T. N. S. 580; *Singer Sewing Mach. Co. v. Union Buttonhole & E. Co. Holmes*, 253, Fed. Cas. No. 12,904; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* (C. C.) 24 Fed. 516, 521; *Goddard v. Wilde* (C. C.) 17 Fed. 846; *Western U. Teleg. Co. v. Union P. R. Co.* (C. C.) 1 McCrary, 558, 3 Fed. 423, 429; *Western U. Teleg. Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13. The injunction, when granted, may not be absolute, but may be based on some equitable condition that will prevent either party from taking advantage of the other, such as the waiver by the plaintiff of the breach of the contract by the principal defendant. The question raised by the demurrer does not relate to any matter of discretion or property, but to the power of the court to grant any relief, conditional or otherwise. We are satisfied with the opinion below upon the subject, and should adopt it as our own without comment, but for a point not thus far considered, which seems to us a conclusive answer to the demurrers, and which, if overlooked, might lead to some confusion. The action is for the specific performance of a lawful contract, duly executed by both parties thereto. It is capable of performance by both, and there is no reason for nonperformance by either. A court of equity has jurisdiction of such actions, and the complaint sets forth the contract, readiness to perform on one side, a refusal to perform on the other, and facts showing no adequate remedy at law. A complete cause of action is therefore alleged, and the only reason for not awarding general relief to the plaintiff is that its nature is so complicated as possibly to require multiplicity of orders by the court in its efforts to superintend the details of an extensive and peculiar business. This fact does not deprive the court of jurisdiction, but justifies a refusal, in its sound discretion, to exercise it. It confers no right upon either party. The court does not refuse to act because the defendants

object to its acting, for it would refuse, under the circumstances, if both parties requested it to proceed; but it refuses because the execution of its decree would require protracted supervision. It is the difficulty of enforcing, not of rendering, judgment that causes it to hesitate. The office of a demurrer is to sweep away a defective pleading, and in the case before us it attacks the substance of the complaint; yet the complaint is good in substance, for it sets forth a cause of action in equity. While it is true that the court, in its discretion, may not hear the cause, or after a hearing may refuse relief owing to the difficulty of enforcing its decree, still this does not make the complaint defective, nor authorize a general demurrer, which 'must be founded upon an absolute, certain, and clear proposition that, taking the charges in the bill to be true, the bill would be dismissed at the hearing.' Beach, Eq. Pr. 225. Upon the facts before us, it is in the power of the court to enforce the agreement the same as it is in the case of railroad contracts; but the difficulties attending the enforcement are so great that the court would ordinarily refuse to undertake it, as there is no public interest involved. As there was complete jurisdiction and a perfect cause of action against both defendants, the demurrers must be overruled. *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 451, 51 N. E. 301." See also *St. Regis Paper Co. v. Santa Clara Lumber Co.* 173 N. Y. 149, 65 N. E. 967; *McCall Co. v. Wright*, 198 N. Y. 143, 31 L.R.A.(N.S.) 249, 91 N. E. 516; *Powell v. Dwyer*, 149 Mich. 141, 11 L.R.A.(N.S.) 978, 112 N. W. 499; *Buckhout v. Witwer*, 157 Mich. 406, 23 L.R.A.(N.S.) 506, 122 N. W. 184; 22 Cyc. 769-771.

Second. Is the contract void as against public policy? An answer to this question in the negative is found in *Buckhout v. Witwer*, 157 Mich. 406, 23 L.R.A.(N.S.) 506, 122 N. W. 184. And the cases cited therein. We do not think the case is within the inhibition of the state.

The decree of the court below is affirmed, with costs, and defendant is given twenty days in which to answer.

Steere, Brooke, and Stone, JJ., concur with Moore, Ch. J. Blair, J., being ill, took no part in the decision. Ostrander, J., concurs upon the ground that the contract in question is not in restraint of trade within the meaning of the contract in question. McAlvay, J., concurs with Ostrander, J.  
42 L.R.A.(N.S.)

## WISCONSIN SUPREME COURT.

### MANUFACTURERS' & MERCHANTS' INSPECTION BUREAU, Resp., v.

EVERWEAR HOSIERY COMPANY, Appt.

(— Wis. —, 138 N. W. 624.)

#### Appeal — defect — appearance — effect.

1. The appearance of the parties and trial of the cause before a circuit court which has jurisdiction of the subject-matter waives a defect in the appeal from a lower tribunal.

#### Evidence — to vary written contract — necessity of signature.

2. Acceptance of a proposed contract contained in a letter, by acting under it for

#### Note. — Validity of contract for detection of crime.

It is seen that the decision adverse to the validity of such a contract, in *MANUFACTURERS' & M. INSPECTION BUREAU v. EVERWEAR HOSIERY Co.*, was reached in the light of cases involving the question as to the validity of contracts to procure testimony. This question has already been fully discussed in the notes in 30 L.R.A.(N.S.) 278, and 19 L.R.A. 371.

But the cases discussed in those notes, while possibly pointing toward some general formula that may be applied in the solution of the present question, are not at all controlling with respect thereto, for the reason that a decision in any particular case depends upon whether the particular contract involved is deemed to be of such a character as to come within the condemnation of public policy.

But one case has been found in addition to *MANUFACTURERS' & M. INSPECTION BUREAU v. EVERWEAR HOSIERY Co.* which involves a contract to induce the detection of offenses as distinguished from the collection of evidence to fasten a particular offense upon some person; and that case, like the *HOSIERY Co. CASE*, involves stipulations for contingent compensation, which were held invalid.

Thus it is held that a contract of county authorities to pay a person for investigating the validity of a public vote in favor of a railroad aid subscription, at the rate of \$100 for the first ten votes shown to have been illegal, \$200 for the next ten, etc., and a gross sum of \$1,200 in addition in case the illegality of the majority in the election is judicially decreed, was held void in *Gillett v. Logan County*, 67 Ill. 256, upon the ground that it was contrary to public policy in that it was such as to encourage attempts to suborn witnesses, to tamper with jurors, and thus taint with corruption the atmosphere of courts of justice.

It should be noted that this note does not deal with the general question of rewards.

L. A. W.

a period of time, is sufficient, without formal signature of it, to exclude parol evidence of its terms.

**Same — acceptance of contract — objection to reports.**

3. Upon the question of the acceptance of a contract for services, evidence is not admissible of objections to reports made by persons acting under the contract.

**Same — illegality of contract.**

4. Parol evidence is admissible to show that a written contract apparently good on its face is a mere cover for an illegal transaction.

**Contract — for detection of crime — validity.**

5. A contract by which one undertakes for a contingent fee to detect larceny or embezzlement among the employees of his employer, and apprehend persons accused and bring them before the employer, with proof that the stolen property is in their possession, is void as contrary to public policy.

(November 19, 1912.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Milwaukee County affirming a judgment of the Civil Court in plaintiff's favor in an action brought to recover compensation for services of an industrial expert. Reversed.

The facts are stated in the opinion.

Mr. A. M. Newald for appellant.

Mr. B. F. Saltzstein, for respondent:

There was confirmation of a contract entered into between the parties and a continued course of conduct by both parties, inconsistent with any other theory except that they were acting under the contract as confirmed by respondent.

9 Cyc. 260, 269; Watkins v. Rymill, 31 Week. Rep. 337, 52 L. J. Q. B. N. S. 121, L. R. 10 Q. B. Div. 178, 48 L. T. N. S. 426, 47 J. P. 357; Sellers v. Green, 172 Ill. 549, 40 L.R.A. 589, 50 N. E. 246.

The contract is not attacked for fraud or mistake, and, in the absence of fraud or mistake, one who signs or accepts a written contract is conclusively presumed to know its contents and assent thereto.

Standard Mfg. Co. v. Slot, 121 Wis. 14, 105 Am. St. Rep. 1016, 98 N. W. 923; McCord v. Flynn, 111 Wis. 78, 86 N. W. 668; Deering v. Hoeft, 111 Wis. 339, 87 N. W. 298; Montgomery v. American Cent. Ins. Co. 108 Wis. 146, 84 N. W. 175; Straker v. Phenix Ins. Co. 101 Wis. 413, 77 N. W. 752; Jackowski v. Illinois Steel Co. 103 Wis. 448, 79 N. W. 757; German Bank v. Muth, 96 Wis. 344, 71 N. W. 361; Hooker v. Hyde, 61 Wis. 207, 21 N. W. 52; John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337; Brown v. Search, 131 Wis. 109, 111 N. W. 210; Frei v. McMurdo, 42 L.R.A.(N.S.)

101 Wis. 423, 77 N. W. 915; Bostwick v. Mutual L. Ins. Co. 116 Wis. 393, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246.

Timlin, J., delivered the opinion of the court:

This action at law upon contract was commenced and tried in the civil court for Milwaukee county, appealed to the circuit court, where a new trial was had without objection or motion to dismiss the appeal from the civil court. The plaintiff recovered judgment in consequence of a directed verdict, and the appellant appeals, assigning error (1) that the circuit court acquired no jurisdiction because the notice of appeal was not served upon the judge of the civil court (2) the circuit court erred in excluding evidence in support of the averments in the answer.

With reference to the first error assigned, it is sufficient to say that the parties after the defective appeal from the civil court, without any motion to dismiss that appeal or other objection to the jurisdiction, appeared generally and tried the case *de novo* in the circuit court. This conferred jurisdiction of the parties in any event, and of the subject-matter of actions at law on contracts the circuit court always had jurisdiction. Bull v. Christenson, 61 Wis. 576, 21 N. W. 521; Givans v. Searle, 136 Wis. 608, 118 N. W. 202.

On June 29, 1910, plaintiff wrote to defendant: "Confirming our verbal arrangement of June 27th, I will say that we will place an industrial and economic expert in your plant for the purpose of checking the general industrial conditions therein, at the rate of \$150 per month. This operative is to be placed upon your pay roll at the same rate of wages that other workmen of his class are receiving. Whatever wages are to be paid to this man are to be deducted from the above-mentioned sum, except wages earned by this operative by working over time or on Sunday and holidays, and also any wages earned by him in excess of \$3 per day will not be deducted. It is further understood that this contract can be terminated by either party at their option; however a weeks' notice is desired. We take this opportunity of thanking you for the business and assure you that the same is appreciated." The "verbal arrangement" referred to in this letter occurred on June 27, 1910, and on this day one of the employees of the plaintiff began work for defendant. The defendant received the letter of June 29th on or about the day of its date, but did not answer it. It continued to accept the services of this man and of other subordinates



of the plaintiff who came afterward, and the plaintiff began on June 29th making daily reports in writing to defendant, and continued this until September 8, 1910. The defendant received all these reports. The vice president of the defendant, who had general management of its factory and who claims to have had the "verbal arrangement" with plaintiff, testified: "After receiving this letter, . . . the operatives of the plaintiff company were placed in the employ of our company. There were several of them. Part of the time I placed them at their respective duties myself; and that was after the receipt of this letter. On each occasion when the plaintiff would send in one of its operators, it would send him with a letter of introduction to me. I would read the letter and then place the employee. I received several of these letters of introduction after the letter of June 29th, and placed those men upon those introductions. Services were rendered by the plaintiff's employees at the plant of the defendant between these dates, June 27th and September 6th. They did hosiery work, and submitted written and verbal reports each day. I received all these written and verbal reports, and the first of the written reports was June 29th and the last was September 8th." It also appeared that on August 31, 1910, the plaintiff sent and defendant received a statement of account showing a balance due from defendant to plaintiff of \$92.20, also one on September 10, 1910, showing a like balance of \$234.45, and the vice president of the defendant testified that this last was a correct statement of the services rendered at the rate of \$150 a month less deductions for wages paid to the men by defendant; in other words, corresponding with the quoted letter of June 29th.

The foregoing testimony was given while the witness was being examined on the part of the plaintiff as an adverse witness pursuant to § 4068, Stats. The defendant's counsel undertook what is called a cross-examination of this witness, in the course of which he asked the witness to state the terms of the oral contract or "verbal arrangement" referred to. The evidence was excluded, and this ruling is the principal ground of complaint on this appeal. So far as the ruling was based upon the ground that the terms of the letter of June 29, 1910, could not be varied or altered by parol evidence of a precedent valid oral agreement varying from the written agreement, the ruling was correct. There was ample proof of the acceptance of and acquiescence in the terms of the letter of June 29th for more than two months, by accept-

ance of daily service thereunder. The letter in question does not by reference to the "verbal arrangement" make that a part of the writing, but it purports to give in writing the true version of the precedent oral contract.

If the defendant had signed its acquiescence at the foot of the letter in question, there could be little doubt that parol evidence of a prior oral understanding varying this writing would be inadmissible. But assent by acceptance of the letter, acceptance of the services tendered after June 29th, with silent acquiescence in this version of the "verbal arrangement," is quite as potent to close a contract as a written declaration to that effect. Bills of sale, promissory notes, deeds, and many other writings are signed by one of the contracting parties and delivered to another, who receives the same, and orally or by conduct acquiesces therein. This party cannot afterwards be heard to alter or modify the writing by proof of some antecedent oral agreement which has become represented by and merged in the writing. *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52, and cases cited in opinion.

The witness was then asked whether he retained the reports received after June 29th from the plaintiff, whether he ever complained to the plaintiff regarding the nature of these reports, and whether he made any objection to the nature of these reports. Objections to these questions were sustained. There was no error in this ruling, because no time was fixed with reference to any of the questions, and objections to the nature of the reports were not relevant to the question of defendant's acceptance of the contract embodied in the letter of June 29th.

Neither could it affect this question if the defendant returned all the reports after it received plaintiff's bill.

He who assigns error must affirmatively show error.

After the plaintiff rested, the defendant recalled its vice president as a witness in its behalf, and offered evidence, whereupon the court made substantially the same rulings. The witness then further testified that after June 29, 1910, he had conversations with a representative of the plaintiff relative to the contract in question. Being asked what the conversations were, counsel for plaintiff interposed an objection on the ground that the testimony sought to be elicited was incompetent, etc., and tended to vary the contract. Although this ruling was correct so far as the evidence attempted to merely vary the writing by proving a different binding and controlling oral con-

tract, there is another ground upon which the evidence first above ruled out might have been admissible. Parol evidence is competent to show that a writing apparently good on its face is a mere cover for an illegal transaction; in other words, to show illegality. *Twentieth Century Co. v. Quilling*, 130 Wis. 318, 110 N. W. 174.

"Contracts to pay for collecting and procuring testimony to be used in evidence, coupled with the condition that the contractee's right to compensation depends upon the character of the testimony procured, or upon the result of the suit in which it is to be used, have been universally condemned by the courts as contrary to public policy, for the reason that such agreements hold out an inducement to commit fraud, or procure persons to commit perjury." Note to *Hughes v. Mullins*, 13 Ann. Cas. 209, 213; *Sherman v. Burton*, 165 Mich. 293, 130 N. W. 667, 33 L.R.A.(N.S.) 87, and note; *Goodrich v. Tenney*, 144 Ill. 422, 33 N. E. 44, 19 L.R.A. 371, and cases in note, 36 Am. St. Rep. 459; *Neece v. Joseph*, 95 Ark. 552, 129 S. W. 797, 30 L.R.A.(N.S.) 278, and cases in note, Ann. Cas. 1912 A, 655; *Quirk v. Muller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077.

*Stanley v. Jones*, 7 Bing. 369, 6 Eng. Rul. Cas. 376, presented a case where the promisor believed he had been defrauded, and that the promisee was in possession of evidence to make this manifest, and to prove that the promisor was entitled to recover considerable sums of money from the persons who defrauded him, so he agreed to pay the promisee one-eighth part of the clear amount of such sum as he might thereafter recover through the means of the promisee. This contract was held illegal, and it was thought that it amounted to the offense of champerty. It is also said that, if there was any difference between this contract and champerty, the difference was strongly against the legality of the contract, because "the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence has a direct and manifest tendency to pervert the course of justice."

*Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154, was where no litigation was pending or apparently contemplated, but the promisor considered that he had a cause of action arising out of injuries in a railroad accident, and procured the promisee, who was a physician, to go with him and lay the facts relative to the extent of his disability before the railroad company's counsel and medical advisers in consideration of a contingent fee. The physician

did so, a settlement was reached, and the physician sued for his contingent fee, but it was held that such contract was illegal, and recovery was not allowed.

In *Neece v. Joseph*, 95 Ark. 552, 30 L.R.A.(N.S.) 278, 129 S. W. 797, Ann. Cas. 1912 A, 655, it was held that a contract to secure evidence of a given state of facts which will permit the winning of a lawsuit is void as against public policy. It is said: "A contract is void as against public policy if by it one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to promote unlawful acts."

In *Gillett v. Logan County*, 67 Ill. 256, where the county authorities contracted with one McNeal to hunt up and prepare testimony for the county for a fee in part contingent upon the outcome of the case in which the testimony was to be used, the contract was held illegal. On account of its corrupting tendency it was considered against public policy.

In *Casserleigh v. Wood*, 56 C. C. A. 212, 119 Fed. 308, the contract is set out in the statement of facts preceding the opinion of the court, and it provides a contingent compensation to the promisee for disclosing evidence theretofore collected by him and then in his possession. The court said: "While such contracts may at times result in the enforcement of rights that would otherwise be lost, yet we are persuaded that as a general rule they tend to disturb the peace of society and occasion suits that otherwise would not have been brought, and which ought not to have been brought. . . . We are also of opinion that, even if an action at law could be maintained for a breach of the contract, yet it is so far meretricious and tainted with illegality that a court of equity ought not to enforce it specifically."

In *Lyon v. Hussey*, 83 Hun, 15, 31 N. Y. Supp. 281, no litigation was pending, but the contract sued on was one to furnish evidence to establish the claim of the plaintiff in a litigation to be commenced. The court said: "It is clear that such a contract is against public policy." See also *Langdon v. Conlin*, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834, where the contract was between an attorney and another person, by which the latter agreed to assist in looking after and procuring witnesses whose testimony was to be used in cases, and to secure the employment of the attorney in such cases, all in consideration of a share of the

fees which the attorney should receive for his services. *Holland v. Sheehan*, 108 Minn. 362, 23 L.R.A.(N.S.) 510, 122 N. W. 1, 17 Ann. Cas. 687.

*Hughes v. Mullins*, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209, presented the case of a written contract to procure evidence relating to a specified subject. The compensation was contingent, but to be paid whether the evidence was used in court or not, and the evidence was of a nature tending to show that fraud had been perpetrated by a third person upon the party agreeing to pay the contingent compensation. Quoting from *Quirk v. Muller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077, the court said: "We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury; but the contract had the tendency and opened the very strong temptation to the procurement of perjury." The word "perjury" does not exhaust or limit the mischievous possibilities of such contracts. If the contract is promotive of false charges which must in the end be supported by perjury, or make the accuser liable, or even if it is only promotive of litigation by one having no interest in the litigation, it is against public policy. *Cowles v. Rochester Folding Box Co.* 81 App. Div. 414, 80 N. Y. Supp. 811; *Reynell v. Sprye*, 1 De G. M. & G. 660, 21 L. J. Ch. N. S. 633; *Rees v. De Barnardy* [1896] 2 Ch. 437, 74 L. T. N. S. 585.

*Wilmoth v. Hensel*, 151 Pa. 200, 31 Am. St. Rep. 738, 25 Atl. 86, is the only case we find somewhat to the contrary where a speaker at a political meeting declared that he would pay \$1,000 for the conviction of any person guilty of any violation of the election laws, and also referred to a handbill offering a like reward, signed by him as chairman of a committee. The plaintiff, who was a railroad policeman hearing of it, obtained from one Howard, a tax collector, a tax receipt running to a fictitious person, and also a number of tax receipts in blank for which the plaintiff paid the other officer. These tax receipts were for the purpose of qualifying fictitious or unqualified real persons as voters. Plaintiff then caused the arrest of the tax collector, who pleaded guilty, the judge suspended sentence, and plaintiff brought action against defendant, who set up various defenses, including that of illegality. The contract was held valid, but the decision smacks more of politics than of law, and the jury was permitted to pass upon the motives of the parties. So that in any event it is not conclusive of the instant case which has not been submitted to the jury. 42 L.R.A.(N.S.)

The exact contract to which the oral evidence is directed we must presume to be that pleaded in the answer. This is stated as follows: "It was agreed that the plaintiff should render secret service to the defendant in and about the plant of said defendant, . . . for the purpose of detecting acts of larceny and embezzlement of the goods in the factory of said defendant, to apprehend the person or persons guilty thereof, to report the same to the defendant, and to produce to this defendant or its officers the person or persons guilty of such acts with the stolen goods in their possession." The contingency was as follows: If the plaintiff should be successful in its investigation by in fact detecting such acts of larceny and embezzlement as aforesaid, and apprehending the person or persons guilty thereof, and reporting the same to this defendant, and producing them before this defendant with the stolen goods in their possession, in such case the defendant should pay, etc. To "apprehend the persons guilty" must be either to arrest them by regular process of law or privately. To produce to the defendant or its officers the person guilty, with the stolen goods in his possession, could only be done by inducing some person to make confession and appear before the defendant's officers, or to forcibly take persons there. The whole tendency of the contract is to induce the promisee, in order to earn his money, to make charges against and fasten upon other persons charges of larceny and embezzlement, and then, in addition to this, to assume the character of public officers, and apprehend such persons, and bring them before the officers of the defendant with the stolen goods, not on their person, but in their possession. We cannot assume the defendant was making this contract for the purpose of satisfying idle curiosity. It had some serious motive. If the plaintiff performed as required by the contract, it became the public duty of the defendant to make complaint and institute a public prosecution, and to give in the name of plaintiff or its employees as witnesses. It might, on the other hand, have intended to settle privately with the guilty person and suppress the public prosecution, but in either case the tendency of the contract is to the commission of unlawful acts on the part of the parties to it, either a contract to procure evidence to produce a certain result or to induce the making of charges by the plaintiff in order to earn his fee, or to provide for traffic by plaintiff and defendant with persons guilty of larceny to the private profit of defendant. Further evidence may relieve this contract of its illegal features or confirm

its illegality, but sufficient appears in the pleading to admit oral proof of the real consideration of the contract and to permit the introduction of the defense of illegality.

It is not necessary that the contingency upon which the compensation of the promisee rests should be the winning of a lawsuit. Any other contingency that would have the same effect in instigating false charges, or in inducing the promisee to stretch his evidence up to a given mark in order to get his pay, would be the same in principle. Here the service is to be secret, the act discovered must constitute larceny or embezzlement, the person accused must be apprehended and brought before the officers of the defendant, and there must be proof that the stolen goods are in his possession. If there were no fee contingent upon defendant, but a regular compensation, there could be no illegality about it. It is the contingent nature of the compensation, and its tendency to induce false charges and all the fraud and trickery of the private detective business, that *prima facie* stamps this contract with illegality.

It follows that the judgment should be reversed, and the cause remanded for a new trial. It is so ordered.

Petition for rehearing denied.

### GEORGIA SUPREME COURT.

LAURA L. ROGERS, Plff. in Err.,  
v.  
C. L. PETTIGREW.

(138 Ga. 528, 75 S. E. 631.)

**Attorney — compromise — compensation.**

An attorney who compromises his client's

Headnotes by EVANS, P. J.

**Note.** — *Attorneys: loss of compensation by compromising case without authority.*

The almost universal rule in this country is that an attorney has no implied authority to compromise his client's cause of action. *Gibson v. Nelson*, 31 L.R.A.(N.S.) 523, and note.

Only one case has been found, however, in addition to *ROGERS v. PETTIGREW*, which passes upon the effect of an unauthorized compromise upon the attorney's right to compensation. In that case, *Chatfield v. Simonson*, 92 N. Y. 209, affirming 10 Daly, 295, plaintiff, who was suing to recover a fee for professional services in contesting a will, was shown to have released certain

case against the latter's express direction is not entitled to any compensation.

(Atkinson, J., dissents.)

(August 15, 1912.)

**ERROR** to the Superior Court for Gwinnett County to review a judgment in plaintiff's favor in a proceeding for the foreclosure of an attorney's lien. Reversed.

The facts are stated in the opinion.

Mr. ALONZO FIELD, for plaintiff in error:

An attorney has no authority to compromise his client's case.

3 Am. & Eng. Enc. Law, 2d ed. § 4, p. 355; *Dickerson v. Hodges*, 43 N. J. Eq. 45, 10 Atl. 111; *Lewis v. Duane*, 141 N. Y. 303, 36 N. E. 322; *Mackey v. Adair*, 99 Pa. 143; *Harbach v. Colvin*, 73 Iowa, 638, 35 N. W. 663; *Dickerson v. Hodges*, 43 N. J. Eq. 46, 10 Atl. 111; *Smith v. Lambert*, 7 Gratt. 143; *Smith v. Dixon*, 3 Met. (Ky.) 438; *Preston v. Hill*, 50 Cal. 54, 19 Am. Rep. 647; *Williams v. Nolan*, 58 Tex. 708; *Huston v. Mitchell*, 14 Serg. & R. 307, 16 Am. Dec. 506; *Holmes v. Rogers*, 13 Cal. 191; *Swinfen v. Swinfen*, 24 Beav. 549, 27 L. J. Ch. N. S. 35, 3 Jur. N. S. 1109, 6 Week. Rep. 10; *Preston v. Hill*, 50 Cal. 48, 19 Am. Rep. 647; *Commercial Union Assur. Co. v. Chattahoochee Lumber Co.* 130 Ga. 191, 60 S. E. 554; *Longman v. Bradford*, 108 Ga. 572, 33 S. E. 916.

Messrs. J. A. Perry and C. L. Pettigrew, for defendant in error:

The attorney has authority in any action to bind his client by any agreement in relation to the case and in signing judgments; but he cannot receive in discharge of a claim anything but the full amount in cash.

*Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133; *Webster v. Dundee Mortg. & T. Co.* 93 Ga. 279, 20 S. E. 310; *Wade v. Powell*, 31 Ga. 1; *McElreath v. Middleton*, 89 Ga. 83, 14 S. E. 906; *Adkins v. Bryant*, 133 Ga. 465, 134 Am. St. Rep. 211, 66 S. E. 21.

It is the attorney's duty to guard in every

property involved from the operation of the action, for a consideration from the adverse parties and without the consent of his clients, and this was held to be a good defense to his action, the court saying: "The conduct of the plaintiff, as disclosed by this evidence, was a violation of his professional duty and the obligations which he owed to his client, and tended directly to defeat the object of the employment, and the sole consideration for the promise counted upon by him in this action. We are therefore of the opinion that the facts were established showing a breach of his agreement, and a good defense to the plaintiff's claim thereon, and it follows that they were properly received in evidence and considered in the determination of the case." R. L. S.

form the interest of his client, and if, therefore, an emergency arises which demands a compromise shall be effected, it is the duty of the attorney to secure the most favorable one that he can obtain.

Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63; Wieland v. White, 109 Mass. 392; Re Heath, 83 Iowa, 215, 48 N. W. 1037; Bonney v. Morrill, 57 Me. 389; Gibson v. Nelson, 111 Minn. 183, 31 L.R.A.(N.S.) 523, 137 Am. St. Rep. 549, 126 N. W. 731.

Evans, P. J., delivered the opinion of the court:

The point in the case is whether an attorney is entitled to collect his fee by foreclosure of his lien under these facts: The client was the administratrix of an estate, and employed the attorney to enjoin the enforcement of certain *fi. fas.*, because of alleged illegalities, against the estate, and to cancel the sale of 250 acres of land made under these *fi. fas.* The case was stubbornly litigated through several years. On the last trial, while the jury were deliberating on the case, a compromise agreement was reached by the attorneys, whereby the title to 100 acres of the land was confirmed in the purchaser (who was the transferee of the *fi. fa.*), and the remainder of the tract (150 acres) was declared to be the property of the estate of the defendant in *fi. fa.*, free of lien. A verdict was taken and a decree was entered according to the agreement. The client promptly disaffirmed the compromise settlement, and moved the court to vacate it. The motion was denied. The attorney then filed his petition to foreclose his lien for fees upon the 150 acres of land awarded in the decree to his client. She resisted the foreclosure, on the ground that the settlement was made by her attorney against her express instructions. On the trial the attorney testified that there had been several propositions of settlement made by the holder of the *fi. fas.*, submitted to his client, all of which were refused. About twelve months before the compromise settlement, the client told the attorney not to compromise the case. The compromise settlement was made pending the last trial, after the case had been submitted to the jury. The attorney had informed his client that she could go to her home, which was in the country, and that he expected to win her case. After his client left he became apprehensive of a mistrial, or an adverse verdict, or his ability to sustain a favorable verdict, inasmuch as the issues of law and fact were both doubtful. Overtures for a settlement between the attorneys culminated in the compromise settlement, which was expressed in the consent verdict. He acted

in the best of faith for the interest of his client, and believed that he made a good settlement of her case. The client testified that she had repeatedly informed her attorney that she would not make any compromise settlement, and that she left the courtroom after the case was submitted to the jury upon the assurance of her attorney that her presence was no longer necessary and that he was confident of winning her case. Other evidence related to the value of the services and the good faith of the attorney. The court instructed the jury that if the attorney, in making the compromise settlement, acted contrary to express instructions of his client, he was not entitled to recover his fees. The jury found for the attorney. In her motion for new trial the client contends that the verdict is contrary to the charge of the court, and without evidence to support it.

The validity of the judgment based on the compromise settlement had been adjudicated adversely to the client; but the issue in that case did not include the right of the attorney to collect his fee, if he settled the case against the client's express instructions. The authorities differ as to the power of an attorney to compromise his client's case without special authority. Weeks, Attorneys at Law, § 228. The prevailing opinion of the English courts is that an attorney has power to make bona fide compromises of his client's case; but it has been held by the court of Queen's bench that, if the attorney enters into a compromise against the express direction of his client, he is liable in an action of damages, and it is no defense that associate counsel advised the settlement. Fray v. Voules, 1 El. & El. 839, 5 Jur. N. S. 1253, 28 L. J. Q. B. N. S. 232, 7 Week. Rep. 446. A litigant has the right to insist that his case be adjudicated according to the established rules of law and procedure. When he instructs his attorney not to compromise his case, the attorney is bound by such instructions, and is not at liberty to violate them, even though the attorney honestly believes a compromise settlement would be to the best interest of his client. If he violates his instruction in this respect, he forfeits all right to compensation. Says Simmons, J., in Larey v. Baker, 86 Ga. 468, 475, 12 S. E. 684: "We think the law is that where an agent or attorney is unfaithful to his trust, or violates his instructions, he is not entitled to any compensation." We do not think there is any serious conflict between the attorney and his client. Both agree that the client had firmly set her mind against a compromise of her suit, and that the attorney was directed not to compro-

mise it. The attorney's testimony is that this instruction was twelve months prior to the actual compromise. The interval of time does not serve to revoke the instruction, especially as the client neither said nor did anything which would imply a change of instruction. We are satisfied that the attorney, in the compromise settlement, was actuated by the best of motives to efficiently serve his client, but his zeal and desire to recover something for his client is no excuse for violating her positive instructions.

Judgment reversed.

All the Justices concur, except Atkinson, J., dissenting.

### KANSAS SUPREME COURT.

STATE OF KANSAS

v.

G. H. BUCK, Appt.

(— Kan. —, 127 Pac. 631.)

**Indictment — murder — poison — sufficiency.**

1. An allegation in an information for murder by poisoning is sufficiently certain which charges that the defendant administered to a person named "certain deadly drugs and poisons, to wit, cyanide of potassium and hydrocyanic acid, and also other drugs and poisonous substances to this county attorney unknown," although such other drugs and poisonous substances are not otherwise designated or described.

**Evidence — exclamation — res gestæ.**

2. An exclamation of a person made when

Headnotes by BENSON, J.

**Note. — Identification of substance by odor.**

In 1 Wharton on Criminal Evidence, 10th ed. § 459, it is said: "Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury. Eminently is this the case with regard to noises and smells."

The holding of the principal case is in effect that witnesses who noticed the smell of a compound given a sick person may compare the odor with that of a liquid produced at the trial of one for homicide by poisoning, and say whether the odor is the same.

A somewhat similar decision in which identification by comparison was permitted is that of Walker v. State, 58 Ala. 393, where the opinion of a prosecuting witness that wheat stolen from him was the wheat

taking a dose of supposed medicine, that it burns her stomach, accompanied by a wry face, sudden sickness, and vomiting, is admissible in evidence on the trial of a charge of poisoning such person.

**Same — murder — poisons.**

3. Evidence tending to show that one accused of murder by means of poison administered a preparation of ergot, cotton root, and dilute sulphuric acid to his alleged victim several times in the two days preceding her death is admissible under the charge stated in the first above paragraph, although he administered a different treatment immediately before her death; the various treatments appearing to be parts of a connected transaction.

**Same — prescription — request not to file.**

4. The testimony of a druggist that the appellant had requested that a prescription for ergot and other drugs presented by and filled for him should be kept from the prescription files kept in the drug store was admissible, with the prescription, in connection with the evidence referred to in the last above and next succeeding paragraph.

**Same — comparison of odors.**

5. To identify a substance administered as a medicine, persons who were present when it was given, and who described it as having a strong, disagreeable odor, may be allowed to compare the odor of the liquid so given with the contents of a bottle produced on the trial, and testify whether the smell is the same.

**Same — expert — cause of death.**

6. A distinction between a hypothetical question to an expert witness calling for an opinion as to what might or could have caused death, and one asking for an opinion as to what did cause it, is considered, and the latter form is approved. A question asking for an opinion of the cause of death, based upon a given hypothesis, or upon personal knowledge of the conditions,

found in defendant's possession was held competent evidence, it appearing that the prosecutor had compared the stolen wheat with that remaining in the hogshead from which it was taken, and that both exuded the same odor, where it was shown that the prosecutor was acquainted with the distinctive peculiarities of wheat, and that wheat cut early as this wheat was possessed of a peculiar odor.

But in Dane v. State, 36 Tex. Crim. Rep. 84, 35 S. W. 661, it was held that evidence was incompetent on the trial of one for a violation of a local option law, to show by one who acknowledged his inability to make a chemical analysis of the compound sold by the defendant, that he had prepared a similar compound, judged by the taste and smell thereof, consisting of many ingredients, one of which was alcohol; and where it appeared that the lower court had permitted the jury to taste and smell of a compound sold by the defendant, he being charged with the sale of a similar com-

or both, is one that a properly qualified witness may be allowed to answer.

**Same — cross-examination — hypothetical question.**

7. On cross-examination a hypothetical question omitting material facts which the evidence tended to prove, and which were included in a question asked upon direct examination, is permissible, within reasonable limits, to test the intelligence, capacity, discernment, and candor of the witness; but where the cross-examination proceeded at great length, and the witness testified upon the matters embraced in the question in detail, and admitted that he did not know positively whether the death might have occurred from poison without the symptoms stated, the ruling excluding the question did not affect the substantial rights of the appellant.

**Trial — verdict — murder — poison.**

8. Upon a charge of murder by poison, it is not necessary that the verdict should state the kind of poison used.

(November 9, 1912.)

**A** PPEAL by defendant from a judgment of the District Court for Kiowa County convicting him of murder. Affirmed.

**Statement by Benson, J.:**

The appellant was convicted of the murder of his wife by means of poison. Errors are assigned upon orders overruling motions to quash the information, for a new trial, and in arrest of judgment; also upon various rulings relating to the evidence and instructions.

The appellant is a physician, and has practised his profession at Greensburg since October, 1908. He was married in December, 1909. His wife died at her home on

pound, an intoxicant, the court, in the absence of any data in the record as to the results of the experiment, declined to review the procedure.

It was held in *Green v. State*, 125 Ga. 742, 54 S. E. 724, that a witness could testify that the odor from the clothes of the accused was that of carbolic acid, and that he had recently smelled carbolic acid in a bottle by the side of the decedent, although it was objected that he was not an expert witness, he having testified that he could distinguish between the odor of carbolic acid and that of iodoform.

It was held in *Marshall v. Laughran*, 47 Ill. App. 29, that one having a sense of smell was competent to discover, and testify to the presence of, spirituous liquor in the contents of the stomach of an injured person who had vomited.

The case of *People v. Marx*, 128 App. Div. 828, 112 N. Y. Supp. 1011, is not a case decisive of the question whether or not a substance may be identified by its odor, but the opinion is susceptible of an

October 17, 1910. She was twenty-three years of age, and had possessed excellent health until near the time of her death. Her younger sister was a member of the household. Her brother was at her home for a few days before her death. Her father came on Saturday, and her mother came on Sunday and was with her when she died on the following Monday. The body was not embalmed, and was buried on Tuesday. Two weeks afterwards it was exhumed and an autopsy held. Parts of the viscera were delivered to a professor of organic chemistry of the State University, who made an analysis for the purpose of ascertaining the presence of poison.

Evidence was given tending to prove the following facts, among which brief quotations from the testimony are given for greater clearness: On August 23, 1910, Dr. Buck made and presented to a druggist at Greensburg, who is his brother-in-law, a prescription for 2 ounces of fluid extract of ergot, fluid extract of cotton root, and dilute sulphuric acid, which was filled. Two weeks later he had the same prescription filled, only the quantity was doubled, and the compound was taken away in a bottle. At the doctor's request the prescription was not filed with other prescriptions, as the custom of the druggist was, but it was found and produced at the trial. About October 1, 1910, the same druggist sold and delivered to Dr. Buck 2 ounces of hydrocyanic acid in a bottle, which he requested should not be labeled, saying that he would use it himself. This druggist had previously given prescriptions for the same article. The doctor's office was near the drug store, with which he was familiar. At times he had put up prescriptions. The druggist

inference in the affirmative. In that case an officer had ordered whisky from the defendant, and drank it, and the objection that he did not know whether or not there are "many medicines" that smell like whisky was overruled, the court saying: "The other policeman testified to the giving and filling of the order, but did not taste or smell the drink."

In *Conner v. State*, 6 Tex. App. 455, a prosecuting witness was permitted to testify, apparently without objection, to the smell of chloroform in a room in which a theft had been committed within the night, and it was held competent for another witness to state that upon entering the room of the prosecuting witness in the night he had smelled chloroform, the evidence being competent to show the intent with which articles were taken. Inasmuch as the evidence in this case was not sought for the purpose of the identification of a substance, this case is not precisely within the scope of this note.

R. S. N.

kept in his stock potassium cyanide, as well as hydrocyanic acid. The doctor knew where these articles were kept in the store. On Saturday preceding Mrs. Buck's death, Dr. Buck gave her a dose with a teaspoon out of a 4 ounce bottle of some dark thick fluid having a greenish hue and a strong, disagreeable odor. She complained that it burned her stomach, and she vomited in a few minutes and was very pale and sick for twenty or thirty minutes, when she regained her usual feelings. Dr. Buck left for the country immediately after giving the dose, telling her brother that she had inflammation of the stomach and bowels. On Sunday morning he gave her a like dose of the same liquid. In two or three minutes she lay down and soon vomited. In the evening he gave her another dose of the same kind, followed immediately by sickness and vomiting as before, after which she appeared to be well, and ate supper of toast and milk, and apparently rested well that night and appeared to feel well the next morning. Her mother attended to the household duties, and Mrs. Buck did not leave her bed until about 9:30 A. M., when she arose to answer a telephone call and held a lengthy conversation with a sister over the telephone. She partook of a dinner of bread and milk with her sister. Dr. Buck left after breakfast and returned between 11 and 12 o'clock and gave her another dose in a teaspoon, which she vomited up. When taking these doses, Mrs. Buck made a wry face and complained of a burning sensation, and pallor and vomiting followed. On Saturday and Sunday after the vomiting referred to, her complexion was clear, and she appeared cheerful and bright. Between 1 and 2 o'clock on Monday, Dr. Buck called two physicians of Greensburg to see his wife, and told them that she "had been ailing for a week or ten days; that she had been nauseated; that that was the chief symptom of which she complained; that she had some pain in the abdominal region; and he further stated that her stomach was very irritable; that she could not retain anything on it, unless it was excessively cold, and after a short time that came up; . . . that she had alternating constipation and diarrhea, and he mentioned that he had been on the verge of diagnosing it appendicitis; that an hour or so before we came her bowels had moved; . . . that the first action seemed to contain blood." He said that he had used cocaine, nux vomica, and bismuth to control the nausea. These doctors made an examination. Her temperature was 98½; pulse 90. They quickly eliminated appendicitis and found apparently normal conditions, except a slight

tenderness in the lower abdomen upon pressure. Her general appearance was good, skin clear, eyes bright, and tongue clear. The visiting doctors asked her husband to make a vaginal examination, which he did while they were out of the room, and reported to them that he found conditions normal, and said that she had menstruated normally ten days before. They concluded that she was not very sick, but came to no satisfactory conclusion about the vomiting, and recommended that the stomach should have absolute rest for twenty-four hours, to which the patient said, "I think that would be a good idea." They recommended that nothing be given to her except calomel tablets, and a saline injection, if thirsty. At 3 o'clock Dr. Buck gave his wife a dose, which he said was water and a little carbolic acid, and also gave her an injection, and then left the house. She made no complaints during the afternoon, but called for a magazine, talked with her mother and sister about dressmaking, and laughed and joked with a neighbor who called. She slept a little after 4 o'clock. At 5 o'clock Dr. Buck returned, sat in the room awhile, and then said, "I must make a fire and get to work," and went to the kitchen. He came back carrying a teaspoon carefully, and told her it was a drop of carbolic acid and water. She said it would make her stomach burn. He said: "Take it; it won't hurt you,"—and poured the contents of the spoon in her mouth. She became nauseated and sick. He hurried to the kitchen and returned with a hot water bottle already filled and commenced giving an injection.

Her mother, who was present, describes what followed: "I seen her eyes didn't look right, and her face, and I told him to stop and take that out, and he did not do it. And I told him the second time, and he stood still, stood there, and I grabbed a handkerchief and run to her to see if I could help her. I was afraid to speak. I was scared; she looked so wild and scared in a way, and I went to her, and I told him to call Mathis or somebody, and then he went and called them, and called Dr. Carter and Dr. Willey, and told them to come right away. I reckon they done the,—I don't know what he said in regard to them coming; but he came back then and grabbed her face and told her to wake up. The froth was working out of her mouth, and her hands were drawn down, and her head was all drawn back there; and he did not do a turn to do anything for her. I went to her, but he did not do anything. I thought he would do something for her, but he did not, and just— . . . Her eyes looked wild like, and the sights were spread open, and



she was just commencing to draw her head back that way; and her little hands were drawn down and cramped." She described her eyes as "glassy" and "spread out," and said she appeared to be unconscious and reaching for breath.

The doctors who had made the previous examination came immediately. One of them describes her condition: "I found her lying on her back in bed,—the same bed she had been in in the afternoon. She was lying close to the edge of the bed, with her head over the edge of the pillow. The head was drawn back; that is, it was in about that position. (Witness indicating.) The eyes were rolled slightly upward, open, and fixed, of a glassy appearance, pupils dilated. The face was sort of drawn, and the mouth formed a sort of a circle, or more of an oval. The teeth were open, and the lips were open, and the teeth were open. When I first observed her, the tongue was protruding slightly between the teeth, but later it dropped back, so it was still visible between the teeth. She was motionless and completely unconscious. The most pronounced thing was the condition of her breathing. She was breathing intensely labored,—forced breathing. The inspirations—the drawing in of the breath—was sort of an effort, gasping; then there was an interval, and then a rather forceful expiration, then a gasping inspiration again. These gradually became further and further apart, until they ceased entirely in, I judge, twenty or twenty-five minutes. The pulse I did not count it; but I took hold of it when I first got in, and it was regular,—a fairly regular, even pulse, enfeebled somewhat, and rapidly growing weaker as the respiration seemingly failed. As the respiration became more depressed, the pulse gradually grew weaker, indicating to us that the heart did not fail until after the respiration did. I stated, I guess, the pulse was even, but enfeebled and gradually growing weaker. Her temperature was not taken. She was in a slight state of rigidity; that is, she was tense. You could lift her hand. We lifted her hand; but there was a tenseness about it, showing a muscular contraction of some degree. There were no spasms. . . . The first thing I observed about was the depressed state of the respiration, and I asked one of the ladies to bring water and a spoon, and I hastily prepared a hypodermic injection of atropin, which is a stimulant of the respiration, and that was given to her, that hypodermic; but before that was given Dr. Carter arrived and was asked. His judgment was asked. . . . Just before she died, we gave her another hypo-

dermic containing some strychnine and atropin."

He said further that she was completely unconscious when he came; that there were no volitional movements; that there was considerable froth at the mouth moving in and out with the breath; that the blood vessels of the face were engorged; the eyes fixed and pupils dilated. She died in fifteen or twenty minutes after he arrived, which was about a half hour after Dr. Buck had given the dose and injection last referred to.

The autopsy revealed the following conditions as testified to by the pathologist who conducted it: "That the body had not been embalmed, and the surface showed some decomposition, but that the vital organs, such as the heart, lungs, liver, stomach, spinal cord, and intestines, were in fairly good state of preservation; that the two chambers on the left side of the heart were empty, and the two chambers on the right side contained dark, clotted blood; that the heart valves were normal; and the aorta in good condition. The pupil of the right eye was distinctly seen, and was dilated. The lips were open, and described an oval shape or ring. The tongue was held firmly between the teeth. The face was dark with blood, and the veins over the temples were prominent and distended, and had been engorged. The blood had settled in the posterior part of the lungs. The omentum and covering of intestines were normal; and the appendix was normal, small, and perfectly free. In the lower part of the pelvis, he found a soft pinkish material, which he took to be the decomposed uterus or womb, and in this material he found the bones of a three months old fetus. The kidneys were decomposed. The entire uterus, the right Fallopian tube, both ovaries, had decomposed, and could not be found. They had broken down and gone into liquefaction. The left Fallopian tube remained, but showed some decomposition. The dark, clotted blood in the right side of the heart, with the absence of clots in the left side, indicated that there had been a disturbance of the respiration immediately before death."

The chemical analysis showed that "sulphocyanide was present in all the jars of viscera except one, and that one contained the liver and showed the presence of cyanide, as distinguished from sulphocyanide. The stomach showed the strongest reaction of sulphocyanide. The quantity of sulphocyanide in the brain was ten times as great as in the normal human being. He also found strychnine in the quantity expected, it having been given hypodermically before death, and for that reason no attempt to de-

termine its quantity accurately, and he regarded its presence important as proving the correctness of the analysis. He also found other alkaloid poisons, whose individual chemical identity he did not determine, but in whose class he placed ergot and cotton root; and he did not believe that ergot and cotton root could be definitely identified in a body after death."

The chemist also testified that if hydrocyanic acid had been administered before death, he "would expect to find sulphocyanide in the body; and if there had been some in the body in the natural condition, the amount would be increased by this decomposition of the cyanide; and if there was none in the body at all before, it ought to show up in the body in the form of sulphocyanide after the hydrocyanic acid had been given."

On the afternoon in which the death occurred, Dr. Buck was seen by the druggist coming from behind the corner of the prescription case in the drug store. He asked for a bedpan. The druggist inquired if Lelia (his wife) was worse. He said: "Yes; she is very bad. I just had the doctors over there a few minutes ago"—and that they had decided she had inflammation of the stomach and bowels. On that evening he told Mrs. Buck's father that he thought the cause of her death might have been the bursting of an abscess. The next morning he said to another person that it was inflammation of the stomach and bowels. He inquired of the doctors he had called in consultation right after the death if they supposed she could have had an abscess that ruptured a blood vessel; that she had told him that afternoon that something hurt as though she had been stuck with a knife. To another person a few weeks before the trial he said that his wife's death had been expected for some time. When a post mortem examination was suggested by the consulting physicians, he said that it was out of the question.

The brother and sister of Mrs. Buck, who had seen him give his wife doses of the thick, dark fluid referred to, having testified that it had a strong, disagreeable smell, were asked to describe the odor, which they could not do. A preparation the same as that described in the prescription for ergot, cotton root, and sulphuric acid was then produced, and, having smelled it, they were allowed to testify, over objections, that the smell was the same as that of the liquid so administered to Mrs. Buck.

As a reason for the speedy funeral, Dr. Buck said that his wife had told him that she had a horror of having her body embalmed, and he wanted her buried as soon

as possible, because he wanted her to look as well as possible.

The doctors who had been called in consultation, and two others, who were witnesses for the appellant, assisted in the autopsy. One of the last-named doctors was given parts of the viscera for examination.

Each of the doctors present at Mrs. Buck's death, after stating what he saw and what took place at that time, was allowed to testify, over appellant's objection, that, based upon the symptoms then observed, it was his opinion that she died an unnatural death. A hypothetical question was framed embracing the material facts which the evidence tended to prove concerning the age, health, symptoms, treatment, sickness, and death of Mrs. Buck, and the pathologist was asked to consider such facts in connection with the facts revealed at the post mortem examination to which he had testified, and to state what, in his opinion, caused her death. An objection was made that the question invaded the province of the jury, but it was overruled. The answer was that she died from cyanide poison. On cross-examination it was admitted that there might be a cause of death which the history of the case or the post mortem examination would not show after the decomposition had advanced to a considerable extent, and that he could not positively say from his findings that death was caused by hydrocyanic poisoning.

The theory of the defense appears to be that death may have been caused by the rupture of a Fallopian tube or extra-uterine pregnancy. The defense produced two physicians who qualified as experts and testified, in answer to hypothetical questions, that, in their opinion, the woman died of extra-uterine pregnancy.

Messrs. George A. Neeley and L. M. Day for appellant.

Messrs. J. D. Beck and J. W. Davis, with Messrs. John S. Dawson, Attorney General, and C. H. Bissitt, for the State:

Testimony that deceased complained of her throat burning was properly admitted.

Atchison, T. & S. F. R. Co. v. Johns, 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237; Federal Betterment Co. v. Reeves, 77 Kan. 111, 93 Pac. 627, 15 Ann. Cas. 796; Wigmore, Ev. § 1719; 16 Cyc. 1164.

Testimony of Dr. Willey and Dr. Carter as to the cause of death was properly admitted.

Com. v. Johnson, 188 Mass. 382, 74 N. E. 940; Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463; State v. Foote, 58 S. C. 218, 36 S. E. 551; Wigmore, Ev. § 675; Bellefontaine & I. R. Co. v. Bailey, 11 Ohio St.

333; Zoldoske v. State, 82 Wis. 580, 52 N. W. 778.

The hypothetical questions asked Dr. Trimble and Dr. Gardner were not upon the point in issue, and do not invade the province of the jury.

Davis v. Travelers Ins. Co. 59 Kan. 76, 52 Pac. 67; Greenl. Ev. 14th ed. § 440; State v. Asbell, 57 Kan. 398, 46 Pac. 770; State v. Smith, 32 Me. 369, 54 Am. Dec. 578; Mitchell v. State, 58 Ala. 417; Boyle v. State, 61 Wis. 440, 21 N. W. 289; People v. Barker, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539; People v. Hagenow, 236 Ill. 514, 86 N. E. 370; State v. Tippet, 94 Iowa, 646, 63 N. W. 446; Van Wycklen v. Brooklyn, 118 N. Y. 424, 24 N. E. 179; Schwander v. Birge, 46 Hun, 66; Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Chicago v. Didier, 227 Ill. 571, 81 N. E. 698; Ahern v. Minneapolis Street R. Co. 102 Minn. 435, 113 N. W. 1019; Zarnik v. C. Reiss Coal Co. 133 Wis. 290, 113 N. W. 752; Wigmore, Ev. § 678; State v. Doherty, 72 Vt. 381, 82 Am. St. Rep. 951, 48 Atl. 658; State v. Baldwin, 36 Kan. 9, 12 Pac. 318, 7 Am. Crim. Rep. 377; State v. Rose-lair, 57 Or. 8, 109 Pac. 865; Smith v. State, 43 Tex. 647; Chicago Union Traction Co. v. Roberts, 229 Ill. 481, 82 N. E. 401; Com. v. Thompson, 159 Mass. 58, 33 N. E. 1111; Page v. State, 61 Ala. 18; People v. Bowers, — Cal. —, 18 Pac. 666; Rogers, Expert Testimony, 2d ed. 484; Order of Commercial Travelers v. Barnes, 75 Kan. 720, 90 Pac. 293.

The administering of ergot and cotton root to the deceased, at intervals of a few hours during the last three days of her life, and the giving of hydrocyanic acid at the last half hour of her life, were all parts of the same act. They were not separate and distinct crimes, but separate acts in the commission of the same crime, and as such the evidence concerning them was admissible as part of the *res gestæ*.

State v. Reed, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; State v. Folwell, 14 Kan. 105; State v. Adams, 20 Kan. 311; State v. Stevens, 56 Kan. 720, 44 Pac. 992; State v. Franklin, 69 Kan. 798, 77 Pac. 588; State v. O'Neil, 51 Kan. 651, 24 L.R.A. 556, 33 Pac. 287; Lewis v. State, 4 Kan. 296; State v. Ames, 90 Minn. 183, 96 N. W. 330; State v. Deschamps, 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 So. 703; Castle v. Bullard, 23 How. 187, 16 L. ed. 428; People v. Morse, 196 N. Y. 306, 89 N. E. 816; People v. Harris, 136 N. Y. 443, 33 N. E. 65.

Fred and Kathleen Kinsall were properly allowed to testify concerning the smell of the medicine defendant gave deceased, and 42 L.R.A. (N.S.)

to compare its smell with that of prescription 443.

Knoll v. State, 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369; State v. Whitbeck, 145 Iowa, 29, 123 N. W. 982; Com. v. Owens, 114 Mass. 252.

Druggist Mathis was properly allowed to testify concerning prescription 443 written and signed by defendant.

State v. Wayne, 62 Kan. 630, 64 Pac. 60.

Benson, J., delivered the opinion of the court:

It is contended that the information is not sufficiently direct and certain wherein it charges poisoning by the administration of "cyanide of potassium and hydrocyanic acid; also other deadly drugs and poisonous substances to this county attorney unknown." It is argued that allegations, such as the one italicized, are allowed only upon the ground of necessity, and that the necessity did not exist in this case, because the results of the autopsy were known before the information was filed. "It is sufficient to allege that a murder was committed in some way and by some means, instruments, and weapons to the grand jury unknown, when the circumstances of the case will not permit of greater certainty of statement." Wharton, Homicide, 3d ed. § 563; Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; Olive v. State, 11 Neb. 1, 7 N. W. 444.

The information was good upon its face. There was no evidence (if that were admissible) that the county attorney had knowledge of the names of other drugs and substances designated as unknown; and the court instructed the jury that under the evidence a verdict of guilty could not be returned, unless cyanide of potassium or hydrocyanic acid was administered. It cannot be held, either upon the face of the information, or the evidence, that the charge was fatally defective. Even where the giving of one kind of poison is alleged, and another kind proven, the indictment is maintained; one kind of death is the same. 2 Hale, P. C. 185; 2 Bishop, New Crim. Proc. § 514.

Complaint is made of the admission of the declarations of Mrs. Buck that the doses given to her by the appellant in the last three days of her life burned her stomach. These exclamations of present pain and suffering were accompanied by a wry face, sudden sickness, and vomiting, and were admissible within the principles stated in Federal Betterment Co. v. Reeves, 77 Kan. 111, 93 Pac. 627, 15 Ann. Cas. 796, and 3 Wigmore on Evidence, §§ 1718, 1719.

It is contended that there was error in allowing the brother and sister of the deceased to testify concerning the doses of

dark, thick liquid causing nausea, referred to above, and especially in admitting evidence by comparison of odors tending to prove that this consisted of ergot and other drugs. These doses were administered by the appellant himself at intervals for two days preceding the day of her death, at times when, to ordinary appearances, she was not greatly indisposed. The acts of the appellant in this sequence of events were admissible as parts of a connected transaction. It is suggested that this testimony tended to prove a crime different from the one charged; but even if it did, that would be no reason for its exclusion if it also tended to prove the charge of poisoning, or to show intent or motive. It is sufficient if the testimony is referable to the point in issue, or tends to exhibit the *re gesta*, or to establish a chain of circumstantial evidence in respect to the act charged. *Lewis v. State*, 4 Kan. 296; *State v. Adams*, 20 Kan. 311, 322; *State v. Ames*, 90 Minn. 183, 96 N. W. 330; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65.

The testimony of the druggist that appellant requested him not to file the prescription presented and filled on August 23d is not too remote in connection with the treatment administered afterward and the attendant circumstances. Evidence tending to show the poisonous effects of ergot in large doses, or in repeated small doses, was properly received to show the properties of the drug. This tended also to answer the suggestion of the appellant that the testimony was offered to prove another offense.

An interesting question of evidence is presented upon the comparison of odors. A compound the same as that prescribed by Dr. Buck on August 23d was prepared during the trial, and witnesses who had noticed the smell of the doses given to Mrs. Buck were requested to smell of this compound, and were asked how the odor compared with that of the doses so given, and whether the smell was the same. It is insisted that the admission of this testimony was erroneous. How may an odor be described by a witness and communicated to the jury? Wharton says: "Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury. Eminently is this the case with regard to noises and smells. . . ." 1 Wharton, *Crim. Ev.* 10th ed. § 459. If one is asked to describe an odor, the answer ordinarily is by comparison; for example, that it was like vinegar, or smoke, or other article supposed to be familiar or

better known. In *Conner v. State*, 6 Tex. App. 455, evidence of a witness that he smelled chloroform in a room was held admissible, although the objection here made was not discussed. Similar rulings have been made respecting the smell of spirituous liquor, extending even to vomit, wherein the odor appeared. *Marschall v. Laughran*, 47 Ill. App. 29. The principle upon which such evidence is allowed is stated in *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; that is: "On the ground that it came within that class of cases where evidence is received from necessity arising from the impossibility of stating those minute characteristics of appearance, sound, and the like, which, never the less, may lead the mind to satisfactory conclusion, and be reasonably reliable in judicial investigations. Among instances of this class forming an exception to the general rule is the proof of identity in a great variety of cases, such as the identity of person, handwriting, animals, and inanimate objects; and so where the identity is detected by the ear, or by the sound of the human voice, of a musical instrument, the discharge of a pistol, and the like. . . . In these and an infinite variety of other cases, the conclusion is drawn from evidence addressed to the eye or ear, or both, and which, from its very nature, cannot be described to another." 46 N. H. 501.

The same reasoning applies here. Although sight may be considered more reliable, evidence afforded by other senses is not excluded. 17 Cyc. 81. Its weight must be left for the jury.

Hypothetical questions addressed to professional witnesses were objected to, on the ground that they invaded the province of the jury. A question to Dr. Trimble, a pathologist, after including a statement of material facts which the evidence tended to prove, concluded with the following: "Q. Considering that these were her symptoms and conditions on Saturday, Sunday, and Monday, and immediately prior to her death, and considering, further, that the facts revealed by the post mortem examination were those testified to by you to-day, have you an opinion as to the cause of death?"

In support of an objection to this question, it is said that an expert witness cannot be permitted to testify to a matter which is directly in issue; that the judgment of witnesses cannot be substituted for that of the jury. If this be the rule, it has no room for operation here. The issue to be decided was whether the death of Mrs. Buck was caused by poison administered by the appellant. To sustain the charge, the state was required to prove the fact of death

by poison; but that alone would not prove the guilt of the accused. It must also be shown that he gave the poison. It seems to be argued that, while the witness might properly give his opinion as to what could or might have been the cause of death, it was error to allow him to say what the cause really was. This distinction, made by some courts, was referred to in *Commercial Travelers v. Barnes*, 75 Kan. 720, 90 Pac. 293. Comments on this question in that opinion are deemed pertinent, but repetition is not necessary here. A question asking for an opinion upon the cause of death, based upon a given hypothesis, or upon personal knowledge of the conditions, or both, is one that a properly qualified witness may answer. *State v. Hatch*, 83 Kan. 613, 112 Pac. 149; *Simon v. State*, 108 Ala. 27, 18 So. 731; *Everett v. State*, 62 Ga. 65; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *Eggler v. People*, 56 N. Y. 642; *Com. v. Crossmire*, 156 Pa. 304, 27 Atl. 40; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *Rogers*, Expert Testimony 2d ed. 49.

Brief criticisms of opinions holding otherwise, based upon the distinction between what caused, and what might or could have caused, death, will be found in 5 *Wigmore on Evidence*, under § 1976.

Objections to other hypothetical questions asked by the county attorney are sufficiently answered by what has just been said.

On cross-examination a hypothetical question was asked embodying only a part of the facts and symptoms embraced in the question asked by the state. An objection that the hypothesis did not include all the material facts in evidence was sustained, we think, erroneously. Great latitude is allowed in such cases to test the intelligence, discernment, and capacity of the witness, that the jury may determine the value of his testimony. *State v. Reddick*, 7 Kan. 143. To this end it has been said that questions may be asked leaving out facts assumed on direct examination. 2 *Elliott, Ev.* § 1124. A careful examination of the abstracts, however, has convinced the court that no prejudice resulted from this ruling, since upon the whole cross-examination, conducted at great length, the witness testified upon the matters in detail embraced in the question, and admitted that he did not know whether death would have been possible from hydrocyanic poisoning without any of the symptoms named. Error in such rulings is not necessarily fatal. The statute provides: "On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions 42 L.R.A. (N.S.)

which do not affect the substantial rights of the parties." *Crim. Code*, § 293 (*Gen. Stat.* 1909, § 6867).

The court, in substance, instructed the jury that a verdict of guilty could not be returned, unless they found that cyanide of potassium or hydrocyanic acid, or both, were actually administered by the defendant knowingly and wilfully, with intent to take the life of Mrs. Buck; that these substances were poisons; and that the deceased came to her death by means of one or both of these poisons, or by means of one or both of them, and also ergot or cotton root, or both. Error is alleged because the court did not, in this connection, inform the jury that it was necessary to find that ergot or cotton root were poisons, nor direct them in what manner the evidence relating to these substances should be considered. The effect of ergot or cotton root alone is not very important, if one or both of the preparations of cyanide, taken alone or together with these drugs, caused death; and the court stated that, unless cyanide in one of the forms named was given, there could be no conviction. If there was any error in these instructions, it is one of which the appellant has no cause to complain.

An objection to the verdict because it did not state the kind of poison is without merit. Such a finding is not required.

It is argued that the evidence was insufficient to convict. This argument is based largely upon the fact that only a trace of cyanide was found in the body, and that the pathologist produced by the state testified that death might have resulted from other causes. The failure to produce further proof of the finding of cyanide in the body, although sulphocyanide, as we have seen, was found in excess quantities, is accounted for by the decomposing process referred to in the statement. The possibility that death resulted from some other cause did not require an acquittal if, upon all the evidence, the jury were satisfied of his guilt beyond a reasonable doubt. *Cox v. People*, 80 N. Y. 500, 516. Neither is proof of motive indispensable when the jury is so satisfied of guilt without it. *State v. Dull*, 67 Kan. 793, 74 Pac. 235.

There was competent evidence tending to prove every material fact necessary to support the charge. A review of the evidence would necessarily be lengthy, and is believed to be unnecessary. The verdict approved by the District Court must stand.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied.

# NORTH CAROLINA SUPREME COURT.

HENRIETTA GOODWIN, Admr., etc., of  
T. C. Goodwin. Deceased, Appt.,  
v.

TOWN OF REIDSVILLE.

(— N. C. —, 76 S. E. 232.)

## Municipal corporation — ball playing in street — liability for injury.

A municipal corporation is not liable for injury to a traveler by a ball with which boys were playing in a public street, according to a custom indulged in for a long time.

(November 13, 1912.)

## *Note. — Liability of municipal corpora- tion for failure to prevent improper conduct in or use of streets.*

This note is intended to include the decisions upon this subject rendered subsequently to the note appended to *VanCleaf v. Chicago*, 23 L.R.A.(N.S.) 636. The general question as to liability of a municipality for property destroyed by a mob is treated in the note to *Gianfortone v. New Orleans*, 24 L.R.A. 592, which will be supplemented in a note in a later volume in connection with the case of *Pittsburgh, C. C. & St. L. R. Co. v. Chicago*, — L.R.A.(N.S.) —.

The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate powers; and the authorities are well agreed that for a failure to exercise legislative, judicial, or executive powers of government, there is no liability. 28 Cyc. 1356.

## Coasting.

As to injury to one while coasting in street, see note to *Lynch v. Public Service R. Co.* post, 865.

In the absence of statute, a city is not liable for injury to a pedestrian received by being run against by a coaster upon a footpath within a common used as a place of recreation and public resort, such path not having been laid out as a highway and not being a part of the city's system of streets, although such city has permitted boys to coast along such path, and has fitted the path for such coasting by building a bridge across it at an intersecting path and by turning water upon it to freeze and render it slippery. *Steele v. Boston*, 128 Mass. 583.

And a city is not liable for injuries to a pedestrian received by reason of the slipperiness of a sidewalk, and by being run 42 L.R.A.(N.S.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Rockingham County in defendant's favor in an action brought to recover damages for the alleged wrongful death of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Mr. George D. Bennett for appellant.

Messrs. Johnston, Ivie, & Dalton and Manly, Hendren, & Womble, for appellee:

The unlawful use of a street by men or animals for play is not an obstruction or defect making a town liable, upon the theory that there has been a failure on the part of the town and its officers to keep its streets in a reasonably safe condition for travel.

against after dark by a boy sliding thereon at a point where boys had been in the habit of sliding without interruption from the city authorities. *Shepherd v. Chelsea*, 4 Allen, 113.

Although sliding in public streets may be a misuse of them, it is not an "obstruction" of the streets within the meaning of Rev. Stat. chap. 5701, and a town cannot be held liable for damages resulting to a traveler from such misconduct; nor is the case altered by the fact that this sliding is a public nuisance, nor by the fact that such misconduct is known to the city. *Ray v. Manchester*, 46 N. H. 59, 88 Am. Dec. 192.

## Racing.

A city which has authorized automobile races within its limits is not liable for injuries received by reason of an accident at the races, or for resultant death to one who is not using the highway as a traveler but is attending simply as a spectator to enjoy the pleasure that the contest affords, although the use of a public highway for such races is illegal. *Bogart v. New York City*, 200 N. Y. 379, 93 N. E. 937, 21 Ann. Cas. 466.

## Animals at large.

The duty imposed by a municipal ordinance requiring proper officers to take up and confine or kill vicious dogs found running at large in the streets without a tag is imposed under the governmental powers of the municipality, and not in its private corporate capacity, and therefore such municipality is not liable for failure of its officers to enforce the ordinance or for injuries received by a pedestrian from such a dog. *Addington v. Littleton*, 50 Colo. 623, 34 L.R.A.(N.S.) 1012, 115 Pac. 896, Ann. Cas. 1912 C, 753.

In an action against a city for personal injuries received by reason of plaintiff's horse taking fright at an exhibition upon a street corner of a wild animal of hideous appearance and disagreeable odor, it was said that the defendant's negligence, if any, consisted solely in its failure to prevent or

Hull v. Roxboro, 142 N. C. 453, 12 L.R.A. (N.S.) 638, 55 S. E. 351; VanCleaf v. Chicago, 23 L.R.A. (N.S.) 637, note; Dudley v. Flemingsburg, 1 Ann. Cas. 961, note; Marth v. Kingfisher, 22 Okla. 602, 18 L.R.A. (N.S.) 1238, 98 Pac. 436; Jones v. Williamsburg, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883; Addington v. Littleton, 50 Colo. 623, 34 L.R.A. (N.S.) 1012, 115 Pac. 896, Ann. Cas. 1912C, 753, 15 Am. & Eng. Enc. Law 2d ed. 459; 28 Cyc. 1356.

The town could only arrest and stop the sport of ball playing upon its streets through its officers and police force, but the town is not responsible for the neglect or failure of its officers to stop those engaged in thus using its streets, because the

remove the alleged obstruction or nuisance from its streets, since there was no active agency upon its part in creating the nuisance; and for the error, among others, in limiting the definition of negligence to careless action, and not including careless omission to act, the judgment for defendant was reversed and a new trial ordered. Stokes v. Sac City, 151 Iowa, 10, 130 N. W. 780.

And where a city licensed for \$2.50 per day the exhibition in a booth in a public square of the "sacred ox," an animal which which emitted an offensive odor, being of uncouth and strange shape and appearance and caparisoned in a gaudy and strange manner so that he was an object of terror to horses and cattle; and where this ox, while being exercised upon the highway outside the booth, frightened a horse, thereby causing damage,—it was held that the city was not responsible, since at the time of the accident the ox was not in the place for the use of which the city received compensation, nor in the charge of any agent of the city. Cole v. Newburyport, 129 Mass. 594, 37 Am. Rep. 394.

For further cases as to liability of a municipality for permitting animals in streets, see note to Cochrane v. Frostburg, 27 L.R.A. 728.

#### Fireworks and explosives.

The act of a mayor of a city in granting permission to fire gunpowder in an anvil on a lot in the city does not create a liability against the city for damages sustained as a result by adjoining property; for even if his act constituted the wrongdoers the licensees of the corporation, the corporation is not liable for their act when it is not shown that their act is intrinsically dangerous. Wheeler v. Plymouth, 116 Ind. 158, 9 Am. St. Rep. 837, 18 N. E. 532.

And a city which voluntarily undertakes under authority of statute to celebrate a holiday exclusively for the gratuitous amusement, entertainment, or instruction of the public, is not liable to an individual for personal injuries sustained by him through negligence of servants of the city in discharging fireworks during the course 42 L.R.A. (N.S.)

required function is one governmental in its character.

Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771.

And this is so, although the street has been used for several years for such pastimes, in violation of an ordinance, to the knowledge of the officers of the town.

Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1.

Brown, J., delivered the opinion of the court:

This action is brought to recover damages for the alleged wrongful death of T. C. Goodwin. The basis of the cause of action is the allegation that the defendant negligently allowed its public streets to become

of the celebration. Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289.

And a municipality, in conducting a Fourth of July celebration under authority of such a statute, is acting solely in the public interest and for the general benefit, and not for gain, and therefore the municipality is not liable for injury received from being struck by a rocket fired from a public playground as a part of the celebration, even though its agents or servants are negligent; nor can the municipality be held liable as for a nuisance, since it does not own the playground in any ordinary sense, nor does the setting off of fireworks on a single occasion create any permanent or continuing condition of the real estate; nor is the sending up of a rocket from a highway or across a highway a defect or want of repair in the way. Kerr v. Brooklyn, 208 Mass. 190, 34 L.R.A. (N.S.) 464, 94 N. E. 257.

But where a city granted the free use of its streets to labor unions for the purpose of holding a labor day celebration and giving a display of fireworks in the evening, it was held that the question whether such a display in the heart of the city constituted a nuisance for which the city was liable to a spectator injured thereby should be submitted to the jury. Moore v. Bloomington, — Ind. App. —, 95 N. E. 374.

And in Moore v. Bloomington, supra, it was said that where a city expressly grants a permission or license authorizing the use of its streets for a purpose which in its nature is intrinsically dangerous, extraordinary, and unusual, and foreign to the purpose for which the street was dedicated, the same principle of liability should be applied, no matter whether the act authorized amounts to an excavation or obstruction in the street or other change in its physical condition, or whether it amounts only to a temporary use not changing or affecting the physical condition of the street; there may be uses to which a street might be appropriated or subjected which would make it more unsafe for travel than it could be made by any obstruction or change in its physical condition.

unsafe for travel, in that certain boys were permitted without molestation to play baseball thereon. The evidence tends to prove that the said Goodwin while driving along the public street of the defendant town in June, 1910, was struck by a baseball, his collar bone broken, and other injuries inflicted, which are charged to have caused his death. The evidence tends to prove that certain boys had a custom of collecting on the street and playing ball in the evenings, frequently during the spring and summer months, which custom had been going on for over two years, and was known to the police officers of the town, and no effort had been made to stop it. Upon these facts the judge below, held that the defendant was not liable, and in his opinion we concur.

A municipal corporation has a dual character, the one public and the other private. It exercises functions that are two-fold,—one being governmental and legislative, and the other private and ministerial. When

the corporation is acting for the preservation of peace, engaged in the maintenance of good order and the enforcement of the laws for the safety of the public, it is exercising governmental functions, and enjoys immunity from suit. When the corporation exercises the powers and privileges conferred on it by its franchise for its private advantage for local and purely corporate purposes, it is subject to suit by those whom it may have injured. The distinction between the two classes of powers is set forth very clearly in many adjudicated cases, as well as by text writers, and the exemption of the municipality from liability in the one case and its liability in the other for an injury resulting from negligence firmly established. 2 Dill. Mun. Corp. §§ 752, 949-966; Hill v. Charlotte, 72 N. C. 56, 21 Am. Rep. 451; McIlhenney v. Wilmington, 127 N. C. 146, 50 L.R.A. 470, 37 S. E. 187; Hull v. Roxboro, 142 N. C. 453, 12 L.R.A.(N.S.) 638, 55 S. E. 351;

And the fact that the person injured was not using the street for travel at the time of the injury, but had come solely for the purpose of watching the fireworks, does not as a matter of law render such person guilty of contributory negligence so as to impose upon him the risk of injury and preclude him from recovering from the city. Ibid.

"Where the particular use of the street authorized by the city cannot be said as a matter of law to constitute a nuisance, but when it is of such a character, when considered in reference to surrounding conditions and circumstances, that it may or may not constitute a nuisance in fact, the question should be submitted to the jury for determination under proper instructions by the court." Ibid.

"If the act authorized is of a character that is necessarily or usually safe where proper care is used, and which can become dangerous only by a failure of the persons in charge to use ordinary precautions, the city cannot be held responsible for the negligence of the persons in charge in failing to use such precautions; but, if the act which the city authorizes to be done in its street, or the use to which it is subjected under such authority, is of such a character as to be necessarily or usually dangerous, and which can be made ordinarily safe only by the use of certain precautions, the city owes the duty to see that such precautions are used." Ibid.

For other cases upon the liability of a municipal corporation for personal injuries resulting from an exhibition of fireworks in a public street, see note to Wells v. Gallagher, 3 L.R.A.(N.S.) 759.

#### Blasting.

In maintaining a city workhouse and quarry pursuant to its charter, the city is 42 L.R.A.(N.S.)

discharging a governmental function, and is therefore not liable to one injured upon a near-by street by falling rocks as a result of the acts of its agents in operating the quarry; such a condition does not constitute a defect in the street. Braunstein v. Louisville, 146 Ky. 777, — L.R.A.(N.S.) —, 143 S. W. 372.

Conceding that blasting is intrinsically dangerous, a municipal corporation which has authorized blasting in a public street by an independent contractor is not as a matter of law liable to a servant of such contractor for injuries resulting from the negligence of the foreman in failing to protect the servant in work which in itself is not inherently dangerous, even though in such case the municipality has failed to enforce an ordinance requiring a license to qualify one to do blasting. Salmon v. Kansas City, 241 Mo. 14, 39 L.R.A.(N.S.) 328 145 S. W. 16.

For other cases as to liability of municipality for tort in connection with quarry worked by it, see note to Radford v. Clark, 38 L.R.A.(N.S.) 281.

#### Public exhibitions.

Where a city is required by statute to keep its streets free from nuisances, and where the city permits a wire to be stretched across the street for acrobatic performances, such city is liable in damages to a pedestrian who is struck and injured by reason of the acrobat falling from the wire. Wheeler v. Ft. Dodge, 131 Iowa, 566, 9 L.R.A.(N.S.) 146, 108 N. W. 1057.

In connection with the report of the above case in 9 L.R.A.(N.S.) 146, see the appended note upon the liability of a municipality for personal injury on account of exhibitions permitted in public street.

H. C. Sh.



Harrington v. Greenville, — N. C. —, 75 S. E. 849; Jones v. Williamsburg, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883; 15 Am. & Eng. Enc. Law, 2d ed. 459; 28 Cyc. 1356. The reason for this distinction is pointed out in a note found in 1 Ann. Cas. p. 961, in the following language: "The obvious reason for this distinction is that the prevention of the improper use of the streets by objects in motion and subject to human control involves the direct control of persons and the regulation by the municipality of the conduct of its citizens, and this requires an exercise of the public and governmental powers of the municipality in respect to which no liability can arise. It is a well-settled rule that a municipality is not liable for tortious injuries to persons or property when engaged in the performance of governmental functions, while in the exercise of private or corporate powers it is liable." This doctrine of the exemption of a municipal corporation from liability for injuries occasioned by unlawful or improper use of its streets, and not from any defect in their condition, has been applied in various kinds of cases, such as coasting, bicycle riding, animals running at large, the use of fire-works, and fast driving. In Addington v. Littleton, 50 Colo. 623, 34 L.R.A.(N.S.) 1012, 115 Pac. 896, Ann. Cas. 1912C, 753, the corporation was held not liable to one injured through the failure of its officers to enforce an ordinance making it unlawful for dogs to run at large upon the streets.

The same conclusion was arrived at by the Oklahoma court in Marth v. Kingfisher, 22 Okla. 602, 18 L.R.A.(N.S.) 1238, 98 Pac. 436, where the injury was received from a horse racing upon the streets of the city; likewise by the court of Kentucky, where the plaintiff was injured by a sled in coasting upon the street. Dudley v. Flemingsburg, 115 Ky. 5, 60 L.R.A. 575, 103 Am. St. Rep. 253, 72 S. W. 327, 1 Ann. Cas. 958, cited with other cases to the same effect on page 639 of the note in 23 L.R.A. (N.S.). In Jones v. Williamsburg, 97 Va. 722, 47 L.R.A. 294, 34 S. E. 883, the plaintiff was injured in a collision with a bicycle improperly ridden upon the sidewalk. In holding the town not liable that court said: "The condition of the street or walk, however, is one thing, and the manner of its use by the public is quite a different thing. For its safe condition the city is responsible, but for its unlawful and improper use it is not. . . . The government does not guarantee its citizens against all the casualties incident to humanity, and cannot be called upon to compensate. 42 L.R.A.(N.S.)

by way of damages, its inability to protect against such accidents and misfortune." In dealing with a situation far more dangerous than that of playing baseball, the supreme court of Pennsylvania in the case of Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771, where it appeared that a crowd of citizens were engaged in firing a cannon in the streets of the city without authority, whereby great damage was inflicted, held that it was one of those injuries for which the municipality was not liable, but that it was within the exercise of governmental agency, and that the city was not liable for the negligence of its officers. This question has been so fully discussed by this court in the cases that we have cited that further discussion is useless.

It is immaterial whether the plaintiff founds her claim upon the failure to enact an ordinance prohibiting baseball on the streets, or upon the failure to enforce such an ordinance. The municipality would not be liable for the negligence of its officers, because the act is governmental in its nature, and the corporation is as much exempt from suit in such cases as the state itself.

The judgment of the Superior Court is affirmed.

#### NEW JERSEY COURT OF ERRORS AND APPEALS.

MILDRED LYNCH, by Next Friend, Plff.  
in Err.,  
v.

PUBLIC SERVICE RAILWAY COMPANY.

(82 N. J. L. 712, 83 Atl. 382.)

#### Highway — coasting — nuisance.

1. Coasting upon a public street of a city is not a nuisance *per se*.

Nuisance — negligent injury — right of recovery.

2. One coasting in a public street who is injured by another's negligence is not pre-

*Note. — Injury to one while coasting in street.*

As to liability of municipal corporation for failure to prevent coasting in its streets, see notes to VanCleaf v. Chicago, 23 L.R.A. (N.S.) 639, and Goodwin v. Reidsville, ante, 862.

It seems that the fact that the injured person was coasting in a public street will not of itself bar a recovery.

Thus, according to LYNCH v. PUBLIC SERVICE R. Co., the fact that plaintiff was coasting in a public street does not render him guilty of such an unlawful act as to bar his recovery for damages received by

vented from recovering for the injury because his own act constituted a public nuisance.

#### **Trial — jury — negligence of motorman.**

3. The jury must determine whether or not a motorman in charge of a street car is negligent in accelerating the speed of his car when attempting to cross a street on which he knows children are coasting, after he has been warned that sleds are approaching the point of intersection.

#### **Same — negligence of coaster.**

4. The jury must determine whether or not a child is negligent in attempting to coast on a street crossing a street railway track when persons are stationed at the point of intersection to warn coasters and car operators so as to prevent collisions.

(Trenchard, Voorhees, and Vredenburg, JJ., dissent.)

(April 19, 1912.)

**E**RROR to the Essex Circuit of the Supreme Court to review a judgment of nonsuit in an action brought to recover damages for personal injuries alleged to

reason of the negligence of a street car motorman.

And, similarly, in an action for damages for personal injuries alleged to have been received by reason of the negligence of defendant in driving a horse, the fact that the plaintiff was coasting in violation of a city ordinance forbidding and punishing coasting in the highway is not of itself sufficient to bar recovery; it must also appear that his violation of the ordinance was a proximate cause of the injury. *Farrington v. Cheponis*, 84 Conn. 1, 78 Atl. 652.

And where a boy nearly six years old was struck by a horse car in the daytime, at a crossing over which for several days boys had been in the habit of coasting, and at a place where the driver of the car, if he had looked, could have seen the boy in time to have avoided the accident, he being accustomed to pass the place about every hour of the day, it was held that the question of his negligence was properly left to the jury, and their verdict of substantial damages was affirmed. *Strutzel v. St. Paul City R. Co.* 47 Minn. 543, 50 N. W. 690.

And if the driver of a street car has seen young boys sliding down to the track so frequently that he has reason to apprehend that they will be encountered there, it is culpable negligence on his part to approach the crossing without looking to see if they are there, unless his inattention is in some way excused; and if he actually sees a boy thus sliding, it is his duty to be careful so to control the motion of the car as to avoid the apparent danger; and in either case, the fact that coasting in the street is unlawful does not excuse him from the duty of carefulness. *Ibid.*

But it has been held that one who has 42 L.R.A. (N.S.)

have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. Benjamin M. Weinberg, for plaintiff in error:

The defendant was guilty of a wilful and wanton act, and could not therefore raise the question of the plaintiff's contributory negligence.

*Hayward v. North Jersey Street R. Co.* 74 N. J. L. 678, 8 L.R.A. (N.S.) 1062, 65 Atl. 737; *Buttelli v. Jersey City H. & R. Electric R. Co.* 59 N. J. L. 302, 36 Atl. 700; 1 *Thomp. Neg.* §§ 20, 21, 207; *Bittle v. Camden & A. R. Co.* 55 N. J. L. 615, 23 L.R.A. 283, 28 Atl. 305.

Plaintiff was not a wrongdoer.

*Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571; *Hutchinson v. Concord*, 41 Vt. 272, 98 Am. Dec. 584; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Jackson v. Castle*, 80 Me. 119, 15 Atl. 49.

The defendant cannot excuse its negligence by showing that the plaintiff, at the time of the injury, was in the commission of a nuisance.

placed a large wagon upon a street, and has left it to stand there over night, is not liable for damages to one injured by reason of running against it while coasting in the street after dark, although the street may have been used for coasting for many evenings preceding, for it is said that the owner of the wagon is under no obligation to exercise care for the protection of one thus improperly using the street. *Reusch v. Licking Rolling Mill Co.* 118 Ky. 369, 80 S. W. 1168.

And, of course, where defendant is guilty of no negligence, the one so injured cannot recover.

Thus, a street railroad company is not liable for injuries to a boy eight years old while coasting in the daytime down a steep street, crossing at right angles the street car track, where the injury occurs by reason of the fact that the motorman suddenly stops the car to avoid striking another boy who is preceding the one injured down the hill, and who undertakes to cross in front of the car, and in so doing the motorman upsets the plans of the injured boy, who is intending to cross behind the moving car, and who as a result comes in contact with the rear wheels. *Kiley v. Boston Elev. R. Co.* 207 Mass. 542, 31 L.R.A. (N.S.) 1153, 93 N. E. 632.

And where a sled with seven boys upon it was coming down a steep hill in the daytime, and appeared "like a shot out of a cannon" to the driver of a wagon upon a cross street, and a collision resulted, and where there was nothing to show that he had knowledge that the boys were sledding on the hill, or that they were likely to be at that time, a verdict based upon the negligence of such driver is not warranted.

1 Thomp. Neg. p. 254; Dimes v. Petley, 15 Q. B. 276, 19 L. J. Q. B. N. S. 449, 14 Jur. 1132; Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; Spofford v. Harlow, 3 Allen, 176; Brown v. Lynn, 31 Pa. 510, 72 Am. Dec. 768; 29 Cyc. 443; 3 Elliott, Railroads, 2d ed. § 1253; O'Leary v. Brooks Elevator Co. 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919; Delaware L. & W. R. Co. v. Reich, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682.

If the defendant was guilty of negligence, the question of plaintiff's contributory negligence was for the jury.

1 Shearm. & Redf. 5th ed. § 65; Newark Pass. R. Co. v. Block, 55 N. J. L. 605, 22 L.R.A. 374, 27 Atl. 1007; Consolidated Traction Co. v. Glynn, 59 N. J. L. 432, 37 Atl. 66; Zolpher v. Camden & S. R. Co. 69 N. J. L. 417, 55 Atl. 249; Conrad v. Elizabeth, P. & C. J. R. Co. 70 N. J. L. 676, 58 Atl. 376; Bauer v. North Jersey Street R. Co. 74 N. J. L. 624, 65 Atl. 1037; Hayward v. North Jersey Street R. Co. 74 N. J. L. 678, 8 L.R.A.(N.S.) 1062, 65 Atl. 737; Zindler v. Public Service R. Co. 78 N. J. L. 536, 74 Atl. 478.

Eastburn v. United States Exp. Co. 225 Pa. 33, 73 Atl. 977.

The fact that children are standing with their sleds near a crossing in the roadway at the foot of a hill, in a safe place, would not put a driver of a wagon upon notice that a large sled was likely to run into his wagon at great speed, and require him to take steps to avoid that possibility. *Ibid.*

The sound of boys' voices in the streets on Saturday is not sufficient warning to require a driver to stop his team and make inquiry as to the location of the sounds, and as to whether they come from boys coasting. *Ibid.*

Even if a driver, upon arriving at a corner, can see boys at a considerable distance up the hill upon the cross street coasting down towards him, he is not obliged to anticipate the possibility of their steering their sled into his wagon. *Ibid.*

The fact that a person, when walking on a street one day, sees children sledding on a particular hill, cannot charge him, when driving a wagon along that street on a later day, with negligence because his wagon is struck in the side by a sled; nor is he under a duty when arriving at the corner to stop his team and wait until all the children coasting down that hill shall arrive safely at the bottom. *Ibid.*

#### Coasting as a nuisance.

In *LYNCH v. PUBLIC SERVICE R. CO.*, it is said that coasting upon a public street is not of itself an illegal act so as to constitute it a public nuisance.

And in *Jackson v. Castle*, 80 Me. 119, 13 Atl. 49, an action for damages alleged to have been occasioned by reason of the negligence or wrongful act of defendant, who

Messrs. *Lefferts S. Hoffman, Leonard J. Tynan, and Howard MacSherry*, for defendant in error:

The bobsled and its occupants were unlawfully on the street.

*Wilmington v. Vandergrift*, 1 Marv. (Del.) 5, 25 L.R.A. 538, 65 Am. St. Rep. 256, 29 Atl. 1047; *Reusch v. Licking Rolling Mill Co.* 118 Ky. 369, 80 S. W. 1168; *Weller v. Burlington*, 60 Vt. 28, 12 Atl. 215; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Shepherd v. Chelsea*, 4 Allen, 113.

The plaintiff, being unlawfully on the street, is not entitled to recover.

*Guinn v. Delaware & A. Teleph. Co.* 72 N. J. L. 276, 3 L.R.A.(N.S.) 988, 111 Am. St. Rep. 668, 62 Atl. 412; *Dudley v. Northampton Street R. Co.* 202 Mass. 443, 23 L.R.A.(N.S.) 561, 89 N. E. 25; *Chase v. New York C. & H. R. R. Co.* 208 Mass. 137, 94 N. E. 377; *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404; *Menger v. Laur*, 55 N. J. L. 206, 20

was coasting, it is said that sliding in a street, accompanied with boisterous conduct, is not necessarily unlawful, nor is it necessarily a public nuisance.

But it has been said that a large sled loaded with several persons coasting down an icy street after dark endangers the safety of every traveler upon the highway in its course, is inconsistent with the purposes for which the street was made and for which it is used, and is *per se* a nuisance. *Reusch v. Licking Rolling Mill Co.* 118 Ky. 369, 80 S. W. 1168.

It cannot be doubted that for seven boys to come down a steep hill on one sled, at such a high rate of speed as would necessarily follow, and to run into a city street at the foot of the hill, would be a wrongful act. *Eastburn v. United States Exp. Co.* 225 Pa. 33, 73 Atl. 977.

And in *McCarthy v. Portland*, 67 Me. 167, 24 Am. Rep. 23, a case of injury to a horse while racing in the streets of a city, it is said that, like racing or playing ball, sliding downhill is not an unlawful exercise or game, but that the streets are not proper places for such recreation, although one engaged in it is passing along the highway, in one sense, as any traveler would.

And in an action for damages to a traveler, alleged to have been caused by the operation of a toboggan slide, it was said that the construction and maintenance of a toboggan slide across one of the principal streets of a populous city, with little or no protection against collision between those riding thereon at a very high rate of speed and travelers passing along the street, is a wrongful, dangerous, and negligent act. *Hayden v. Clarke*, 56 Hun, 645, 32 N. Y. S. R. 478, 10 N. Y. Supp. 291. H. C. Sh.

L.R.A. 61, 26 Atl. 180; *Brown v. De Groff*, 50 N. J. L. 409, 7 Am. St. Rep. 794, 14 Atl. 219; *Brown v. Perkins*, 12 Gray, 100.

The nonsuit was proper, as plaintiff could not maintain an action in which she must trace her right to recover through her own breach of the law.

*Gregg v. Wyman*, 4 Cush. 322; *Way v. Foster*, 1 Allen, 408; *Eyre v. Eyre*, 19 N. J. Eq. 42; *Walker v. Hill*, 22 N. J. Eq. 513; *Ruckman v. Conover*, 37 N. J. Eq. 583; *Church v. Muir*, 33 N. J. L. 318; *Eisner v. Heileman*, 52 N. J. L. 378, 9 L.R.A. 96, 19 Am. St. Rep. 449, 20 Atl. 46; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178; *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402; *Dickey v. Kurzenberger*, 8 N. J. L. J. 306.

The defendant was not guilty of negligence.

*Dieckman v. Delaware, L. & W. R. Co.* 81 N. J. L. 460, 79 Atl. 310; *Knox v. North Jersey Street R. Co.* 70 N. J. L. 348, 57 Atl. 423, 1 Ann. Cas. 164; *Reusch v. Licking Valley Rolling Mill Co.* 118 Ky. 369, 80 S. W. 1168; *Thompson v. Bridgewater*, 7 Pick. 188.

**Vroom, J.**, delivered the opinion of the court:

The accident upon which this suit was based occurred at about 5:30 in the afternoon of January 7, 1910, in the city of Newark, at the corner of Montclair and Mt. Prospect avenues. The plaintiff, a child of thirteen years, was riding down Montclair avenue on a bobsled with a number of other persons, and the injury she received was occasioned by the bobsled coming into collision with a trolley car of the defendant company.

It appeared from the evidence that Montclair avenue was a street used by children and others for coasting, and that on the afternoon in question many had taken advantage of the sport. Montclair avenue runs east and west, and is intersected by Mt. Prospect avenue, which runs north and south, and upon the latter the defendant runs and operates trolley cars; that the trolley company was aware of the use of Montclair avenue for coasting appears, and it caused all of its cars at that time which were going north to stop at the first or southerly crossing, and all the cars going south to stop at the first or northerly crossing. It appeared that a number of boys stood at the corner of Montclair and Mt. Prospect avenues from time to time, and signaled to the sleds and also to the cars. The plaintiff had by invitation made two trips down on the bobsled in question, and 42 L.R.A. (N.S.)

the accident occurred on the third trip. The sled was equipped with a bell, which was kept ringing all the way down the hill. The sled was about 12 feet in length, and could be steered.

On the trip when the accident occurred, a young man stood at the corner of the avenues in question and signaled to the sleds to come down the hill. Soon after he did this, he saw a car coming along Mt. Prospect avenue from the south, and which was then about a block away. Fearing the car was not going to stop, he ran towards it the length of a lot about 85 feet, and signaled it to stop. The car, as it got to him, slowed up; he jumped from the track, when the motorman put on a burst of speed and ran his car across Montclair avenue and collided with the bobsled. It also appeared that the person steering the sled saw the car slow up and then start again; whereupon he started to turn his sled up Mt. Prospect avenue, and would have made the turn, but the car put on the burst of speed, which caused the collision. The plaintiff received severe and permanent injuries as a result of the collision.

At the close of the plaintiff's case, the defendant moved for a nonsuit, which was granted by the court, and judgment entered thereon.

In granting the motion for a nonsuit, the trial judge said that "on a motion to nonsuit two questions arise in this case: First, is there evidence tending to show that there was want of due care in the operation of the car which was a cause of the accident? Secondly, does it appear that the plaintiff by her own fault contributed to the injury? In this question, the word 'fault' is used, not in a popular sense, but in a legal sense. There is evidence to go to the jury on the question whether the car was operated with due care. I pass at once to the other question, which is this: Does it appear from the plaintiff's own case that her own fault was a proximate, direct, and immediate contributing cause of the injury? The declaration alleges that the bobsled was lawfully crossing Mt. Prospect avenue. If this be true, the plaintiff was not at fault. Is it true? The decision of the motion to nonsuit turns on the answer to this question." He further went on to say that an act which seriously interferes with the legitimate use of a public highway, and endangers the safety of the travelers upon it, is a public nuisance, and that one who voluntarily and intelligently participates in such act is, in a legal sense, a wrongdoer; but he added that coasting on a public highway was not always and necessarily a public nuisance; that it depended

on circumstances. He further held that to coast downhill on a bicycle, if under control, was not a nuisance, and it would not be a nuisance to coast downhill on runners, provided it is in the power of the person who guides the vehicle to check and stop it if occasion requires; but that it was improper to launch upon a highway a traveling body of great weight, which is incapable of control as to its speed, and capable of imperfect control as to its direction.

The contention on the part of the defendant was even broader than the ruling of the trial court. It was that the plaintiff interfered with its rights upon the public streets, and that, against the company, she was a trespasser, and the duty of the company was such as is due to any trespasser, to wit, merely to refrain from wilfully injuring her.

We think the view taken of the case by the trial court was erroneous. The granting of the nonsuit at the close of the plaintiff's case could be justified only upon the ground that the act of the plaintiff was a public nuisance, in fact, a nuisance *per se*, the existence or nonexistence of which is admittedly a question of law purely. If the act was not a public nuisance, then whether or not the particular thing, act, omission, or use of property complained of was in fact a nuisance was to be determined by the jury. 21 Am. & Eng. Enc. Law, p. 621.

We cannot concede that coasting upon a public street is an illegal act, so as to constitute it a public nuisance. Public highways are intended for pleasure uses as well as business uses; and it is difficult to see why a sled coasting downhill should be said to be a public nuisance any more than a sleigh drawn by horses going down the same highway.

The matter of the coasting or sled riding in a public street has been a subject of decision in several jurisdictions; and we agree with the contention of the plaintiff in error, that the most logical opinion upon the subject is that of Justice Cooley in the case of *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571, where he held that "coasting does not necessarily interfere with the customary use of the street, and might be indulged in with no serious inconvenience to anyone, not only in many places in the country towns, but even within the limits of incorporated cities and villages. We are accustomed to make our public ways 4 rods in width, but it is not expected that the whole 4 rods will be occupied for travel; and it is possible to make use of parts of the public highways without encroaching at all upon the portions

kept in repair and used for passage. . . . It could not be seriously contended that for the municipal authorities to permit coasting upon such a street would be to license a public nuisance. On the contrary, as the sport is healthful and exhilarating, it seems eminently proper, if the street is not put to other public use, that this diversion be allowed, if not expressly sanctioned. The sport itself is not entirely foreign to the purposes for which public ways are established; for the use of these ways for pleasure riding is perfectly legitimate, and coasting is only pleasure riding in a series of short trips repeated over the same road, not differing essentially from the riding in sleighs, of which so much is seen on some of the streets of northern cities, when suitable weather and proper condition of roads invite to this enjoyment." See also *Hutchinson v. Concord*, 41 Vt. 272, 98 Am. Dec. 584; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Jackson v. Castle*, 80 Me. 119, 13 Atl. 49.

Even if it be true, as contended, that the plaintiff was engaged in a sport, which, when indulged in in the public streets, amounted to a public nuisance, yet we think that if her injury resulted from the negligence of the motorman, and not from any negligence on her part, she was entitled to recover. *Dela-ware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178.

The question of the negligence of the motorman and the contributory negligence of the plaintiff was clearly for the jury. There was evidence which shows that the motormen of the defendant's cars were aware that the hill on Montclair avenue was being used by children and others for coasting, and that a young man was usually at the intersection of Montclair and Mt. Prospect avenues to warn trolley cars of the approach of coasters, and that the motorman of this particular car had received warning of the approach of this bobsled. Whether the plaintiff can be held negligent in doing what she did with these precautions having first been taken is for the jury; and whether the motorman, who apparently understood the signal by first slowing down his car, and then disregarded it by putting on a "burst of speed," was himself negligent, manifestly was a question for the jury.

The judgment of nonsuit must be reversed, and a new trial granted.

**Trenchard, Voorhees, and Vredenburg, JJ., dissent.**

## MINNESOTA SUPREME COURT.

A. S. PALMERLEE, Respt.,  
v.  
G. W. NOTTAGE et al., Appts.

(119 Minn. 351, 138 N. W. 312.)

**Libel — public officer — cause for removal.**

1. A publication which charges by way of insinuations and comparisons that cause exists for the removal of a public official, because of favoritism, nepotism, and malfeasance in office, is libelous *per se*.

**Same — evidence — "work."**

2. An article stating that it is easy "to work" the county commissioners held actionable; for the word "work," in the connection and manner in which it appears in the publication, conveys a reflection upon the competency and integrity of the officials.

(November 15, 1912.)

**A** PPEAL by defendants from an order of the District Court for Dodge County overruling a demurrer to the complaint in

Headnotes by HOLT, J.

**Note. — Right of one not specially named to maintain action for libel or slander, based on charges made against a class or group of persons to which he belongs.**

This note supplements those in 23 L.R.A. (N.S.) 726, and 25 L.R.A. (N.S.) 382.

The present question is, Admitting or conceding that the language used would be libelous if it had been directed at the plaintiff personally, is it actionable when directed impersonally at a class or group to which he belongs? It is also to be observed that in this note, as in the earlier one, the words "class" and "group" are to be used in separate and distinct senses. "Class" is used in its most general sense, having reference to a large number of persons who may be designated collectively by a single name, irrespective of geographical limitation, political division, place of abode, etc. "Group" is to indicate a particular local or limited collection of members of a general class.

The note in 23 L.R.A. (N.S.) summarizing the case cited therein deduced the following rules:

1. If defamatory words are used broadly in respect to a general class of persons, and there is nothing that points, or by colloquium or innuendo can be made to apply, to a particular member thereof, such member has no right of action.

2. But if the language is employed toward a comparatively small group of persons, or a restricted or local portion of a general class, and is so framed as to make defamatory imputations against all mem-

bers of the small or restricted group, any member thereof may sue.

The facts are stated in the opinion.

Messrs. Lord & Ronken, for appellants:

Even if the same words would be defamatory when applied to a private individual, yet being written in this case of a public official, concerning his conduct in his office, they are within the rule of fair comment and criticism.

Marks v. Baker, 28 Minn. 162, 9 N. W. 678; Wilcox v. Moore, 69 Minn. 49, 71 N. W. 917; Herringer v. Ingberg, 91 Minn. 71, 97 N. W. 460; Hamilton v. Eno, 81 N. Y. 116; Sweeney v. Baker, 13 W. Va. 184, 31 Am. Rep. 757; Donaghue v. Gaffy, 53 Conn. 43, 2 Atl. 397; Klos v. Zahorik, 113 Iowa, 161, 53 L.R.A. 235, 84 N. W. 1046; Cherry v. Des Moines Leader, 114 Iowa, 298, 54 L.R.A. 855, 89 Am. St. Rep. 365, 86 N. W. 323; Dowling v. Livingstone, 108 Mich. 321, 32 L.R.A. 104, 62 Am. St. Rep. 702, 66 N. W. 225; Note to St. James Military Academy v. Gaiser, 28 L.R.A. 667; Crane v. Waters, 10 Fed. 619; Hunter v. Sharpe, 4 Fost. & F. 983, 15 L. T. N. S. 421; Paris v. Levy, 2 Fost. & F. 71.

Mr. S. L. Pierce, for respondent:

The language claimed to be defamatory

bers of the small or restricted group, any member thereof may sue.

3. On the other hand, if the words used in respect to the small or restricted group expressly, but impersonally and indefinitely, refer to one or more of the several members thereof, one of the members, in order to maintain his action, must establish the application of the language to himself.

**Class.**

In International Text Book Co. v. Leader Printing Co. 189 Fed. 86, it was held that a correspondence school's complaint for libel by making alleged defamatory statements about correspondence schools generally was insufficient for want of an allegation that the statements were intended to apply to the plaintiff and were so understood in the community in which the article was published; but that an amended complaint averring that the article was intentionally directed at the plaintiff, and was so commonly understood, was sufficient, in view of a statutory provision that in an action for libel it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff. In this case, the court, by quoting, indorses the criticism of Watson v. Detroit Journal Co. 143 Mich. 430, 5 L.R.A. (N.S.) 480, 107 N. W. 81, 8 Ann. Cas. 131, contained in the note appended to it in 5 L.R.A. (N.S.) 480, which deals with the liability to an individual for general reflections upon the business in which such individual is engaged.

And in Lynch v. Kirby, 74 Misc. 266, 131 N. Y. Supp. 680, in holding that the

is not a criticism of any specially designated official act of the board, but is in effect a personal charge of dishonorable, criminal misconduct on the part of each person composing the board.

Byram v. Aiken, 65 Minn. 87, 67 N. W. 807; Townshend, Slander & Libel, § 130.

The publication is unambiguous and clearly libelous on its face and incapable of admitting of an innocent meaning.

Alwin v. Liesch, 86 Minn. 281, 90 N. W. 404; Haire v. Wilson, 9 Barn. & C. 643; Levi v. Milne, 4 Bing. 195, 12 Moore, 418, 5 L. J. C. P. 153; Lewis v. Chapman, 16 N. Y. 371; Smith v. Stewart, 41 Minn. 7, 42 N. W. 595; Moore v. Francis, 121 N. Y. 199, 8 L.R.A. 214, 18 Am. St. Rep. 810, 23 N. E. 1127.

Holt, J., delivered the opinion of the court:

The defendants own and publish a newspaper in Dodge county. In 1911 plaintiff was a member of the board of county commissioners. During the year there was an agitation to change the location of the county seat, and special election for that purpose was to be had on July 11. On June 29, 1911, the defendants published in their

paper the article hereinafter referred to. Plaintiff brought this suit for libel, setting out two causes of action. Defendants demurred to each separately, and from the order, overruling the demurrers this appeal is taken.

The article serving as the basis for the first cause of action is as follows:

"Do you know that on Friday, June 23, last, a petition was filed with Governor Eberhart asking for the removal of five of Hennepin county's commissioners from office? If not, we refer you to the Twin City papers of above date. The charge against these commissioners is 'favoritism, nepotism, and malfeasance in office.' Do you realize that any taxpayer of Dodge county can bring a similar petition and use the identical claim that Hennepin county is using?"

We have no hesitancy in holding that the court rightly overruled the demurrer to this cause of action. The article conveys the thought that the county commissioners had been guilty of malfeasance in office. There is no occasion to initiate steps for the removal of a commissioner unless there has been official misconduct. A charge need not be made directly,—indeed, the venom and

president of a typographical union could not maintain an action for libel based upon a publication imputing criminality to the union as such, the court invoked the principle that the mere allegation in the complaint that the libel had reference to the plaintiff is not in itself sufficient, unless some fact is alleged to show that the article was intended to refer to the plaintiff.

#### Group—imputation against all.

A sweeping charge of misconduct against an election board, without exception, necessarily points the finger of condemnation at every member, though none are named, and every member of the board may maintain an action therefor. Reilly v. Curtiss, — N. J. L. —, 84 Atl. 199, relying upon Levert v. Daily States Pub. Co. 123 La. 594, 23 L.R.A. (N.S.) 726, 131 Am. St. Rep. 356, 49 So. 206. In this connection note PALMERLEE v. NOTTAGE.

And a writing attacking a religious faction may be held a libel upon one of its members, where he pleads extrinsic facts and innuendoes ascribing to the publication a defamatory meaning and showing an intent to apply it to him. Mothersill v. Voliva, 158 Ill. App. 16.

But it is held in Arnold v. Ingram, — Wis. —, 138 N. W. 111, that a published article attacking generally the officials of a city is not actionable by one of the officials where the words do not refer to the plaintiff; and it is further held that if the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. 42 L.R.A. (N.S.)

#### —imputation against part.

In Harris v. Santa Fe Townsite Co. — Tex. Civ. App. —, 125 S. W. 77, involving a publication stating that nine women of a certain place had been guilty of fence cutting while their husbands looked on, the same being a statutory offense, it appeared that in the town named in the article lived fifteen women and seventeen men, and that the plaintiff and his wife were prominent in opposing the construction of the fence. In sustaining a demurrer to the complaint the court held that the averment or innuendo that the plaintiff was the person referred to, would not make the petition sufficient unless the facts and circumstances alleged were such that the truth of the innuendo could be reasonably inferred therefrom. "It seems to us," said the court, "that these facts, so far from sustaining, negative the conclusion that plaintiff or his wife was intended to be referred to in the alleged libelous publication. There is no denial in the petition that the fence was cut as charged nor that nine women of South Silsbee were engaged in the cutting, and upon the face of the publication the only persons referred to were the nine unnamed women who did the cutting. The fact that plaintiff was prominent among the thirty or more inhabitants of said town in opposing the construction of the fence could raise nothing more than a suspicion or surmise that he and his wife were referred to in said publication, and cannot be held to be any evidence of the fact that such publication did refer to them." L. A. W.

sting of an accusation is usually more effective when made by insinuations. The floating calumny which each reader may affix to any and every official act which has aroused suspicion may lay hold of it as capable of inflicting graver injury and injustice than a direct, specific charge, which may be squarely met and refuted, if untrue. The contention that the article is a legitimate criticism cannot be adopted, for no act of the commissioners is referred to. Calling names is not criticism.

As to the second cause of action, the complaint contains allegations that a committee called the "press committee" had been appointed to write newspaper articles favorable to removal of the county seat, and then avers that in an article in their paper of June 29, 1911, entitled: "Four-year-old Tommy Jones to His Teacher," the defendants published the false and defamatory matter of and concerning plaintiff: "Teacher—What was it created for?" (Meaning what was the said press committee created for.) "Tommy—To bamboozle de people, work de county commissioners (dat is easy enough)." It is to be noticed that an effort is made in the characters selected, the spelling and language used, to ridicule and reproach. Ability to work usually designates a good and redeeming quality in man. To say of a person that he is easily worked is applied generally in a disparaging sense. And in the language of the street or in such use of expression as here employed, to "work" a public official means to obtain from him something which the law does not permit. One definition in the Century Dictionary of "to work" is: "To manage or turn to some particular course or way of thinking or acting by insidious means." A public official who can be worked is commonly understood to be one who is either so incompetent as to be easily led away from the path of duty by the designing, or one who, for a consideration, would so depart.

The one doubt which may be suggested against the complaint on the second cause of action is that the county commissioners cannot act, except as a body; therefore to work the board one needs only work the majority; hence the minority is not touched by the accusation. But the charge is not made against the board as such, and the complaint alleges that the language was used of and concerning plaintiff. In alleging a cause of action for libel in this state (§ 4152, Rev. Laws 1905), "it shall be sufficient, instead of stating extrinsic facts showing the application to plaintiff of the defamatory matter complained of, to allege, generally, that the same was published or

spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on the trial that it was so published or spoken." We think this complaint comes within the rule of *Petsch v. Dispatch Printing Co.* 40 Minn. 291, 41 N. W. 1034. See also a case in point, *Wofford v. Meeks*, 129 Ala. 349, 55 L.R.A. 214, 87 Am. St. Rep. 66, 30 So. 625, where a member of the commissioners' court (county commissioners) brought an action for libel, and it was urged against his right to maintain it that he was not named in the libel, and he may have voted against the making of the contracts charged to have been fraudulently made, "and therefore he is not, and cannot be, referred to in the publication. This proposition might be tenable, if the complaint admitted the making of the contracts charged to have been corruptly entered into in the publication. But it is absolutely without merit in the face of the averment that the entire publication is 'false, untruthful, scandalous, malicious, and defamatory,' and especially is this true where the defendants, by their motion to strike the substantial allegations of the complaint, confess the truth of every material averment thereof."

The order appealed from is affirmed.

#### MINNESOTA SUPREME COURT.

NAISH McKINNON et al., Copartners, as  
McKinnon and Lapalm, Appts.,  
v.

RED RIVER LUMBER COMPANY, Respt.

(119 Minn. 479, 138 N. W. 781.)

#### Lien — labor — horse hire.

1. The owner of horses who hires them to a contractor, the latter using the horses in aid of hauling and banking logs, and the owner performing no "manual labor or other services" in connection with the logs, is not entitled to a lien on such logs, under Rev. Laws 1905, § 3524.

#### Judgment — personal — evidence of lien.

2. A prior judgment in an action by the owner of the horses against the contractor to recover a personal judgment for the agreed price of their services, and against defend-

Headnotes by BUNN, J.

*Note. — Statutory lien on property of third person for rental of personal property let to contractor for use in work of a lienable nature.*

This note supplements that in 16 L.R.A. (N.S.) 585. Very few cases have been found in addition to those cited in that



ant in this action to establish and foreclose a lien claimed by such owner, is held not to estop defendant from now claiming that plaintiffs acquired no lien on the logs; the judgment being merely a personal one against the contractor, and it appearing that the court in such action did not and could not adjudicate such lien.

(December 6, 1912.)

**A**PPEAL by plaintiffs from an order of the District Court for Hubbard County denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to enforce a lien on logs which had been sawed and converted into lumber by defendant. Affirmed.

The facts are stated in the opinion.

Mr. Charles W. Scrutchin, for appellants:

Plaintiff's lien was a good and valid one.

Martin v. Wakefield (Martin v. Palmer) 42 Minn. 176, 6 L.R.A. 362, 43 N. W. 966; Hogan v. Cushing, 49 Wis. 109, 5 N. W. 490; Breault v. Archambault, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348; Carver v. Bagley, 79 Minn. 114, 81 N. W. 757.

Defendant is estopped *res judicata* from denying the validity of plaintiffs' claim of lien.

Baxten v. Myers, — Iowa, —, 47 N. W. 879; Mally v. Mally, 52 Iowa, 654, 3 N. W. 670; Thompson v. Myrick, 24 Minn. 4; Bazille v. Murray, 40 Minn. 48, 41 N. W. 238; Doyle v. Hallam, 21 Minn. 515; Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393; O'Brien v. Manwaring, 79 Minn. 86, 79 Am. St. Rep. 426, 81 N. W. 746; Drea v. Cariveau, 28 Minn. 280, 9 N. W. 802; Pierro v.

note and in MCKINNON v. RED RIVER LUMBER CO.

It is held that a claim for rental of machinery let to a contractor is neither labor nor materials within the purview of a mechanics' lien act. Hall v. Cowen, 51 Wash. 295, 98 Pac. 670.

So, machinery leased to a contractor, but not becoming a part of the improvement, is not a lienable article under a statute giving a lien to those who furnish material or machinery for the purpose of erecting, altering, repairing, or removing certain structures and improvements. Potter Mfg. Co. v. A. B. Meyer & Co. 171 Ind. 513, 131 Am. St. Rep. 267, 86 N. E. 837. It was further held in this case that a mechanics' lien could not be enforced for the use of a private switch used for delivering cars loaded with materials for the structure.

And a plumber's license is not to be regarded as labor or materials so as to entitle its owner to a lien for the amount which an unlicensed plumber agreed to pay him for the use of the license to enable him to purchase materials. Burnside v. O'Hara, 35 Ill. App. 150, 42 L.R.A. (N.S.)

St. Paul & N. P. R. Co. 39 Minn. 451, 1 Am. St. Rep. 673, 40 N. W. 520; Battle Creek Valley Bank v. Collins, 3 Neb. (Unof.) 38, 90 N. W. 921; Northern Trust Co. v. Crystal Lake Cemetery Asso. 67 Minn. 131, 69 N. W. 708.

Mr. P. V. Coppernoll, for respondent:

Plaintiffs are not entitled to any lien whatever upon said logs for the work and use of their horses in hauling, banking, rafting, cribbing, etc., said logs.

Hogan v. Cushing, 49 Wis. 109, 5 N. W. 490; Mabie v. Sines, 92 Mich. 545, 52 N. W. 1007; Lohman v. Peterson, 87 Wis. 227, 58 N. W. 407; McAuliffe v. Jorgenson, 107 Wis. 132, 82 N. W. 706; Edwards v. H. B. Waite Lumber Co. 108 Wis. 164, 81 Am. St. Rep. 884, 84 N. W. 150; Richardson v. Hoxie, 90 Me. 227, 38 Atl. 142; Hale v. Brown, 59 N. H. 551, 47 Am. Rep. 224; Martin v. Wakefield (Martin v. Palmer) 42 Minn. 176, 6 L.R.A. 362, 43 N. W. 966; Breault v. Archambault, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348; Carver v. Bagley, 79 Minn. 114, 81 N. W. 757.

Defendant is in nowise estopped to deny the validity of the claim of a lien upon said logs made by plaintiffs for the hire and use of their horses by John Sibley in hauling logs, by anything found on the trial of the former action relating to him, or to any work or labor performed by him in, upon, or about said logs.

Gaffield v. Plumber, 175 Ill. 521, 51 N. E. 749; Koon v. Mallett, 68 Iowa, 205, 26 N. W. 74; Bayliss v. Deford, 73 Iowa, 495, 35 N. W. 596; Watts v. Watts, 160 Mass. 464, 23 L.R.A. 187, 39 Am. St. Rep. 509, 36 N. E. 479; Dixon v. Merritt, 21 Minn.

Cases in which the plaintiff rented the property to the owner of the improvement or premises upon which the lien is sought to be enforced are not within the scope of the note.

As to the right to a lien for teaming as distinguished from the present question of rental of teams, see the note in 30 L.R.A. (N.S.) 85, dealing with the question whether contractors or subcontractors are within the protection of statutes giving liens to "laborers," "mechanics," "workmen," and the like.

As to whether food furnished a contractor for employees and teams constitutes materials which will give a lien upon a railroad, see the note in 15 L.R.A. (N.S.) 509.

As to the right to a lien for materials furnished for a structure, but not actually used therein, see the note in 31 L.R.A. (N.S.) 746.

As to the right to a lien for materials wholly or partially consumed in the process of the work, but not becoming a part of the structure, see the note in 36 L.R.A. (N.S.) 354.

L. A. W.

196; Irish American Bank v. Ludlum, 56 Minn. 317, 57 N. W. 927; Augir v. Ryan, 63 Minn. 373, 65 N. W. 640; Thompson v. Myrick, 24 Minn. 11; Adams v. Adams, 25 Minn. 72; McClung v. Condit, 27 Minn. 45, 6 N. W. 399; Boom v. St. Paul Foundry & Mfg. Co. 33 Minn. 253, 22 N. W. 538; Dyer v. Thorstadt, 35 Minn. 534, 29 N. W. 345; Eide v. Clarke, 65 Minn. 470, 68 N. W. 98; Waterhouse v. Levine, 182 Mass. 407, 65 N. E. 832; Child v. Morgan, 51 Minn. 116, 52 N. W. 1127; Schurmeier v. Johnson, 10 Minn. 310, Gil. 250; Smith v. Rountree, 185 Ill. 219, 56 N. E. 1130; Minor v. Walter, 17 Mass. 237; Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224; Perkins v. Cheney, 114 Mich. 567, 68 Am. St. Rep. 495, 72 N. W. 595; People ex rel. Bridgeman v. Hall, 104 N. Y. 170, 10 N. E. 135; State v. Smith, — Minn. —, 137 N. W. 295.

Bunn, J., delivered the opinion of the court:

Plaintiffs brought this action to recover the sum of \$1,296, the amount of a claimed lien on logs which had been sawed and converted into lumber by defendant. At the close of the evidence each party moved for a directed verdict. The court granted defendant's motion. Plaintiffs afterwards moved for judgment notwithstanding the verdict, or for a new trial, and appeal to this court from an order denying this alternative motion.

There are two main questions for our consideration: (1) Did plaintiffs have a valid lien on the logs in question? (2) If not, is defendant estopped from denying the validity of the lien by reason of a former judgment?

The facts are as follows: John Sibley, was engaged in logging and lumbering in the second lumber district under contract with defendant. Plaintiffs entered into a written contract with Sibley, by the terms of which they hired and let to him twelve teams of horses at the agreed price of \$26 per month for each team. These teams worked for Sibley in hauling and banking the logs he was under contract to haul and bank for defendant. Lapalm, one of the plaintiffs, worked for Sibley in caring for the horses, and drove one of the teams on the work. He was to receive \$40 per month for his services, which was paid by defendant. The contractor, Sibley, became insolvent. Plaintiffs, after demanding payment for the services of their horses, both of Sibley and of defendant, filed a lien on the

logs for such services. The lien statement, as well as the evidence, shows that the amount claimed was only for the labor of the horses at the contract price, and did not include anything for the personal services of Lapalm, which had been paid for.

The facts in relation to the claim of *res judicata* are these: Within three months after filing their lien statement, plaintiffs brought an action in the district court for Hubbard county against the defendant in this action, the Red River Lumber Company, and John Sibley. The relief demanded was a personal judgment against Sibley for the amount of plaintiffs' claim for the services of the horses, and a judgment adjudging the lien and directing the sale of the logs to satisfy the same. Neither defendant answered. The court made findings of fact to the effect that the work had been done by the horses at the request of Sibley; that plaintiffs had filed a lien statement, and had thereafter sued out a writ of attachment, and placed the same in the hands of the sheriff, but that said writ was not returned for the reason that the lumber company had theretofore sawed the logs involved into lumber. As conclusions of law, it was determined "that plaintiffs are entitled to judgment against the defendant John Sibley in the sum of \$1,296 damages, together with the costs and disbursements of this action." The judgment against Sibley was entered pursuant to this decision.

1. If plaintiffs' lien was valid, it is clear they are entitled to recover in this action in conversion. The question is whether, under the statute, one who hires horses to a contractor is entitled to a lien on logs, when, under the contract of hiring, the owner is not to render personal services in connection with the horses. The statute (Rev. Laws 1905, § 3524), so far as material here, is as follows: "Whoever performs manual labor or other personal service for hire, in or in aid of the cutting, hauling, banking, driving, rafting, towing, cribbing, or booming any logs, . . . shall have a lien thereon for the price or value of such labor or service." This statute should be construed liberally; but we must not, by construction, do violence to the plain meaning of the language used. Were the services performed by the horses hired to Sibley "manual labor or other services" performed by plaintiffs? In *Martin v. Wakefield* (*Martin v. Palmer*) 42 Minn. 176, 6 L.R.A. 362, 43 N. W. 966, it was held that "manual labor," as those words were used in the log lien

statute then in force, "includes the use and earnings of all implements, instrumentalities, or agencies, such as ax, cant hook, team, or the like, which are actually used in and necessary to the performance of such labor by the lumberman or logger." Applying this rule to the facts in that case, it was decided that where a man and a team are employed, at a gross price for both, to haul or bank logs, his lien on the logs extends to the use of his team. This was followed in *Breault v. Archambault*, 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348, in which case it was also decided that one who furnishes a team and a teamster to a contractor at a gross price for both per month, to haul or bank logs, is entitled to a lien. *Carver v. Bagley*, 79 Minn. 114, 81 N. W. 757, was decided after the law was amended so as to give a lien to one who performs "manual labor or other services for hire," and is important in this connection only as it again announces the rule that the statute is a remedial one and should be given a broad and liberal construction.

It is clear that the present case is not controlled by *Martin v. Wakefield*, *Breault v. Archambault*, or by any decision of this court. Here the contract was only for the use of the teams at an agreed price for each team per month. It did not provide for the services of teamsters, or of men to care for or shoe the horses. The fact that one of the plaintiffs was employed by Sibley under a separate contract to care for and attend to the shoeing of the horses does not bring the case within either of those cited. In addition to the fact that this employment of Lapalm was under an entirely separate and distinct contract, the lien statement shows that no lien was claimed for his services, and the evidence shows that they had been paid for before the lien was filed. The case must be treated, therefore, as if plaintiffs had performed no personal services.

The question has been decided adversely to plaintiffs' contention in *Wisconsin*, *Maine*, and *Michigan*, under statutes identical with ours. *Lohman v. Peterson*, 87 Wis. 227, 58 N. W. 407; *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706; *Edwards v. H. B. Waite Lumber Co.* 108 Wis. 164, 81 Am. St. Rep. 884, 84 N. W. 150; *Richardson v. Hoxie*, 90 Me. 227, 38 Atl. 142; *Mabie v. Sines*, 92 Mich. 545, 52 N. W. 1007. Each of these cases is absolutely in point, and no authority to the contrary is known to us. Indeed, we do not see how an opposite conclusion could be reached, except by a main strength construction of the words of the statute. 42 L.R.A.(N.S.)

The owner of horses, machinery, or tools, who leases his equipment to a contractor, certainly does not "perform manual labor or other personal services for hire" in aid of the cutting, hauling, or banking of logs, which the contractor by himself and his servants does under his contract. The contractor has a lien for his own and his employees' labor, and for the use of all instrumentalities, including teams, which are actually used in and necessary to the performance of such labor by the contractor and his employees. Sibley doubtless would have a lien upon the logs for his own and his employees' services, including the services of the teams with which they worked. This is the rule of *Martin v. Wakefield* and *Breault v. Archambault*, supra, and is also the rule in *Wisconsin*, *Michigan*, and *Maine*. But we must hold that the owner of teams or instrumentalities, who leases or hires them to a lumberman or a logger, and who does not, by himself or by his servants, perform manual labor or other services, is not entitled to lien on logs for the services of such horses or instrumentalities. A contrary holding would not only be against the plain words of the statute and the decisions cited, but it would open the door to abuses. If an owner of horses leased to a logger is entitled to a lien, so is the owner of any equipment, machinery, or tools leased to a logging contractor. And why not the grocer or butcher that supplies the camp of the contractor? Or the merchant that sells the men their clothing?

2. The claim that defendant is estopped by the judgment in the former action is wholly untenable. While in that suit plaintiffs claimed a lien on the logs, and asked to have it established and the logs sold to satisfy it, it is perfectly clear from the judgment and findings that the matter of the lien was not and could not be litigated. The judgment, which followed the conclusions of law, was simply a personal judgment against John Sibley. The decision does not find that plaintiffs had a lien which was valid; indeed, it finds the contrary, as it is recited that an attachment was issued, but not returned, because the logs had been sawed into lumber. An attachment of the logs was necessary to an adjudication that plaintiffs had a lien which they were entitled to enforce *Griffin v. Chadbourne*, 32 Minn. 126, 19 N. W. 647.

We find no other points that require discussion. The decision of the trial court was correct.

Order affirmed.

**MASSACHUSETTS SUPREME  
JUDICIAL COURT.**

**DOMENICO SPOATEA  
v.  
BERKSHIRE STREET RAILWAY COM-  
PANY.**

(212 Mass. 599, 99 N. E. 467.)

**Street railway — headlight — blinding  
traveler — liability for injury.**

The mere fact that the headlight of a street car which is of a kind in ordinary use momentarily blinds a traveler upon the highway so that he comes into collision with a team does not render the street car company liable for the resulting injury to him,

(October 15, 1912.)

**EXCEPTIONS** by plaintiff to rulings of the Supreme Judicial Court for Berkshire County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict for defendant. Overruled.

The facts are stated in the opinion.

Mr. Mark E. Couch, for plaintiff:

The rights of the plaintiff and defendant to the use of the highway are equal, and each must use it with due regard to the safety and convenience of the other.

Ellis v. Lynn & B. R. Co. 160 Mass. 343, 35 N. E. 1127.

Messrs. Henry W. Ely and Joseph B. Ely for defendant.

Rugg, Ch. J., delivered the opinion of the court:

The plaintiff, traveling in the nighttime upon a bicycle on a highway, was injured by collision with a team. It is sought to fasten liability upon the defendant because a headlight upon one of its cars proceeding on its track dazzled the plaintiff so that he ran into the team. The plaintiff testified: "The light blinded me. I was unable to guide my bicycle. . . . It blinded me for the moment and I could not see; it was one of those large night reflectors. . . . It was the same light on the cars that I saw them ordinarily use; that is, about the same. . . . The light was thrown upon me as it rounded a curve. I was coming down the hill, straight down, when the car rounded the curve." The plaintiff saw the team a few steps ahead. The street was wide, and the tracks of the defendant were on its side, and there was plenty of room to pass without collision but for the blinding effect of the light.

This, in substance, is the plaintiff's case. It is too meager to show any negligence on the part of the defendant, either in the character or management of the light or in the running of the car. At most, there appears to have been only a momentary blinding of the plaintiff, as the rays from a headlight such as are in common use included him in their range for an instant while the car came around a curve. More facts than these must appear before it can be said that there was fault in the use or operation of the light or car.

Exceptions overruled.

**Note. — Liability for injuries to one  
blinded by headlight.**

\* The only other case found involving negligence in using a headlight having a blinding effect upon other persons using the highway is Garfield v. Hartford & S. Street R. Co. 79 Conn. 458, 65 Atl. 598, in which the driver of an automobile alleged that the failure of defendant to subdue its headlight, together with other negligence, caused him to run into a trolley pole while endeavoring to get out of the way of defendant's trolley car. In that case the court held that the management of the light was, with other alleged negligent acts, a question for the jury, saying: "If the car bore down upon him, running into a narrow part of a highway, on which were laid both steam railroad and trolley tracks, at an excessive rate of speed, at night, and equipped with a light of dazzling brilliancy, and the motorman kept no proper lookout, and carelessly failed to use the means at his command to avoid blinding

the plaintiff by such a searchlight, it would be a fair question for the jury whether the latter was or was not negligent in doing what he did, and also whether the servant of the defendant was or was not negligent in what he did and what he failed to do." See also a second appeal of this case reported in 80 Conn. 280, 67 Atl. 890.

The fact that an injured person was blinded by a headlight may be shown for the purpose of relieving him from contributory negligence. Thus in Weller v. Chicago, M. & St. P. R. Co. 164 Mo. 180, 86 Am. St. Rep. 592, 64 S. W. 141, which was an action against the railway company for the death of a person struck by a train at a crossing, testimony showing that a trolley car was standing near the crossing, the headlight of which would have a dazzling effect and tend to prevent deceased from seeing the dim light on the approaching train, was held to be properly admitted.

R. L. S.

## NORTH DAKOTA SUPREME COURT.

L. M. SUMMERVILLE et al., Appts.,  
v.  
S. A. SORENSON, Sheriff, et al., Respts.  
(— N. D. —, 136 N. W. 938.)

**Mortgage — redemption — certificate by deputy.**

Relators claimed to be junior mortgagees, and as such entitled to redeem from a certain sheriff's foreclosure sale upon mortgage foreclosure, and attempted to comply with § 7146, Rev. Code 1905, by furnishing a certificate signed by the deputy register of deeds in his own name, instead of one signed in the name of the register of deeds

by said deputy. Held, that such certificate was and is a nullity, and the sheriff was justified in refusing to issue the certificate of redemption. The section above mentioned, being enacted for the protection of the sheriff and subsequent redemptioners, must be complied with.

(Fisk and Bruce, JJ., dissent.)

(February 14, 1912.)

**A**PPEAL by relators from a judgment of the District Court for Ward County quashing a writ of mandamus to compel defendant as sheriff to issue a certificate of redemption to the relators on certain property. Affirmed.

The facts are stated in the opinion.

Headnote by BURKE, J.

**Note.—In whose name acts by deputy officers should be performed.**

- I. In general, 877.
- II. Where the act is in the name of the principal "by" deputy, 877.
- III. Where the act is in the name of the principal alone, 878.
- IV. Where the designation of the office is erroneous or incomplete, 879.
- V. Acts by a special deputy, 880.
- VI. Where the act is in the name of the deputy.
  1. As to deeds, 880.
  2. As to execution of process and writs, 881.
  3. As to certificates of clerks, 883.
  4. As to informations and indictments, 886.
- VII. As to actions by and against deputies, 887.
- VIII. Miscellaneous, 888.

Other cases on the point here presented are to be found in the note to Gibbens v. Pickett, 19 L.R.A. 177.

**I. In general.**

Mr. Mechem, in his work upon Public Officers, § 584, has very clearly stated the law upon the subject annotated in the instant note, in these words: "The question in whose name a deputy officer should act is one of much importance and of considerable apparent uncertainty. The conflict in the cases is, however, believed to be more apparent than real. . . . In several of the states the authority to act in an official capacity is given to the principal alone, or if the appointment of deputies is recognized or authorized by law, they are regarded as the mere private agents or servants of the principal, and not as independent public officers deriving independent authority from the law. Where such is the case, the authority exercised by the deputy is manifestly a derivative and subsidiary one,—it is the authority conferred upon the principal, and not an authority in-

herent in the deputy. It follows, then, logically and legally, that the authority should be exercised in the name of him in whom it exists, and not in his name who, of himself, has no recognized authority at all. The execution should therefore be in the name of the principal alone, or in the name of the principal by the deputy. In other states, as has been seen, the deputy is recognized as an independent public officer, and is endowed by law with authority to do any act which his principal might do. In these cases, where the authority exists in the deputy himself by operation of law, and is not derived solely through the principal, it is well executed in the name of him in whom it exists, the deputy himself. Under either state of facts, the authority of a special deputy, who, as has been seen, is regarded as the mere private agent or servant of the principal, would, unless otherwise provided by statute, be properly exercised in the name of the principal."

**II. Where the act is in the name of the principal "by" deputy.**

An act purporting to be that of the principal by a deputy has been sufficient in the following cases: Terrell v. Martin, 64 Tex. 121 (deputy clerk executing a deed; held, also, to be the proper person to acknowledge it); Piper v. Chippewa Iron Co. 51 Minn. 495, 53 N. W. 870; Piper v. Chippewa Iron Co. 51 Minn. 499, 54 N. W. 486 (statute providing for the acknowledgment of deeds before clerks of courts of record of sister states permits the certificate of acknowledgment of a deed to be in the name of the clerk by the deputy, and entitles such deed to recordation in the local state); Platt v. Roland, 54 Fla. 237, 45 So. 32 (even prior to the adoption of the Rev. Stat. of 1892, expressly authorizing a deputy clerk of any court of record to take acknowledgments of conveyances, a deputy clerk of the circuit court had authority to take an acknowledgment to a tax deed); Halbouer v. Cuenin, 45 Colo. 507, 101 Pac. 763 (deputy clerk of a court of record certifying an acknowledgment to a tax

Messrs. H. L. Halvorson and Palda, Aaker, & Greene, for appellants:

The record made by relators on their offer to redeem was sufficient on its face.

North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A. (N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; Williams v. Lash, 8 Minn. 496, Gil. 441; Tinkcom v. Lewis, 21 Minn. 132; Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868; Sardeson v. Menage, 41 Minn. 316, 43 N. W. 66; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; Spackman v. Gross, 25 S. D. 244, 126 N. W. 393; Bridgeport v. Blinn, 43 Conn. 274.

Messrs. Bosard & Twiford and Murphy & Woledge for respondents.

deed); Yonge v. Broxson, 23 Ala. 684 (clerk's name subscribed to a writ to which is attached an affidavit that the name was subscribed "by the affiant," by authority of the clerk); Briggs v. Greenlee, Minor (Ala.) 123 (deputy sheriff's return to a writ); Jamesville & W. R. Co. v. Fisher, 109 N. C. 1, 13 L.R.A. 721, 13 S. E. 698 (holding a minor, in the absence of statutory restrictions, may be appointed by a sheriff as his general or special deputy, and as such has full authority to serve a summons and make the return); Eversole v. Eastern Kentucky Asylum, 30 Ky. L. Rep. 989, 100 S. W. 300 (deputy sheriff's return to summons); Lynch v. Livingston, 8 Barb. 463, affirmed in 6 N. Y. 422, cited while in lower court in the original note to Gibbens v. Pickett, 19 L.R.A. 177 (deputy county clerk certifying to the official act of a commissioner); Anderson v. Kana-wha Coal Co. 12 W. Va. 526 (deputy clerk's certificate of the affidavit for an attachment, and of the acknowledgment and approval of the bond); Schott v. Youree, 142 Ill. 233, 31 N. E. 591, affirming 41 Ill. App. 476 (signature to a certificate of record under the seal of the court, where a statute required the certificate to be "under the hand of the clerk of the court," and another statute authorized the appointment of a deputy); Nesbit v. People, 19 Colo. 441, 36 Pac. 221; People v. Etting, 99 Cal. 577, 34 Pac. 237; People v. Darr, 61 Cal. 554 (signature appended to an information or indictment); Nesbit v. People, 19 Colo. 441, 36 Pac. 221 (verification to an information and jurat to the verification signed by deputy); People v. Griner, 124 Cal. 10, 56 Pac. 625 (information for felony signed by an assistant district attorney); People v. Turner, 85 Cal. 432, 24 Pac. 857 (blank information signed by the district attorney, but filed out by a *de facto* assistant district attorney, who adds his own signature after the district attorney's and then files it, acting under the approval and by the direction of the district attorney; held to be no error to refuse to strike the information from the files of the court, or to set it aside on the ground that it 42 L.R.A. (N.S.)

Burke, J., delivered the opinion of the court:

The Kenmare National Bank was the holder of a sheriff's certificate issued to it upon a tract of land sold under mortgage foreclosure by advertisement. Upon the last day but one of the period of redemption, plaintiffs attempted to redeem from said certificate in accordance with § 7146, Rev. Code 1905, claiming that they were junior mortgagees. They served upon the sheriff, at different times during said day, the following papers: First, a notice of redemption stating that they desired to redeem "by virtue of a junior mortgage upon said premises, dated July 25, 1906, and recorded September 1, 1906, at 8:30 A. M. in Book 65 of Mortgages, page 42, said mort-

has not been signed, presented, or filed by the district attorney); Stout v. State, 93 Ind. 154 (signature to an indictment where statute authorized the appointment of deputy); Ansley v. Hart, 77 Ga. 42 (marshal's deed conveying property sold under a *fi. fa.* not inadmissible in evidence because signed, "James Longstreet, United States Marshal, Southern District of Georgia, by A. Wright, Deputy").

Under a statute providing that, in the event of the death of an officer leaving a deputy, the latter may continue to discharge the duties of the office in the name of the deceased officer, as if he had not died, it was held in McRee v. Swalm, 81 Miss. 679, 33 So. 503, that a tax deed signed by "Charles McNair, Tax Collector, by R. C. Applewhite, Deputy," was valid. It was said: "If the tax collector's name had not been mentioned, since he was dead, and the deputy acted not as agent for a principal, but solely by virtue of the power conferred by the statute [§ 3079, Code 1892], the deed would have been perfectly good; and so it is here, in the form we have it, because it is perfectly manifest that the sale and deed were made by the deputy."

Other cases as to the proper signature to be appended to an indictment or information may be found under subdivision 4, "As to informations and indictments," *infra*. And see United States v. Nagle, 19 Blatchf. 258, Fed. Cas. No. 15,852; and State v. Mathews, 133 Iowa, 398, 109 N. W. 616, cited under, "Where the act is in the name of the principal alone," *infra*.

As to other cases that may be considered with propriety under this subdivision, see subdivision 2, "As to execution of process and writs," *infra*.

### III. Where the act is in the name of the principal alone.

In the following cases, where the act in question was done by the deputy in the name of his principal alone, with no reference to himself as deputy, it was held to be sufficient: Wilkerson v. Dennison, 113

gage being made to the Minneapolis Thresher Company, and by them assigned to the undersigned by an instrument in writing dated May 11, 1909, and filed for record in the office of the register of deeds, Ward county, North Dakota, on the 17th day of July, 1909, and recorded in Book 113 of Mortgages, page—, and we, the undersigned, tender herewith the sum of \$1,517.85," etc.; second, a certified copy of the assignment of the mortgage; third, an affidavit of the plaintiffs to the effect that they were legally entitled to redeem from the sheriff's certificate by virtue of the mortgage held by them, and that there was due upon said mortgage the sum of \$2,500; fourth, a purported note by the deputy register of deeds of Ward county, in words as follows:

Tenn. 237, 106 Am. St. Rep. 821, 80 S. W. 765, 3 Ann. Cas. 297 (acknowledgment to deed taken and certified to by deputy clerk; in Tennessee, deputy clerks are authorized to take and certify acknowledgments of deeds in both the names of their principals and themselves as deputies; and authority to do so in the name of their principals is conferred by § 4050 of the Code, vesting in them all the powers of the principal clerks; and § 2039 also of the Code confers upon them, in their official capacity as deputies, the authority independent of that derived from principal clerks); Gibson v. Martin, 38 Ark. 207 (deed for the sale of land under execution made by a deputy sheriff); Harrison v. Harwood, 31 Tex. 650 (attachment bond approved, and the attachment issued and tested by the deputy clerk; it was said that the deputy clerk *ex virtute officii* may perform all official acts in the name of the principal clerk, which the principal himself can perform in discharging his duties as clerk; but where the duties are imposed upon the clerk by statute, not necessarily belonging to his office as clerk, then the rule is different); United States v. Nagle, 17 Blatchf. 258, Fed. Cas. No. 15,852 (signature of the district attorney attached to information by a sworn assistant by virtue of a general authority conferred upon him by the district attorney); State v. Mathews, 133 Iowa, 398, 109 N. W. 616 (deputy signing an indictment where principal had given him full authority so to do, and statute expressly authorized the appointment of deputies to assist in the discharge of the duties of the office); Garneau v. Dozier, 100 U. S. 7, 25 L. ed. 536 (transcript of record for purposes of appeal or a writ of error to the United States Supreme Court signed by deputy: exact form of signing not given); People ex rel. Springsteen v. Powers, 19 Abb. Pr. 99 (*dicta* to the effect that a statute reciting that a clerk of the court may, by an instrument in writing, appoint a deputy who may in his name perform all the duties required of the clerk, authorizes the deputy to take the jurat to certain affidavits).

42 L.R.A.(N.S.)

I, S. S. Reishus, deputy register of deeds in and for Ward county, North Dakota, do hereby certify that I have examined the records in regard to the S.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  and lots 3 and 4, Sec. 5, Twp. 163, Rge. 338, and find that the statements regarding the mortgage recorded in Book 65 of Mortgages, page 42, as above set forth, are correct and true.

[Signed] S. S. Reishus,  
Deputy Register of Deeds.

At the same time they paid to the sheriff the money above mentioned. The sheriff, upon the instigation of the bank, refused to execute and deliver to them a certificate of redemption, and an alternate writ of mandamus issued from the district court to the sheriff. The return of the sheriff set forth

The courts of this country have in fact treated it as a matter of little consequence whether the deputy affixed his own name or that of his principal to an information. Browne's Appeal, 69 Mo. App. 159, wherein it was also said: "As to whether or not the assisting prosecuting attorney was technically correct in signing the name of the prosecuting attorney instead of his own to the information is not material in this controversy."

A clerk of the superior court may appoint a deputy who will be authorized to issue executions; but he should not sign them with the name of the clerk as if the clerk himself has made the signature. Biggers v. Winkles, 124 Ga. 990, 53 S. E. 397, wherein it was also held that the clerk cannot by oral authority confer general power upon another to sign his name to executions issued in his absence and not under his immediate direction and control.

By statute on the death of a sheriff, the powers of the undersheriff to act in the name of the sheriff shall survive for the benefit of the parties interested in the execution of process delivered to the sheriff before his decease; and though the undersheriff is himself appointed sheriff, he may proceed under the provision of the statute as undersheriff. Ward v. Storey, 18 Johns. 120.

In Springer v. McSpadden, 49 Mo. 299, it is held that where a statute authorizes the appointment of deputy clerks, the deputy acting in the name of the chief clerk may take the acknowledgments of deeds and grant certificates thereon. In this case, while the form of the signing is not given, the court says that the deputy cannot act in his own name, but must act in the name of the chief clerk.

And for another case that may be considered under this subdivision, see Kelly v. Harrison, 69 Miss. 856, 12 So. 261, under subdivision, "Acts by a special deputy," *infra*.

**IV. Where the designation of the office is erroneous or incomplete.**

The appointment of a deputy clerk being

the facts as stated above, and asked that the Kenmare bank be allowed to intervene and contest the regularity of the redemption. This was allowed, and the defendant bank insisted that the attempted redemption was void for failure to comply with said § 7146. The question for us to decide is whether the redemption was valid or void. Section 7146 reads: "A redemption-er must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff: (1) A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the district court of the county where the judgment is docketed, or if he redeems upon a mortgage or other lien, a note of the record thereof certified by the

register of deeds. (2) A copy of the assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto. (3) An affidavit by himself or his agent showing the amount then actually due on the lien."

Respondents contend that the proceedings taken by the plaintiffs do not amount to a legal redemption for the following reasons: First, that the relators did not serve with their notice of redemption a note of the record of the mortgage under which they claim to redeem, certified by the register of deeds; second, that the copy of the assignment of the mortgage served upon the sheriff was not verified by the relators or the subscribing witnesses as required by law. Under the first head, they point out that

authorized by statute, it has been held that an acknowledgment signed by one as "special deputy" is valid, since the certificate being regular in all other respects, the word "special" will be held to be surplusage; no authority being shown for the appointment of any such officer as a special deputy. *Thompson v. Johnson*, 84 Tex. 548, 19 S. W. 784.

A writ returned "executed by B. Brandon, D. S.," without naming his principal, does not legally show the service of process. *Land v. Patteson, Minor* (Ala.) 14, wherein it was said: "If we were authorized to infer that these initials mean deputy sheriff, there remains nothing to show in what county this person was deputy. The court is presumed to know who are sheriffs of the several counties. But a deputy sheriff is not commissioned in the name of the state, or required by statute, to take any oath of office. He is appointed by the sheriff, amenable only to him for his ministerial acts, and though he may lawfully execute process, his acts must appear to have been done by authority of, and in the name of, the sheriff."

And another case that may be considered under this subdivision is *Land v. Patteson, Minor*, (Ala.) 14, cited under subdivision 2, "As to execution of process and writs," *infra*.

#### V. Acts by special deputy.

Where a local county law authorized the appointment of a deputy constable, it was held that the return on the writ of garnishment signed in the name of the constable "by" the deputy was legal. *Stephens v. Cox*, 124 Ala. 448, 26 So. 981.

In *Kelly v. Harrison*, 69 Miss. 856, 12 So. 261, where the return to a summons was made by a special officer in his own name, instead of in the name of his principal by himself, as he was required to do by the statute, it was held that the error was a mere irregularity, and amendable upon motion. It was said that while the error was subject to review on direct appeal, it did not affect the jurisdiction, 42 L.R.A. (N.S.)

or render a judgment by default thereon subject to collateral attack.

A return to a subpoena by a special deputy in his own name is invalid. *State v. Huff*, 161 Mo. 450, 61 S. W. 900.

#### VI. Where the act is in the name of the deputy.

##### 1. As to deeds.

A deputy sheriff may, in his own name, after the expiration of the term of office of his principal, and in the absence of the latter from the state, execute a deed to the purchaser at a judicial sale made by the sheriff while in office. *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74. In this case it was also held that the authority of the deputy to execute the deed under the circumstances was not impaired by the act of 1858, allowing a deed in such cases to be executed by the succeeding sheriff.

So a sheriff may cause a deed to be made in the name of, and attested by, one of his legally qualified deputies, and when so made and attested it has the same validity as though it were made and attested by the sheriff. *Kellar v. Blanchard*, 21 La. Ann. 38. In this case the court applies the maxim, *Qui facit per alium, facit per se*.

In *Carr v. Hunt*, 14 Iowa, 206, it was held to be no cause for setting a sheriff's deed aside at the instance of the defendant in execution, that it was executed by a deputy in his own name. It was said that if the deed was set aside, the judgment or decree and sale would remain, and that if the sale was valid, to set aside the deed would accomplish no practical good.

Under a statute authorizing a deputy "to perform all and singular the duties pertaining to the office of sheriff, within his respective county," it has been held that the deputy sheriff may, in his own name, execute a valid deed for lands sold on execution by himself or principal. *Haines v. Lindsey*, 4 Ohio, 88, 19 Am. Dec. 586.

Where a statute authorizes a county



the certificate served upon the sheriff was signed by the deputy register of deeds in his own name and right, without signing the name of his principal. In the case of *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 649, this court, speaking of a deputy sheriff, says: "A deputy sheriff has no power nor authority other than that which pertains to him, and which he exercises as acting for the sheriff by whom he is appointed, to whom he gives bond, and to whom also he is responsible for his acts as such deputy, the sheriff, himself, in turn, being responsible for the acts of his deputy as such." As the statute authorizing the appointment of a deputy register of deeds and a deputy sheriff are the same, we think the above-entitled case in point. This is also the holding of

*Ditch v. Edwards*, 2 Ill. 127, 26 Am. Dec. 414, and of the authorities collected in the note in the *American Decisions*, supra, wherein it is stated: "The question of a deputy's power to sign his own name without specifying his principal most often arises. And the cases with few exceptions are uniform that the return, to be valid, should be in the name of the sheriff,"—citing many cases. In line with these authorities, we must hold that the purported note of record issued by the deputy register of deeds was a nullity, having no effect whatever, and leaving the redemption in the same condition as though none had been served whatever upon the sheriff. As to the legal effect of this omission we quote from 27 Cyc. page 1832 (F), the following general

treasurer to appoint one or more deputies, it has been held that a duly appointed deputy has power to execute a tax deed required by the statute to be executed by the county treasurer. *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850, wherein it was also held that the deputy might have made the deed in the name of his principal if he had so wished.

Under a statute authorizing a sheriff to sell land for taxes, a deputy may also sell and convey title to such land in his own name. *Chapman v. Doe*, 2 Leigh, 329.

So, under the preceding statute, since the officer making the sale is the only one competent to convey the land to the purchaser, it has been held that a deed reciting that the sale was made by the sheriff, but executed by a deputy for his principal, and acknowledged by the deputy for registry as his, the deputy's, own deed, whereby the land sold is conveyed to the purchaser, is ineffectual to convey the title. *Wilson v. Doe*, 7 Leigh, 22.

A tax deed executed by a deputy auditor general in his own name is valid under a Michigan statute (How. Stat. § 283) providing that a deputy may execute the duties of the office during the sickness or necessary absence of the auditor general. The presumption is that it was necessary for the deputy to act. *Drennan v. Herzog*, 56 Mich. 467, 23 N. W. 170. To the same effect is *Fells v. Barbour*, 58 Mich. 49, 24 N. W. 672.

For another case that may be considered in this connection, see subdivision, "Where act is in the name of the principal 'by' deputy," supra.

## 2. As to execution of process and writs.

Process signed by a deputy clerk of the superior court in his own name is as valid and sufficient in law as if signed by the principal clerk. *Goodwyn v. Goodwyn*, 11 Ga. 178, wherein a statute expressly so provided. To the same effect, see *Dever v. Akin*, 40 Ga. 423.

Prior to the adoption of the statute (Acts 1902, p. 106) authorizing the ap-

pointment of deputy clerks and defining their powers and duties, it was held in *Tietjen v. Merchants' Nat. Bank*, 117 Ga. 501, 43 S. E. 730, that one acting as deputy clerk of the city court of Savannah, by authority of the clerk of that court, was legally authorized to sign in his own name process issued from that court.

An attachment issued by a deputy clerk in his own name, who has been properly appointed and is in the daily exercise of his official duties under color and claim of his office, is valid, and not vitiated by the fact that the deputy had not taken the prescribed oath of office, nor his attachment subject to abatement for the same reason. *Joseph v. Cawthorn*, 74 Ala. 411, wherein it was stated: "It has frequently been decided, and it is clear upon principle, that the failure of an officer to conform to some statutory condition or constitutional requirement, such as taking an oath, . . . does not remove his *de facto* character where he is acting under color of a known and valid appointment or election. . . . There is no distinction in law between the official acts of an officer *de jure* and those of an officer *de facto*. So far as the public and third persons are concerned, the acts of the one have precisely the same force and effect as the acts of the other."

An assistant clerk appointed by the court under legislative authority may sign in his own name, in the absence of the clerk, writs required by the Constitution to be signed by "the clerk of such court," although the Constitution requires "clerks of court" to be elected by the people. *Jacobs v. Measures*, 13 Gray, 74, wherein it was held that the assistant clerks of the courts in Middlesex are authorized by statute to sign precepts, although acting as such in another town within the county.

An order of arrest granted by a deputy clerk in his own name is invalid, since the granting of such an order is a judicial act which deputy clerks are not authorized to perform. *Weingerter v. White*, 5 La. Ann. 487.

A deputy clerk may approve an attachment bond in his own name, as well as is

rule: "Where redemption from a mortgage is made on common-law or equitable grounds, the form in which the transaction is cast is not material, . . . but in the case of a redemption after sale on foreclosure, the provisions of the statute granting the right and regulating the manner of its execution must be strictly pursued." In *Wilcoxson v. Miller*, 49 Cal. 193, it was held that "a person claiming the right to redeem from a sheriff's sale as a judgment creditor must produce for the sheriff a copy of the docket of the judgment; and an attempted redemption is ineffectual without such production, and the sheriff's deed is void. The power of the sheriff in relation to redemption is purely statutory, and his acts are

nugatory unless the provisions of the statute are pursued."

In the case of *Tinkcon v. Lewis*, 21 Minn. 132, the attempting redemptioner failed to file the affidavit as to the amount due upon his lien, as required by statute. The court held this omission fatal to the redemption, and used this language: "The sections of chapter 81 [Gen. Stat. 1878] which confer the right of redemption, . . . being of a remedial character, . . . should receive such liberal construction. . . . But by no allowable liberality of construction can we hold that the computation made by the defendants and the sheriff, 'of the amount of Lewis & Shaubert's claim on the 80 acres,' is equivalent to the affidavit required by the 3d subdivision of § 14. The

sue the writ, and since the district court knows its own clerk and his deputy, it is not necessary that his signature to a jurat (accompanying a petition for attachment) shall be authenticated by his official seal. *Finn v. Rose*, 12 Iowa, 565, wherein it was held not to be necessary that the absence or inability of the principal officer should be stated by the deputy.

So, a deputy clerk has the power to issue execution in his own name, and he may perform any of the other duties of the office except such as are judicial in character, or where a statute specifically provides otherwise. *Miller v. Miller*, 89 N. C. 402.

While a statute authorizes a deputy clerk to take depositions, and to do and perform all other acts that may be lawfully done by the principal clerk, he must nevertheless act in the name of his principal, and a citation tested by a deputy clerk in his own name as deputy clerk, and premitting the name of his principal, is absolutely void. *Wimbish v. Wofford*, 33 Tex. 109.

A sci. fa. to revive and continue the lien of a judgment, signed by a deputy prothonotary in his own name as such, attested in the name of the president judge, and issued under the seal of the court, is lawful process. *Harden v. Roberts*, 9 Pa. Co. Ct. 160.

A writ of attachment which is signed by a deputy clerk in his own name is invalid, notwithstanding a statute authorizes the appointment, and declares that such deputies may discharge any of the duties of the clerk. *Pendleton v. Smith*, 1 W. Va. 16, wherein it was held that whatever duties the deputy may discharge for his principal must be in the name of the principal.

A mere rule to show cause why an information in quo warranto should not be filed may be served by any person competent to do business, and is therefore valid when served by and returned in the name of an undersheriff. *United States ex rel. Boyd v. Lockwood*, 1 Pinney (Wis.) 386, wherein it was said: "If it were a writ directed to a sheriff, a deputy sheriff or an undersheriff could not make a legal return in his own name.

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The act and return of a deputy sheriff is a nullity unless done in the name and by the authority of the sheriff, and a certificate of the service of summons by a deputy sheriff or one acting as such is void as proof of such service, if signed by the deputy in his own name, and not sworn to nor purporting to be an affidavit of service, and a judgment by default will be set aside upon motion, if rendered upon such proof of service. *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089.

A return to a summons made by a deputy sheriff in his own name is not void so as to require the reversal of a judgment, but is amendable. *First Nat. Bank v. Ellis*, 27 Okla. 699, 114 Pac. 620, Ann. Cas. 1912 C, 687.

Service of process should be made in the name of the sheriff, and a return of service in the name of the deputy sheriff is void. *State ex rel. Bond v. Fisher*, 230 Mo. 325, 130 S. W. 35, Ann. Cas. 1912 A, 970.

In *Harriman v. State*, 1 Mo. 504, while it was conceded that a deputy sheriff may do any act which the principal sheriff can do, it was said that the law is well settled that every act must be done in the name of the sheriff, and that where a writ is served by the deputy sheriff and returned in his own name, the service is bad.

In *Bolard v. Mason*, 66 Pa. 138, where the return of process in an action of attachment was in the name of the deputy sheriff, it was held that the service was bad. The court said that the return should have been in the name of the sheriff no matter by whomsoever served.

A deputy sheriff who has not made service upon a petition and citation or other proceeding has no authority to make the return to certain interrogatories in his own name. *McKnight v. Connell*, 14 La. Ann. 397.

The return to an execution may be made by a deputy marshal in his own name. *Spafford v. Goodell*, 3 McLean, 97, Fed. Cas. No. 13,197, wherein it was said: "A deputy marshal is an officer known to the law, and it is the general practice, long sanctioned by the courts, for the deputy

right of redemption from sales upon foreclosure by advertisement is wholly the creature of the statute; and, while we would construe the statute liberally in favor of the mortgagor and redeeming creditors, we cannot dispense with or repeal its positive terms. Merely formal deviations or irregularities may be overlooked; but there must be a substantial compliance with the express requirements of the statute, in order to a valid redemption. The language of § 14 is clear and imperative. The person desiring to redeem shall produce to the sheriff . . . an affidavit of himself or his agent, showing the amount then actually due on his lien.' The object of this requirement is to provide the evidence whereby a junior creditor may know the amount neces-

sary to be paid to the senior creditor upon a redemption from him." In the same case it is held that the holder of the certificate "is not affected by the sheriff's waiver, the sheriff not being in any sense his agent,"—citing *Horton v. Maffitt*, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222; *Davis v. Seymour*, 16 Minn. 210, Gil. 181. The redemption was held invalid. We have purposely quoted at length from this Minnesota case, because it is one of the cases relied upon strongly by the appellants. In the same case, and as an additional reason for the invalidity of the redemption, it is insisted that the junior mortgagee did not produce to the sheriff a copy of his assignment as required by the Code, but in its stead produced the original instrument, together

to make return of process served by him. It might be more technical to return the same in the name of the marshal, but the custom has been otherwise. The deputy is a sworn officer, and the court think that the return is good. They would even now permit the marshal to amend the return if it were essentially defective."

While in *Blackwell v. Glass*, 43 Ark. 212, it is stated to be a general rule that a deputy has no power to act officially except in his principal's name, yet, since the action at bar was upon a judgment rendered by a justice of the peace in Tennessee, and objection was made to the introduction of the transcript as evidence, upon the ground that the return of process designed to bring the defendant before the justice was signed by a person who described himself as deputy sheriff without disclosing the name of his principal, and it appeared by the depositions of practising attorneys in Tennessee, skilled in the laws, usages, and practice of the courts in that state, that such a return was sufficient there to authorize the judgment, the court permitted the introduction of the transcript.

The deputy of the clerk of a district court has, in his own name, the same power to administer an oath to an affidavit for a writ of error to a justice of the peace as his principal. *Wood v. Bailey*, 12 Iowa, 46.

### 3. As to certificates of clerks.

In the following cases, where the act was performed by the deputy officer in his own name and without reference to the principal officer, the act was held sufficient: *Hague v. Porter*, 45 Ill. 318 (deputy clerk of the county commissioners' court certifying to the official character of a magistrate who had taken the acknowledgment to a deed); *Edson-Keith & Co. v. Bedwell*, — Colo. —, 122 Pac. 392 (deputy clerk attesting a homestead declaration: the court said: "It would be a sacrifice of substance to form to hold the attestation void for the reason simply that the party attesting did so in his own name as a deputy, instead 42 L.R.A. (N.S.)

of adding the name of his principal thereto by him as such"); *Stewart v. Desha*, 11 Ala. 844 (deputy clerk, in the absence of principal, taking affidavit to a deposition in his own name); *Southern R. Co. v. Hundley*, 151 Ala. 378, 44 So. 195 (jurat to affidavit made by a deputy, where a statute gives circuit court clerks authority to take affidavits, and to appoint deputies with power to transact all the business of such clerks); *Jennings v. Newman*, 52 How. Pr. 282 (deputy clerk certifying to a copy of a notice of claim required by the mechanics' lien law); *Sumner v. Roberts*, 13 N. C. (2 Dev. L.) 527 (deputy clerk taking the probate of a will); *Evans v. Wilder*, 5 Mo. 313 (certificate to purchaser of the fact of sale. In this case the certificate commenced in the name of the sheriff, but was signed by the deputy; the court said that the signature of the sheriff was not essential, particularly where the certificate purported to be the act of the sheriff in the body of the instrument); *Com. ex rel. Clark v. Read*, 2 Ashm. (Pa.) 261 (deputy clerk taking the acknowledgment of the bond required to be given by the county treasurer to the commonwealth, it appeared that the acknowledgment was taken "before him for the recorder"); *Merriam v. Coffee*, 16 Neb. 450, 20 N. W. 389 (signature to jurat of oath administered to certain tax assessors, where statute authorized the appointment of a deputy and provided that, in the absence or disability of the principal, he might perform the duties of the principal); *Ballard v. Orr*, 105 Ga. 191, 31 S. E. 554 (deputy clerk authorized by statute to attest deeds and other instruments; held no error to admit in evidence a registered mortgage attested by such officer, over an objection to its reception based on the invalidity of such attestation); *Kemp v. Porter*, 7 Ala. 138; *Pinkard v. Ingersol*, 11 Ala. 9 (probate of a deed: statute authorizing deputy to do in the absence of the principal clerk all the acts which the principal clerk could do were he present); *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177 (acknowledgment to a tax deed; statute providing that the county clerk shall

with the indorsement of the register of deeds that it had been duly recorded. The court said that the statute did not require the sheriff to refuse a higher class of proof than named therein. This seems to be their idea of informal deviations from the Code. To the same effect are the cases of *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; *Pamperin v. Scanlan*, 28 Minn. 345, 9 N. W. 868, and other cases relied upon by appellants. Whenever the omission is material the redemption falls. In *Spackman v. Gross*, 25 S. D. 244, 126 N. W. 393, the redemption certificate issued to Spackman was set aside because a duplicate of the notice of redemption was not filed with the register of deeds, although he had made some attempt to com-

ply with the said provision by leaving the notice there several days. See also *Chapin v. Kingsbury*, 135 Mass. 580, where it is held that recording an instrument does not comply with the statute requiring it to be filed. Upon the authority of the above cases, we are inclined to the holding that the omission of the note by the register of deeds required by § 7146 is fatal to the redemption, and that the purported certificate by the deputy does not supply the omission.

This conclusion renders it unnecessary to pass upon the other objections raised by the respondents, that the copy of assignment of the mortgage was not properly verified, and that the appellants are not upon the records before us proven to be redemptioners.

appoint a deputy who shall perform the duties of a clerk in the absence of the clerk, under the seal of the court); *Willamette Falls Canal & Lock Co. v. Gordon*, 6 Or. 175 (certificate of acknowledgment to a deed; the court said that a deputy, under the territorial act of 1856, was an independent officer, and not a mere deputy in the ordinary sense of that term, and that, the representative words "deputy clerk" being the title of his office, the certificate was valid); *Small v. Field*, 102 Mo. 104, 14 S. W. 815 (conveyance acknowledged before deputy clerk in a territorial district court is sufficient and admissible in evidence, though U. S. Rev. Stat. 1878, § 1871, provides that each judge of a territory shall designate and appoint one person as clerk of his district, and another provision is made for the appointment of a deputy, § 748, however, expressly speaking of "deputy clerks" of territorial courts); *McRaven v. McGuire*, 9 Smedes & M. 34 (acknowledgment to a deed under statute giving deputies the right to perform all the acts and duties enjoined upon their principals); *Wert v. Schneider*, 64 Tex. 327 (acknowledgment to a deed of assignment, where the statute named the district clerk as one of the officers before whom such acknowledgments might be taken); *Frizzell v. Johnson*, 30 Tex. 31 (acknowledgment of a deed presumably taken by a deputy; this case, which is cited in subdivision 3, "As to certificates of clerks," in the note to *Gibbens v. Pickett*, 19 L.R.A. 177, cites *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172, holding the contrary, as overruled); *Farmers' & M. Bank v. Chester*, 6 Illuph. 458, 44 Am. Dec. 318 (probate of a deed under an act which authorizes a "legally appointed" deputy clerk to take probates, notwithstanding in the particular case he had not qualified); *Coltrane v. Lamb*, 109 N. C. 209, 13 S. E. 784 (probate of deed); *Babbitt v. Johnson*, 15 Kan. 252 (acknowledgment of deed, where statute authorized the appointment of a deputy and conferred upon him the power to perform any ministerial office); *Gate City v. Richmond*, 97 Va. 337, 33 S. E. 615 (holding that, even 42 L.R.A. (N.S.).

prior to the passage of the act of 1890, authorizing deputy clerks to take acknowledgments to deeds, a deputy clerk of a county court could take such acknowledgment in his own name, and that he had power to discharge any of the duties of his principal, unless otherwise provided by law, and this duty was not otherwise so provided); *Davis v. Seybold*, 115 C. C. A. 304, 195 Fed. 402 (acknowledgment to a deed to lands in West Virginia, where a statute authorized a deputy to discharge any of the duties of his principal. In this case the court held that the deed was not inadmissible in evidence, because the acknowledgment was taken by a deputy clerk in Nevada); *Beuley v. Curtis*, 92 Ky. 505, 18 S. W. 357 (certificate to a deed. In this case the court did say, however, that the deputy clerk ought to act in the name of his principal, and not in his own name, and also held that the grantor in such a deed, although a married woman, would not be allowed to repudiate the deed, it being admitted by her that the person who took and certified the acknowledgment was in fact the deputy clerk, and that he was acting for his principal); *MacKenzie v. Jackson*, 82 Ga. 80, 8 S. E. 77 (holding that a deputy clerk may perform any duty that the clerk is authorized to perform, but further holding that when the deputy clerk certifies, he must certify over his own signature, and not over that of the principal by himself as deputy); *State v. Devine*, 6 Wash. 587, 34 Pac. 154 (holding that where an information is made by the prosecuting attorney before the deputy county clerk, it is proper that the jurat should be signed by the deputy in his own name, and it is unnecessary that he sign in such case in the name of his principal by himself as deputy); *State v. Rosener*, 8 Wash. 42, 35 Pac. 357 (holding that when an information is verified before the deputy county clerk, the verification is sufficient, where the jurat is signed by the deputy in his own name as such, or in the name of his principal by himself as deputy; the point is emphasized that the essential thing is that the person administering the oath is duly

The trial court properly quashed the writ upon the return, and the judgment is affirmed.

A petition for rehearing having been granted, the following *Per Curiam* response was handed down on June 21, 1912:

Upon rehearing plaintiffs complain of that part of the decision wherein we held that a certificate made by the deputy register of deeds in his own name was not sufficient to meet the requirements of § 7146, Rev. Code 1905, which calls for a certificate by the register of deeds. They insist that a certificate made by the deputy is just as good as one made by the deputy in the name of his principal, and point out defects in the law, whereby they claim that, if the register should die upon the last day of

redemption, they would have been without power to obtain this certificate. We cannot agree with their views. The deputy is responsible upon his bonds only for his official acts. For his private acts he is responsible to no one. When he signs the name of his principal to a certificate, it is an official act. When he signs his personal name to a certificate, it is his private business. So far as we know, there is no law against any citizen examining the records and making certificates as to their contents. The deputy might claim that he was running a personal information bureau. Supposing the certificate issued in this case was false, and the register of deeds was called upon in a suit to stand the damages, he would reply that the act of the deputy

authorized to do that act); *Campbell v. Boulton*, 3 Baxt. 354 (oath administered to one who wishes to bring suit *in forma pauperis*; the court said that whatever oath the clerk might himself administer, his deputy might in like manner administer); *Jackson v. Buchanan*, 89 N. C. 74 (holding that the affidavit of the plaintiff, and the order for the seizure of personal property in an action of claim and delivery, may be taken and made by the deputy, since the acts stated are mere ministerial duties, and not judicial); *Stamper v. Com.* 30 Ky. L. Rep. 992, 100 S. W. 286 (holding there can be no question as to the authority of the deputy clerk to take the affidavit of one offering himself as surety upon a replevin bond, or to administer in his own name the oath required of the surety); *Martin v. Porter*, 4 Heisk. 407 (affidavit of a guardian *ad litem* to an answer; statute authorizing the deputy to transact all business of the principal clerk); *Ellison v. Stevenson*, 6 T. B. Mon. 271 (claims of witnesses for fees taken and entered in the clerk's books); *Ellis v. Ellis*, 134 Ga. 287, 67 S. E. 819 (holding that the deputy clerk of the superior court is competent to administer oaths and attest affidavits in his own name, to be used as evidence in judicial proceedings); *Moore v. McKinley*, 60 Iowa, 367, 14 N. W. 768 (approval and acceptance of the stay bond, while the principal was not absent or laboring under any disability. In this case the statute gave the deputy the power to perform the duties of the principal pertaining to his office "in the absence or disability of the principal," and the court said: "The provision above quoted was designed, we think, rather to devolve upon and make imperative by the deputy clerk the performance of the duties of the clerk in the absence or disability of the latter, and not to withhold from him all power to perform such duties except in the absence or disability of his principal. The construction contended for would render his official acts void except in the absence or disability of his principal. Such, we think, has not been the construction adopted in practice"); *People ex rel. Isaacs* 42 L.R.A. (N.S.)

*v. Warden*, 73 Hun, 118, 25 N. Y. Supp. 1095 (commitment consisting of a transcript of the entry of conviction on the minutes of the court of special sessions, and of the sentence certified under authority of a statute definitely authorizing either the clerk or the deputy to certify the sentence); *Miller v. Lewis*, 4 N. Y. 554 (certificate of a copy of the docket of a judgment); *Graves v. Warner*, 26 Ga. 620 (administration of an oath to a party that he is unable from his poverty to pay costs and give security for certain condemnation money in order to procure an appeal); *Harris v. Regester*, 70 Md. 109, 16 Atl. 386 (approval of an appeal bond; it was said: "The law does not contemplate that the clerk in his own person shall be constantly in attendance at his office. Code 1888, art. 17, § 3. And the Constitution of the state makes provision for the appointment of deputies 'to perform, together with themselves (the clerks), the duties of said office.'"); *Burton v. Hicks*, 27 La. Ann. 507 (signature to certificate to transcript of case on appeal); *Downes v. Tarkington*, 3 La. Ann. 247 (record and proceeding of a suit authenticated under the seal of the court, and signature to certificate thereof); *Eldridge v. Deets*, 4 Kan. App. 241, 45 Pac. 948 (certificate of the authenticity of the record of an action on appeal. In this case the court said: "The clerk of the district court is a ministerial officer, and, even under the common law, all ministerial officers were empowered to appoint deputies. Our statute especially provides that the clerk of the district court may appoint one or more deputies, and there is no statute either defining or limiting the power of the deputy. The natural inference is that the deputy clerk may do anything that the clerk himself may do"); *Com. v. Harvey*, 111 Mass. 420; *Com. v. Wetherbee*, 153 Mass. 159, 26 N. E. 414 (assistant of a municipal court clerk attesting copies of the record of case on appeal); *Reigart v. McGrath*, 16 Serg. & R. 65 (deputy of the clerk of the mayor's court administering the oath on appeal).

A deputy clerk of a probate court has

was not an official act, and no liability rested upon him, the register, therefor. The deputy gives no bond to the state or county. His bond runs to the register only, and is for his official acts only. The laws are passed with due consideration for the rights of all the people, and not for the benefit only of the redemptioners.

And, again, admit, for the sake of argument, that the law is not a good one, and does not meet every contingency, is that any reason why this court should amend it? It would not be the first time that a court has found an imperfect law that could have been immensely improved by the addition of a few sentences. When some fatherly courts have made the attempt to insert such provisions, however, they were loudly ac-

cused of usurpation of legislative power. It is just possible that this law should be amended to provide that the deputy should be able to make this certificate in his private capacity, and it is further possible that this duty should be imposed upon the clerks of the office, the office boy, or the janitor, but the legislature has seen fit to place it upon the register of deeds, or his deputy acting in his official capacity under his official bond. We have nothing to do but give to this legislative act its plain English meaning. That the language does not admit of any other interpretation is shown by the fact that all of the courts passing upon the language have given to it the same reading. Plaintiffs cite no cases, and

authority to administer oaths to parties making applications for marriage licenses touching the merits of such applications, and perjury may be alleged upon such oaths. *Warwick v. State*, 25 Ohio St. 21, wherein the form of the signing does not appear, but the record shows that the oath was administered by one "then acting as deputy clerk" of the court, under a statute authorizing an appointment of a deputy and reciting that "said deputy may do and perform any and all the duties pertaining to the . . . clerk, . . . and administer oaths in all cases in which it is necessary, in the discharge of his duties as such deputy clerk."

But in the following cases, where the deputy officer seems to have acted in his own name, without any reference to his principal, a different conclusion has been reached.

In *Springer v. McSpadden*, 49 Mo. 299, where the acknowledgment to a deed was taken and certified by the deputy of the circuit clerk in the name of the principal, the exact form of the signing does not appear, but the court says that "the deputy has no authority to act in his own name, but when he performs an official act in the name of the principal, it is the act of the principal himself."

A deputy clerk of the court has no authority to certify to the official character of an officer making an affidavit of service of process on a nonresident, where the statute requires that the certificate shall be given by the clerk or judge of such court. *Murdock v. Hillyer*, 45 Mo. App. 287, where the deputy apparently acted in his own name.

And under a statute providing that when depositions shall be taken, the official character of the judge or the judicial officer before whom the same shall be taken shall be authenticated and proved by the certificate and seal of the clerk of any court of record, it was held in *Hyde v. Benson*, 6 Ark. 396, that the authentication of the official character of a judge before whom depositions were taken by a deputy clerk was insufficient, since the name of the principal was not disclosed.

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In *Tison v. Morgan*, 41 Ga. 410, a writ of error was dismissed because the record was certified by one as deputy clerk, instead of by the clerk of the court himself. No reason was given as to why the clerk himself should have made the certificate.

One cannot, as deputy clerk, administer an oath when he has not been appointed in writing and sworn in as the law provides. *Muir v. State*, 8 Blackf. 154, wherein it was held that perjury cannot be predicated upon an answer to a bill in chancery when the affidavit was made before a deputy who was without authority to take it, and a judgment of conviction was reversed. And this is the effect of *Walker v. State*, 107 Ala. 5, 18 So. 393.

The probate of a deed of trust or mortgage as authorized by statute is not valid when taken by one who, though "acting as deputy clerk," has not been duly appointed nor qualified by taking the prescribed oaths, and the registration of a deed under such a probate has no effect in rendering the deed operative. *Suddereth v. Smyth*, 35 N. C. (13 Ired. L.) 452.

#### 4. As to informations and indictments.

In *Taylor v. State*, 113 Ind. 471, 16 N. E. 183, where an indictment was signed by the deputy prosecuting attorney in his own name, the court held that, while the better practice doubtless would be for a deputy to sign the name of his principal, it could not be said, in view of a statute giving the court power to require the prosecuting attorney to sign in the presence of the jury any indictments that he may have neglected to sign, that a reversal of the judgment would be entered. It was said in this case: "The indictment having been verified by the signature of a deputy prosecuting attorney, an officer who is required to act under an official oath, we may well presume that some sufficient reason appeared to the court into which the indictment was returned, for the absence of the name of the prosecuting attorney."

Since, in *State v. Walton*, 53 Or. 557,

there are likely none, holding otherwise. Just why we should now establish a minority line of decisions with such a light excuse we cannot see.

We hold to our former decision, that the certificate of the private citizen, though self-described as a deputy register of deeds, was a nullity, and the redemption attempted void, even though it should be further conceded that plaintiffs were in fact redemptioners.

**Fisk and Bruce, JJ., dissent.**

On the rehearing Chas. F. Templeton, Judge of the First Judicial District, sat with the court by request in place of Goss, J., disqualified.

99 Pac. 431, 101 Pac. 389, 102 Pac. 173, a statute authorizes the appointment of a deputy prosecuting attorney, who is authorized to sign an information where such act will be the act of his principal, the requirements of § 9, article 1, of the Constitution, which declares that no warrant shall issue but upon probable cause supported by oath or affirmation, are satisfied where the deputy signs the information. In this case the form of signing does not appear.

Where one statute requires a prosecuting attorney to sign informations, and another statute invests deputy prosecuting attorneys with about the same powers as are granted to their principals, it has been held that the two statutes must be construed together, and that such deputy officers are authorized to sign their own names to informations. *State v. Riddell*, 33 Wash. 324, 74 Pac. 477.

An indictment signed by the assistant prosecuting attorney, instead of the prosecuting attorney, is sufficient. *State v. Higgins*, 16 Mo. App. 559.

An information filed in the name of and signed by "G. N. Fickeissen, acting prosecuting attorney of the St. Louis court of criminal correction," and verified by the affidavit of the prosecuting witness, is not defective on the ground that there is no such prosecuting officer known to or provided for by statute. *State v. Ittner*, 100 Mo. App. 276, 73 S. W. 289.

Where a statute says that it shall be the duty of an assistant prosecuting attorney to aid generally in the performance of the same duties as are enjoined upon the prosecuting attorney, it has been held that the assistant circuit attorney of the city of St. Louis may properly sign an information. *State v. Speritus*, 191 Mo. 24, 90 S. W. 459.

Where there is full statutory authority for an assistant district attorney, during the absence from the district or the sickness or inability of the district attorney, to perform all the duties of the district attorney, the court will presume, when an information is signed by the assistant district attorney, that the district attorney

**Fisk, J., dissenting:**

After reargument and on more mature deliberation, I am obliged to dissent in this case. The majority opinion announces a rule which in my judgment is technical in the extreme. It gives effect to the mere letter of the statute, and ignores its true meaning and intent. I believe in a case like this, involving, as it does, the right of redemption, the court should give the statute a liberal construction in favor of the redemptioner. Such is the rule as I understand it, and the rule is a wise and salutary one, as it works no injustice to the certificate holder who gets his money with interest, while the property is made to satisfy as much of the debtor's liabilities as possible. It is held by the majority of my

was absent for some allowable reason. *State v. Faulkner*, 32 La. Ann. 725.

In *State v. Amos*, 101 Tenn. 350, 47 S. W. 410, wherein a constitutional provision authorizes the appointment of an assistant district attorney, it was held that he could not sign an indictment except in the presence and by the consent or direction of his principal, since a general authority to sign any and all indictments would be unconstitutional.

Other cases it may be noticed in this connection are cited under the subdivision, "Where the act is in the name of the principal 'by' deputy," *supra*.

#### **VII. As to actions by and against deputies.**

A deputy sheriff has such title in personal property which he has seized on execution as will enable him to maintain trespass against a stranger for a tortious disturbance of his possession of it; and his right of action is not taken away by his failure to sell the property on execution at the time he has advertised. *Gibbs v. Chase*, 10 Mass. 125.

A deputy sheriff who takes a judgment in the name of the sheriff against a purchaser at a sheriff's sale, and mixes up with such judgment a private judgment due to himself, cannot control the judgment, since it belongs to the sheriff. *Wilson v. Gale*, 4 Wend. 623.

A deputy sheriff who takes a receipt to himself for property attached by him may maintain an action thereon in his own name. *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711; *West v. Thompson*, 27 Vt. 613.

In *Stanton v. Hodges*, 6 Vt. 64, it was held that if a deputy sheriff attaches property and takes it into his possession, and it is unlawfully taken from him, he must have an action in his own name, as he is ultimately answerable, and has no way to compel the sheriff to sue, or suffer his name to be used.

Since a sheriff and his deputy are severally liable for the acts of the deputy, it

associates that, because the certificate or note of the record as to the mortgage under which a redemption is sought was signed by the deputy register of deeds in his own name, and not in the name of his principal by himself as such deputy, that the alleged redemption is utterly null and void. This in the face of the fact that the officer from whom the redemption was attempted to be made was satisfied with the proof submitted by appellant of his right to redeem, and accepted the money necessary to effect such redemption.

I deem the majority opinion erroneous, and the precedent thereby established most dangerous, and will, without elaboration, state my reasons:

(1) I believe that the statutory requirement as to proof of the mortgage was sufficiently complied with. In other words, the language of the Code (§ 7140), "or, if he redeems upon a mortgage or other lien, a note of the record thereof certified by the register of deeds," should not be construed literally, but that all that is, and was, intended to be required, was a note of such record signed by the officer in charge of the office, having authority to represent and act for the register. In any event, where such deputy affixes the official seal of the office to such document, together with his own signature, it is, I believe, a substantial compliance with the statute, and cannot be treated as a nullity. At most, it is a mere irregularity. I think the affixing of the

seal of the office when the certificate is signed by the deputy should be treated in a case like this as the equivalent of subscribing the officer's name by such deputy. There can be no doubt that in making the certificate or note of the record in question, the deputy acted in the line of his official duties, and is responsible on his bond to the register of deeds for a failure to perform such duties according to law. The case of *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 645, is chiefly relied on by my associates as sustaining their conclusion. As I read the opinion, it is far from being in point in the case at bar. There a deputy sheriff, in conducting foreclosure proceedings by advertisement, did so in the name of his principal, the sheriff. He made the certificate of sale, and acknowledged the same in the name of his principal by himself as deputy, and the sheriff's deed was signed and acknowledged by the sheriff in person. The foreclosure was sought to be set aside upon the alleged grounds that the deputy was an independent officer and should have acted in his name as deputy merely, and that the acknowledgments of the certificate of sale and deed were insufficient. The court very properly held that the proceedings were valid, and it refused to vacate the same. No such question as is here involved was before the court. The inevitable logic of the majority opinion in exacting a compliance with the strict letter of the statute is that no redemption can be made

has been held that they may jointly maintain an action for property seized under a writ of attachment by the deputy and taken from his possession. *Burton v. Winsor Utah Silver Min. Co.* 2 Utah, 240.

An action will lie in the name of a sheriff's deputy, upon a promise made to the latter to surrender the body of the debtor during the life of the execution. *Miller v. Goold*, 2 Tyler (Vt.) 439.

### VIII. Miscellaneous.

In *Merlette v. State*, 100 Ala. 42, 14 So. 562, it was held that the duty of a register in chancery under subdivision 5 of § 736 of the Code, and rule 60 of chancery practice, in issuing a commission to take testimony when no objection is filed by the opposite party to the commissioner named by the party filing the interrogatories, being ministerial, and not judicial, may be performed in the name of the register "by" a deputy or assistant to the register.

Where a clerk has granted an order for a commission to take testimony, the issuance of the order may be made by his deputy, in his own name, since this is a mere ministerial act: not judicial. *Rhodes v. Myers*, 16 La. Ann. 398. 42 L.R.A. (N.S.)

An affidavit upon which is founded a motion for judgment in a case of nonsuit, which is sworn to before a deputy clerk of the county, the clerk being in life, is defective, and will not sustain the motion. *Norton v. Colt*, 2 Wend. 250. The form of the signing does not appear.

A deputy clerk is apparently without the power to grant an injunction in his own name. *Sale v. Van Bibber*, 11 La. Ann. 628.

A constitutional provision giving clerks of the district court the exercise of important duties and judicial powers does not authorize the clerk's deputy, in his own name, to make an order commanding a tutor to account upon the emancipation of a minor. *Gerald v. Gerald*, 5 La. Ann. 243.

Since the deputy officer as a rule, subject perhaps to some few special statutory exceptions, derives all of his power and authority from his principal, and can act only for and in his place, and must act in his name, it is held that a deputy county surveyor acting in his own name, and not that of his principal, in making a survey and plat of a town addition, does not bind his principal, or make his act that of the county surveyor. *Auburn v. Goodwin*, 128 Ill. 58, 21 N. E. 212. E. M. S.



during a vacancy in the office of the register of deeds by death or otherwise, although the Code gives the debtor or redemptioner one full year from the sale in which to redeem. I apprehend that in such an event some other proof of the record of the instrument under which it is sought to redeem would suffice.

(2) I do not think the statutory provisions (§ 7146, Rev. Code) requiring certain proof to be made to the officer were intended for the benefit of the certificate holder. Such proof is made *ex parte* to such officer, and is in no way binding on the holder of the certificate. He may always question the fact of the alleged redemptioner's right to redeem, even though such proof is strictly in conformity with the statute. He ought not to be permitted to urge technicalities as to such proof. If the same, although not technically as required by statute, is satisfactory to the officer to whom such proof is made, and he accepts the redemption money, the certificate holder ought not to be permitted to complain, for he is not injured. He, of course, may always question the alleged redemptioner's right to redeem, but, if he is in fact a redemptioner, the holder of the certificate is in no way injured. Suppose a person who is unquestionably a legal redemptioner applies for a certified note of the record of the mortgage under which he claims the right to redeem, preparatory to effecting a redemption, and the deputy in charge of the office of the register of deeds prepares and delivers to him a certificate identically like the one in this case. He presents it to the sheriff with his other proof without examining the same, relying on the presumption that it is properly executed. Such proof is satisfactory to the sheriff, and he accepts the redemption money one week before the expiration of the year of redemption. The day following the expiration of the redemption period the certificate holder, while conceding that the alleged redemptioner was a lawful redemptioner under the statute, repudiates such redemption solely on account of the irregularity of the certificate aforesaid. Is it possible that any court would uphold such a contention? I think not. Whether the attempted redemption was made a week before the expiration of the redemption period or on the last day thereof, the rule would, of course, be the same.

For the above briefly stated reasons, I find myself unable to concur in the majority opinion.  
42 L.R.A. (N.S.)

## OKLAHOMA CRIMINAL COURT OF APPEALS.

WILLIAM VAUGHAN, Appt.,

v.

STATE OF OKLAHOMA.

(7 Okla. Crim. Rep. 685, 127 Pac. 264.)

### Evidence — silence of accused.

It is error in the trial of a criminal case for the court to admit testimony as to declarations between an officer who had accused under arrest and the state's witnesses, or other persons, in the presence of the accused, tending to connect him with the offense charged, and that the accused remained silent as to such conversation; and, when a conviction results with such testimony before the jury, a new trial should be granted.

(December 22, 1911.)

**A**PPEAL by defendant from a judgment of the District Court for Pottawatomie County convicting him of murder. Reversed.

The facts are stated in the opinion.

Messrs. Blakeney & Maxey for plaintiff in error.

Mr. Smith C. Matson, Assistant Attorney General, for the State.

Headnote by ARMSTRONG, J.

**Note.** — *Uncontradicted statement in presence of accused as confession or admission.*

I. Scope, 889.

II. General rules, 890.

III. Foundation, grounds of admission, and nature.

a. Generally, 890.

b. Incompetency as witness of person making statement as affecting, 891.

IV. Circumstances of accusation as affecting.

a. Generally, 891.

b. The question of hearing and understanding, 891.

c. Accused in custody or under arrest as affecting, 892.

d. Statement made in judicial proceedings as affecting, 893.

V. Nature of statement as calling for response.

a. General rules, 893.

b. The question as to what statements call for contradiction, 893.

VI. Admission and use, 894.

### I. Scope.

This note supplements a note on the same subject in connection with *O'Hearn v. State*, 25 L.R.A. (N.S.) 542. The general questions as to the admissibility of such statements as *res gestæ* or dying dec-

**Armstrong, J.**, delivered the opinion of the court:

William Vaughan was convicted at the November, 1909, term of the district court of Pottawatomie county. He was charged under the name of William Canalis, together with Irene McKinney, with having murdered Victoria Page in September of the same year. At the regular term of the court in January, 1910, this case was set for the 7th day of the following March. When it was called for trial, the defendants named in the indictment elected to be tried separately, and the cause was tried as to Vaughan, resulting in his conviction on the 9th day of March thereafter. He was subsequently sentenced by the court to life imprisonment in the state peniten-

tiary in accordance with the verdict.

The proof shows: That Mrs. Page, the deceased, and her daughter, Irene McKinney, with some other children, were picking cotton on a farm belonging to Mrs. Shawnee, the mother of the accused, in September, 1909. That they had been in the community only a few days, and the accused had known them only since they had come to his mother's farm. On the morning of the 12th of September the accused, Mrs. Page, and Irene McKinney walked from the Shawnee farm a distance of about 2 miles to the city of Shawnee, and spent the day there. They left the city of Shawnee for Benson park, which is situated about 2 or 3 miles south of Shawnee, about 8 o'clock in the evening. This park ap-

larations are not within the scope of these notes. The decisions rendered since the earlier note are but applications of apparently well-established rules to particular circumstances.

## II. General rules.

Statements made in the presence of a defendant, of sufficient importance to call for affirmation or denial, may be presumed to have been acquiesced in by him by virtue of his silence. *Territory v. Harrington*, — N. M. —, 121 Pac. 613.

So, in *State v. Burk*, 234 Mo. 574, 137 S. W. 969, statements, the nature of which is not disclosed, made by defendant's grandson, in the presence and hearing of defendant, at a time when he was not under restraint or duress, and undenied, were evidence against him.

And in *Smith v. Com.* 140 Ky. 599, 131 S. W. 499, a statement made by deceased in presence of accused, and undenied by him, that accused shot him first, was admitted in evidence. But the court also held this statement competent evidence as a part of the *res gestæ*.

And on a trial for aggravated assault, a statement in the presence of accused to a third party by a party to the assault, who pleaded guilty to simple assault, that his paying a fine would not be half there was to be done, was admissible in evidence although objected to as hearsay. *Boykin v. State*, 59 Tex. Crim. Rep. 267, 128 S. W. 382.

Ordinarily when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789 (*dictum*).

So, silence under accusation of crime is a circumstance to go to the jury on the question of guilt or innocence of the person who remained silent. *Jackson v. State*, 167 Ala. 44, 52 So. 835; *Com. v. Aston*, 227 Pa. 112, 75 Atl. 1019; *State v. Booker*, 42 L.R.A. (N.S.)

68 W. Va. 8, 69 S. E. 295; *Gordon v. State*, 60 Tex. Crim. Rep. 570, 133 S. W. 255.

So, that defendant, when told, "You have been gambling up here," merely laughed and made no reply, was admissible in evidence as a circumstance proper for the consideration of the jury. *State v. Miller*, 234 Mo. 588, 137 S. W. 887.

Where defendant was near enough to have heard deceased say, "She knows better than that," in answer to her statement that the shooting was accidental, and, being under no legal restraint at the time, failed to deny the truth of his words, an admission of guilt was implied from her silence. *State v. Lovell*, 235 Mo. 343, 138 S. W. 523.

And where defendant claimed as his own a gun alleged to have been stolen and found in the house in which he and his father lived, his silence when asked where he got it was admissible in evidence against him. *Jackson v. State*, 167 Ala. 77, 52 So. 730.

And on his trial for murder, where defendant admitted that he bore the same name as the alleged slayer, but denied any knowledge of the homicide, and there was evidence that defendant was the actual slayer, testimony of a witness that immediately after the homicide two persons, one of them corresponding in appearance with defendant, came near the house of the witness, located about 350 yards from the scene of the homicide, and while there the companion of defendant told witness the name of defendant and that he was the slayer, under circumstances authorizing an inference that defendant heard him, was not open to the objection that the same was inadmissible because it did not positively appear that defendant heard the statement of his companion. *Watson v. State*, 136 Ga. 236, 71 S. E. 122.

## III. Foundation, grounds of admission, and nature.

### a. Generally.

The rule allowing the silence of a person to be construed as an admission of the

pears to be east from the Shawnee farm, where the parties lived. After arriving at the park, a man named Winfred Shifflet was introduced to Mrs. Page, and the party wandered around the park until about 10 o'clock, when they started home. It appears that there was a public road about 200 yards south of the park, leading to the home of the parties, and that there was a trail from the southwest corner of the park to this road. The accused appears to have spent the entire evening with Irene McKinney, and, when they started home, Shifflet was with Mrs. Page, and the accused and Irene McKinney were ahead of them, going along this trail to the road leading home. The parties had crossed the fence and walked probably 40 or 50 yards

when a shot was fired which killed Mrs. Page. At this place a brush top lay across the trail, and the accused and Irene McKinney were on one side of this brush top and the deceased and Shifflet on the other. The evidence conflicts some as to just what happened after the persons named had crossed the park fence. The accused contending that he heard Shifflet say that he could not go any farther than the fence, and that he and Irene McKinney walked on, thinking Shifflet was telling Mrs. Page good-by; that, when they had gotten a distance of about 35 steps, they passed around the brush top, and had gone about 15 steps farther when the shot was fired; that he did not fire the shot, and believed that it came from the direction of the park

truth of the matters stated in his presence is based upon the assumption that the party is at liberty to speak, and that the circumstances are such as call upon him for reply. *Territory v. Harrington, supra.*

So, statements made, in the presence of one accused of crime, can be put in evidence against him, only when his silence, under the circumstances, is ground for the inference of his assent to their correctness. *Com. v. Aston, 227 Pa. 112, 75 Atl. 1019.*

The ground upon which evidence of admissions by failure to reply to accusations is admissible is that the silence of the accused when he may and naturally would speak in denial of the statements imputing guilt, if untrue, is regarded as an acquiescence in their truth. *Knight v. State, — Tex. Crim. Rep. —, 144 S. W. 967; Hauger v. United States, 97 C. C. A. 372, 173 Fed. 54.*

So, silence of one prosecuted for stealing cattle, when his brother, in his presence, offered the owner of the stolen cattle other cattle to drop the prosecution, which offer he must have heard and understood, is admissible in evidence as showing his acquiescence in the proposition made by his brother. *Territory v. Harrington, supra.*

And where defendant makes only evasive answers to questions put to him upon the reading of letters, the statements in which, if true, implicate him in crime, such letters are admissible in evidence,—not to establish the truth of their contents, but to show defendant's implied acquiescence, by his conduct, in the truth of the statements contained therein. *People v. Rollins, 14 Cal. App. 134, 111 Pac. 123.*

Failure of defendant, not under restraint or duress, to deny statements (the nature of which are not disclosed) made in his presence and hearing by his grandson, was held in *State v. Burk, 234 Mo. 574, 137 S. W. 969*, to raise the presumption that such statements were true.

#### **b. Incompetency as witness of person making statement as affecting.**

Although defendant's wife is not a competent witness, a statement calling for a 42 L.R.A. (N.S.)

denial, made by her in his presence, is admissible in evidence against him. *Dunham v. State, 8 Ga. App. 668, 70 S. E. 111.*

#### **IV. Circumstances of accusation as affecting.**

##### **a. Generally.**

Declarations or statements made in presence of accused are only competent when he hears and fully comprehends the effect of the words spoken, and when he is at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent. *People v. Conrow, 200 N. Y. 356, 93 N. E. 943.*

To give silence effect as an admission, the party charged with it must have been in a position to explain. *Hauger v. United States, supra.*

And one accused of a crime by a bystander is entitled to explain his silence by showing that he had but recently denied such an accusation to the officers having him in charge. *People v. Byrne, 160 Cal. 217, 116 Pac. 521.*

To make defendant's silence evidence against him, declarations made in his presence and hearing must have been made under such circumstances as call for serious admission or denial on his part. *Gibbons v. Territory, 5 Okla. Crim. Rep. 212, 116 Pac. 129.*

##### **b. The question of hearing and understanding.**

Before acquiescence in the language of another can be assumed as an admission of the truth of any particular statement, it must plainly appear that the language was heard and understood. *Hauger v. United States, supra.*

And in order to entitle the state in a prosecution for murder to introduce proof of threats made by some third person, for the purpose of binding the defendant, it must be made clear that the declaration or statement containing the threat was made

fence; that a man ran by him and Irene McKinney, and that they ran to the fence; that, after getting to the fence, the girl called to her mother two or three times, but she did not answer, and they went back to the brush top, and found that she had been killed. The state contending that the accused and Irene McKinney crossed the fence; that Shifflet got on the fence and assisted Mrs. Page over, and that they stopped at the brush top; that while there a man passed by, and Shifflet looked up and saw it was not the defendant; that the steps went on down the path, and in a short space of time a shot was fired; that the witness, Shifflet, ran around the brush top and passed near the accused and Irene McKinney, who were about 30 steps away

and running also. Later on the accused and the McKinney girl went to the night watchman of the park, and inquired about a car for Shawnee. The night watchman informed them it was due in a short time. The girl began to cry, and told him that somebody had killed her mother. Officers at Shawnee were notified, and they went to the park and arrested the accused and Irene McKinney, and carried them to town. The next day Sheriff Pierce went over to Shawnee from Tecumseh, and had a talk with Irene McKinney, and secured a statement from her to the effect that the accused had done the shooting, saying that he slipped up to the brush pile, fired the shot, threw the gun in a near-by creek, and ran off, and that afterwards they came

in the presence and hearing of the person sought to be bound. *Gibbons v. Territory*, supra.

Whether or not an unchallenged statement charging defendant with crime was made in his presence was a question for the jury. *Watson v. State*, 136 Ga. 236, 71 S. E. 122.

The testimony having placed accused where he could and probably did hear deceased tell witness of accused having cursed and threatened him, the statement is admissible, but it is a question for the jury to determine whether or not he heard it. *La Grone v. State*, — Tex. Crim. Rep. —, 135 S. W. 121.

And where witness could not tell positively whether or not defendant, who was intoxicated, heard him remark, "That is something you ain't going to get away with," yet, as he was within 4 feet of him at the time he uttered the words, the question was for the jury. *Com. v. Detweiler*, 229 Pa. 304, 78 Atl. 271.

***c. Accused in custody or under arrest as affecting.***

A person under arrest on a charge of crime is not called upon to contradict statements prejudicial to him made in his presence by another, and, though such statements were not contradicted by such person, they are not admissible in evidence against him. *Ellis v. State*, — Okla. Crim. Rep. —, 128 Pac. 1095; *Com. v. Spiropoulos*, 208 Mass. 71, 94 N. E. 451 (*dicta*); *Ripley v. State*, 58 Tex. Crim. Rep. 489, 126 S. W. 586.

This is the rule in *VAUGHAN v. STATE*.

So, in a prosecution for burglary, silence of defendant in face of declarations by his codefendant in his presence while under arrest, and after being cautioned that anything he might say could be used against them, is not admissible in evidence against him. *Couch v. State*, 58 Tex. Crim. Rep. 505, 126 S. W. 866.

As shown in the earlier note, however, the rule is well supported, that the fact 42 L.R.A.(N.S.)

that declarations charging a person with crime, not denied by him, were made while under arrest or in custody, does not affect their admissibility as implied admissions, and that view is sustained by the following subsequent decisions: *Jackson v. State*, 167 Ala. 44, 52 So. 835; *People v. Byrne*, 160 Cal. 217, 116 Pac. 521; *People v. Ferrara*, 199 N. Y. 414, 92 N. E. 1054; *Com. v. Aston*, 227 Pa. 112, 75 Atl. 1019; *State v. Booker*, 68 W. Va. 8, 69 S. E. 295; *Hardy v. State*, 150 Wis. 176, 136 N. W. 638.

So, unrefuted evidence of silence by one when charged with a crime in his hearing by his codefendant, though the party remaining silent be under arrest or in custody, is admissible for the consideration of the jury, where the circumstances shown are such that an innocent man similarly situated would naturally speak in denial. *State v. Booker*, 68 W. Va. 8, 69 S. E. 295.

And the fact that one arrested, and accused of murder by the arresting officer, remained silent when he had an opportunity to deny the accusation, was held admissible in *Jackson v. State*, 167 Ala. 44, 52 So. 835, as a circumstance tending to show guilt.

But the weight of such evidence is for the jury to determine. *Ibid*.

When one charged with crime is at full liberty to speak, although in custody, but remains silent, and makes no denial of the accusation by word or gesture, his silence is a circumstance to be taken into consideration by the jury. *Com. v. Aston*, 227 Pa. 112, 75 Atl. 1019.

So, failure of one taken in charge for murder, but not yet formerly arrested, to assert his innocence when he hears a bystander tell the officers that they have the right man, is admissible in evidence as a circumstance tending to show an admission of guilt. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521.

But he may explain his silence. *Ibid*.

And evidence that one accused of rape remained silent when children stated in his presence while in custody, but before his arrest, that he was the guilty party,

back and found that he had killed Mrs. Page. She was then taken into the presence of the accused by the officer, and asked to restate what she had stated to the sheriff. She refused to do so, and said the defendant was not guilty, and that she would not make any such statement. The officer repeated the conversation in the presence of the defendant, and she denied it and said it was a story. The accused neither denied nor affirmed the statement. The testimony relative to these statements was introduced over the objection and exception of the accused.

The case was submitted, and, after the jury had been out about a day, they returned into court, and said they could not agree as to what the evidence was, and

asked that the evidence of the officer who made the arrest be read, which was done, including the statements made by Irene McKinney to the sheriff. Counsel for the accused renewed the objections to the statements, and asked that they be stricken, which was overruled. Several hours later the court recalled the jury, and had other evidence read to them. At this time the accused requested the court to instruct the jury that they must consider the evidence read with all the other evidence in the case. This the court abruptly refused to do, ordered counsel to sit down, and censured them for making the request. The request was proper, and the court should have so instructed the jury.

A great many exceptions were taken

is not objectionable as hearsay and is proper for the consideration of the jury. *Hardy v. State*, 150 Wis. 176, 136 N. W. 638.

Where accused when told that a third person charged him with stabbing decedent denied it, evidence that later, when the third person, at the jail, in his presence, stated, "That's the man that did the cutting," accused merely shrugged his shoulders, was admissible, but its value or effect was for the jury. *People v. Ferrara*, 199 N. Y. 414, 92 N. E. 1054.

But where accused was under arrest, and acted on advice of counsel in refusing to answer statements made in his presence by an accomplice implicating him in the crime, his silence was not competent evidence against him; the prosecution not having at any time shown that he was in a position where, by reason of his silence, he should be charged with assent to or acquiescence in the truth of such statements. *People v. Conrow*, 200 N. Y. 356, 93 N. E. 943.

And it is reversible error for the trial court to permit the district attorney to recite the statements to the jury in detail, and then ask defendant whether such statements were made and whether he refused to answer them. *Ibid*.

And such error is not cured by the court's subsequently striking the testimony from the record. *Ibid*.

#### ***d. Statement made in judicial proceedings as affecting.***

The rule that statements made in the presence of an accused person, charging him with crime, create a presumption against him, if not denied by him, does not apply to such statements made in the course of judicial proceedings.

So, the fact that one accused of selling intoxicating liquors within 4 miles of an institution of learning failed to take the stand in other proceedings, to deny accusations against him by witnesses therein, is not admissible in evidence against him upon his trial. *Parrott v. State*, 125 Tenn. 1, 35 L.R.A.(N.S.) 1073, 139 S. W. 1056. 42 L.R.A.(N.S.)

#### ***V. Nature of statement as calling for response.***

##### ***a. General rules.***

It is permissible to permit a witness to state what he said in the presence of accused, if the statement involved such an accusation as calls for a denial. *Powell v. State*, — Ala. App. —, 59 So. 530.

A statement by defendant's son to the officer who came to search defendant's place for whisky, "If you will let him off this time, I will see that he doesn't sell any more whisky. Mamma and I both have tried to get him not to do that,"—heard, and not denied by defendant, is admissible in evidence. *Carver v. State*, — Tex. Crim. Rep. —, 150 S. W. 914.

Where one accused of seduction sought to have an interview with the prosecutrix in the presence of his friend and kinsman, which was denied by the aunt of the prosecutrix, who told the accused that what he needed then was not talk, but a marriage license and a preacher, and he remained silent, such silence was an acquiescence in the truth of the charge. *Knight v. State*, — Tex. Crim. Rep. —, 144 S. W. 967.

In *Com. v. Detweiler*, 229 Pa. 304, 78 Atl. 271, it was held that it was for the jury to say whether or not the remark, "That is something you ain't going to get away with," made within 4 feet of accused, while standing by the body of the deceased, was in the nature of an accusation.

And while the truth of oral statements made to a person may be admitted by his silence, the rule is otherwise as to written communications; hence the failure of a person to reply to a statement made in a letter, or the absence of proof that he did reply, is not an admission of its truth. *State v. MacFarland*, — N. J. —, 83 Atl. 993.

##### ***b. The question as to what statements call for contradiction.***

Statement of witness addressed to defendant: "You said he had a revolver drawn

both as to the admission of evidence and the instructions of the court, and are urged here by proper assignments of error; but the only question we deem it necessary to consider is the question of the admissibility of the declarations made by the officers in the presence of the defendant while he was in custody.

Counsel for the accused contend that the defendant was not required to deny anything or any statements made in his presence by any one while he was under arrest and confined in prison. The contention is correct. This proposition is raised by the testimony of the officers quoted, *supra*. In the case of *Gardner v. State*, — Tex. Crim. Rep. —, 34 S. W. 945, the court of criminal appeals of Texas lays down the rule in the following language: "Were these facts, and especially the silence of appel-

lant, competent evidence? They were not. In *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120, it is held: 'A person who is held in custody on a charge of crime is not called upon to contradict statements, prejudicial to him, made in his presence by another person in answer to inquiries made by an officer; and such statements, though not contradicted by him, are not admissible in evidence against him.' This case cites *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Com. v. Walker*, 13 Allen, 570. To give silence the effect of an admission, the party charged with it must have been in a position to explain. If the party is under arrest, his silence cannot be used as sustaining the hypothesis of acquiescence thereto." The court then cites a number of cases, and says: "We deem these authorities sufficient to support the

on you; how did you shoot him in the back?" was such an accusation as called for a denial. *Powell v. State*, *supra*.

And where a bystander, just after the shooting, asked accused, "What in the hell do you mean, Bob?" or "What do you mean?"—either question was such as to elicit a reply from the accused if heard by him. *Rhea v. State*, — Tex. Crim. Rep. —, 148 S. W. 578.

Defendant's wife's statement, "Jim, go on home, Lymus [the defendant] is trying to kill you with a gun," made in defendant's presence to the prosecutor,—was admissible in evidence as such a statement as might have required a denial on the part of the defendant. *Dunham v. State*, 8 Ga. App. 668, 70 S. E. 111.

Evidence that accused when notified to stop running a disorderly house, or permitting women to resort there for purposes of prostitution, remained silent, was held admissible in *Finn v. State*, 60 Tex. Crim. Rep. 521, 132 S. W. 805, as implying in substance, a direct charge against accused of violation of law, without denial on her part.

But where deceased, shortly after the shooting and in presence of accused, said to witness, "Harve, you certainly will not let this pass. I want you to prosecute my father," and witness, that he "would if no one else would not,"—it was held in *Beaty v. Com.* 140 Ky. 230, 130 S. W. 1107, that testimony of accused's silence was incompetent, as there was nothing in the statement that called for an answer.

So, alleged threats made by a third person in the presence of accused, to the effect, "Never mind! We'll fix Renfro—we'll give that red-headed thing . . . something to go to Anadarko for,"—are not such statements as require specific denial, where the testimony as a whole shows that no bodily harm to the deceased was contemplated, but that the threats referred to a criminal prosecution about to be instituted against him. *Gibbons v. Territory*, 5 Okla. Crim. Rep. 212, 115 Pac. 129. 42 L.R.A. (N.S.)

#### VI. Admission and use.

Whether the circumstances are such as to make failure to reply to an accusation proper evidence tending to show an admission is, in the first instance, a question for the trial court. *People v. Byrne*, 160 Cal. 217, 116 Pac. 521.

Declarations made in the presence of accused are regarded as dangerous and should always be received with caution (*Territory v. Harrington*, — N. M. —, 121 Pac. 613; *People v. Conrow*, *infra*); and should not be admitted unless the evidence clearly brings them within the rule. *People v. Conrow*, 200 N. Y. 356, 93 N. E. 943.

Declarations or statements made in the presence of a party are not received as evidence in themselves, but for the purpose of ascertaining the reply the party to be affected makes to them. *Ibid*.

Testimony of a witness that just after the shooting, a third person, whom the evidence placed in close proximity to both witness and accused, asked accused what he meant, was held properly admitted in *Rhea v. State*, *supra*, where the evidence showed that accused made no reply; but the court further held that accused having positively denied hearing the question or exclamation, the jury should have been instructed to disregard it unless they believed beyond a reasonable doubt that he did hear it.

The weight of evidence of silence when the circumstances call for denial is for the jury. *State v. Booker*, 68 W. Va. 8, 69 S. E. 295; *People v. Byrne*, *supra*.

Where, in *Com. v. Detweiler*, 229 Pa. 304, 78 Atl. 271, witness while standing by the body of deceased, within 4 feet of defendant who was intoxicated, remarked, "That is something you ain't going to get away with," but was not certain that defendant heard him, it was held that it was for the jury to say what effect they would give to defendant's silence under the circumstances.

W. W. A.

rule that, if the party is under arrest, silence cannot be used to support the hypothesis of consent to statements made in his presence by others." See *Simmons v. State*, 50 Tex. Crim. Rep. 527, 97 S. W. 1052; *Merriweather v. Com.* 118 Ky. 870, 82 S. W. 592, 4 Ann. Cas. 1039; *State v. Epstein*, 25 R. I. 132, 55 Atl. 204, 15 Am. Crim. Rep. 10; *State v. Weaver*, 57 Iowa, 730, 11 N. W. 675; *State v. Carter*, 106 La. 407, 30 So. 895; *State v. Howard*, 102 Mo. 142, 14 S. W. 937.

There are other errors complained of, most of which involve the competency of testimony. There is hardly sufficient competent testimony in this record to justify an examining magistrate in holding the accused for trial, much less to warrant a conviction for murder.

Let the judgment be reversed, and the cause remanded, with directions to grant a new trial.

Furman, P. J., and Doyle, J., concur.

**OKLAHOMA SUPREME COURT.**  
(Division No. 1.)

HARRY G. STEIN, Sheriff, Plff. in Err.,  
v.

DENNIS F. SCANLAN.

(— Okla. —, 127 Pac. 483.)

**Officer — amercement — grounds.**

1. An amercement is a money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty.

Headnotes by ROBERTSON, C.

**Note. — Variance between execution and judgment as affecting amercement of officer for failure to return execution.**

Where an execution plaintiff seeks to amerce a sheriff for a default in respect to the execution of his writ, he must show a valid judgment and the execution must conform strictly to that judgment. 35 Cyc. 1889.

The statute relating to the amercement of a sheriff for failure to return an execution within sixty days is highly penal in its character, and he who would avail himself of the remedy by amercement must bring himself strictly both within the letter and spirit of the law. *Reese v. Rice*, 1 Kan. App. 311, 41 Pac. 218, wherein it was held that the execution must conform strictly to the judgment rendered, and that when the execution commands the sheriff to collect a sum in excess of that named in the judgment, the sheriff, in a proceeding to amerce him for a failure to return the same within sixty days as required by law, will 42 L.R.A. (N.S.)

It is a statutory proceeding, and, like all other penal statutes, must be strictly construed. The right to demand a judgment in amercement is based on no equitable grounds, and in its enforcement courts are bound to hold the party claiming it to a strict observance of the requirements of the statute.

**Judgment — assignment — right to enforce.**

2. The assignee of a judgment is the only party who can maintain an action on the judgment or enforce it by execution.

**Same — method of assignment.**

3. When an assignment of a judgment duly executed has been recorded in the court where the judgment was entered, or where it has been sent on appeal, or other legal transfer, it operates to, and does in fact, transfer both the legal and equitable title thereto to the assignee, and the assignor thereafter has no greater right or interest therein than any other stranger to the record.

**Officer — amercement — failure to return execution.**

4. Before an officer can be amerced, it must clearly appear that a valid judgment has been entered; that the same has not been satisfied; that the judgment creditor, or someone acting for him, has filed a precept for execution; that an execution has been issued and delivered to the officer for service and return, and that the officer has failed to serve or return the same as required by law.

**Same — irregular execution.**

5. A judgment on its face showed that it was entered for \$211 and no costs. The execution issued thereon showed the judgment to be for \$211 and \$184 costs. No effort was made to supply the omission, although the attention of the court and the judgment creditor was called thereto at

be relieved from the penalty or from a judgment of amercement.

And where an execution failed to conform to the judgment rendered in that it stated a greater amount of costs than the actual amount due or taxed at the date of the judgment, the sheriff was not liable to amercement for failure to return the execution. *Gleason v. Itten*, 52 Kan. 218, 34 Pac. 892, following *Fisher v. Franklin and Fuller v. Wells, F. & Co.*, infra.

So, where the judgment recited in a writ of execution, and for the satisfaction of which the writ purports to have been issued, is for an amount substantially greater than the actual judgment recovered in the case, the officer to whom such wrongful execution is directed is not liable to amercement for neglecting to return it on or before its proper return date. *Moore v. McClellan*, 16 Ohio St. 50. To the same effect is *Fisher v. Franklin*, 38 Kan. 252, 16 Pac. 341.

Where a special execution or order of sale of real estate is placed in the hands of a sheriff by the party interested in its en-

the trial. Held, to be such a variance between the judgment and execution as would prevent the court from entering judgment in amercement for the full amount.

(October 15, 1912.)

**E**RROR to the County Court for Creek County to review a judgment in plaintiff's favor in an action brought to amerce defendant for failure to levy and return an execution as required by law. Reversed.

Statement by Robertson, C.:

On May 11, 1909, Dennis F. Scanlan recovered a judgment in the county court of Creek county against Henry Jackson and R. E. Broyles in the sum of \$242.67. On July 6, 1909, the judgment creditor sold, by unconditional assignment duly sworn to, and entered on the record in said county court, all his right, title, and interest to and in said judgment. Thereafter, on August 10, 1909, execution was issued on said judgment on a preceipe signed by "Thompson & Smith, attorney for plaintiff and assignor of said judgment." On April 10, 1910, said Dennis F. Scanlan, assignor of said judgment, filed in said court his motion to amerce the sheriff for failure to levy and return said execution as required by law. Trial was had to the court, a jury being denied the sheriff, and a judgment was entered in favor of plaintiff and against the sheriff in the sum of \$502.59 and costs. Motion for new trial was presented and overruled, and the sheriff brings error.

forcement, and upon the execution there is indorsed by mistake of the clerk issuing the same certain costs taxed by him in the case, but which are no lien upon the premises and are not to be paid out of the same or the proceeds thereof, and after the issuance of the special execution the court has not retaxed the costs embraced in the execution or made any direction thereon, the sheriff cannot be amerced at the instance of the party placing the execution in his hands, for neglecting or refusing, on demand, to pay over to him the costs collected under the writ from the sale of the real estate. *Kothman v. Prest*, 34 Kan. 179, 8 Pac. 228.

Where a judgment required a sale of the land upon an appraisal duly made, while the execution indicated that the property was to be sold "without appraisalment," it was held that the writ of execution did not conform strictly to the judgment, and the sheriff was not liable to amercement because of his failure to return the execution. *Fuller v. Wells, F. & Co.* 42 Kan. 551, 22 Pac. 561.

*Bittman v. Mize*, 45 Kan. 450, 25 Pac. 42 L.R.A.(N.S.)

*Messrs. McDougal, Lattimore, & Lytle and C. B. Rockwood*, for plaintiff in error:

Plaintiff having assigned, transferred, and sold all his right, title, and interest in his judgment of May 11th, was without power or authority to issue execution thereon, and defendant was excusable for not serving said execution.

*Robinson v. Towns*, 30 Ga. 818; *McGregor v. Walden*, 14 Vt. 450; *Com. v. Wampler*, 104 Va. 337, 1 L.R.A.(N.S.) 149, 113 Am. St. Rep. 1039, 51 S. E. 737, 7 Ann. Cas. 422.

The judgment shows upon its face to have been given, made, and rendered on the 11th day of May, A. D. 1909, whereas the execution shows upon its face that the judgment upon which it is rendered was secured on the 13th day of May, A. D. 1909, and no attempt is made in the record to show that said judgments are one and the same.

*Bittman v. Mize*, 45 Kan. 450, 25 Pac. 875; *Rider v. Alexander*, 1 D. Chip. (Vt.) 267; *Fuller v. Wells, F. & Co.* 42 Kan. 551, 22 Pac. 561; *Fisher v. Franklin*, 38 Kan. 253, 16 Pac. 341.

The judgment fails to support the execution, because the costs were not taxed as provided by law.

*Fisher v. Franklin*, 38 Kan. 253, 16 Pac. 341.

*Messrs. Hughes & Miller*, for defendant in error:

These proceedings to collect the judgment should be continued in the name of Dennis F. Scanlan, who was the original

875 and *Rider v. Alexander*, 1 D. Chip. (Vt.) 267, are set out in *STEIN v. SCANLAN*, and need no further recitation.

In *Cutler v. Wadsworth*, 7 Conn. 6, which is but partially set out in *STEIN v. SCANLAN*, it was held that the execution in question, being unsupported by a judgment, was void, and the sheriff under no legal obligation to enforce it; nor could he do it without becoming a trespasser.

But where a judgment was rendered at the June term of a county court, 1839, and the execution thereon was issued on the 13th of June, 1839, reciting the judgment correctly, but by mistake of the clerk was dated June 13, 1809, and within thirty days from the rendition of the judgment the execution was delivered to the officer to execute, it was held in *Bank of Whitehall v. Pettes*, 13 Vt. 395, 37 Am. Dec. 600, that the execution was not void and the sheriff liable for not enforcing its execution. The court said "though the date, alone, might show the execution to be without life, yet when the officer looked at the whole execution all reasonable doubt must have been dissipated."

E. M. S.



plaintiff and judgment creditor, and the assignment specifically provides for that, and the assignee in accepting the assignment has accepted the conditions to save the assignor harmless from costs.

*Rullman v. Rulman*, 81 Kan. 521, 106 Pac. 52.

An officer cannot amend his return so as to relieve himself from liability after proceedings are instituted against him.

*Smith v. Martin*, 20 Kan. 572; *Excelsior Mfg. Co. v. Boyle*, 46 Kan. 202, 26 Pac. 408; *Ferguson v. Tutt*, 8 Kan. 370; *Wilkins v. Tourtellott*, 28 Kan. 825; 3 *Freeman*, Executions, 3d ed. § 366; *Bishop v. Poundstone*, 11 Colo. App. 73, 52 Pac. 222; *Studebaker v. Johnson*, 41 Kan. 326, 13 Am. St. Rep. 287, 21 Pac. 271; *McClelland v. Slingluff*, 7 Watts & S. 134, 42 Am. Dec. 224; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Jackson v. Esten*, 83 Me. 162, 23 Am. St. Rep. 765, 21 Atl. 830; *Freeman v. Paul*, 3 Me. 260, 14 Am. Dec. 237; *Trustees' Exrs. & Secur. Ins. Corp. v. Bowling*, 2 Kan. App. 770, 44 Pac. 42; *Johnson v. Stone*, 40 N. H. 197, 77 Am. Dec. 706.

*Robertson, C.*, filed the following opinion:

An amercement is a money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty. It is a statutory proceeding, and, like all other penal statutes, must be strictly construed. The right to demand a judgment of amercement is based upon no equitable grounds, and in its enforcement courts are bound to hold the party claiming it to a strict observance of the requirements of the statute. In *Duncan v. Drakeley*, 10 Ohio, 46, it is said: "In proceedings under the statute authorizing the amercement of an officer, great strictness is required, and he who would avail himself of the remedy therein provided must bring himself both within the letter and the spirit of the law. It is right that it should be so, because the remedy is summary, and in its consequences highly penal. There is no trial by jury, and but little, if any, discretion left to the court." While in *Moore v. McClief*, 16 Ohio St. 50, is found the following: "The plaintiff's right to demand a judgment of amercement in this case can rest on no equitable ground, for the neglect of official duty of which she complains has done her no injury. The execution debtor was wholly insolvent when judgment was recovered against him, and has continued to be so ever since. Her rights then are purely statutory. And, if she makes a clear case for amercement under

the statute, it is no defense against her claim that she had not been damaged. The statute under which she proceeds is of a penal character. It affords a summary remedy, without trial by jury, for official delinquency; and, without regard to the amount of damages, resulting in fact from such delinquency, it leaves no discretion to the court as to the amount of the judgment to be rendered against the delinquent officer." Section 5997, Comp. Laws 1909, provides for the amercement of an officer as follows: "If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, . . . or shall neglect to return any writ of execution to the proper court on or before the return day thereof, . . . [he] shall on motion in court, and two days' notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with 10 per cent thereon to and for the use of said plaintiff or defendant, as the case may be."

Counsel for plaintiff in error have raised many questions in their petition in error, but there seems to be but one that demands our consideration in the determination of this case, and that one is, Was the execution in this case properly issued, and was it sufficient in law to sustain the amercement proceedings? If these questions are answered in the negative, the proceedings in the court below are void, and this is especially true in an amercement proceeding in which, as we have seen, every act must be construed strictly in favor of the officer.

At common law the assignee of a judgment was not regarded as invested with the legal title, and therefore was not permitted to maintain an action on the assigned judgment in his own name. This rule, however, has been abrogated in this state, and here the assignee is the only party who can maintain an action on the judgment or enforce it by execution. This does not mean that the name of the action shall be changed, but it does mean that the proceedings and pleadings subsequent to the assignment shall be carried on in the name of, or at least by the real party in interest, and this must appear affirmatively of record.

When an assignment, duly executed, has been recorded in the court where the judgment was entered, or where it has been sent on appeal, or other legal transfer, it operates to, and does in fact, transfer both the legal and equitable title thereto to the assignee, and the assignor thereafter has no greater right or interest therein than any other stranger to the record. In this case the record plainly shows that Dennis F.

Scanlan, the defendant in error, has no right, title, or interest in or to the judgment over which this controversy arose. He does not claim to be the agent or attorney of the real party in interest, nor do the attorneys who filed the precipe upon which the execution issued sign for, or claim to represent, the assignee. Counsel for defendant in error in his brief (page 10a) insists that this proceeding should be in the name of Dennis F. Scanlan, for that the assignment contains the provision "that I will not collect the same or any part thereof, or release or discharge said judgment, but will own and allow all lawful proceedings therein, the said E. K. Scanlan saving me harmless of and from any costs and charges in the premises." We fail to see how this can strengthen the contention of the defendant in error. On the other hand, it plainly shows that he bound himself by said assignment to refrain from doing the very thing he is now attempting to do. It would be a peculiar and inconsistent rule of court that would recognize the rights of defendant in error to do everything necessary in and about the collection of this judgment, except to receipt the docket for the money. Under the theory he is now proceeding under, he would claim that right also; and the trial court, to be consistent, would be bound to grant it to him, which rule would permit a stranger or one whom the record affirmatively shows to have no interest in the action to issue process, create costs, originate proceedings, and collect the judgment. Such surely is not the policy of the law. We are strengthened in our view of this matter in the instant case because of the fact that defendant in error at the trial in the court below had his attention called to this phase of the controversy, and yet, instead of asking leave to correct or amend the pleadings so as to show his authority to act as agent or attorney in fact of the real party in interest, failed to do so, but persisted in conducting the hearing in his own name, notwithstanding the record showed him to have no interest in the judgment. We do not attempt to lay this down as a general rule for all classes of cases. We have in mind at this time the instant case, and recall that amercement proceedings are highly penal in their nature, that trial courts are clothed with but little discretion in the premises, and that the statutory remedy, thus provided, must be strictly followed.

Before an officer can be amerced as in this case, it must clearly appear that a valid judgment has been entered; that the same has not been satisfied; that the judgment creditor, or someone for him, has, as 42 L.R.A. (N.S.)

provided by statute, filed a precipe for execution; that an execution has been issued and regularly delivered to the officer for service and return, and that the same has not been served or returned, as required by statute.

In the case at bar, the judgment on its face recites that it was given, made, and rendered on the 11th day of May, 1909, and the execution shows that it was rendered on May 13, 1909. It may have had reference to the judgment rendered on May 11, 1909, and again it might not. The original judgment was filed in the county court on May 11, 1909, as shown on page 41 of the case-made. We in such case will indulge in no presumption in favor of defendant in error. If it, in fact, had reference to one and the same judgment, the record should affirmatively show it. Attention to this discrepancy was called to the court's attention at the trial below, but no effort was made to reconcile the conflicting dates, and we must assume that the conflict was irreconcilable, and resolve the doubt in favor of the officer. This question was before the supreme court of Kansas in the case of *Bittman v. Mize*, 45 Kan. 450, 25 Pac. 875, wherein it was said: "The question is, Was there such a variance between the execution and the judgment introduced to support it as will excuse the sheriff or save him from amercement? We think there was. This is a statutory proceeding, and its character penal, and strict compliance with the law must be observed in its enforcement. The record in this case shows there was but one judgment in the Harper county court between Bittman, Taylor & Co. as plaintiffs, and W. O. Mize, as defendant, and that was dated October 14, 1885. There being no judgment in said court between said parties bearing date October 14, 1886, it follows that the clerk of the district court of said county had no authority to issue the execution in question in this case. If the clerk had no authority to issue said execution, it was void, and the sheriff was under no obligation to respect it in any way." In *Cutler v. Wadsworth*, 7 Conn. 6, it was said: The execution recited a judgment rendered on the fourth Tuesday of February, and the record showed a judgment rendered on the second Tuesday of February. In *Rider v. Alexander*, 1 D. Chip. (Vt.) 207, it was held that where the execution recited a judgment entered at one term, and the record produced to support such execution was entered up at another term, such execution was irregular, and all proceedings had under it were void. The law certainly will not require a sheriff, under a penalty, to do a thing which, when

done, would be void. In *Fuller v. Wells, F. & Co.* 42 Kan. 551, 22 Pac. 561, it is held, where a plaintiff is seeking to amerce a sheriff for his neglect or failure to return an execution, the execution to sustain such a proceeding must conform strictly to the judgment rendered. So, also, in *Fisher v. Franklin*, 38 Kan. 252, 16 Pac. 341.

Another discrepancy in the execution under discussion is also pointed out, viz., there were no costs taxed in the judgment as entered in the county court in this case, whereas, the execution shows costs taxed in the sum of \$184.15. According to our view of the law, where an execution shows on its face that it was issued for an amount greatly in excess of the actual judgment entered in the case, the sheriff or officer to whom it is directed will not be liable to amercement for failing to return same on or before its return day, there being such a substantial discrepancy between the recitals of the execution and the judgment upon which it is based as to render the former void. We do not say, in this connection, that such defect in the judgment cannot be supplied, but we do say that in the instant case it was not supplied, but still exists wholly unexplained.

After a full consideration of the whole record, we find that it clearly fails to show that the defendant in error had at the time the execution was issued in this case any interest, direct or remote, as principal or agent in the judgment upon which he attempted to have execution issued; that the delinquency of the sheriff, if any there was, occurred long after the assignment of the judgment; that there is a substantial variance between the execution and the judgment, both in date and amount; and that, therefore, the court erred in rendering judgment in amercement, for which error the judgment of the County Court of Creek county should be reversed.

**Per Curiam:**  
Adopted in whole.

#### WISCONSIN SUPREME COURT.

CHAIN BELT COMPANY, Plff. in Err.,  
v.  
CITY OF MILWAUKEE.

(— Wis. —, 138 N. W. 621.)

**Municipal corporation — power to license elevator operator.**

Power to license elevator operators is not conferred upon a municipal corporation by the "general welfare clause" of the charter, for special provisions authorizing the 42 L.R.A.(N.S.)

prohibition of insecure or unsafe buildings and the use of buildings not provided with ample means for safe and speedy egress therefrom, and the prevention of dangerous construction and condition of apparatus used in and about any building.

(November 19, 1912.)

**ERROR** to the Municipal Court of Milwaukee to review a judgment convicting defendant of violating a city ordinance forbidding the operation of elevators without a licensed operator. Reversed.

The facts are stated in the opinion.

*Note. — Validity of regulations concerning elevators and hoistways.*

CHAIN BELT CO. v. MILWAUKEE seems to be a case of first impression upon the question of licensing elevator operators. The only legislation regulating elevators which seems to have come before the appellate courts involves general regulations.

It is held that a statute authorizing cities of the first class to regulate by general ordinance the management and inspection of elevator, hoistways, and elevator shafts does not confer power to condemn a whole class of elevator appliances without inspection, and to require their removal wherever found; and that the manufacturer of such appliances is entitled to injunctive relief against a general regulation so providing. *Richmond Safety Gate Co. v. Ashbridge*, 116 Fed. 220.

And a statute providing that when any hoisting apparatus is used in any building "in the course of construction," the shaft or opening shall be fenced, should, where its title shows that it is designed to protect persons engaged in constructing, repairing, or removing a building, be construed to embrace buildings undergoing repairs as well as those being constructed, though, without being so construed, the act may not be unconstitutional as special legislation, in that it singles out buildings under construction, and does not apply to those being repaired. *Claffy v. Chicago Dock & Canal Co.* 249 Ill. 210, 94 N. E. 551.

Neither statutes providing that elevators shall be equipped with safety devices when required by the chief inspector, and authorizing cities to inspect and license elevators, nor the implied power of a city, authorizes it to require by general ordinance that every elevator, car, or platform that runs on guides shall be provided with approved safety devices. *Indianapolis Abattoir Co. v. Neidlinger*, 174 Ind. 400, 92 N. E. 109.

No attempt has been made to present the cases relating to grain elevators.

For the discussion of other questions relating to licensing and the regulation of business of employments and their instrumentalities, see the numerous notes indexed under "Constitutional Law" and "Licenses," in the L.R.A. Indexes to Notes.

L. A. W.

Messrs. Glicksman, Gold, & Corrigan, for plaintiff in error:

Section 11 of the ordinance, as amended December 5th, 1910, is void as beyond and outside of the chartered powers of the city of Milwaukee.

Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Wisconsin Teleph. Co. v. Milwaukee, 126 Wis. 1, 1 L.R.A.(N.S.) 581, 110 Am. St. Rep. 886, 104 N. W. 1009; Wilkie v. Chicago, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004; Bear v. Cedar Rapids, 147 Iowa, 341, 27 L.R.A.(N.S.) 1150, 126 N. W. 324; Burlington v. Bumgardner, 42 Iowa, 673.

It is unreasonable, arbitrary, and oppressive.

Hayes v. Appleton, 24 Wis. 542; Barling v. West, 29 Wis. 307, 9 Am. Rep. 576; Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 331, 85 N. W. 1036; Le Feber v. West Allis, 119 Wis. 608, 100 Am. St. Rep. 917, 97 N. W. 203; Gunderson v. Struebing, 125 Wis. 173, 104 N. W. 149; Carthage v. Block, 139 Mo. App. 386, 123 S. W. 483; Johnson v. Philadelphia, 94 Miss. 34, 19 L.R.A.(N.S.) 637, 47 So. 526, 19 Ann. Cas. 103; People ex rel. Lockwood & S. Co. v. Grand Trunk Western R. Co. 232 Ill. 292, 83 N. E. 839; Freund, Pol. Power, § 63.

And it seeks to confer arbitrary and discriminatory power upon the chief inspector of buildings.

Little Chute v. Van Camp, 136 Wis. 526, 128 Am. St. Rep. 1100, 117 N. W. 1012; State ex rel. Garrabad v. Dering, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Bear v. Cedar Rapids, 147 Iowa, 341, 27 L.R.A.(N.S.) 1150, 126 N. W. 324.

Messrs. Daniel W. Hoan and E. L. McIntyre, for defendant in error:

The city of Milwaukee had the charter authority to pass § 11 of the elevator ordinance.

State ex rel. Nowotny v. Milwaukee, 140 Wis. 38, 133 Am. St. Rep. 1060, 121 N. W. 658; State v. Orr, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770; Chicago Packing & Provision Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545; Mt. Carmel v. Wabash County, 50 Ill. 69; St. Louis v. Cafferata, 24 Mo. 94; Louisville City R. Co. v. Louisville, 8 Bush. 415; 2 Dill. Mun. Corp. 5th ed. § 665; 28 Cyc. 747; Com. v. Plaisted, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224.

The section of the elevator ordinance is not invalid as being unreasonable, arbitrary, and oppressive.  
42 L.R.A.(N.S.)

C. Beck Co. v. Milwaukee, 139 Wis. 340, 131 Am. St. Rep. 1061, 120 N. W. 293; Pugh v. Pugh, 25 S. D. 7, 32 L.R.A.(N.S.) 954, 124 N. W. 959; Ordelheide v. Modern Brotherhood, 226 Mo. 203, 32 L.R.A.(N.S.) 965, 125 S. W. 1105; Skrocki v. Stahl, 14 Cal. App. 1, 110 Pac. 957; State v. Rose, 40 Mont. 66, 105 Pac. 82; State ex rel. Kellogg v. Currans, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; State v. Sheppard, 64 Minn. 287, 36 L.R.A. 305, 67 N. W. 62; State v. Barr, 78 Vt. 97, 62 Atl. 43; St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S. W. 929; Ex parte Cramer, — Tex. Crim. Rep. —, 36 L.R.A.(N.S.) 78, 136 S. W. 61; State v. Evans, 130 Wis. 381, 110 N. W. 241; Glucose Ref. Co. v. Chicago, 138 Fed. 217; Adams v. Milwaukee, 144 Wis. 371, — L.R.A.(N.S.) —, 129 N. W. 518.

As amended, it is not void because it seeks to confer arbitrary and discriminating power upon the chief inspector of buildings.

State ex rel. Nowotny v. Milwaukee, 140 Wis. 38, 133 Am. St. Rep. 1060, 121 N. W. 658; People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964; Waldo v. Christman, 72 Misc. 349, 130 N. Y. Supp. 260; Lane-Moore Lumber Co. v. Storm Lake, 151 Iowa, 130, 130 N. W. 924; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Decorah v. Dunstan Bros. 38 Iowa, 99; Wiggins v. Chicago, 68 Ill. 378; Child v. Bemus, 17 R. I. 230, 12 L.R.A. 57, 21 Atl. 539; St. Louis v. Meyrose Lamp Mfg. Co. 139 Mo. 560, 61 Am. St. Rep. 474, 41 S. W. 244; St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; Com. v. Kinsley, 133 Mass. 578; Muller v. Buncombe County, 89 N. C. 171; New York ex rel. Lieberman v. Van de Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144.

Timlin, J., delivered the opinion of the court:

On December 5, 1910, the city of Milwaukee, by amendment of § 11 of an ordinance relating to elevators, forbade the operation of any elevator in the city of Milwaukee except by a person duly licensed for that purpose, and provided for the payment of a fee and issue of a license to persons possessing the qualifications of sobriety, industry, and efficiency. The plaintiff in error was convicted of having violated this ordinance. This writ of error to the judgment of the municipal court challenges the power of the city to enact such an ordinance on the ground that it is not within any ordinance power delegated by the legislature to the city. Section 3 of chapter 4 of the city charter, con-

taining what is popularly known as the "general welfare clause," provides that the common council shall have power to enact, etc., all such ordinances, etc., as they shall deem expedient for the government and good conduct of the city, for the benefit of the trade, commerce, and health thereof, for the suppression of vice, for the prevention of crime, and for carrying into effect the powers vested in said common council. "For these purposes the common council shall have authority—anything in a general law of this state to the contrary notwithstanding—by ordinances, resolutions, by-laws, rules, or regulations" (1) to regulate groceries, etc.; (2) to license, tax, regulate, suppress, and prohibit billiard tables, etc.; (3) to license, tax, regulate, suppress, or prohibit all exhibitions of common showmen, etc.; (4) to restrain or prohibit all descriptions of gaming, etc.; and so on in this form for sixty-four subsections covering a variety of subjects, none of which includes the licensing of elevator operators by any stretch of construction, unless it be subsection 62, which reads: "To control and regulate the construction of buildings, chimneys, and stacks, and to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings, stack, wall, or chimney, in said city, and to declare them to be nuisances, and to provide for their summary abatement,"—or subsection 63, which authorizes the common council to declare by ordinance that it shall be unlawful for any hall, theater, opera house, church, schoolhouse, or building of any kind whatsoever to be used for the assemblage of people, or for any building exceeding three stories in height to be used as a manufactory, hotel, or boarding house, or for any other purpose, unless the same is provided with ample means for the safe and speedy egress of the persons therein assembled in case of alarm, and may require and regulate the erection of ladders, fire escapes, standpipes, or other appliances for the escape of persons from such buildings. In chapter 14 of the charter, relating to the fire department, authority is given to the common council to prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stovepipes, ovens, boilers, and apparatus used in and about any building, and to cause the same to be removed or placed in a safe and secure condition when considered dangerous. Also to compel the owners and occupants of buildings to have scuttles in the roofs and stairs or ladders leading to the same; also to authorize the mayor, aldermen, and other officers of the city to keep away from the vicinity of any fire all idle and suspected persons, and to compel all bystand-

ers to aid in the extinguishment of fires and in the preservation of property exposed to danger thereat; and generally to establish such regulations for the prevention and extinguishment of fires and for the safety and protection of persons from injury thereby as the common council may deem expedient. No other provision of the charter or of any general law of the state under which this power to license elevator operators is claimed has been brought to our attention.

General statutes of the state relative to elevators are § 1636—5, being § 2, chap. 349, Laws of 1901, which provides that the inside walls or casings of every elevator used for the conveyance of passengers to and from the upper stories of certain described buildings shall be constructed of fireproof material throughout; chapter 523, Laws of 1907, which prohibits any person, firm, or corporation from employing or permitting any child under sixteen years of age to have the care, custody, management, or operation of any elevator; chapter 338, Laws of 1909, to the same effect. By chapter 112, Laws of 1907, being § 1021h of 1898 Stat., it is made the duty of an officer of the bureau of labor and industrial statistics to examine freight and passenger elevators, and condemn those found to be defective and unsafe by serving written notice on the person for whom it is being operated, or on his agent, or by posting such notice on the walls or in the cab of any elevator found to be in an unsafe condition. If, after such condemnation, the owner or person for whom the elevator is being operated shall continue the use thereof, without making such repairs as will place it in a safe condition, he will be liable, civilly and criminally, for any physical injury caused by such use, whether such injury results in the death of the person injured or not.

One of the most effective modes of regulation is to declare the acts, conduct, business, or transaction in question unlawful unless licensed, and then provide rules for the granting or revocation of such license. But this extraordinary power is liable to be used oppressively, and the possession of such power is not readily presumed. The legislature may be willing to give this power to the city in its full extent, so as to enable the city to license practically all callings, or to a limited extent, so as to enable the city to license dangerous callings; or it may not be willing to delegate this power at all, or only with limitations and restrictions. "Even the right to license must be plainly conferred, or it will not be held to exist. Thus power to make by-laws relative to hucksters, grocers, and

virtualizing shops' does not authorize the corporation to exact a license from persons carrying on such business. Nor does the general power to pass prudential by-laws not inconsistent with the laws of the state confer the authority to demand a license. If the charter or statute enumerates the occupations or businesses which may be regulated and licensed, the enumeration, if on the whole such appears to be the legislative intent, is exclusive, and the municipality has no power to license or regulate occupations or businesses not embraced in the enumeration." 2 Dill. Mun. Corp. 5th ed. § 667; Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828.

The power of a municipal corporation to impose license taxes on persons engaged in the pursuit of a particular occupation must be conferred by the state expressly or by necessary implication. *Cambridge v. Cambridge Water Co.* 99 Md. 501, 58 Atl. 442, 2 Ann. Cas. 311. To the same effect, *Wilkie v. Chicago*, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004; *Gray v. Wilmington*, 2 Marv. (Del.) 257, 43 Atl. 94; *State v. Smith*, 67 Conn. 541, 52 Am. St. Rep. 301, 35 Atl. 506. An ordinance requiring a license for carrying on a jewelry business in the town and declaring a fine for carrying it on without a license is *ultra vires* where the power to pass it is not expressly or impliedly granted the town. *Mena v. Smith*, 64 Ark. 363, 42 S. W. 831.

A statute giving power to license must be strictly construed, and doubt or ambiguity arising out of the language employed must be resolved in favor of the public. *Cache County ex rel. Matthews v. Jensen*, 21 Utah, 207, 61 Pac. 303. The authority of a city to impose a tax on the use of its streets by enumerated vehicles must be conferred either expressly or by necessary implication, and is subject to strict construction. *Terre Haute v. Kersey*, 159 Ind. 300, 95 Am. St. Rep. 298, 64 N. E. 469.

Licenses for the purposes of regulation, granted under an exercise of the police power, must also have special legislative authorization, at least to the extent of conferring upon the city authority to regulate the particular or dangerous callings which the ordinance undertakes to license.

There is, in the charter and statutes above referred to, no express grant to the city of Milwaukee of power to license elevators or elevator operators. No such power can be implied from the "general welfare clause," or from the specific provisions relating to other and different subjects. The enumeration of subjects which may be regulated by license also tends somewhat to indicate a legislative intention that the city should not exercise that power over other

subjects. This court cannot grant that power to the city. If the legislature has not in some way given the city that power, the city does not possess it. We are satisfied that, upon no fair and ingenious construction of the charter and other relevant statute provisions, can there be found any indication that the legislature intended to confer this power upon the city. If we apply the rule of strict construction upheld by the great weight of authority in such cases, this lack of authority on the part of the city is still more obvious.

The judgment of the Municipal Court is reversed, and the cause remanded, with directions to dismiss the prosecution.

#### WASHINGTON SUPREME COURT.

(Department No. 2.)

J. B. KETTENHOFEN and Wife, Respts.,

GLOBE TRANSFER & STORAGE COMPANY, Appt.

(— Wash. —, 127 Pac. 295.)

#### Carriers — accumulating property for carload lots — liability.

1. One who undertakes to transport property from its location in one city to another city, for a through rate less than the published rates of the railroad company for broken lots, which it is enabled to do by accumulating property for the given destination until a car can be filled, which is billed to its own agent there, assumes, while holding the property for accumulation, the liability of a common carrier.

#### Appeal — damages — lack of evidence.

2. A judgment for a property owner against a carrier for goods lost in transportation will not be disturbed on appeal for lack of evidence, although it is based on an arbitrary reduction of the cost price of the property, which was several years old, where defendant admitted a value nearly as great as that awarded, and offered no evidence on the question.

(October 30, 1912.)

*Note. — Character as common carriers of persons or corporations other than express companies that neither own nor operate transportation routes, but undertake to transport goods.*

This note includes cases in which the character, as a common carrier, of individuals or companies is considered, which make it their business to assemble goods of various ownership, having a common destination, for the purpose of obtaining, for instance, a railroad carload, to enable the owner of the goods to obtain the advantage of the cheaper carload freight rates, which are less than parcel rates, the car being

**A**PPEAL by defendant from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover the value of certain goods destroyed by fire while in defendant's custody as a common carrier. Affirmed.

The facts are stated in the opinion.

Messrs. Totten & Rozema, for appellant:

The business of assembling goods and shipping them in a pool car is not that of a common carrier, but that of a forwarder merely.

Export Shipping Co. v. Wabash R. Co. 14 Inters. Com. Rep. 437; California Commercial Asso. v. Wells, F. & Co. 14 Inters. Com. Rep. 422.

As a forwarder, or as a warehouseman,

consigned by a single bill of lading by the company, whether in its own car or not, over a transportation route other than its own, to its distributing agent, who parcels out the goods among the respective owners.

Cases involving express companies are not included herein, since the law is well settled that such companies are common carriers. 6 Cyc. 369; 1 Hutchinson, Carr. § 80.

Although disputed by some decisions, the holding of the principal case seems to be the better doctrine. It is in effect that it is sufficient to fasten the character of a common carrier upon a company, if, in the ordinary course of its business, it made a contract by which it agreed to transport goods; and the deposit of the goods in a warehouse was held to be merely incidental to carrying the goods, and intended to facilitate the carriage.

Upon this question it is said in 1 Hutchinson on Carriers, § 71: "Warehousemen, wharfingers, and forwarders of freight, so long as they confine themselves to the business which their names import, cannot be held liable as common carriers. If goods are deposited with them merely as the initiatory step towards starting them *in itinere*, they having undertaken to do no more than to safely keep them and forward them when the opportunity offers, and being in no wise interested in their carriage after delivery to the carrier, it would be contrary to the well-settled principles of the law to hold them to the responsibilities of common carriers. . . . But where warehousemen, wharfingers, or forwarders of freight combine the two characters, treating the deposit with them as being merely for the convenience of further carriage, or to encourage or promote their business as common carriers, they will be held to a strict liability as such from the time of the delivery to them. In such cases the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, and the liability as carrier begins with the receipt of the goods." And § 84: "Other carriers under the names of despatch companies, fast freight lines, and the like have also

the liability of the defendant was that of a mere bailee for hire.

8 Am. & Eng. Enc. Law, pp. 1165, 1166; 30 Am. & Eng. Enc. Law, pp. 49, 50.

And it could not be held liable for the destruction of the goods by fire, unless it was proved that the fire was occasioned by or through its negligence.

3 Am. & Eng. Enc. Law p. 751; 30 Am. & Eng. Enc. Law, pp. 49, 50.

The evidence was insufficient to prove the market value of the goods.

Watson v. Loughran, 112 Ga. 837, 38 S. E. 82; Goldberg v. Besdine, 76 App. Div. 451, 78 N. Y. Supp. 776; Whitmark v. Lorton, 15 Daly, 548, 8 N. Y. Supp. 480; Schwartz v. Schendel, 24 Misc. 733, 53 N. Y. Supp. 829; 13 Cyc. 218.

come into existence, which conduct their business upon the same principle as express companies, that is, by the employment of the means of transportation furnished to them by others."

So, it is said in Lawson on Contracts of Carriers, § 233: "It has been attempted on the part of express, forwarding, and despatch companies, to evade the responsibilities of common carriers on the ground that they are not the owners of the vehicles employed in the transportation; but this pretense has not been permitted in the courts. The names which they assume are regarded as immaterial, the duties which they undertake being the criterion of their liability. They are therefore held to the responsibility of common carriers, both where they are and where they are not interested in the conveyances by which the goods are transported."

In the case of the Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, 115, it was held that a company which, in the exercise of a public employment, undertook for hire to transport goods from one point to another, was a common carrier, and that the relation to the goods was not changed by reason of the fact that the word "forward" was used in the contract of carriage, nor by the fact that the transportation company was not a proprietor of the boats or vessels used in transportation.

A so-called forwarding company was held to be a carrier in Bare v. American Forwarding Co. 146 Ill. App. 388, where it undertook to transport complainant's trunk from one point to another for hire, it appearing that the company's business was to assemble carloads of goods having a common destination, for all who desired to avail themselves of its rates, and to consign the car routed over some railroad to its agent, who distributed the goods among the respective owners. The car containing the complainant's trunk, with the goods of others, being burned *en route*, the forwarding company was held liable therefor. See Blair v. American Forwarding Co. *infra*.

In J. H. Cownie Glove Co. v. Merchants'

Messrs. Kerr & McCord, for respondents:

Defendant was liable as a common carrier.

Lee v. Fidelity Storage & Transfer Co. 51 Wash. 208, 98 Pac. 658; Garberson v. Trans-Continental Freight Co. 51 Wash. 213, 98 Pac. 612; Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133; J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co. 130 Iowa, 327, 4 L.R.A.(N.S.) 1060, 114 Am. St. Rep. 419, 106 N. W. 749; Buckland v. Adams Exp. Co. 97 Mass. 124, 93 Am. Dec. 68; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, 115; Hutchinson, Carr. 3d ed. §§ 83, 84; Bare v. American Forwarding Co. 146 Ill. App. 388, affirmed in 242 Ill. 298, 89 N. E. 1021; Meloche v. Chicago, M.

& St. P. R. Co. 116 Mich. 69, 74 N. W. 301; Garner v. St. Louis, I. M. & S. R. Co. 79 Ark. 353, 116 Am. St. Rep. 83, 96 S. W. 187; St. Louis, I. M. & S. R. Co. v. Burrow, 89 Ark. 178, 116 S. W. 198; Pittsburg, C. C. & St. L. R. Co. v. American Tobacco Co. 126 Ky. 582, 104 S. W. 377; St. Louis, I. M. & S. R. Co. v. Murphy, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419; Allen & Gilbert-Ramaker v. Canadian P. R. Co. 42 Wash. 64, 84 Pac. 620, 7 Ann. Cas. 468; McDonald v. Western R. Corp. 34 N. Y. 497; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 327, 21 L. ed. 302; Webmann v. Minneapolis, St. P. & S. Ste. M. R. Co. 58 Minn. 22, 59 N. W. 546.

The correct measure of damages for the

Dispatch Transp. Co. 130 Iowa, 327, 4 L.R.A.(N.S.) 1060, 114 Am. St. Rep. 419, 106 N. W. 749, the court said: "The evidence also sufficiently showed that the defendant was a common carrier, and that the gloves were delivered to it as alleged. To constitute a common carrier, it is not essential that the person or corporation undertaking such service own the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends." The court merely set out the facts that the transportation company undertook to carry the gloves from a foreign country to the city in which was the place of business of the complainant, which, for the purpose of enabling the transportation company to carry out the contract, had signed an order directing the consignor to deliver its goods to the transportation company. And here the transportation company was held liable for damages, it having failed to deliver the goods according to its contract, at an inland port of entry, by reason of its failure to clear the goods at the port of arrival, where the goods were injured within the period of the delay.

In Read v. Spaulding, 5 Bosw. 395, affirmed in 30 N. Y. 630, 86 Am. Dec. 426, where it appeared that the defendant, who operated under the name of "Spaulding's Express Freight Line," agreed to forward goods to a certain place, giving a bill of lading in which it was set out that the goods were to be delivered at the depot of the company or its docks, and further that no liability should exist if the goods were delivered in good order, and it also appeared that the stipulated freight charge served as compensation for the entire cost of transportation, the defendant was held to be a common carrier and liable as such for damages to the goods caused by his inexcusable neglect and delay, as a result of which the goods were damaged by an extraordinary flood, although he had no interest in or control over any of the rail-

roads over which the goods were transported.

And, the decision in Chouteaux v. Leech, 18 Pa. 224, 57 Am. Dec. 602, holds that the right of one to recover for the loss of his goods in transit depends upon the obligation created by the particular contract of carriage, and that where the company in charge of the goods bound itself as a carrier in the particular contract, it was no defense to show that it had never engaged as a common carrier between two particular points, and that its business was between only one of the points and another place.

In Lee v. Fidelity Storage & Transfer Co. 51 Wash. 208, 98 Pac. 658, it was held in effect that the so-called forwarding and distributing company was a common carrier, and that, by undertaking to forward goods from St. Paul to Tacoma without prepayment, it was liable for conversion upon a breach of the contract by the refusal of its agent to forward the goods from an intermediate point without prepayment.

And so, in Garberson v. Trans-Continental Freight Co. 51 Wash. 213, 98 Pac. 612, where it appeared that the freight company was engaged in the business of assembling carload lots of goods for shipment, the purpose being to serve those who had less than carload lots, and to enable them to avail themselves of carload shipping rates, it was held, where a transportation company at Chicago undertook safely to ship and deliver to the complainant his household goods at Seattle without loss or damage, for the amount prepaid to cover cartage, storage, etc., at Seattle, that it was liable for damages sustained by the goods and for the extra cartage charges made at Seattle. And the court said: "The contract was therefore a straight undertaking to deliver to respondent in Seattle the goods in question without damage, and to cart them to his home, which was shown to have been within reasonable distance, without further charges. Under such a contract it was immaterial whether appellant was a mere



loss of the property is not its market value, but what it was really worth to the owner.

*Green v. Boston & L. R. Co.* 128 Mass. 221, 35 Am. Rep. 370; *International & G. N. R. Co. v. Nicholson*, 61 Tex. 550; *Denver, S. P. & P. R. Co. v. Frame*, 6 Colo. 385; *Ft. Worth & R. G. R. Co. v. McCarty*, 42 Tex. Civ. App. 514, 94 S. W. 178.

Ellis, J., delivered the opinion of the court:

This is an action to recover the value of certain household goods and wearing apparel destroyed by fire while in the custody of the defendant, Globe Transfer & Storage Company. The defendant was engaged in the business, among other things, of soliciting goods from different persons having

forwarder or a forwarder and distributor. It undertook to do a special thing, and it was obligated, like any other person, to carry out its undertaking, without regard to what name it may use in designating its business."

So the holding in *Blakiston v. Davies*, 42 Pa. Super. Ct. 390, is merely to the effect that, even if the general business of the company claiming to be a forwarding company was not that of a common carrier, yet an allegation in the complaint that the forwarding company undertook to carry goods and deliver them as provided in a shipping receipt was sustained by testimony that its truckmen called for the box, hauled it to the railroad and there shipped it, first by rail, consigned to the company at an intermediate point, and then by boat, consigned to its distributing agent. And the court said in its opinion: "It is thus seen that the defendant's duty did not terminate, and its control over the package was not surrendered, when it was delivered to the steamship company, but the control was retained for the purpose of delivery through its agents in Honolulu to Lyon. At least, this is an inference which fairly may be drawn from the testimony. This being so, we think a jury would have been warranted in inferring negligence."

Where a transportation company undertook to transport goods from one place to another for a stipulated sum, over routes not its own and over which it had no control except that for a portion of the distance the goods were within a car owned by the company, but the right of selection of the routes was in the company, it was held to be a common carrier, in *Merchants' Dispatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881. And despite the stipulation in a so-called bill of lading to the effect that in case of injury the company in whose actual possession the goods might be at the time should be held answerable for any loss or damage thereto, where, as in this case, the loss was occasioned after the goods had been delivered by the transporter 42 L.R.A. (N.S.)

less than a carload lot, for shipment from Seattle to other points. Its custom was to receive such lots and hold them at its warehouse until a carload destined to a common point had been assembled. It then arranged with some railroad company for a car to that point, placed the goods in the car, each piece marked for identification as to ownership, billed the car to its agent, and turned the car over to the railroad company for transportation to the given point. The placing of such goods in the warehouse was not for storage, but for the defendant's own convenience in assembling the carload lots as incidental to the carriage of the goods. No storage charge was made. The defendant usually charged a freight rate for such shipments, higher than the

tion company to a railroad company at an intermediate point, the transportation company was held liable therefor, the loss being occasioned by its agent in an attempt to fulfil its duty to deliver the goods at the agreed point. The court said: "Here the defendant undertakes the whole transportation upon its own responsibility, and, owning no railroad itself for any part of the route, it employs such lines of others as it sees fit to use. In making the contract with the consignors it acts for itself alone; and in making the necessary sub-contracts with such railroad lines as it chooses to employ for assistance in the performance of its undertaking with the consignors, it again acts for itself and no one else. And though it thus assumes for itself the duty of through transportation and selects its own agencies, it nevertheless attempts to exempt itself absolutely from all accountability for any loss that may occur during any part of the entire transit." And further: "Manifestly, no one of several connecting lines of railroad would be permitted to contract against accountability for a loss upon its own line; and for the same obvious reasons, this defendant, which makes such lines its agents and its own for the purposes of this transportation, as between it and the owner of the goods, should not be allowed to protect itself behind the stipulation presented in this case."

In *Shelton v. Merchants' Dispatch Transp. Co.* 59 N. Y. 258, the court assumed, apparently without objection, that the transportation company was a common carrier, and held, in the absence of any special agreement by the agents of the complainant at the time of delivery of the goods for transportation, that the parties were bound by the customary method employed by the carrier and agent in transacting business, and that the carrier might limit his liability in the customary manner.

In the following cases the Merchants' Dispatch Transportation Company was treated, apparently without objection, as common carrier: *Stewart v. Merchants'*

railroad company's carload rate and lower than its less than carload rate; the defendant's compensation being the difference between its own charge and the carload rate paid by it to the railroad company. The defendant's manager testified that its agent at the point of destination pays the freight and collects the freight plus the defendant's compensation, styled by him "our commission," unless it is paid in advance.

The plaintiffs delivered their goods to the defendant under an oral agreement for shipment from their residence in Seattle to Milwaukee, Wisconsin; the defendant having agreed to notify the plaintiffs as soon as it would be ready to load the car. On Saturday, January 28, 1911, the notification was given, and the defendant in the afternoon of that day sent its conveyances, transported the goods from the plaintiffs' residence to its warehouse, where they arrived at about 6 o'clock in the evening, too late for loading into the car. They were placed in the warehouse for weighing, sorting, listing, and storage till they could be placed in the car. While in the warehouse the goods were destroyed by fire. There was no evidence that the plaintiffs had any knowl-

edge of the details of the defendant's business, or that the goods would be stored in the warehouse at all. The cause was tried to the court without a jury. The court found the facts substantially as above condensed; also, that the plaintiffs were damaged in the sum of \$686, and that the reasonable value of the defendant's services in packing and carting the goods was the sum of \$27.50. Judgment in favor of the plaintiffs was rendered for the difference of \$658.50 and for costs. The defendant has appealed.

The appellant concedes that, if the goods when destroyed were in its possession as a common carrier, it is liable for their loss. It contends, however, that its possession was that of a forwarder or warehouseman, and not that of a common carrier. The duties and liabilities assumed by the appellant, "in legal contemplation, must be determined by the nature of the contract of the parties." A thorough examination of the evidence leads to the sure conclusion that the contract was one for a through shipment from the residence of the respondents, in the city of Seattle, to the city of Milwaukee. The means to that end were left

Despatch Transp. Co. 47 Iowa, 229, 20 Am. Rep. 476 (where it appeared that the company owned or controlled its own cars); *Wilde v. Merchants' Despatch Transp. Co.* 47 Iowa, 247, 29 Am. Rep. 479; *Bancroft v. Merchants' Despatch Transp. Co.* 47 Iowa, 262, 29 Am. Rep. 482; *Robinson Bros. v. Merchants' Despatch Transp. Co.* 45 Iowa, 476; *Merchants' Despatch Transp. Co. v. Leysor*, 89 Ill. 43; *Merchants' Despatch Transp. Co. v. Jesting*, 89 Ill. 152.

And in *Merchant's Dispatch & Transp. Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757, it was apparently assumed that the company was a common carrier.

And in *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473, there was a stipulation to the effect that the company was a common carrier.

In *Hersfield v. Adams*, 19 Barb. 577, it was held that a so-called express company was not a common carrier, and was not liable as such, although it undertook to transport goods from one place to a distant place and collected the charges for the entire trip, where the company was not the owner of, nor interested in, any of the boats or vessels by which transportation was attempted to be effected. It expressly appeared that the express company conveyed the goods in its own name from one intermediate point to another, and that it had an office at the destination of the goods, and the proper inference would seem to be that its control over the goods continued until its agent at the conclusion of the transfer had delivered the goods to the sender's consignee.

The case of *Roberts v. Turner*, 12 Johns. 42 L.R.A. (N.S.)

232, 7 Am. Dec. 311, is not precisely within the scope of this note, since it does not appear that the forwarder exercised any control over the merchandise after it left his hands, consigned directly to the consignee of the sender. But the case is frequently cited, and for that reason is here set out. It appears therein that a forwarder had sent certain merchandise, receiving as compensation an amount in excess of the regular freight charge, and the boat on which the merchandise was shipped was sunk, and the court, in holding that the forwarder was not a common carrier, said: "The plaintiff knew, or might have known (for his agent knew), that the defendant had no interest in the freight of the goods, owned no part of the boats employed in the carriage of goods, and that his only business in relation to the carriage of goods consisted in forwarding them. That a person thus circumstanced should be deemed an insurer of goods forwarded by him, an insurer too without reward, would, in my judgment, be not only without a precedent, but against all legal principles."

In *Blair v. American Forwarding Co.* 159 Ill. App. 511, it was held that the forwarding company acted as a forwarder, and not as a common carrier in this particular case, where it appeared that it received goods shipped to it by an agent of the owner, with instructions to forward the goods to a distant point, although the company assumed entire control of the box, placing it in a railroad car consigned to its agent; and that the fact that the owner's agent had consigned the goods to the forwarding company, "released at owner's

entirely to the appellant's selection and control. The goods were delivered with no other direction expressed or implied. Neither the service on the one hand nor the compensation on the other was segregated, itemized, or separately considered. It was a contract for a through shipment at a rate to be fixed by the appellant. The goods were not delivered for mere forwarding to the railroad company, nor for storage in a warehouse. They were delivered for shipment by whatever route the appellant might find most to its advantage, and in a car of its own procuring. In this branch of its business the appellant was exercising the employment of receiving, carrying, and delivering goods, wares, and merchandise as an occupation, and for all people indifferently. By its contract it assumed the entire control of the goods, severing the respondents' connection therewith until delivery at the place of destination. Such was the ordinary course of its business, and such was the plain purport of the contract. It was a contract for carriage and delivery for hire, pure and simple; and in so contracting the appellant assumed the attributes and took on the relation of a common carrier for

hire, with all of the duties and liabilities incident to that relation. It can make no manner of difference that in other branches of its business it may have been a mere forwarder or warehouseman, or that it so styled itself. Its character, as concerns the business here involved, must be determined by the nature of the service it contracted to perform, without regard to the name by which it has chosen to designate its general business. *Bare v. American Forwarding Co.* 146 Ill. App. 388; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Lee v. Fidelity Storage & Transfer Co.* 51 Wash. 208, 98 Pac. 658; *Garberson v. Trans-Continental Freight Co.* 51 Wash. 213, 98 Pac. 612. "The law, regardless of forms or names, will look at the real transaction, and if the contract be in fact one for the transportation and delivery of the goods to a consignee, no matter through what agencies it is to be effected, the undertaking will be construed as that of a common carrier." *Hutchinson*, Carr. 3d ed. § 83.

The appellant lays much stress upon the fact that it did not own a line of railway, nor control the entire means of transportation. This is not material. It is sufficient

risk," was sufficient authority to the forwarding company to release the railroad company in whose car the goods were when burned, of its common-law liability. In commenting upon the case of *Bare v. American Forwarding Co.* supra, the loss in which was occasioned by the same conflagration as in this case, the court said: "In that case, the plaintiff in person took the goods to the freight depot of the railway company for shipment, and there met one of the officers of the American Forwarding Company, who received the goods and issued a receipt therefor; and there is also testimony in the case (though denied by the defendant) to the effect that the officer of the forwarding company thus receiving the goods assured the plaintiff that the company would be responsible for the trunk if lost."

The holding of the Interstate Commerce Commission in *California Commercial Asso. v. Wells, F. & Co.* 14 Inters. Com. Rep. 422, was to the effect, *inter alia*, that a voluntary association of merchants of one place, which engages its agent in another place to assemble goods for it and make up a carload thereof, consigning the car to the association, is not a common carrier, and the commissioner reporting said: "The characteristics of a common carrier were pointed out with some care in the case of *Buckland v. Adams Exp. Co.* 97 Mass. 129, 93 Am. Dec. 68: 'They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire, on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume right of posses-

sion and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it.' The complainant does not hold itself out in any sense as a carrier; it does not transport goods, it does not maintain custody of them while in the course of transportation; in brief, it exercises no functions outside of those which are characteristic of the ordinary forwarding agent."

In *Export Shipping Co. v. Wabash R. Co.* 14 Inters. Com. Rep. 437, a complaint by reason of the enforcement of parcel rates against a bulk shipment of goods of various ownership, assembled by the complainant and shipped by it consigned to itself, a reference was made to the complainant in the commissioner's report as a forwarding agent and a customhouse broker, but the report merely set out that in all respects this case was governed by the decision in *California Commercial Asso. v. Wells, F. & Co.* supra, and it does not expressly appear that the question arose as to whether the complainant was a common carrier.

The case of *Barasch v. Richards*, 113 N. Y. Supp. 1005, merely holds that where a course of dealing between parties has established the relation of a forwarder as to one of them, a failure in one instance to deliver the customary special contract will not work such a change in their relation that the forwarder may be held to have assumed the burden of a common carrier, there being no evidence that the parties intended, in the particular instance, to enter into an anomalous contract.

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that, in the ordinary course of its business, it made a contract by which it agreed to transport and deliver the goods. *J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co.* 130, Iowa, 327, 4 L.R.A. (N.S.) 1060, 114 Am. St. Rep. 419, 106 N. W. 749; *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. St. Rep. 68; *Hutchinson*, Carr. 3d ed. §§ 83, 84.

Nor is it material that the goods were destroyed while in the appellant's warehouse. They were delivered for transportation, not for storage. The storage was at the appellant's instance and for its own convenience. "But where warehousemen, wharfingers, or forwarders of freight combine the two characters, treating the deposit with them as being merely for the convenience of further carriage, or to encourage or promote their business as common carriers, they will be held to a strict liability as such from the time of the delivery to them. In such cases the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, and the liability as carrier begins with the receipt of the goods." *Hutchinson*, Carr. 3d ed. § 71; *St. Louis, I. M. & S. R. Co. v. Murphy*, 60 Ark. 333, 46 Am. St. Rep. 202, 30 S. W. 419; *Wehmann v. Minneapolis, St. P. & S. Ste. M. R. Co.* 58 Minn. 22, 59 N. W. 546. The reasoning of the court in the Illinois case of *Bare v. American Forwarding Co.* supra, seems to us unanswerable. The appellant claims that the later case of *Blair v. American Forwarding Co.* 159 Ill. App. 511, decided by the same court, counteracts the former decision, but we think not. It does not purport to overrule the former decision, but merely to distinguish the two cases on the facts. In any event the earlier decision, as it seems to us, is the more logical and convincing. Nor are we impressed by the interstate commerce decisions—*California Commercial Asso. v. Wells, F. & Co.* 14 Inters. Com. Rep. 422, and *Export Shipping Co. v. Wabash R. Co.* 14 Inters. Com. Rep. 437—cited by the appellant. So far as applicable to the facts here, they seem to us unsound. On both reason and what we conceive to be the more logical authorities, we hold that, under the circumstances here shown, the appellant assumed the duties and liabilities of a common carrier.

The appellant also contends that there was not sufficient evidence of the value of the goods destroyed. The respondents testified that they were of the value of \$1,000. No evidence was offered to the contrary. It appeared, however, that this value as to most of the items was the same as the cost price, paid from one to three years previously. The court, therefore, found a value 42 L.R.A. (N.S.)

of 30 per cent less than that testified to. The evidence as to value was not satisfactory, and the court's reduction was arbitrary; but in view of the fact that the appellant in its answer admitted that the goods at the time of their destruction were worth \$500, and that it offered no evidence as to value, we would not be warranted in disturbing the court's finding.

The judgment is affirmed.

Mount, Ch. J., and Main, Morris, and Fullerton, JJ., concur.

## FLORIDA SUPREME COURT.

JAMES F. SCOTT et al., Pliffs. in Err.,  
v.

CITY OF TAMPA.

(62 Fla. 295, 55 So. 983.)

### Municipal corporation — powers.

1. Municipalities can lawfully exercise only such rights, powers, and authority, and perform such duties, as are conferred upon them, expressly or impliedly, by valid provisions of law; and such rights, powers, authority, and duties are exercised or performed through officers, agents, or em-

Headnotes by WHITFIELD, Ch. J.

*Note.* — *Liability of municipality in tort for acts beyond the scope of its powers.*

Generally as to municipal liability for torts of police officers, see notes to *Gillmor v. Salt Lake City*, 12 L.R.A. (N.S.) 537, and *Sehy v. Salt Lake City*, post, 915.

It is not the purpose of this note to discuss the question what acts by officers, agents, or servants of a municipality or other public corporation are beyond the scope or *ultra vires* its powers, as that term is used herein, but the discussion is limited to the mere question of the liability of a municipality, conceding or assuming that the act complained of is *ultra vires*. Although sufficient of the facts are stated to illustrate the character of the act held or assumed to have been *ultra vires*, yet as the question what acts are *ultra vires* is not discussed, the cases referred to herein are not to be taken as exhaustive on the ultimate question of municipal liability for any particular act or omission, since other cases involving the same act or omission may have taken the view that it was not *ultra vires*, and therefore presented no question within the scope of this note. As indicated by references to other notes in connection with some of the cases cited herein, the ultimate question of municipal liability for some of the acts or omissions referred to has formed the subject of annotation in earlier volumes. And for other notes of similar character see Index to

ployees; the municipalities being corporate entities, existing only in contemplation of law.

**Same—liability for injuries.**

2. Municipalities are not liable in damages for injuries to property caused by the wrongful acts of the officers or agents of the municipalities, where such wrongful acts are not done in the exercise of any authority or duty conferred by law upon the municipalities.

**Same—unlawful acts.**

3. A municipal corporation is not liable for tortious acts committed by its officers and agents, unless the acts complained of were committed in the exercise of some corporate power conferred upon it by law, or in the performance of some duty imposed upon it by law. Such a corporation may be

liable in damages for injuries to others proximately resulting from the doing by its officers, in an unauthorized manner, of a lawful and authorized act, but not for doing an unlawful or prohibited act.

**Same—scope of authority.**

4. To create a liability against a municipality for the torts of its agents, the act done by the officers or agents of the municipality that causes injury to another must be within the scope of the corporate authority of the municipality as prescribed by its charter, or by positive enactment. If the act complained of is wholly outside of any and all the authority and duties of the municipality, it is not in any event liable.

**Same—unlawful eviction.**

5. Where, in an action for tort, it is alleged that the defendant municipality, "by

Notes, under the title "Municipal corporations; liability for damages."

By the great weight of authority a municipal corporation, county, town, or other public corporation, is not liable in tort for the wrongful acts of its officers, agents, or servants, where the act complained of is wholly beyond the scope of the powers of the corporation, and not merely as an individual instance in excess of its powers.

Fed.—*Kansas City v. Lemen*, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905 (ejection of circus).

Ala.—*Posey v. North Birmingham*, 154 Ala. 511, 15 L.R.A.(N.S.) 711, 45 So. 663 (operation of electric light plant).

Cal.—*Dunbar v. San Francisco*, 1 Cal. 355 (destruction of buildings for the purpose of arresting progress of conflagration); *Healdsburg Electric Light & P. Co. v. Healdsburg*, 5 Cal. App. 558, 90 Pac. 953 (cutting and uprooting parts of electric light plant).

Colo.—*Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6 (licensing the construction and operation of a steam railroad in a public street); *Idaho Springs v. Woodward*, 10 Colo. 104, 14 Pac. 49 (damage from water leaking from flume built in the highway with the consent of the town); *Idaho Springs v. Filteau*, 10 Colo. 105, 14 Pac. 48 (facts similar to preceding case).

Fla.—*Orlando v. Pragg*, 31 Fla. 111, 19 L.R.A. 196, 34 Am. St. Rep. 17, 12 So. 368 (doctrine stated).

Ga.—*Cooper v. Athens*, 53 Ga. 638 (injury to property while being transported by servants of municipality over a ferry constructed and operated by it); *Lloyd v. Columbus*, 90 Ga. 20, 15 S. E. 818 (cutting ditch or excavation outside of city limits; criticized and doubted in *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 486, on the theory that the act was in excess of powers rather than wholly outside thereof: *Roughton v. Atlanta*, 113 Ga. 948, 39 S. E. 316 (injury to a house by a servant of a municipality attempting to jack it up and make it level with a fill or grade made by the municipality in an adjoining street); *McDonald* 42 L.R.A.(N.S.)

*v. Butler*, 10 Ga. App. 845, 74 S. E. 573 (desecrating grave and disinterring corpse).

Idaho.—*Doyle v. Sandpoint*, 18 Idaho, 654, 32 L.R.A.(N.S.) 34, 112 Pac. 204. Ann. Cas. 1912 A, 210 (maliciously suing out or wrongfully keeping in court an injunction); (as to liability of municipality for wrongful legal proceedings instituted by its officers for its benefit, see note in 32 L.R.A.(N.S.) 34).

Ill.—*Chicago v. Turner*, 80 Ill. 419 (act of employees in trespassing upon private property and threatening and driving away the owner's customers and breaking up his business in order to prevent him from operating a slaughter house); *Tollefson v. Ottawa*, 228 Ill. 134, 11 L.R.A.(N.S.) 990, 81 N. E. 823 (negligence of officers or employees in operating a hospital for revenue); *Chicago v. Hannon*, 115 Ill. App. 183 (injury to person from unsafe condition of driveway on private property used by him under the direction of an employee of a city).

Ind.—*Browning v. Owen County*, 44 Ind. 11 (injury to landowner by construction of bridge by county); *Haag v. Vanderburgh County*, 60 Ind. 511, 28 Am. Rep. 654 (rule stated); *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618 (doctrine stated); *Shelby County v. Deprez*, 87 Ind. 509 (personal injuries received by a negligent failure of county to keep in repair a bridge it had no authority to construct); *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711 (rule stated).

Ky.—*Arnold v. Stanford*, 113 Ky. 852, 69 S. W. 726 (maintenance by city of pest-house within its limits).

La.—*Hoggard v. Monroe*, 51 La. Ann. 683, 44 L.R.A. 477, 25 So. 349 (personal injuries received from negligence of municipality in operation of ferry).

Me.—*Seele v. Deering*, 79 Me. 343, 1 Am. St. Rep. 314, 10 Atl. 45 (act of employees of a town in wrongfully opening and digging a ditch across a main road to drain on a lower landowner a cesspool of filthy and stagnant water); (as to liability of municipality for changing course of drainage, see notes in 5 L.R.A.(N.S.)

and through its mayor, chief of police, and by and through its servants, agents, and employees acting under the orders of its mayor and chief of police, entered in and upon" the plaintiff's premises and building used for offices and convention halls, and "forcibly, violently, and unlawfully ejected the plaintiffs . . . therefrom, and closed and locked said building," and prevented the plaintiffs from using the same, and in so ejecting the plaintiffs "destroyed, mutilated, injured, damaged, and demolished" the furniture and fixtures, and abstracted and carried away the books of account, minutes, pay rolls, contracts, and other valuable papers, the declaration is subject to demurrer, as the acts complained of are not within the authority of the municipality to do.

(June 23, 1911.)

831, and 30 L.R.A.(N.S.) 619); Brunswick Gaslight Co. v. Brunswick, 92 Me. 493, 43 Atl. 104 (act of town in constructing sewers); Atwood v. Biddeford, 99 Me. 78, 58 Atl. 417 (act of municipality in emptying sewer in a stream to the injury of lower landowners); (as to liability of municipality for pollution of waters by sewers, see note in 1 L.R.A.(N.S.) 124, also note in 25 L.R.A.(N.S.) 589).

Md.—Horn v. Baltimore, 30 Md. 218 (injury to adjoining landowner by grading of street).

Mass.—Lemon v. Newton, 134 Mass. 476 (act of town constructing drain and sewer to the injury of property upon which it empties); McCarthy v. Boston, 135 Mass. 197 (injury to person while cutting down tree on private property under orders of superintendent of public grounds); (as to liability of municipality to its employees while injured in performance of *ultra vires* act, see note in 2 L.R.A.(N.S.) 910); Cavanaugh v. Boston, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834 (injury resulting from the construction by a city of a dam upon private property); Tyler v. Revere, 183 Mass. 98, 66 N. E. 507 (injury to land by act of superintendent of streets in opening culvert on land of another).

Minn.—Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131 (rule stated).

Mo.—Rowland v. Gallatin, 75 Mo. 134, 42 Am. Rep. 395 (act of officer of city in trespassing upon private property and removing earth and other material therefrom for the purpose of improving the streets of the city); Stealey v. Kansas City, 179 Mo. 400, 78 S. W. 599 (personal injury received from defective walk maintained by city outside the city limits).

Neb.—Murray v. Omaha, 66 Neb. 279, 103 Am. St. Rep. 702, 92 N. W. 299 (wrongful tearing down of private buildings under orders of board of inspectors of buildings).

N. H.—Wakefield v. Newport, 60 N. H. 374 (negligence of officers of town in taking down flagstaff in a manner causing it to fall upon and injure a pedestrian); Connor v. Manchester, 73 N. H. 233, 60 Atl. 436 (rule stated).  
42 L.R.A.(N.S.)

**E**RROR to the Circuit Court for Hillsboro County to review a judgment sustaining a demurrer to the complaint in an action brought to recover damages for the alleged wrongful destruction by defendant of plaintiff's property. Affirmed.

Statement by Whitfield, Ch. J.:

The declaration is as follows: "James F. Scott, Y. Suarez, and C. Marti, by their attorneys, Dickenson & Dickenson, bring this suit for the use and benefit of Central Trades & Labor Assembly, hereinafter mentioned, against the city of Tampa, a municipal corporation under the laws of the state of Florida, located in Hillsboro county, which has been summoned to answer the plaintiffs in a civil action, for that, where-

N. J.—Wheeler v. Essex Public Road Board, 30 N. J. L. 291 (act of public road board in constructing dam to the injury of a lower riparian owner injured by the subsequent giving away of the dam because of defective workmanship).

N. Y.—Albany v. Cunliff, 2 N. Y. 165 (injury to third person from defects in construction of a bridge by a city); Smith v. Rochester, 76 N. Y. 506 (injury to pedestrian by being run over by fire wagon owned and used by city when being driven in a parade under orders of officers of the city; see note 34 L.R.A.(N.S.) 464, for liability of municipality for injuries by exhibition conducted by its officers or employees); Stoddard v. Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030 (construction of sewer by village); O'Donnell v. Syracuse, 184 N. Y. 1, 3 L.R.A.(N.S.) 1053, 112 Am. St. Rep. 558, 76 N. E. 738, 6 Ann. Cas. 173 (act of city in polluting stream to the injury of lower riparian owner); Tilford v. New York, 1 App. Div. 199, 37 N. Y. Supp. 185 (entering upon private property and quarantining the owner thereof and his family in the house located thereon); Brennan v. Albany, 67 Misc. 42, 121 N. Y. Supp. 895 (use of land for a dump ground, filling it in, and causing water therefrom to flow upon an adjoining landowner, to his injury); (as to liability for injuries resulting from use of dumping ground, see note in 6 L.R.A.(N.S.) 1013); Dilluvio v. New York, 73 Misc. 122, 132 N. Y. Supp. 531; Hanvey v. Rochester, 35 Barb. 177 (act of city officers in trespassing upon private property and removing personal property therefrom).

Okla.—Marth v. Kingfisher, 22 Okla. 602, 18 L.R.A.(N.S.) 1238, 98 Pac. 436 (injury to pedestrian from horses racing in public street as part of a celebration by the municipality); (generally as to liability of municipality for injuries resulting from an exhibition conducted by its officers or employees, see note in 34 L.R.A.(N.S.) 464).

N. C.—Love v. Raleigh, 116 N. C. 296, 28 L.R.A. 102, 21 S. E. 503 (injury to child in street from falling skyrocket sent up in

as, at the time of the committing of the several acts and grievances hereinafter mentioned, the plaintiffs were, and ever since have been, and still are, the trustees of Central Trades & Labor Assembly, an unincorporated voluntary society for mutual benefit and protection, composed of representatives from the various labor unions and organizations of the said city of Tampa and its vicinity, and as such trustees, at the time of the committing of the said several acts and grievances hereinafter mentioned, the plaintiffs were, and ever since have been, and still are, the holders of the title to the following described real estate, situate, lying, and being within the corporate limits of said city of Tampa, and in said county of Hillsboro and state of Florida, to wit:

celebration of municipality); (as to liability of municipality for failure to prevent use of fireworks in street, see note in 23 L.R.A.(N.S.) 643, display of fireworks in street as nuisance, see note in 16 L.R.A.(N.S.) 621); Barger v. Hickory, 130 N. C. 550, 41 S. E. 708 (construction by municipality of sewer).

Pa.—Betham v. Philadelphia, 196 Pa. 302, 46 Atl. 448 (negligence of city in maintaining dyke and sluiceway).

R. I.—Briggs v. Allen, 24 R. I. 80, 52 Atl. 679 (act of surveyor of highways of town in trespassing upon and using property adjoining the highway).

Tex.—Galveston v. Brown, 28 Tex. Civ. App. 274, 67 S. W. 156 (act of officers of municipality in seizing and using team of horses to cart away the injured and dead at the time of the Galveston flood); Blankenship v. Sherman, 33 Tex. Civ. App. 507, 76 S. W. 805 (injury by hose cart while taking part in parade under orders of city council, see note in 34 L.R.A.(N.S.) 464).

Utah.—Royce v. Salt Lake City, 15 Utah, 401, 49 Pac. 290 (injury to prisoner while being compelled to work).

Va.—Donable v. Harrisonburg (Switzer v. Harrisonburg) 104 Va. 533, 2 L.R.A.(N.S.) 910, 113 Am. St. Rep. 1056, 52 S. E. 174, 7 Ann. Cas. 519 (personal injuries received by employee in operation by municipality of stone quarry outside of city limits); (see note in 38 L.R.A.(N.S.) 281, as to liability of municipality for tort in connection with quarry worked by it).

The doctrine applies to the failure of a municipality to perform an act or duty it has undertaken and which is wholly beyond the scope of its powers as defined by statute or charter, as well as to acts of misfeasance. Montezuma v. Law, 1 Ga. App. 579, 57 S. E. 1025 (holding that a municipality cannot be held liable in tort for injuries resulting from its failure to perform an act [repairing a bridge outside the city limits] the performance of which is entirely outside the scope of its powers); Shelby County v. Deprez, 87 Ind. 509 (holding that a county cannot be held liable for personal injuries caused by its negligent 42 L.R.A.(N.S.)

The east half of lot seven (7) and the west half of lot eight (8) of block fifty-five (55) of Ybor City, according to a map or plat thereof recorded in the office of the clerk of the circuit court of Hillsboro county, Florida, in plat book number one (1) on page eleven (11), and as such trustees were at the several dates and times aforesaid and still are entitled to the possession, and were, at the time of committing of the said several acts and grievances hereinafter mentioned, in the rightful possession and control of said real estate for said uses and purposes, on which said real estate was located a certain two-story frame building, the property of said plaintiffs as trustees aforesaid, which said building was used by the said Central Trades & Labor Assembly

failure to keep in repair a bridge it had no power to construct); Stealey v. Kansas City, 179 Mo. 400, 78 S. W. 599 (holding that a city cannot be held liable in tort for injuries received from a defective walk outside the city limits, the maintenance of which was beyond its powers).

Where a city has no power to enter upon private property and appropriate it to public use, acts of its officers in connecting its waterworks system with a private artesian well, and using the water therefrom do not bind the city, and the owner of the well cannot waive the tort and sue the city upon an implied contract for the value of the use and possession of the premises. Wilson v. Mitchell, 17 S. D. 515, 65 L.R.A. 158, 106 Am. St. Rep. 784, 97 N. W. 741.

The Iowa decisions indicate a doctrine in that state contrary to the general rule stated. It has there been held that although a city is without power to permit the use of its streets by a steam road, nevertheless it is liable for injuries received by an individual from such use. Stanley v. Davenport, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 708.

And Shinnick v. Marshalltown, 137 Iowa, 72, 114 N. W. 542, holds that a municipality cannot escape liability for personal injuries received from an obstruction of a public street upon the plea that the act causing the obstruction was *ultra vires*. And Fitzgerald v. Sharon, 143 Iowa, 730, 121 N. W. 523, holds a municipality liable in tort for injuries to the owner of land, sustained by creating a nuisance thereon by emptying sewerage, although the act complained of constituted a trespass and is *ultra vires* the powers of the municipality. And the general doctrine is asserted that a municipality cannot escape liability for its tort on a plea of *ultra vires*. The cases of Stanley v. Davenport and Shinnick v. Marshalltown were disposed of on the theory that a municipality may be held liable for an *ultra vires* act in obstructing a public street because of nonfeasance; that is, for the failure of the city to keep in safe condition a public street; and hence these decisions are not inconsistent with

and by the plaintiffs for their offices for the conduct of their business as a mutual benefit and protective society and organization, and which said building was divided and partitioned into various halls and offices and assembly rooms wherein said Central Trades & Labor Assembly held its meetings and conventions, offices in and parts of which said building were at said times and dates aforesaid leased and let and rented under contracts of lease and rental by the said plaintiff trustees to various fraternal and benevolent societies and organizations and

to various labor unions to the number of twelve or more at and for certain hire and reward by the week and month, from which said source the plaintiffs derived income and funds for the use and benefit of said Central Trades & Labor Assembly in their work and purpose of its organization as a benevolent and protective association; to wit, an income of not less than \$75 per month; that said building was furnished with expensive furniture and fixtures of great value, the property of said Central Trades & Labor Assembly, and in said offices were kept by

the general doctrine stated. This is not true, however, as to *Fitzgerald v. Sharon*; in that case the *ultra vires* act resulted in the creation of a nuisance, but not on a public street. The case itself, however, cites as authority *Lewis v. Schultz*, 98 Iowa, 341, 67 N. W. 266, which is merely authority for the proposition that the master may be liable for the torts of a servant, performed within the scope of employment, although in violation of the instruction of the master; and *Shinnick v. Marshalltown*, which has already been referred to, and which is also clearly distinguishable. On the other hand, in *Field v. Des Moines*, 39 Iowa, 575, 28 Am. Rep. 46, it is held that, in the absence of statute, a municipality is not liable for the destruction of a building destroyed to arrest the progress of a fire, where the destruction was unnecessary, although it was destroyed by virtue of the authority of an ordinance authorizing municipal officers to destroy buildings when, in their judgment, necessary to prevent the spread of fire, the ordinance, however, being invalid because beyond the scope of the powers of the corporation.

There are some exceptions to the general doctrine referred to. One of them has already been referred to in connection with the Iowa cases; that is, that a municipality cannot escape liability for injuries received from an obstruction of a public street on the plea that in making the obstruction, or consenting thereto, it acted beyond the scope of its powers. *Stanley v. Davenport* and *Shinnick v. Marshalltown*, supra; *Cohen v. New York*, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700 (holding that although a city is without power to authorize the storing of a wagon in one of its streets, yet where it permits such obstruction, which constitutes a nuisance in the street, the city is liable in tort to a person injured by reason thereof while he is properly using the highway).

In *Sings v. Joliet*, 237 Ill. 300, 22 L.R.A. (N.S.) 1128, 127 Am. St. Rep. 323, 86 N. E. 663, it is denied that a city may escape liability for the destruction of an alleged nuisance in an attempt to abate it, on the ground that if it is not in fact a nuisance, the act complained of was *ultra vires*. This case, however, may also be reconciled with the general doctrine, al-

though it is apparently assumed therein that an attempt to abate a nuisance which is not in fact a nuisance is an *ultra vires* act. While, as already stated, it is not the purpose of this note to discuss the question of what acts are *ultra vires*, yet this case may be reconciled with the general doctrine on the theory that it is within the general powers of a municipality to abate a nuisance within its limits, and its misjudgment in that regard, or an act in excess of its authority, would not be an *ultra vires* act within the meaning of the doctrine stated.

Under the maritime law, where the relation of master and servant exists between a municipality and a tort-feasor, as where the owner of a vessel wrongfully and negligently colliding with another vessel is a municipality, it is liable in a court of admiralty for the injury, under the rule of *respondere superior*, although at the time of the collision the vessel was being operated under authority of the municipality in reference to a matter *ultra vires* its powers. The *Major Reybold*, 111 Fed. 414.

It has been held that a municipal corporation is *prima facie* liable for a trespass on private property and the destruction of buildings thereon, and it bears the burden of proving that the acts of its officers and agents in that regard are wholly beyond the scope of their employment. *Fauchoux v. St. Martinville*, 120 La. 764, 45 So. 600.

To recover in tort from a municipality for injuries received from negligence in failing to keep weighing scales and approaches thereto in safe condition, it must be alleged that the maintaining of such scales by the municipality was within the scope of its powers. *Mitchell v. Clinton*, 99 Mo. 153, 12 S. W. 793.

It has, however, been held that where the declaration does not show upon its face that the acts complained of were wholly outside the corporate powers of the municipality, or that, from their nature, they were impossible of commission by the corporation in the exercise of the powers conferred upon it, or in the performance of any duty imposed upon it, it is not subject to demurrer on the ground that the action was based upon *ultra vires* acts. *Orlando v. Pragg*, 31 Fla. 111, 19 L.R.A. 196, 34 Am. St. Rep. 17, 12 So. 368. A. G. S.



the plaintiffs all the records, minutes, pay rolls, leases, and contracts, insurance policies, charters, and instruments of every kind and character belonging to and pertaining to the business of said Central Trades & Labor Assembly, and that said plaintiffs were, at the several dates and times hereinafter mentioned, and ever since have been, and still are, the rightful custodians thereof, and as such trustees aforesaid had and held said real estate, said building with its furniture and fixtures, and said records, minutes, pay rolls, leases, and contracts, insurance policies, and charters and instruments and valuable papers of every kind, for the use and benefit of said Central Trades & Labor Assembly, and were responsible to said Central Trades & Labor Assembly for the safe-keeping thereof; and that on the 17th day of October, A. D. 1910, the said defendant, by and through its mayor, chief of police, and by and through its servants, agents, and employees acting under the orders of its said mayor and chief of police, entered in and upon the said premises and building of the plaintiffs aforesaid, and forcibly, violently, and unlawfully ejected the plaintiffs, the said Central Trades & Labor Assembly and their said tenants of the plaintiffs therefrom, and closed and locked said building, and stationed police officers and guards about said premises to prevent, and who did so prevent, the plaintiffs and their said tenants from the use of said premises and from access to their said records, for a long space of time, to wit, for two weeks and upwards; and in so ejecting the plaintiffs, the said Central Trades & Labor Assembly, and their said tenants from said premises and building, destroyed, mutilated, injured, damaged, and demolished the said furniture and fixtures of the plaintiffs, and injured and damaged said building of the plaintiffs to the extent of \$500 which the plaintiffs allege as special damages to them accruing; and then and there abstracted and took and carried away the books of account, minutes, pay rolls, leases, and contracts, policies, charters, and valuable papers, instruments, and records and lists of members of the plaintiffs and of the said Central Trades & Labor Assembly and their said tenants, which said papers and records cannot now be duplicated or proven, and failed and refused and still fail and refuse to return the same to the plaintiffs, and thereby threw the business of the plaintiffs and of said Central Trades & Labor Assembly and their said tenants into utter confusion, and thereby deprived the plaintiffs of divers rents and profits from their said tenants as aforesaid, and thereby deprived the plaintiffs of large

sums and amounts which the plaintiffs derived from dues from its said membership, and great loss in membership on account of being unable to hold meetings and conventions in their said premises, and on account of being unable to meet its weekly pay rolls, on account of the loss of their said records and papers and lists of members, and deprived the plaintiffs of the use of their said offices and of a place to meet and transact their said business as a mutual benefit and protective association; whereby the plaintiffs, suing as aforesaid for the use and benefit of said Central Trades & Labor Assembly, say that they have been injured and sustained damages, and wherefore they bring this suit and seek judgment and claim damages against the said defendant in the sum of twenty thousand dollars (\$20,000)."

A demurrer to the declaration was sustained, the cause was dismissed, and the plaintiffs appealed.

Messrs. Dickenson & Dickenson, for plaintiffs in error:

Defendant was liable for the acts of its officers and agents.

Dill. Mun. Corp. 3d ed. p. 968; Orlando v. Pragg, 19 L.R.A. 196, and notes, 31 Fla. 111, 34 Am. St. Rep. 17, 12 So. 368; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; License Cases, 5 How. 504, 12 L. ed. 256; Allison v. Richmond, 51 Mo. App. 133; Waggoner v. South Gorin, 88 Mo. App. 25; Eckhardt v. Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204; Ely v. Niagara County, 36 N. Y. 297; Welch v. Stowell, 2 Dougl. (Mich.) 332; Fauchaux v. St. Martinville, 120 La. 764, 45 So. 600.

Mr. G. E. Mabry, for defendant in error:

Defendant is not liable for malfeasance or negligence of its officers or employees.

Ford v. School Dist. 121 Pa. 543, 1 L.R.A. 607, 15 Atl. 812; Hines v. Charlotte, 1 L.R.A. 845, note; Mitchell v. Rockland, 52 Me. 118; Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Woodcock v. Calais, 66 Me. 234; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Gordon v. Taunton, 126 Mass. 349; Symonds v. Clay County, 71 Ill. 357; Greenwood v. Louisville, 13 Bush, 229, 26 Am. Rep. 263; Richmond v. Long, 17 Gratt. 382, 94 Am. Dec. 461; Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Lorillard v. Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Lyman v. Edgerton, 29 Vt. 305, 70 Am. Dec. 415; Snow v. Brunswick, 71 Me. 582; Dunbar v. Boston, 112 Mass. 75; New Bedford v. Taunton, 9 Allen, 209; Wild v. Paterson, 47 N. J. L. 406, 1 Atl. 400; Livermore v. Camden County, 31 N. J. L. 508; Pray v. Jersey City, 32 N. J. L. 394;

Cooley v. Essex, 27 N. J. L. 415; Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Condict v. Jersey City, 46 N. J. L. 157; Martin v. Brooklyn, 1 Hill, 545; Delmonico v. New York, 1 Sandf. 222; New York v. Furze, 3 Hill, 612; Maxmilian v. New York, 62 N. Y. 164, 20 Am. Rep. 468; New York & B. Saw Mill & Lumber Co. v. Brooklyn, 8 Hun, 40; Stillwell v. New York, 17 Jones & S. 365; Ham v. New York, 5 Jones & S. 468; Rossire v. Boston, 4 Allen, 58; Buttrick v. Lowell, 1 Allen, 173, 79 Am. Dec. 721; Walcott v. Swampscott, 1 Allen, 101; Carrington v. St. Louis, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240; Elliott v. Philadelphia, 75 Pa. 347, 15 Am. Rep. 591; Armstrong v. Brunswick, 79 Mo. 319; Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Murtaugh v. St. Louis, 44 Mo. 479; Dill. Mun. Corp. 3d ed. 975; Vorrath v. Hoboken, 49 N. J. L. 285, 8 Atl. 125; Boyd v. Insurance Patrol, 113 Pa. 269, 6 Atl. 536; Burrill v. Augusta, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196; Hafford v. New Bedford, 16 Gray, 297; Shearm. & Redf. Neg. 139; 2 Dill. Mun. Corp. 878; Gillmor v. Salt Lake City, 32 Utah, 180, 12 L.R.A.(N.S.) 537, 89 Pac. 714, 13 Ann. Cas. 1016; Chicago v. Williams, 182 Ill. 135, 55 N. E. 123; Kansas City v. Lemen, 6 C. C. A. 627, 12 U. S. App. 640, 57 Fed. 905.

**Whitfield, Ch. J.**, delivered the opinion of the court:

Municipalities can lawfully exercise only such rights, powers, and authority, and perform such duties, as are conferred upon them, expressly or impliedly, by valid provisions of law; and such rights, powers, authority, and duties are exercised or performed through officers, agents, or employees; the municipalities being corporate entities existing only in contemplation of law.

In the absence of organic or statutory provisions regulating the subject, the liability of a municipal corporation in damages for injuries to others caused by the negligence or other torts of its officers, agents, and employees, while acting within the scope of their authority for the municipality, depends upon the nature of the authority being exercised or of the duty being performed or omitted by the officers, agents, or employees. Where the authority being exercised is essentially governmental in its nature, the municipality is in general not liable for the torts of its agents committed in exercising such authority.

Where a tort is committed by the officers

or agents of a municipality in the exercise of authority, or in the performance of a duty, that is not conferred or imposed upon the municipality by law, the municipality is not liable, for, if a municipality has no lawful authority, its officers cannot assume it, so as to bind the municipality.

Municipalities are not liable in damages for injuries to property caused by the wrongful acts of the officers or agents of the municipalities, where such wrongful acts are not done in the exercise of any authority or duty conferred by law upon the municipalities.

The liability of municipalities for the torts of their agents is predicated upon the theory that the municipalities, through their agents, wrongfully perform or omit to exercise some authority or duty (not essentially governmental in its nature and involving primary discretion) that is imposed by law upon the municipalities; and, if a tort that caused an injury was committed in doing something the municipality had no authority to do, the tort may be that of the persons committing it, but not of the municipality, and the doctrine of *respondet superior* does not apply to render the municipality liable in damages for such tort. A municipal corporation is not liable for tortious acts committed by its officers and agents, unless the acts complained of were committed in the exercise of some corporate power conferred upon it by law, or in the performance of some duty imposed upon it by law. Such a corporation may be liable in damages for injuries to others proximately resulting from the doing by its officers, in an unauthorized manner, of a lawful and authorized act, but not for doing an unlawful or prohibited act. To create a liability against a municipality for the torts of its agents, the act done by the officers or agents of the municipality that causes injury to another must be within the scope of the corporate authority of the municipality as prescribed by its charter, or by positive enactment. If the act complained of is wholly outside of any and all the authority and duties of the municipality, it is not in any event liable. *Orlando v. Pragg*, 31 Fla. 111, 19 L.R.A. 196, 34 Am. St. Rep. 17, 12 So. 368.

The declaration alleges that "the said defendant, by and through its mayor, chief of police, and by and through its servants, agents, and employees, acting under the orders of its said mayor and chief of police, entered in and upon the said premises and building of the plaintiffs aforesaid, and forcibly, violently, and unlawfully ejected the plaintiffs . . . therefrom, and closed and locked said building, and stationed po-

lice officers and guards about said premises to prevent, and who did so prevent, the plaintiffs and their said tenants from the use of said premises, and from access to their said records, for a long space of time . . . and in so ejecting the plaintiffs, . . . and their tenants from said premises and building, destroyed, mutilated, injured, damaged, and demolished the said furniture and fixtures of the plaintiffs, and injured and damaged said building . . . and then and there abstracted and took and carried away the books of account, minutes, pay rolls, leases, contracts, policies, charters, and valuable papers, instruments, and records," etc. These allegations taken with the orders, clearly indicate that the acts complained of were such acts as are not within the authority or duty of the municipality to lawfully do, to command, or to permit. There is no allegation that the acts complained of were done in abating a supposed nuisance. No color of authority is alleged or appears for ejecting the plaintiffs from their property, or for appropriating or destroying the property as alleged by the municipality, through its officers, agents, and employees, under the circumstances alleged in the declaration, or under any circumstances. It is expressly alleged that the ejection was "forcibly, violently, and unlawfully" done; but there was no lawful authority to eject the plaintiffs peaceably and without violence, and consequently the city is not liable for the tort complained of.

In the case of *Orlando v. Pragg*, supra, the property taken being wild animals, reptiles, etc., was of such a nature that it could have been a nuisance, and the city could have at its peril acted for itself, or under the direction of the board of health, in abating a nuisance; and, where the act of abating the nuisance is a corporate, rather than a governmental, function, the city would be liable for torts committed in exercising its independent authority, or in performing the duty imposed upon it by the board of health. For these reasons the declaration in that case was not subject to the demurrer. Here the property taken cannot be regarded as a nuisance; and, if the place was the scene of a breach of the peace, the city had no authority to take or to destroy or appropriate the property to preserve the peace, even if keeping the peace were not a primary governmental function. for the tortious performance of which by its officers the municipality is not liable in damages. The acts of the officers complained of in this case were not authorized to be done by the municipality, and as the authority could not be assumed, so as to bind the 42 L.R.A.(N.S.)

municipality, it is consequently not liable in damages for the tort alleged.

The judgment is affirmed.

Hocker, J., absent, concurred in the opinion as prepared.

## UTAH SUPREME COURT.

ANNA SEHY, Resp't.,

v.

SALT LAKE CITY, Appt.

(— Utah, —, 126 Pac. 691.)

### **Municipal corporation — damming back water in stream — liability for injury to property.**

A municipal corporation is not liable for injury caused by the backing of the water of a stream flowing through its limits onto the property of an upper proprietor, by a wire netting stretched across the stream by police officers to rescue the body of a person drowned in the stream, and negligently permitted to remain there until it formed a dam of floating material which backed the water and caused the injury, since the act was done in the performance of a governmental duty.

(July 22, 1912.)

**A**PPEAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to recover damages for injuries to her property through the overflow of a stream, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. H. J. Dininny and Aaron Myers, for appellant:

Defendant is not liable for the injury to plaintiff's property.

### **Note.—Municipal liability for torts of police officers.**

This note is supplemental to a note on the same subject in 12 L.R.A.(N.S.) 537.

As shown in the note referred to, and as borne out by the later cases on the subject, the law is well settled, so far as relates to the appointment and maintenance of its police officers, that a city exercises a public and governmental function, and hence is not responsible for their unlawful or negligent acts in the discharge of their duties. *Wilcox v. Rochester*, 190 N. Y. 137, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 Ann. Cas. 759; *Gietjens v. New York*, 132 App. Div. 394, 116 N. Y. Supp. 759; *Lawton v. Harkins*, — Okla. —, ante, 69, 126 Pac. 727; *Hall v. Dunn*, 52 Or. 475, 25 L.R.A.(N.S.) 193, 97 Pac. 811. Thus, a city is not liable for unlawful arrests

Gillmor v. Salt Lake City, 32 Utah, 180, 12 L.R.A.(N.S.) 537, 89 Pac. 714, 13 Ann. Cas. 1016; O'Donnell v. Syracuse, 184 N. Y. 1, 3 L.R.A.(N.S.) 1053, 112 Am. St. Rep. 558, 76 N. E. 738, 6 Ann. Cas. 173; Coonley v. Albany, 132 N. Y. 145, 30 N. E. 382; A. L. Lakey Co. v. Kalamazoo, 138 Mich. 644, 67 L.R.A. 931, 110 Am. St. Rep. 338, 101 N. W. 841.

Messrs. W. R. Hutchinson and A. R. Barnes, for respondent:

The city is liable for the damage caused by the overflow of the water.

Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Haynes v. Burlington, 38 Vt. 350; Spelman v. Portage, 41 Wis. 144; McClure v. Red Wing, 28 Minn. 186, 9 N. W. 767; Perry v. Worcester, 6 Gray, 544, 66 Am. Dec. 431; Lawrence v. Fairhaven, 5 Gray, 110; Schumacher v. New York, 166 N. Y. 103, 59 N. E. 773.

Straup, J., delivered the opinion of the court:

In the complaint it is alleged that the city negligently obstructed the flow of the waters of Jordan river, and suffered and permitted it to be obstructed, and caused the waters to back up and overflow plaintiff's premises, to her damage. It is alleged the obstruction consisted "of wire and timbers and other material extending across said stream at or near" a bridge across the river. The case was tried to the court and a jury, and resulted in a judgment for

the plaintiff, from which the defendant appeals.

It is not necessary to consider the numerous assignments of error, for we think the defendant's motion to direct a verdict ought to have been granted. The river at the place in question courses through the corporate limits of the city. Near the place of the alleged obstruction the city had constructed and maintained a bridge across the river. Near the bridge and south of it a dam and head gates in the stream were maintained and used by an irrigation company to divert water. The dam was made of piling driven in the river, and was entirely separate from the bridge.

Of course, the city cannot be held liable for the injury unless it resulted from a negligent discharge of some duty within the scope of its corporate powers and ministerial in its nature, or unless it itself, or its agents or officers acting within the scope and in pursuance of its corporate powers and benefits, and not merely within its governmental powers or functions, negligently or wrongfully obstructed the flow and caused the injury. It is not alleged, nor is it claimed, that any duty was imposed on the city to keep the stream in a safe condition and free from obstruction.

And no such duty was imposed on the city. O'Donnell v. Syracuse, 184 N. Y. 1, 3 L.R.A.(N.S.) 1053, 112 Am. St. Rep. 558, 76 N. E. 738, 6 Ann. Cas. 173; A. L. Lakey

made by a police officer in the attempted enforcement of a municipal ordinance or regulation which is invalid (Lawton v. Harkins, supra; Hershberg v. Barbourville, 142 Ky. 60, 34 L.R.A.(N.S.) 141, 133 S. W. 985, Ann. Cas. 1912D, 189. And see note in 34 L.R.A.(N.S.) 141, as to liability of municipality for attempting to enforce a void ordinance); nor is it liable for the action of its officers in arresting a person in the enforcement of an ordinance, where the arrest is unlawful because of interference with interstate commerce (Clark v. Atlantic City, 180 Fed. 598); nor is an incorporated town liable for the acts of its mayor and marshal in unlawfully imprisoning a person in the enforcement of a void ordinance (Franks v. Holly Grove, 93 Ark. 250, 137 Am. St. Rep. 86, 124 S. W. 514); nor for the acts of its officers in prosecuting and authorizing further prosecutions of a person for violation of an ordinance relative to the procurement of a license in order to engage in certain kinds of business, although as a result of the acts complained of the plaintiff's business is destroyed (Butler v. Moberly, 131 Mo. App. 172, 110 S. W. 682); nor is a city liable for the acts of a police officer in arresting and confining a person in a guard-house in company with other prisoners who injured him (Morgan v. Shelbyville, 42 L.R.A.(N.S.)

— Ky. —, 121 S. W. 617. See also note in 25 L.R.A.(N.S.) 180, on the liability of a municipality for negligence, or other tort, of keeper or inmate of municipal prison).

Nor is a city liable for the wrongful closing of a theater through its mayor and chief of police (Clarke v. Chicago, 159 Ill. App. 20); or for the act of its police officers in trespassing upon one's premises and assaulting and robbing him (Hathaway v. Everett, 205 Mass. 246, 137 Am. St. Rep. 436, 91 N. E. 296); nor for the act of its mayor and chief of police in entering in and upon the premises and building of the plaintiff, and unlawfully and violently ejecting him therefrom, and destroying his property (Scott v. Tampa, ante, 908). The last case, however, was disposed of upon the ground that the acts in question were *ultra vires*.

But where the act of a police officer in stretching a rope across the street creates a nuisance in the street, and the city has notice thereof and fails to remove it, it is liable to a traveler injured thereby, the liability, however, resting upon the general principle that a municipality owes a duty to users of public streets to keep them in a safe condition for travel. Shinnick v. Marshalltown, 137 Iowa, 72, 114 N. W. 542.

A. G. S.

Co. v. Kalamazoo, 138 Mich. 644, 67 L.R.A. 931, 110 Am. St. Rep. 338, 101 N. W. 841.

What is alleged and claimed is that the city negligently extended a chicken wire or netting across the stream near the bridge, and suffered and permitted it there to remain, and by such means obstructed the flow and caused the overflow. The evidence shows that a year or two prior to the alleged injury police officers of the city, and others, at the place in question, stretched a wire across the stream in an attempt to recover the body of a boy drowned in the stream. The wire was fastened to rocks, and sunk to the bottom of the stream south of the dam. The top of the wire, by baling wire, was fastened to the piling of the dam. The wire was not fastened to the bridge. Some of the wire had been removed before the injury. A portion of it, crushed and battered down, remained in the stream at the time of the injury. There is evidence to show that it caused some obstruction to the flow by the collection of rubbish and material and caused the overflow. But it is very clear that the wire was stretched across the stream by the officers and others, not in the discharge of any corporate powers or functions of the municipality, or on account of any municipal benefits of the city, but in the discharge and in pursuance of mere governmental duties and for public good, and that the city cannot be held liable for a negligent or wrongful discharge of such acts. Gillmor v. Salt Lake City, 32 Utah, 180, 12 L.R.A. (N.S.) 537, 89 Pac. 714, 13 Ann. Cas. 1016.

There is therefore no evidence to show that it negligently caused the obstruction. And, as there was no duty imposed on it to keep the stream free from obstructions, it cannot be held liable on the theory of a negligent discharge of such a duty.

The judgment of the court below is reversed, and the case remanded for a new trial; costs to appellant.

Frick, Ch. J., and McCarty, J., concur.

Petition for rehearing denied September 28, 1912.

#### WASHINGTON SUPREME COURT.

(Department No. 2.)

KATIE WALTERS et al., Respts.,  
v.

SPOKANE INTERNATIONAL RAILWAY  
COMPANY, Appt.

(58 Wash. 203, 108 Pac. 593.)

Evidence — *res gestæ* — subsequent statements.

1. Statements by the conductor in charge  
42 L.R.A. (N.S.)

of a train the engine of which was derailed to the injury of the engineer and head brakeman, at a time when he had the responsibility of caring for the injured men, to the first stranger to reach the scene of the disaster, as to the cause of the accident, may, in the discretion of the trial judge, be admitted as *res gestæ*, in an action against the railroad company to recover damages for the death of the brakeman, although they were not made until two hours after the accident, and until after he had gone to a farmhouse some distance away to summon assistance and returned to the train.

#### Appeal — rejection of evidence — error.

2. Rejection of a particular offer of evidence is not reversible error if the party has been accorded every reasonable opportunity for showing facts which would be likely to aid the jury to reach a correct conclusion upon the issue involved.

#### Damages — death — excessiveness.

3. Twenty thousand dollars is excessive to award as damages for the death of a man forty-four years old with a life expectancy of twenty-five years, who was earning from \$100 to \$120 per month as a brakeman at the time of his death, and had served as stage driver, bridge carpenter, miner, stationary engineer, locomotive fireman, and brakeman.

(Rudkin, Ch. J., dissents from proposition 1.)

(May 6, 1910.)

**A**PPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiffs' favor in an action brought to recover damages for the alleged

*Note. — Statements made some time after accident as res gestæ.*

#### I. Declarations by party causing the accident.

- a. Narrative, 918.
- b. Time and place, 921.
- c. Heartless, vulgar, profane, or abusive, 926.
- d. Apologetic, 928.
- e. Where the injured party was seen, 930.
- f. Failure to see injured party, 931.
- g. Failure to whistle, 931.
- h. Admitting negligence or fault, 932.
- i. Showing negligence, 933.
- j. Defective appliances, 934.
- k. Exonerating self, 937.
- l. Opinions, 938.
- m. Statements before transaction had fully terminated, 939.
- n. Principal and agent, 943.

#### II. Statements of bystanders. 948.

#### III. Statements made by injured party.

- a. Admissions as *res gestæ*, 952.
- b. Explaining accident, 953.
- c. Effect of unconsciousness, 967.

negligent killing of their intestate. Affirmed on condition of remission of damages.

The facts are stated in the opinion.

Messrs. Allen & Allen and Graves, Kizer, & Graves, for appellant:

The statements claimed to have been made by the conductor as to the cause of the wreck, after it occurred, were erroneously admitted as *res gestæ*.

3 Wigmore, Ev. §§ 1749, 1750; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *Merkle v. Bennington Twp.* 58 Mich. 150, 55 Am. Rep. 666, 24 N. W. 776.

Messrs. Charles P. Lund and Hamblen & Gilbert, for respondents:

The statement of the conductor was admissible as *res gestæ*.

*Roberts v. Port Blakely Mill Co.* 30 Wash. 32, 70 Pac. 111; *Jones, Ev.* § 360; *Mechem, Agency*, § 715; *McKelvey, Ev.* p. 280; 1 *Taylor, Ev.* p. 519; *Keyser v. Chicago & G. T. R. Co.* 60 Mich. 390, 33 N. W. 867; *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085; *O'Connor v. Chicago, M. & St. P. R. Co.* 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481; *Ohio & M. R. Co. v. Stein*, 133 Ind. 255, 19 L.R.A. 733, 31 N. E. 180, 32 N. E. 831; *New York & C. Min. Syndicate & Co. v. Rogers*, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. 719, 17 *Mor. Min. Rep.* 123; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 40; *Hall v. Union Cent. L. Ins. Co.* 23 Wash. 610, 51 L.R.A. 288, 83 Am. St. Rep. 844, 63 Pac. 505; *Lambert v. La Conner Trading & Transp. Co.*

### I. Declarations by party causing the accident.

#### a. Narrative.

Without deciding squarely that the alleged statements are not close enough in time, or are not related to the operation of the instrument that caused the injury, some courts avoid the responsibility by saying that this was narrative. All verbal *res gestæ* after accident are narrative unless explosive or apologetic. The question is whether the narrative is true or not, and to become evidence it must relate to the accident, or the mechanism or factor that produced it, and be so close in point of time as to be spontaneous, and not concocted.

Of course, after the lapse of a reasonable time a narrative loses its virtue, and is relegated to the realm of hearsay. It depends on the circumstances, as well as the expression used. But a case that discards the evidence as narrative, without considering the proximity of time or the probability of the truth of the matter, is not of much value, except as it illustrates that the declarations in that case were not simultaneous with the accident.

A declaration of an engineer as to the speed at which the train was running when the train was derailed, made between ten and thirty minutes after the accident occurred, was held inadmissible in *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118. The court said: "Although the speed of the train was, in some degree, subject to his control, still his authority in that respect did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train at the moment the plaintiff was injured was being run at the rate of 18 miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries

in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*." Three justices dissented. The case of *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437, was not cited. In the dissenting opinion, it is also said that the railroad would be liable in any event, and therefore the declarations were immaterial. Field, J., said: "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in presence of the injured parties, and whilst surrounded by excited passengers."

In *Sample v. Consolidated Light & R. Co.* 50 W. Va. 472, 57 L.R.A. 180, 40 S. E. 597, the case of *Vicksburg & M. R. Co. v. O'Brien*, supra, was distinguished, the court saying: "It will be observed that these declarations excluded were made some time, from ten to thirty minutes, after the accident occurred, and even in that case Justice Field wrote a dissenting opinion, in which Chief Justice Waite, Justice Miller, and Justice Blatchford concurred. In which dissenting opinion they refer with approval to the case of *Hanover R. Co. v. Coyle*, 55 Pa. 402. This opinion was rendered in 1886. In 1897 Harlan wrote the opinion in the case of *Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, in which it is held: 'Where a railroad employee has been injured by the movement of cars about which he was at work, statements of the conductor of the train, made almost immediately, and while the cars were moving or had just stopped, and while the injured man was bleeding from the injury at that moment received, describing his own part in bringing about the motion that effected the injury, are admissible on the trial of an action for such injury, as part of the *res gestæ*.'"

A chip from a hammer struck a helper in the eye. What was said about the hammer and work by the man he was helping, immediately after the injury, was held no part of the *res gestæ* and inadmissible, in *Dompier v. Lewis*, 131 Mich. 144, 91 N. W.

30 Wash. 346, 70 Pac. 960; Dixon v. Northern P. R. Co. 37 Wash. 321, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620; Starr v. Aetna L. Ins. Co. 41 Wash. 199, 4 L.R.A.(N.S.) 636, 83 Pac. 113.

Crow, J., delivered the opinion of the court:

This action was commenced by Katie Walters, in her own behalf and as guardian *ad litem* of John S. Walters and William H. Walters, minors, against the Spokane International Railway Company, a corporation, to recover damages for the death of William H. Walters, husband and father of the plaintiffs. From a judgment in their favor, the defendant has appealed.

152. The court said: "The injury had already occurred. It became a matter of narration, and was not even narration of the incident, but of the cause which led to the incident."

That case was distinguished in *Ensley v. Detroit United R. Co.* 134 Mich. 195, 96 N. W. 34, the court saying: "In this case the exclamation was made at the very time of the injury, and related to the very fact; in the former case it was in the nature of a narrative of a past event, and did not relate to the very fact of the injury."

And a statement of a salesman that he forgot to notify plaintiff of the bad condition of the steps until it was too late, made six or eight minutes after plaintiff was injured, was held inadmissible as *res gestæ*, as it was a past occurrence and merely narrative. *Clack v. Southern Electrical Supply Co.* 72 Mo. App. 506.

A passenger on a street car was ejected because he did not pay his fare promptly. He fell to the ground and was injured. Statements made by the conductor after the man fell, showing that he did not stop the car, were held inadmissible and no part of the *res gestæ*, in *Gotwald v. St. Louis Transit Co.* 102 Mo. App. 492, 77 S. W. 125. It was said: The declaration, to be part of the *res gestæ*, need not be coincident in point of time with the main fact to be proved, but it is sufficient if the two are so nearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous exclamation of the real cause; the declaration is then a verbal act, and may well be said to be a part of the main fact or transaction; or, if the subsequent declaration and the main fact at issue taken together form a continuous transaction, then the declaration should be received; but mere narratives of past events, disconnected from the main fact and already transpired, are admissible.

And declarations of a conductor after a passenger attempting to board a train had fallen through an uncovered bridge, were held inadmissible and hearsay, in *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 266. Statement was not given. The court said: 42 L.R.A.(N.S.)

William H. Walters, while serving the appellant as head brakeman on a freight train, was so badly scalded in a derailment of the engine on which he was riding that he died the next day. The respondents alleged the accident was due to negligence of appellant in permitting its roadbed, track, rails, and ties to be and remain in an unsafe condition. The appellant alleged that the accident occurred in Idaho; that under the laws of that state William H. Walters was a fellow servant of George E. Kendall, the engineer, who caused the wreck by negligently running the train at a dangerous speed, and that Walters was guilty of contributory negligence in failing to set the brakes. The jury returned a verdict for \$20,000, and answered interroga-

"Whatever knowledge the conductor had, as to the condition of the bridge at the time, should have been stated by himself. His statements tended to show that the company were negligent."

And a statement by a motorman after the accident, who had left the car to extricate the deceased from the wheels, was held inadmissible as *res gestæ*, it being a narration of a past event, in *Ruschenberg v. Southern Electric R. Co.* 161 Mo. 70, 61 S. W. 626.

And declarations of the man in charge of the hoisting apparatus, made after plaintiff was hurt in a mine, by reason of the cage descending too fast, were held inadmissible, being merely a narration of past transactions, and were not *res gestæ*. *Sloss-Sheffield Steel & I. Co. v. Bibb*, 164 Ala. 62, 51 So. 345.

A conversation took place immediately after an accident, and a third person asked the motorman: "Are you blind to run over a child like that?" and the motorman's reply, "I didn't see the child, I was looking at the car coming east," was held inadmissible as *res gestæ*, and not to bind the company. *Koenig v. Union Depot R. Co.* 173 Mo. 698, 73 S. W. 637. The court said: "What the motorman said was a narration of a past event, with respect to which he was not authorized to speak for his employer or master. His business was to control and manage the cars of which he had care, and for whose actions within the scope of his employment his employer was answerable, but for nothing he said which did not accompany or form a part of the accident, in other words, the *res gestæ*."

And almost immediately after an accident the motorman said: "Let go, Bill; I couldn't help it, I lost control." This was held to be no part of the *res gestæ*, in *Norris v. Interurban Street R. Co.* 90 N. Y. Supp. 460. This was on the ground that it was an explanation or a narration.

In *Wormsdorf v. Detroit City R. Co.* 75 Mich. 472, 13 Am. St. Rep. 453, 42 N. W. 1000, it was held error to permit a witness to testify to a conversation which he claimed he heard between Mr. Barry and the driver immediately after the accident, as follows:

tories propounded at appellant's request, as follows: "(1) Was defendant's roadbed in a weak and insecure condition at the point where the wreck occurred? Yes. (2) If you answer that it was, state in what respects it was weak and insecure. Answer: The track was not properly surfaced and ballasted; and that a large percentage of the ties were culls; and a large percentage of the ties were of black pine, and the roadbed was too narrow. (3) Were the rails insecurely fastened to the ties at the point where the wreck occurred? Answer: Yes. (4) At what rate of speed was the train running at the time it left the rails? Answer: Between 16 and 20 miles per hour. (5) At what rate of speed was it reasonably safe to run a train like

the one that was wrecked, over the track at the place where it was wrecked? Answer: We are unable to state. (6) Was the wreck occasioned by a defective condition of the track and roadbed, or by the rate of speed of the train, or by the condition of the track and roadbed and rate of speed jointly? Answer: The wreck was caused wholly by the defective condition of the track and roadbed."

Appellant first contends the evidence was not sufficient to sustain a recovery, and that the trial court erred in denying its motion for a directed verdict. As stated by appellant's counsel, "The record in this case is of fear-inspiring bulk." The evidence is too voluminous to be stated in this opinion. We find sufficient to sustain a ver-

"The driver told Mr. Barry that he had reported the car to the barn, as having a bad brake; that he had reported the car to the barn before; that he didn't hear Barry ask anything as to the cause of the accident." This narration of the driver was of a past transaction, and was no part of the *res gestæ*, and was inadmissible to bind the defendant with notice of the defect claimed."

And evidence of a conversation had with the foreman the afternoon of an accident caused by a falling derrick, while he held a clamp in his hand, explaining the accident, was held inadmissible. *McKinnon v. Norcross*, 148 Mass. 533, 3 L.R.A. 320, 20 N. E. 183.

A conversation between a mine examiner and the state mine inspector, with reference to the examination of and marking the place in a mine where an accident occurred, had two hours thereafter, was held not admissible as part of the *res gestæ*, as it was a narration of a past occurrence. *Belakis v. Dering Coal Co.* 246 Ill. 62, 92 N. E. 575, 20 Ann. Cas. 388.

A conductor was killed in a railroad accident. Declarations by the division foreman a half hour thereafter, as to broken rails, were held no part of the *res gestæ*. *Briggs v. East Broad Top R. & Coal Co.* 206 Pa. 564, 56 Atl. 36. Time had converted them into a mere narrative.

And evidence that the conductor said in a conversation after the car resumed its journey, "that someone told him that there was a woman made a misstep back at Ninth and Cypress in getting off the car. . . . He said she didn't fall, just made a misstep," was held inadmissible and no part of the *res gestæ*, in *Alten v. Metropolitan Street R. Co.* 133 Mo. App. 425, 113 S. W. 691.

And a statement made by the conductor of a cable car to the injured passenger when he was being removed from the car, explaining that the car had been stopped suddenly by a coupling pin falling in the slot rail, was held admissible and not part of the *res gestæ*, but a subsequent narrative of how the accident occurred, in *Redmon v. Metropolitan Street R. Co.* 185 Mo. 1, 105 Am. St. Rep. 538, 84 S. W. 26. 42 L.R.A. (N.S.)

Deceased was on a barge which was being towed, and the rope broke when the barge struck the shore. A remark made by one of defendant's employees, that "that rope had nearly drowned two or three men before," was held no part of the *res gestæ*, as it related to past matters, in *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575.

A passenger in a cab was injured in a collision with a street car. In an action against the railway company, it was held that admissions made a minute afterwards by the cab driver to a witness for defendant, reciting what had occurred, were no part of the *res gestæ*. *Springfield Consol. R. Co. v. Puntenney*, 101 Ill. App. 95, affirmed in 200 Ill. 9, 65 N. E. 442. The latter report said: "The event had fully transpired, and what was said was purely narrative of a past transaction fully ended, and did not characterize or in any way relate to a transaction then taking place."

And statements made by an engineer five minutes after an accident in which a pedestrian was killed were held no part of the *res gestæ*, in *Tennis v. Inter-State Consol. Rapid-Transit R. Co.* 45 Kan. 503, 25 Pac. 876. The court said: "There must be concurrence in point of time between the act and the declaration; otherwise it is but a narrative of what has been, or an assertion of what will be, done."

A conductor fell from a trolley car. A minute elapsed before the motorman reached him by reversing the motor and going back a block. What was said between them, the conductor having gotten up, was held inadmissible as *res gestæ*, as it must have been narrative. *Boyd v. West Chicago Street R. Co.* 112 Ill. App. 50.

And where an employee was injured in a collision of trains, evidence by the conductor that one of the engineers said that he "didn't see a whistling post; didn't know where he was," was held inadmissible, as no part of the *res gestæ*. *Williams v. Southern P. Co.* 133 Cal. 550, 65 Pac. 1100. The court said: "Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous, and caused by the event,



diet in respondents' favor. There was competent evidence that appellant's track, although new, was in a dangerous condition: that inferior and unsafe ties had been used in its construction; that the rails had not been spiked to all the ties; that the track had not been properly surfaced; that the road had not been ballasted; that the train was running at a moderate and safe rate of speed, and that the unsafe condition of the track caused the rails to spread and ditch the engine. Other evidence offered by appellant tended to show that the track, although new, was safe, well constructed, and in good condition; that it was being constantly examined and repaired by appellant's employees; that the accident was caused by the act of the engineer, who ran

the train at a reckless and dangerous rate of speed, and that the appellant was without fault. This conflicting evidence was properly submitted to the jury, and it is manifest from their verdict and special findings that they accepted and credited the statements of the respondents' witnesses.

Immediately after the accident J. D. Lacey, the conductor in charge, went forward from the rear end of the train, saw the ditched engine, the condition of the track, rails, and ties, and the injured men. Returning to his caboose, he attempted to attach a telephone instrument to the wires, and call appellant's head offices at Spokane, 19 miles distant. Failing in this, he ran about 1 mile to a farmhouse, where he ob-

they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent, and inadmissible as *res gestæ*. A narrative, even if given during the occurrence, is inadmissible."

Plaintiff "unconsciously" stepped backward on a track in front of an engine and was injured. A statement after the accident, made by the engineer, "You would pull the train up and run over him," was held incompetent. *Chewning v. Ensley R. Co.* 100 Ala. 493, 14 So. 204. The court said: "It was entirely incompetent to show that a past act was wantonly or wilfully done, by the subsequent declaration of the engineer."

A street car bumped a wagon, killing the driver. Within five seconds a passenger heard the motorman say: "He bothered me all across the bridge." This was held not to be *res gestæ*, as it was a declaration relating to a past event. *Brauer v. New York City Interborough R. Co.* 131 App. Div. 682, 116 N. Y. Supp. 59. The court said: "The only theory upon which the learned counsel for the respondent seeks to sustain the admissibility of this evidence is that it was an involuntary, spontaneous exclamation under the ruling in the case of *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690, and kindred cases. In order to sustain the admissibility of the evidence upon that ground, however, it is essential that the exclamation should characterize the accident, and shed light upon how it happened. This exclamation does not fall within that category."

A brewery truck ran over a pedestrian. Admissions made by the driver after he alighted from the wagon, that he had to get his beer on the 4 o'clock train, were held not a part of the *res gestæ*. *Wagner v. H. Clausen & Son Brewing Co.* 146 App. Div. 70, 130 N. Y. Sup. 584.

#### b. Time and place.

In order to constitute *res gestæ*, the words should be spoken at the time of the 42 L.R.A. (N.S.),

accident and at the place of accident. This is the general rule. Or, to put it another way, the declaration, in order to be part of the *res gestæ*, must be so clearly connected with the accident that it can be said to be the spontaneous exclamation or the act speaking, and then it becomes a verbal act, and a part of the *res gestæ*. While some cases admit declarations that were apparently made at a different place and a subsequent time, the connection was so complete that it was evident that there was no chance to fabricate, and they were admitted because made under the excitement of the act, and as part of a single transaction.

A horse stepped in a hole in a bridge at a railroad crossing, and the driver was injured. Statements made by trainmen fifteen minutes thereafter, as to a piece of timber on the track, were held inadmissible and no part of the *res gestæ*. *Denison & P. Suburban R. Co. v. Foster*, 28 Tex. Civ. App. 578, 68 S. W. 299.

A section hand was injured by the derailling of a hand car. What the foreman said some time after the injury, as to the defective condition of the car, was held not *res gestæ*. *Lee v. St. Louis, M. & S. E. R. Co.* 112 Mo. App. 372, 87 S. W. 12.

And statements made to a person called to the place by a conductor when the train stopped, that he saw something like a piece of paper on the track, and when too late discovered it to be a man, were held inadmissible as made too long after the accident to be considered part of the *res gestæ*. *Early v. Louisville, H. & St. L. R. Co.* 115 Ky. 13, 72 S. W. 348.

And in an action against a bicyclist for injuring a pedestrian, what he said after the accident, as to the cause having been an obstacle in the road, was held to be hearsay, and not evidence. *Myers v. Hinds*, 110 Mich. 300, 33 L.R.A. 356, 64 Am. St. Rep. 345, 68 N. W. 156.

And what a person apparently in charge of an engine, but not shown to be the engineer, said to a witness after a mule cart had collided with the engine, and the driver had been thrown to the ground and then

tained the use of a long distance telephone and occupied about twenty-five minutes in calling Spokane, and arranging for a relief train and assistance for the injured men. He then walked back to his train. Living at the house was one Samuel Williams, who dressed himself, and, accompanied by one Scharpenberg, followed the conductor. The accident occurred about 10:45 P. M., and it was almost two hours later when Williams reached the train. Walters, the head brakeman, and the engineer, Kendall, were fatally injured. They had been removed to the conductor's caboose, where they were awaiting medical assistance.

Williams, as a witness for respondent, testified in part as follows:

Q. Just state what the conductor said there at that time.

carried to a platform, was held inadmissible, as it was said from five to ten minutes thereafter. Kentucky C. R. Co. v. Fox, 10 Ky. L. Rep. 399.

And declarations of an employee of a railroad company after the body had been carried to the next station were held incompetent as *res gestæ*, where a train and a wagon collided, killing the driver. Bellefontaine R. Co. v. Hunter, 33 Ind. 335, 5 Am. Rep. 201.

And declarations of an engineer explaining an accident, made within five minutes thereafter, were held not part of the *res gestæ*. Durkee v. Central P. R. Co. 69 Cal. 533, 58 Am. Rep. 562, 11 Pac. 130. The court said: "In the case before us, the occurrence had taken place, the child had been removed from under the tender, carried away nearly a quarter of a mile, and brought back on the way to the father's house, before the declaration was made."

And a declaration by a motorman fifteen minutes after an accident, where plaintiff had been extricated from beneath the car and removed from the track, and his wounds washed, that "he saw plaintiff, but thought he would get off the track," was held inadmissible as *res gestæ*. Citizen's Street R. Co. v. Howard, 102 Tenn. 474, 52 S. W. 864.

And a statement made by a switchman twenty minutes after a wreck, that he had left a switch open, was held inadmissible as part of the *res gestæ*. Chicago & A. R. Co. v. Fietsam, 19 Ill. App. 55. This statement was a mere narrative of a past occurrence, and the party making it was not authorized to bind the company.

And a statement made by a superintendent long after a collision, and at a place 4 miles away, "that he should have known better than to have put Stanley (the motorman) on the car," was held not *res gestæ*. Ft. Wayne & W. Valley Traction Co. v. Crosbie, 169 Ind. 281, 13 L.R.A.(N.S.) 1214, 81 N. E. 474, 14 Ann. Cas. 117.

A driver of a water cart was injured by a trolley car in a collision. What the motorman said to the injured party five minutes

A. Well, he said that it was caused by a rail, the spikes pulling out and letting the rail turn over, and the spreading of the track. . . .

Q. What did he say at that time about the condition of the roadbed or about the company maintaining a roadbed? . . .

A. Well, he said it was a bum track.

These alleged statements were admitted as part of the *res gestæ*, and the appellant now insists that the trial court erred in overruling its objections thereto; that the statements were incompetent, immaterial, and hearsay, being made long after the accident, and that they constituted no part of the *res gestæ*. It appears that Williams and his companion were the first persons to reach the train after the accident, other than those upon the train; that the con-

utes thereafter was stricken out on motion as not *res gestæ*. Chicago Union Traction Co. v. Daly, 129 Ill. App. 519.

A pedestrian walking on a railroad track was injured by a train. Statements made by the engineer some minutes after the accident were held to be too remote, and not a part of the *res gestæ*. Davis v. Louisville, H. & St. L. R. Co. 30 Ky. L. Rep. 172, 97 S. W. 1122.

And an admission made by the foreman of defendant that he had placed a timber under the piston rod of a pump, which timber fell on plaintiff, was held inadmissible and no part of the *res gestæ*, where it was made a half hour after the accident. Martin v. South Covington & C. R. Co. 29 Ky. L. Rep. 148, 92 S. W. 571.

And statements made by a conductor a half hour after a collision were held inadmissible and no part of the *res gestæ*, as he was not an agent authorized to bind the company. Norfolk & C. R. Co. v. Suffolk Lumber Co. 92 Va. 413, 23 S. E. 737.

And declarations made by servants of a railroad company within an hour or two after a wreck were held inadmissible as *res gestæ*, in an action for injuries resulting in the death of a passenger on a train which collided with another. Missouri P. R. Co. v. Ivy, 71 Tex. 409, 1 L.R.A. 500, 10 Am. St. Rep. 758, 9 S. W. 346.

And a statement by an agent that before the accident he knew an ore bank was dangerous, made an hour after the bank had caved in, was held not to be *res gestæ*. Aldridge v. Midland Blast Furnace Co. 78 Mo. 559.

A half hour after an accident to a passenger attempting to board the car, the driver of the street car made declarations. It was held that they were no part of the *res gestæ*. Dietrich v. Baltimore & H. S. R. Co. 58 Md. 347.

The narrative of an agent of a past occurrence was held inadmissible in evidence against his principal. Fawcett v. Bigley, 59 Pa. 411. This accident was caused by defendant's barges becoming loose and striking plaintiffs; the declarations were

ductor was appellant's chief representative then upon the scene and in charge of the train. He had the injured brakeman and engineer in his care. Both of them were severely injured, suffering intensely, in need of immediate medical attention, and were receiving such assistance only as the remainder of the train crew could give. The conductor was in a condition of responsibility and anxiety which directly tended to render his statements spontaneous, impulsive, and truthful, and to negative the idea that they might be the result of reflection. Appellant insists that his statements were too remote in point of time from the actual ditching of the train, to be admissible. Although it is the usual rule that contemporaneous declarations, explanatory of the principal occurrence, made under circum-

stances excluding the idea of premeditation, are competent as part of the *res gesta*, it is not always essential to their admissibility that the declarations and principal occurrence shall be identical in point of time. In many instances the former may succeed the latter by a considerable period. This court has so held in numerous cases. *Roberts v. Port Blakely Mill Co.* 30 Wash. 25, 70 Pac. 111; *Lambert v. La Conner Trading & Transp. Co.* 30 Wash. 346, 70 Pac. 960; *Dixon v. Northern P. R. Co.* 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620; *Starr v. Aetna L. Ins. Co.* 41 Wash. 199, 4 L.R.A. (N.S.) 636, 83 Pac. 113.

It is not always necessary that statements or admissions should be exactly concurrent with the principal act, if they arise nat-

made an hour after, and were to the effect that defendant's ropes were insufficient.

That case was distinguished in *Elkins v. McKean*, 79 Pa. 493, the court saying that it "was decided on a different principle. That was an attempt to make the narration of an agent of a past transaction evidence against his principal, and was not competent. It was especially so when the agent had an adverse interest to relieve himself by his statements of the consequences of his own negligence."

A statement made one hour after the occurrence, by the engineer of a train that killed cattle, was held inadmissible as *res gesta*, and could not bind the company. *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825.

And admissions of an engineer made an hour after an accident, that he did not see the injured party in time to ring or whistle, were held inadmissible as part of the *res gesta*. *Louisville, H. & St. L. R. Co. v. Davis*, 32 Ky. L. Rep. 580, 106 S. W. 304. Former trial, 30 Ky. L. Rep. 172, 97 S. W. 1122.

During a fire caught from a burning elevator, the agent of the elevator said: "I tightened up the chain; the fire must have come that way." This was held no part of the *res gesta*. *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305. The running of the elevator had ceased more than an hour before this admission.

And declarations of a pilot that caused a collision, admitting his negligence, made an hour after the accident, were held no part of the *res gesta*. *Bigley v. Williams* 80 Pa. 107.

One hundred feet of piping fell in a well, owing to defects in the lowering apparatus. In an effort to take out the pipe, the well caved in, causing an injury. A statement by the agent who was superintending the placing of the pipe, made several hours thereafter, was held not *res gesta*. *Dodge v. Childs*, 38 Kan. 526, 16 Pac. 815.

Fiegle, Sr., was president of the light commission, and Fiegle, Jr., was city electrician. In an action for injuries from elec-

tricity, testimony was offered that "about two hours after the accident, 'Fiegle, Sr., asked Fiegle, Jr., why he did not have this circuit that Forbis was working on taken out, and the latter said for the reason that Gissell up there was baking bread, and Fiegle, Sr., asked him right then, 'Are you going to burn a man up for two loaves of bread?' and further said, 'Damn Gissell and his bread.'" This was held inadmissible, as neither party was authorized to bind the city. *Austin v. Forbis*, 99 Tex. 234, 89 S. W. 405.

And statements of an engineer showing the place where he had first seen the deceased on a tricycle car, made some two hours after the accident, were held no part of the *res gesta*. *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894.

And statements made by an engineer at a coroner's inquest five and one-half hours after an accident, as to his having seen the deceased, were held not a part of the *res gesta*. *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 628, 77 Am. St. Rep. 557, 80 N. W. 682.

In response to a question asked about six hours after an explosion, away from the scene of the accident, "You must have turned on new wells," the agent said. "They only opened the Nufer well; turned the Nufer well on." Such declaration was held inadmissible as *res gesta*. *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. 449, 15 Atl. 865. The court said: "While he undoubtedly had control to regulate the flow established for the Clarion line, shut on and off the different wells for that purpose, it does not appear that for a new well he had any authority to connect and open it until he received instructions from headquarters. The presumption would be the other way, he being a subordinate superintendent. His statement is no part of the *res gesta*."

And statements made by a conductor some days after the injury, as to signals and speed, were held inadmissible. *Wengler v. Missouri P. R. Co.* 16 Mo. App. 493.

And evidence of a conversation about the

urally therefrom, without evidence of premeditation, and directly tend to characterize or explain it. The surrounding circumstances and conditions may be shown, and the determination of the competency and admissibility of the declarations as a part of the *res gestæ* will then, as a general rule, rest largely in the sound discretion of the trial judge. Mr. Wigmore, at § 1750, vol. 3, p. 2256, of his work on Evidence, says: "It is to be observed that the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway, and to be dissipated. The fallacy, formerly entertained by a few courts, that the utterance must be strictly contempo-

aneous (post, § 1756) owes its origin to a mistaken application of the verbal act doctrine: . . . Furthermore, there can be no definite and fixed limit of time. Each case must depend upon its own circumstances. . . . Since the application of the principle thus depends entirely on the circumstances of each case, it is therefore impossible to regard rulings upon this limitation as having in strictness the force of precedents. To argue from one case to another on this question of 'time to devise or contrive' is to trifle with principle, and to cumber the records with unnecessary and unprofitable quibbles. There is a lamentable waste of time by supreme courts in here attempting either to create or to respect precedents. Instead of struggling

signals, had during the afternoon following the accident, was held inadmissible as part of the *res gestæ*. Sanborn v. Detroit, B. C. & A. R. Co. 99 Mich. 1, 57 N. W. 1047.

Plaintiff, who was working in a car loading grain, was injured by projecting lumber near the track. Statements made by the conductor, "We killed a nigger down there this evening. You go move that lumber back in the morning right away;" were held inadmissible, and not part of the *res gestæ*, on the ground that they took place after the accident and at a different place. Hopkins v. Boyd, 18 Ind. App. 63, 47 N. E. 480.

And a statement made by an engineer three days after plaintiff was hurt, that, at the time of the injury, the engine was defective, was held inadmissible as *res gestæ*. Central R. & Bkg. Co. v. Maltby, 90 Ga. 630, 16 S. E. 953. The court said: "That an engine was defective is not established by the testimony of the plaintiff that the engineer told him, some days after the injury, that it had certain defects; although the engineer had testified that he did not so tell him. Impeaching the evidence of the engineer by contradicting him as to what he had said would not prove that what he had said was true."

And evidence of statements made by a brakeman the afternoon of the accident, that "the axle of the car which had run off was 2 inches too short, and that he had told them so," was held inadmissible to show negligence on part of the railroad company, in an action for the death of a passenger resulting from a car running off the track. Wright v. Georgia R. & Bkg. Co. 34 Ga. 330.

And statements made by the conductor or engineer the day after the accident, that the man was seen riding on the track some time before he was struck, but he was thought to be a boy who wanted to race, and therefore they did not blow the whistle, were held to be no part of the *res gestæ*. Tanner v. Louisville & N. R. Co. 60 Ala. 621.

And statements at an inquest the day after a pedestrian on a bridge was killed, 42 L.R.A.(N.S.)

made by an engineer, admitting negligence, were held not *res gestæ*. Southernland v. Wilmington & W. R. Co. 106 N. C. 100, 11 S. E. 189. The engineer was afterwards on the stand and admitted, on cross-examination, making the statements. The court said: "Conceding that it then became competent to impeach him, by showing that his former declarations on oath were in conflict with his statement as a witness at the trial, such evidence was admissible for that purpose alone, and not to be used as substantive testimony."

A passenger on a street car was badly injured by reason of his arm protruding through the bar guard on a window as another car passed. It was claimed that the track was defective and a sudden lurch threw his arm out and the cars together. Evidence that the motorman, the day after the accident, admitted that the car had been caught there three times in two weeks, was held not part of the *res gestæ*. Schloemer v. St. Louis Transit Co. 204 Mo. 99, 102 S. W. 565.

And declarations the day after a collision of vessels, made by one of the captains, were held inadmissible, in Shaw v. De Salaberry Nav. Co. 18 U. C. Q. B. 541. Robinson, Ch. J., said: "What he said at the instant when the vessels came together, and the people of the 'Corra Linn' jumped into his vessel to save themselves, could not, with propriety, have been excluded, for it was part of the occurrence at the moment. Any admission made by him afterwards, when the danger and excitement were passed, could not properly be received in evidence to the prejudice of his owner."

And statements made by railroad employees the day after an accident were held inadmissible in Union P. R. Co. v. Fray, 35 Kan. 700, 12 Pac. 101, and Kansas P. R. Co. v. Pointer, 9 Kan. 620.

A passenger was fatally injured in alighting from a train. Statements made by the conductor the next day were held inadmissible, and the same was held in regard to statements of deceased made some hours after the accident. Wade v. Illinois C. R. Co. — Ky. —, 112 S. W. 1103.

weakly for the impossible, they should decisively insist that every case be treated upon its own circumstances. They should, if they are able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial court. Until such a beneficial result is reached, their lucubrations over the details of each case will continue to multiply the tedious reading of the profession." The authorities differ as to the instances in which such declarations should be admitted. The circumstances of each case should be carefully weighed by the trial judge in exercising his sound discretion and in arriving at a correct determination. *Grant v. Oregon R.*

An employee was injured in operating a derrick. Statements made the next day by other employees were held inadmissible. *Union P. R. Co. v. Fray, supra.*

And admissions made by a conductor some days after a passenger was injured, that he had kicked the plaintiff from the train, were held no part of the *res gestæ*. *Moore v. Chicago, St. L. & N. O. R. Co. 59 Miss. 243.*

A passenger, in attempting to board a car, was hurt by its starting. Evidence that "the motorman made a remark that he had no right to stop on the railroad track, and I remarked to him, 'What did you stop for, then?'" was held inadmissible as *res gestæ*. *Blue Ridge Light & P. Co. v. Price, 108 Va. 652, 62 S. E. 938.* The court said: "It has been held that the declarations of the conductor or engineer of a railroad train, as to the manner in which an accident occurred, made after its occurrence, are not admissible."

And in an action for injuries to cattle at a crossing, admissions made some time thereafter by the engineer were held inadmissible. *Card v. New York & H. R. Co. 50 Barb. 39.*

After a train injured a man on the track, on its reaching a station, a man in "greasy clothes" was seen to leave the engine and "register," and was heard to remark that he had "knocked a hobo off the track south of Leeper." This was held to be no part of the *res gestæ*, as it was made subsequent to the event. *Frye v. St. Louis, I. M. & S. R. Co. 200 Mo. 377, 8 L.R.A. (N.S.) 1069, 98 S. W. 566.*

And evidence as to what the driver of a buggy said to the conductor concerning an accident was held inadmissible as *res gestæ*, where plaintiff received injuries from a collision between the buggy and a street car, and was not present at the conversation, which took place some time after the accident. *Edwards v. Foote, 129 Mich. 121, 88 N. W. 404.*

In *Mabley v. Kittleberger, 37 Mich. 362*, where there was a collision of teams, and there was an attempt to show a conversation between the driver of defendant's team

& Nav. Co. 54 Wash. 678, 688, 25 L.R.A. (N.S.) 925, 103 Pac. 1126.

In *State v. McDaniel, 68 S. C. 304, 310, 102 Am. St. Rep. 661, 668, 47 S. E. 351, 386*, the court said: "When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction, and be the instinctive, spon-

and third persons, to show a recognition by the driver that his negligence caused the injury, the court said: "It does not appear with any reasonable degree of certainty how soon after the injury was done that this proposed conversation took place. It could only be admissible as a part of the *res gestæ*, and, to be admitted on that ground, it should appear that the conversation occurred at or immediately after the injury."

And statements made by an engineer, as to his forgetting the dead time the train had at the place of accident, were held no part of the *res gestæ*, where they were made long after the accident. *Illinois C. R. Co. v. Houchins, 121 Ky. 526, 1 L.R.A. (N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530.* It was said that they would be admissible in the action against the engineer.

And a statement of the conductor, made some time after an accident to a small boy hanging to a freight car for a ride, was held not *res gestæ*. *Louisville & N. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117.*

And a statement made by a conductor a considerable time after an accident, that "he expected it was the man he put off the train," was held not part of the *res gestæ*. *Louisville & N. R. Co. v. Ellis, 97 Ky. 330, 30 S. W. 979.*

Testimony of a driver of an ice wagon, that the car conductor said that the car driver was at fault, where a helper on the rear of the ice wagon was injured, was held inadmissible as *res gestæ*. *Seipp v. Dry Dock, E. B. & B. R. Co. 45 App. Div. 489, 61 N. Y. Supp. 409.* The time of the conversation was not given.

And a statement made by an engineer in regard to a ratchet or dog causing a locomotive to become unmanageable and collide with a car was held inadmissible as hearsay. *Atchison, T. & S. F. R. Co. v. Parker, 5 C. C. A. 220, 12 U. S. App. 132, 55 Fed. 596.* The time when the statement was made is not given.

A statement made some time after an accident, by the conductor of a train, that the engineer said he had pulled the reverse



cumstances as necessarily to exclude the idea of design or deliberation. They were made by one having the control and management of the road. Under these circumstances we think the declarations were admissible."

The appellant, citing the recent case of *Henry v. Seattle Electric Co.* 55 Wash. 444, 104 Pac. 776, contends that it is controlling here. That case can be readily distinguished. The conductor had left the scene of the accident, had proceeded with his usual employment, had taken his car to the end of his run, had returned on another trip, and could not have anticipated that he would again meet the driver of the wagon at the place where the collision had occurred. It was a fortuitous circumstance

that he did so. He had ample time to devise, contrive, and reflect, and his statements made after his return were properly excluded as hearsay, and not a part of the *res gestæ*. Although the conductor in this case had left his train, he did so under compulsion, for the purpose of procuring assistance. His train remained in the ditch at the place of the accident, and was still in his charge. He was the principal representative of the appellant. Two of his crew, who had been fatally injured, were without medical attention. Much responsibility rested upon the conductor. He had telephone instruments to communicate with his superiors in case of necessity. When needed, these instruments failed to perform their functions. His trip to the

618. The court said: "The declaration was not sufficiently connected with the main fact, or contemporaneous therewith, to constitute a part of the *res gestæ*. Without serving to explain or elucidate its character, it was merely a heartless narration of a transaction really and substantially past, only tending to prejudice the minds of the jury, and which should not, and does not, bind the defendant."

A brakeman in charge of gates on the platform of a car closed them on plaintiff, injuring her. In response to her exclamation of pain, he said, "You can go to hell. Shut up." This was held inadmissible and not *res gestæ*. *Butler v. Manhattan R. Co.* 143 N. Y. 417, 26 L.R.A. 46, 42 Am. St. Rep. 738, 38 N. E. 454, reversing 4 Misc. 40, 24 N. Y. Supp. 142. The court said: "But as in this case the act was complete before the remark of the brakeman was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as *res gestæ*."

And in an action for causing a runaway from escaping steam and a defective crossing, and efforts of a yard man to intercept the horse, statements made by the yard man as witness was lifting plaintiff's intestate. "Let her alone; she's dead as hell," were held inadmissible and no part of the *res gestæ*. *Belt v. San Antonio & A. P. R. Co.* — Tex. Civ. App. —, 37 S. W. 362, second appeal, 46 S. W. 374.

And an engineer, a half hour after killing a deaf mute on the track, said: "The damn fool (meaning deceased) made me (meaning the engineer) mad because he would not get off the track." This was held inadmissible as *res gestæ*. *International & G. N. R. Co. v. Munn*, 46 Tex. Civ. App. 276, 102 S. W. 442.

A statement made by the foreman when he heard that Thompson, who caused the accident at a switch, had been reported for drunkenness, replied, "What of it? If Thompson (the switchman) should kill three or four Polacks, there is enough of them yet," was held admissible as *res gestæ*. 42 L.R.A. (N.S.)

*Wabash Western R. Co. v. Brow*, 13 C. C. A. 222, 31 U. S. App. 192, 65 Fed. 941.

In *Havens v. Rhode Island Suburban R. Co.* 26 R. I. 48, 58 Atl. 247, 3 Ann. Cas. 617, that case was denied as an authority, the court saying: "And it is to be noted that the question of *res gestæ* was passed upon without any discussion or citation of authorities, and it would seem to have been treated as a matter of minor importance in the decision of the case."

And after a collision of a boat and ferry-boat, someone on board the boat was heard to say, "Go ahead and let her sink; its nothing but a ——— old flatboat anyhow." The manner in which they were spoken and the facts that the engine had stopped, and the boat went on as soon as the words were spoken, were held competent to show that the boat went on without any effort to render assistance after the collision, which, in admiralty, is regarded as a suspicious circumstance. *Otis v. Thom*, 23 Ala. 469, 58 Am. Dec. 303.

And defendant, shortly after his arrest, when asked whether he knew the boy's bicycle, which was brought to the station, answered, "Damn the bicycle anyway; they are no good." This was held admissible, in an action to recover damages for a collision with a wagon, while riding a bicycle, resulting in death. *Quinn v. Pietro*, 38 App. Div. 484, 58 N. Y. Supp. 419. This evidence tended to show hostility to bicycles. It will be noted, however, that the evidence was admitted against the one doing the injury, and it was not necessary to rely on the *res gestæ* rule.

And a passenger on a street car, about to alight, was thrown to the ground by the jerking of the car. The statement of the conductor while plaintiff was lying on the ground, "Let him lay there and go to h—l," was held competent as part of the *res gestæ*. *South Covington & C. Street R. Co. v. Riegler*, 26 Ky. L. Rep. 666, 82 S. W. 382.

An engineer ran his engine back 200 yards to a wreck, and said to the conductor, "Cap, we have played hell." It was held to be admissible. *Shelton v. Southern R.*

farmhouse 1 mile distant was one of necessity, made in the midst of grave responsibilities. Before the evidence of Williams was admitted, the respondents called the conductor, and had him narrate the details of his trip and the length of time he thus occupied. The trial judge saw him and the witness Williams, and heard them both testify. He heard other evidence describing the accident and the surrounding circumstances. He was in a position to exercise his sound discretion and determine whether the alleged declarations should go to the jury for their consideration as a part of the *res gesta*, and we cannot find that his discretion was abused. The conductor was permitted to, and did, deny the evidence of the witness Williams. The jury were able to pass upon their credibility, and conclude whether the alleged declarations were made, and if made, whether

they were spontaneous and truthful, or the result of reflection. A vast amount of evidence, showing all the circumstances, was introduced and considered by the jury, and we do not feel that we would be justified in concluding that the trial judge has so abused his discretion in admitting this evidence as to constitute prejudicial error and necessitate a new trial.

Appellant further contends that the trial court erred in refusing its offer of evidence to show that its roadbed and track were in as good condition as is customary with roads of like age and carrying like traffic. The appellant was permitted to introduce evidence of experienced railroad men showing proper methods of construction, the ties, rails, and other material that should be used, how the grade should be made, how the track should be surfaced and ballasted, the tendency of a new track to settle after

Co. 86 S. C. 98, 67 S. E. 899. The court said: "While the length of the time between the wreck and the making of the declaration in this case was such as to raise some doubt as to its admissibility, it was not such a clear case as would warrant the holding that the testimony was not within the rule. The declaration was made immediately upon the engineer's returning to the wreck and seeing what had been done, and we cannot say that it was not the spontaneous utterance of his mind, influenced solely by what had been done."

Where an insecure chain box rolled across a deck, striking plaintiff, throwing him into the water, and injuring him, evidence that when the captain was asked to allow some of his men to assist him into a carriage, he replied that he had enough for his men to do on board, was held admissible as a part of the transaction. The refusal of the master was given while he was acting within the scope of his authority. *Hall v. Connecticut River S. B. Co.* 13 Conn. 319. This was admissible to show his indifference, and to increase the damages.

In a collision between a street car and plaintiff, statements made by the driver of the car after he passed were competent evidence. *Whittaker v. Eighth Ave. R. Co.* 5 Robt. 630. The court said: "Although I find no exception to such admission, it may be proper to say that any expression of the driver, either before, during, or immediately after, and in the heat of the occurrence, showing his then design to do an injury, and not a declaration predicated upon an after-thought, was admissible." This was an action for wilful injury by a driver, under the N. Y. act, 1824, highway act.

#### d. Apologetic.

There is some conflict of cases where the declarations were apologetic. Some cases holding that in the form of opinions they 42 L.R.A.(N.S.)

are no part of the *res gesta* and are inadmissible. So in regard to a simple apology. Other cases deny the admissibility on the ground that the words spoken did not enter into the transaction or give it character.

Plaintiff stated that the conductor, a minute after an accident, "said that he caught my foot with his handle, raising the lever, and pulled me off." It was held that this was not admissible as part of the *res gesta*, that it was history, and not a part of the accident. *Lecklieder v. Chicago City R. Co.* 142 Ill. App. 139. The court said: "The alleged statement in the case at bar to the effect that the conductor said he caught the plaintiff's foot by raising the lever, and pulled her off, does not relate to any defect in the machinery, but solely to an alleged explanation of an alleged act of the conductor himself. Such explanation, made after the plaintiff's fall, appears in the nature of an apology to the plaintiff. It does not purport to be given in the exact words of the conductor, and a part of it at least—'pulled me off'—apparently purports to state a conclusion of the conductor, formed as well as expressed after the accident had occurred."

A street car collided with a bus. In an action by a passenger in the bus, against the street car company, a statement made by the driver of the bus, just after the accident, that it was all his fault, was held inadmissible, as the event had fully transpired, and it was narrative of a past transaction, and did not characterize or in any way relate to a transaction then taking place. *Springfield Consol. R. Co. v. Puntenney*, 200 Ill. 9, 65 N. E. 442, affirming 101 Ill. App. 95.

And a statement by a conductor, immediately after assisting a passenger from the ground, "I am very sorry, madam, that was my fault," was held inadmissible and no part of the *res gesta*. *Williamson v. Cambridge R. Co.* 144 Mass. 148, 10 N. E. 790.



rains, and in fact all details on the subject. The record is of sufficient length to satisfy the most critical that much latitude was accorded both parties in the introduction of evidence. The appellant was granted every reasonable opportunity for showing facts which would aid the jury in finding whether the track was in as reasonable and safe a condition as it should be.

The appellant further insists the judgment is excessive. This contention must be sustained. The evidence shows that the deceased was a man forty-four years of age; that he had been a stage driver, bridge carpenter, miner, stationary engineer, locomotive fireman, and brakeman; that, at the time of the accident, he was making from \$100 to \$120 per month; and that his life expectancy was twenty-five years. Verdicts must be compensatory only. After full compensation has been

reached, no further award should be made. The judgment is excessive. It is ordered that, if within thirty days after the filing of the remittitur the respondents shall serve upon the appellant and file with the clerk of the superior court their written consent to remit \$5,000 of the damages awarded, the judgment as thus reduced, with interest from the date of the trial, be affirmed, and that otherwise a new trial will be granted. The appellant will recover its costs in this court.

**Dunbar, Mount, and Parker, JJ., concur.**

**Rudkin, Ch. J., dissenting:**

I cannot agree that statements made by the conductor under the circumstances disclosed by the record, two hours after the accident, were a part of the *res gestæ*, and I therefore dissent.

The court said: "In the case under consideration the plaintiff relied upon the act of the conductor in ringing the bell and starting the car while the plaintiff was leaving it, to prove negligence in the defendant. The words of the conductor did not form part of that transaction, or in any manner qualify his act, or any act of the plaintiff. They were in form and substance narrative, and expressed an opinion upon a past transaction."

In an action for injuries sustained from a collision between two carriages, the statement of defendant's servant to plaintiff, while plaintiff was being extricated from his carriage, that plaintiff was not to blame for what had occurred, was held inadmissible as part of the *res gestæ*. *Lane v. Bryant*, 9 Gray, 245, 69 Am. Dec. 282. The court said: "It was made after the accident occurred, and the injury to the plaintiff's carriage had been done. It did not accompany the principal act, on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestæ*. It is no more competent because made immediately after the accident than if made a week or a month afterwards."

A collision occurred between a car and a carriage. The motorman was asked a question, "Don't you remember saying to Miss Robinson in the presence of those people that were around there that you were sorry, that it was your fault, that you were rubbing your hand, something had stung you?" It was held that this question was properly excluded as an admission of fact by the motorman for the purpose of proving negligence of the defendant. *Robinson v. Old Colony Street R. Co.* 189 Mass. 594, 76 S. E. 190. The court said: "It would have been entirely competent for the plaintiffs to have shown that, as the car came through Wilbur street, and just before the plaintiffs started to pass over the tracks,

the motorman, instead of having his hands placed where he could control its operating machinery, and thus regulate its speed, was engaged in rubbing one hand with the other."

A motorman, fifteen minutes after his car struck a child, where a mob of 1,000 people had gathered, stated, "Gentlemen, this is my fault." This was held no part of the *res gestæ*. *Feldman v. Detroit United R. Co.* 162 Mich. 486, 127 N. W. 687. In this case the crowd had already assaulted him and had injured the conductor.

A passenger was hurt in alighting from a trolley car. The car was stopped and the conductor said: "It is too bad, are you hurt?" The passenger said to him, "I signaled you to let me get off and you answered me." He said, "I know I did, but forgot you. It is entirely my fault." This was held inadmissible and no part of the *res gestæ*. *Blackman v. West Jersey & S. R. Co.* 68 N. J. L. 1, 52 Atl. 370. The court said: "They were, however, not spoken until after the accident had occurred; and although the time which had elapsed between the happening of the accident and the making of the declaration was very short, still the words were merely narrative of the conditions which had brought it about."

An employee on the 9th floor of a building was injured by negligent operation of a hoist-hoisting engine. The engineer was on the street, operating the same. Statements by him admitting negligence and regret that he caused the injury, made when plaintiff walked up to him, were held no part of the *res gestæ*, but narrative. *McConnell v. Thomas & B. Operating Co.* 148 App. Div. 635, 133 N. Y. Supp. 255.

A passenger was hurt in falling over a board used by a brakeman to light the lamps in a car. The brakeman then said that the board being left there was his fault. This was proved to contradict the brakeman after he had denied such con-

## MICHIGAN SUPREME COURT.

HENRY BERNARD

v.

GRAND RAPIDS PAPER BOX COMPANY,  
Plff. in Err.

(— Mich. —, 136 N. W. 374.)

**Evidence — res gestæ — statement after accident.**

1. A statement by an employee twenty minutes after he had caused an accident by starting machinery, in response to a question as to why he did so, is not admissible in evidence, in an action to hold the employer liable for the injury, as part of the *res gestæ*.

**Appeal — weight of evidence.**

2. Upon appeal from denial of a motion

versation on cross-examination. It was held error and no part of the *res gestæ*. *Sherman v. Delaware, L. & W. R. Co.* 106 N. Y. 542, 11 N. Y. S. R. 318, 13 N. E. 616. The court said it was narrative. "The evidence being in its nature inadmissible, the plaintiff could not obtain the benefit of it by cross-examining the brakeman in regard to it, and, upon his denying it, seek to prove it by another witness, under the guise of contradicting the brakeman."

But in the following cases the declarations were held to be part of the *res gestæ*:

A guard seized plaintiff as the gates were being closed on an elevated railroad, and she fell. The guard said he was very sorry that he had done it. This was held to be part of the *res gestæ*. *Koetter v. Manhattan R. Co.* 36 N. Y. S. R. 611, 13 N. Y. Supp. 458, affirmed in 129 N. Y. 668, 30 N. E. 65. The court said: "1st. As already stated, no objection was made to the question. 2d. That it was wholly immaterial whether the guard was sorry he had done it or not, the liability of the defendant resting upon the fact that the act complained of had been permitted, and that the evidence could not prejudice the defendant in any manner; and 3d, that if this be not so, the declarations of the party in a case like this, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence."

An engineer used a blow-off cock which frightened a small child, so that she fell, breaking her leg. Some of the steam might have struck the child. The father, who was near, ran around a crib to the engineer, asking what was the matter. The engineer said, "I was only having a little fun with the children." This was less than a minute after the accident. This was held part of the *res gestæ*. *Elsever v. Minneapolis & St. L. R. Co.* 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841. The court said: "The declarations, if made by the engineer, were but the natural expressions of one so engaged,

for new trial because the verdict is against the weight of the evidence, the Michigan supreme court must exercise its judgment as to the weight of the evidence.

(May 31, 1912.)

**ERROR** to the Circuit Court for Kent County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Bundy, Travis & Merrick for appellant.

Messrs. Carroll, Kirwin, & Hollway for appellee.

upon the discovery of the result of his diversion, and were so immediately connected in point of time and circumstance with what he had done as to exclude the probability of meditation, and, as we think, were properly received in evidence as a part of the *res gestæ*."

In loading cotton on a cart, plaintiff's leg was broken by a bale falling on him, caused by a clerk putting his hand on a bale. He said he was sorry, that it was carelessness on his part. This was held admissible as *res gestæ*. *Courtney v. Baker*, 2 Jones & S. 529, reversed in 5 Jones & S. 249, appeal dismissed in 60 N. Y. 1.

A servant drove a horse against a pedestrian. After plaintiff was struck, the boy stopped the horse and came back, and said that he did not mean to do it. This was held to be part of the *res gestæ* and admissible in evidence. *Cleveland v. Newsom*, 45 Mich. 62, 7 N. W. 222.

**e. Where the injured party was seen.**

In some cases of this nature the declarations of the party causing the accident were held admissible as part of the *res gestæ*.

Statements made as soon as the body of a pedestrian who had been killed was reached by a motorman, "Well I seen the man, I seen his fate and all, and tried to make the stop, but couldn't make it," and the conductor said to the motorman, "Keep your damned mouth still, and don't make any statement until you are called upon to make one," were held part of the *res gestæ* in *Louisville R. Co. v. Johnson*, 131 Ky. 277, 20 L. R.A. (N.S.) 133, 115 S. W. 207. The court said: "The rule in this state is that declarations which would otherwise be incompetent to be admissible as a part of the *res gestæ* must be made by one of the actors in the affair, contemporaneous in point of time with the principal transaction under consideration, be made at or near to the place of its occurrence, and illustrate or explain how or what caused it to happen; but, if a declaration is so far removed in point of time from the main fact under investigation as to make it a mere narrative of a transaction that

McAlvay, J., delivered the opinion of the court:

This case is before this court for review upon writ of error by defendant from a judgment against it in favor of plaintiff, recovered for personal injuries, claimed to have been caused on account of the negligence of defendant. Defendant company operated a paper box manufactory in Grand Rapids. Plaintiff was first employed by defendant in August, 1908, just after it had met with a fire loss which necessitated moving temporarily into other quarters. He was employed as a millwright and carpenter to assist in installing machines moved over from the building where the fire occurred to another building, and continued at such work for about four weeks. In

November following, when defendant's building was ready for occupancy, he was again employed by defendant, and worked as a millwright in installing machines, fitting up shafting, pulleys, hangers, etc., in defendant's building. The work was of the same kind as that done by him when first employed. As fast as machines were set up by him and ready for operation, they were put in use in the regular work of the factory; and his work continued in the same room in which machines were in operation until December 18, 1908, when the injury complained of occurred. Plaintiff on that day, and the day previous, had worked at putting in the shafting, setting up and getting ready for operation a dovetailing machine. He was working under the direc-

has happened, or if it does not illustrate or explain the principal fact, or was made at some distance from the place of its occurrence, or by a bystander or third party, the declaration is not admissible as substantive evidence or as a part of the *res gestæ*." The admonition of the conductor was inadmissible, but was immaterial.

And a declaration of a motorman, made within two minutes of the occurrence of an accident, "that he could have stopped the car in time, but that he supposed that the lineman, who had jumped from the car and run ahead, would have had the deceased removed from the track before the car reached him," was held admissible as *res gestæ*. *Coll v. Easton Transit Co.* 180 Pa. 618, 37 Atl. 89. The man was seen on the track in time to stop the car.

Three or four minutes after an accident to a wagon caused by a trolley car, the motorman said "he thought he could pass without hitting him." This was held to be admissible and part of the *res gestæ*. *Champlin v. Pawcatuck Valley Street R. Co.* 33 R. I. 572, 82 Atl. 481. This statement was made in response to a remark of a bystander.

And a statement made by a motorman immediately after an accident, and while the car was still on the body of the child, "This is a terrible thing. I saw the child, but thought I could run past it," was held admissible as *res gestæ*. *Sample v. Consolidated Light & R. Co.* 50 W. Va. 472, 57 L.R.A. 186, 40 S. E. 597, 694.

Where a child was killed on a railroad track by a train, evidence of statements by the engineer, made shortly after the accident, that he kept thinking that the child would get off the track, until it was too late, was held admissible where the witness made statements contrary to that on the witness stand. *Southern R. Co. v. Smith*, — Ala. —, 58 So. 429. The court said: "It is true that this testimony was not admissible as part of the *res gestæ* to show how the injury occurred."

#### f. Failure to see injured party.

So it is held in some cases where the party 42 L.R.A. (N.S.)

causing the injury failed to see the injured party, that the declarations were part of the *res gestæ*.

Where the conductor walked to the brakeman, whose hand had been crushed between the cars, and said: "I was going to put this car on the elevator track. When I backed up I did not see you. I did not know just where you was until I heard you holler," this was held to be competent and part of the *res gestæ*. The master was doing the work under authority. The statements were made while the work was in progress, while plaintiff was assisting, and in the presence of the fact necessary to be explained. They illustrated what had up to that moment been done, and the work was not completed. The injury and statements were nearly simultaneous. *Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693.

And a statement of a motorman, made immediately after an accident, "I thought he had got off before," was held admissible because it contradicted his evidence, and because it supported plaintiff's contention that he was thrown off by a sudden jerk of the car, which was due to the negligence of the motorman. *McDonough v. Boston Elev. R. Co.* 191 Mass. 509, 78 N. E. 141. In this case the passenger was on the front platform, and the motorman knew he wanted to get off at this place, but started the car too soon.

Plaintiff was injured by the starting of a car as she was going to alight. The statement of the conductor that "he thought they were off" was held admissible as part of the *res gestæ*. *Reese v. Detroit United R. Co.* 159 Mich. 600, 124 N. W. 539. The court said it was during the happening of the event. Besides, the conductor testified to the same effect.

#### g. Failure to whistle.

A train collided with a wagon at a crossing, injuring the driver and his wife and killing their child. Statements by the trainmen, made before any were taken out,

tion of Mr. Vos, who had charge over him, and who told him where to set this machine. He had put up most, if not all, of the shafting in that room. He fastened the dovetailing machine to the floor with but two lag screws, which, passing through holes in the bottom of the frame, were screwed into the floor. This machine is connected with a countershaft on the floor. There is a main shaft along the ceiling, to which the countershaft, upon which there is a loose pulley and a drive pulley connected with the machine by a belt, is connected. To start this machine, the belt is shifted from the loose pulley to the drive pulley.

Plaintiff, considering he had completed his work in setting up this machine, went

down to the next floor and asked Mr. Vos to come and see if it was right. At this time, the belt from the main shaft to the countershaft was on the loose pulley, and the belts from the countershaft to the machine were on. The top part of the machine which holds the material to be dovetailed, and is operated by pushing it over the knives, was not in place. These knives were fastened to an arbor, at each end of which is a pulley connected with a countershaft by belts, and when power is applied the knives revolve in plain view in the open throat, when the top is removed. Mr. Vos went with plaintiff as requested. At that time, the machine was not running.

What occurred after they came to the machine is in dispute. Plaintiff's version is

of the wreck, to the effect that they did not have to whistle at that crossing, and that the train was trying to get over before the wagon, which was seen, were held admissible as *res gestæ*, being made at the time of the accident, and directly connected with the main facts. *East St. Louis Connecting R. Co. v. Allen*, 54 Ill. App. 27.

In a collision case a witness, a few minutes thereafter, heard the plaintiff ask the engineer why he did not blow the whistle. The engineer said he did whistle. The plaintiff said, "You whistled too far off." The engineer replied, "If I had whistled up this way further, he (the appellee) would have said if I had whistled nearer, I was too near to whistle." This was held evidence of admissions. *Grand Rapids & I. R. C. v. Diller*, 110 Ind. 223, 9 N. E. 710.

A train killed several children on a bridge. As soon as the train stopped, the engineer was asked, "What have you been doing?" He looked up and said they had "whistled enough for them." This was held to be *res gestæ*. *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085.

#### *h. Admitting negligence or fault.*

A trolley car struck a cow. The motorman, in alighting at that place, said, "There, that is running without a headlight." This was held *res gestæ* and properly admitted in evidence. *Ensley v. Detroit United R. Co.* 134 Mich. 195, 96 N. W. 34.

An engineer threw a shovel of water on a boy riding on the tender and then ordered him off, and in jumping off he was hurt. A statement by the engineer, four minutes after the accident, "I told him to get off the engine, and he dropped down in front of the engine," was held admissible as *res gestæ*, as it tended to show that the engineer required the boy to get off. *Stone v. Campbells Creek R. Co.* 66 W. Va. 417, 66 S. E. 521.

And a declaration by an engineer, who was operating an engine to which a mine cable was attached, that he "got scared" and turned the brake the wrong way, made

twenty-five minutes after the accident, and within five minutes after the men were brought to the surface, was held admissible as part of the *res gestæ*. *Hyvonen v. Hector Iron Co.* 103 Minn. 331, 123 Am. St. Rep. 332, 115 N. W. 167.

And where a passenger on a street car was injured in alighting, the conductor came around the end of the car and said, "It is too bad. I ought to have been there." This was held admissible as part of the *res gestæ*. *Tri-City R. Co. v. Brennan*, 108 Ill. App. 471.

Boys attempted to jump on while a car was in motion. The motorman said, "It was my own carelessness that the boy got hurt, running them from one end of the car to the other, playing with them." This was held inadmissible as part of the *res gestæ*, on the ground that the statement did not immediately accompany the act. *Little Rock Traction & Electric Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7. The court said, it "was a relation of what had occurred. When it was made, the injury was complete, and Cecil had been removed from where he had fallen, and was sitting in the car. The motorman obviously made it for the purpose of showing that he was guilty of no intentional wrong; for he said, 'he was playing with the boys.'"

The declaration of an engineer, made within five minutes of an accident, to the first person who got to him, while he was lying on the ground, within a few feet of the wreck, that it had been caused by a mistake in reading the time card, was held admissible as part of the *res gestæ*. *Illinois C. R. Co. v. Houchins*, 125 Ky. 483, 101 S. W. 924. Former trial 121 Ky. 526, 1 L.R.A.(N.S.) 375, 123 Am. St. Rep. 205, 89 S. W. 530. It was also cumulative, as that fact was proved by other evidence. The court adopted the rule in *Keefer v. Pacific Mut. L. Ins. Co.* 201 Pa. 448, 88 Am. St. Rep. 822, 51 Atl. 366, saying: "No fixed time or distance from the main occurrence can be established as a rule to determine what shall be part of the *res gestæ*. Each case must necessarily depend on its own circumstances to determine whether

that Vos looked at the machine, and, putting a straight edge alongside of the pulley, said it was all right; that Vos was standing on the side of the machine near the countershaft and the loose pulley, and plaintiff was on the opposite side of the machine; that when Vos said it was all right, plaintiff turned and picked up a chisel in his right hand, and was passing the machine; that he heard the loud buzzing of the machine starting, and that is the last he recollects. He was just across the machine from Vos, looking at him, and saw him make no motion to start it. He claims the chisel caught in the knives, and his arm was drawn into them. He testifies that he did not start the machine, and that it had not been started before on that

morning; that he had never started the machine, and had never started any machine, nor seen any started. No other eyewitness was produced by plaintiff.

The testimony of Mr. Vos contradicts the testimony of the plaintiff. He says plaintiff came to him after he had installed this machine, stating that the boxes were running hot, and requested him to come up and see what the trouble was. He went upstairs with him and felt of the boxes. They were warm, which indicated that the machine had been running. He told plaintiff that they were screwed down too tight, and at his request plaintiff got a wrench and loosened them. He then told plaintiff to start the machine to see how it would run. Plaintiff did as directed, and the ma-

the facts offered are really a part of the same continuous transaction."

A brakeman was injured coupling cars. A statement made by a car inspector ten minutes after the accident, that he had been troubled with coupling these two cars in question before the train started from the yard, was held admissible as part of the *res gestæ*. *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866. The court said: "But it seems to us that declaration of the car inspector having been evidently made as the mere result or consequence of feelings or motives coexistent with the injury, and without time or incentive for calculation as to effect or influence it would have upon rights of the parties, should be regarded as of the *res gestæ*, and therefore competent evidence."

Men repairing a roof allowed sparks from their fire pot to escape, setting the house on fire. Declarations of the workmen, made while the fire was in progress, admitting their carelessness, were held to be admissible and part of the *res gestæ*. *Shafer v. Lacock*, 168 Pa. 497, 29 L.R.A. 254, 32 Atl. 44.

A porter was injured in an accident, by reason of acts of a brakeman. A statement by the brakeman, five minutes after the accident, in response to questions, "that he knew Dewalt had been there clearing the car a few minutes before, but thought he had gone away," was held to be part of the *res gestæ*. *De Walt v. Houston, E. & W. T. R. Co.* 22 Tex. Civ. App. 403, 55 S. W. 534.

#### 4. Showing negligence.

Only such declarations are held admissible which grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it. The cases that refuse such evidence as *res gestæ* do so on the ground mainly that the declarant is not an agent authorized to bind the defendant, where any time has elapsed.

A workman under the hull of a ship was injured by the crew moving the rudder. The captain said: "You will be killing

someone next. You have pretty nearly killed one man now." This was held to be admissible as part of the *res gestæ*. *Swanson v. Pacific Shipping Co.* 60 Wash. 87, 110 Pac. 795.

Declarations of an engineer, made immediately after a collision, in view of the scattered goods from a peddler's wagon, showing his negligence, were held to be admissible as part of the *res gestæ*. *Hanover R. Co. v. Coyle*, 55 Pa. 396. The court said: "The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

That case was distinguished in *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305, the court saying: "In that case the declaration of the engineer was made in view of the goods strewn along the road by the breaking up of the boxes, the result of the accident. It was made immediately after the happening of the fact. But there was no doubt, under the proofs in that case, that the train ran into the peddler's cart while it was under the control of the engineer who made the declaration. This case has been much cited, and is otherwise in point in sustaining respondent's contention; but this court, early in the history of the state, declared squarely in favor of the doctrine that declarations must accompany the act they characterize, and be a part of it."

It was also distinguished in *Darling v. Oswego Falls Mfg. Co.* 30 Hun. 276, the court saying: "It will be observed that in that case the declaration was made by one of the actors in that occurrence, and illustrated the character of his act, and was contemporary with it, and did not relate to a matter that happened at another time and place."

And declarations of a mine foreman, immediately after an accident, as to the unsafe condition of the appliance, were held admissible as part of the *res gestæ*, being closely connected with the principal facts.

chine started. It shook considerably, and Vos asked if he had put all the lag screws in. Plaintiff replied that he had not; and then he picked up an oil can and oiled the side on which he stood, and reached across the knives to oil the box on the other side. In doing so, the knives caught his shirt sleeve and dragged his arm in.

The theory of the plaintiff was that Vos started the machine for the purpose of testing it; and to establish this he was permitted, over objection, to testify to a statement made by Vos after the accident, when in the ambulance with him on the way to the hospital. This testimony was offered and admitted as a part of the *res gestæ*.

At the close of the plaintiff's case, counsel for the defendant moved to strike out

the conversation with Mr. Vos in the ambulance on the way to the hospital, on the ground that it was not a part of the *res gestæ*. A motion was also made for a directed verdict in favor of the defendant, for the reason that no negligence chargeable to defendant had been shown. Both motions were denied and exceptions taken.

On the part of the defendant, much testimony was introduced for the purpose of showing that the accident was caused by the negligence of plaintiff. This testimony was given by eyewitnesses and those to whom plaintiff had stated the cause of his injury. A motion for a new trial was made, based upon the refusal to give certain requests to charge, the improper admission of testimony, particularly the

New York & C. Min. Syndicate & Co. v. Rogers, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. 719, 17 Mor. Min. Rep. 123. He was upon the ground when plaintiff was injured. The court said: "His remark was called forth by the accident, and was uttered while giving instructions with reference to that which plaintiff claims was its cause."

A superintendent was employed to put some building walls in condition, which he claimed to have done. The next day he, with plaintiff, was moving some timber near the building, when a brick from the cornice fell and hurt plaintiff. A statement was made by the superintendent within two minutes, that he saw the loose brick the day before, and had failed to throw them down. This was held not to be part of the *res gestæ*. *Darling v. Oswego Falls Mfg. Co.* supra. This was because it did not relate to any act being done by him or plaintiff, but to a collateral circumstance at another time.

In *Johnson v. Lindsay*, 53 J. P. 599, 5 Times L. R. 454, an action against a contractor for injury sustained by his workman through the fall of a bucket, a statement by a fellow workman who, when asked why he had not hooked the bucket securely, replied, "We were in a hurry," was held admissible in evidence, and a verdict of 50 guineas was given plaintiff. This verdict was set aside by the divisional court on the ground of "common employment" and because this "evidence was inadmissible." This is shown by the statement in the report in 38 Week. Rep. 119, reporting the court of appeal case, but not in s. c. L. R. 23 Q. B. Div. 508. There the appeal was dismissed on the ground of "common employment." On appeal to the House of Lords [1891] A. C. 371, this was reversed without discussing the question of evidence, and the judgment for plaintiff restored. Whether the rule of *res gestæ* evidence has any authority after the struggles of the fellow-servant doctrine have effaced that question is somewhat doubtful.

#### 1. Defective appliances.

Where an employee attributes the accident to defective machinery that he is

operating, and the statement is made so close in point of time to the accident as to preclude suspicion of any intent to fabricate, it is held that the statement is admissible.

A brakeman on a loose car moving was injured by reason of its colliding with the engine. Statements made by the engineer, as soon as he could reach the injured man, a car's length distant, to the effect that the engine was out of order, and that this was the cause of the collision, were held to be part of the *res gestæ*. *Ohio & M. R. Co. v. Stein*, 133 Ind. 243, 19 L.R.A. 751, 31 N. E. 180. The court said: "We are strongly inclined to the opinion that where an employee is injured in a collision, all that is done toward stopping the train and relieving the injured employee from a dangerous position forms part of one occurrence; but, without authoritatively affirming this, we do affirm that, where there is such a continuous chain of acts and events as there was in this case, all are part of the *res gestæ*."

A statement made by a motorman while the injured party was still under the car, that "he could not reverse the car, the reason he did not stop it," was held admissible as part of the *res gestæ*. *Springfield Consol. R. Co. v. Welsh*, 155 Ill. 511, 40 N. E. 1034.

In *Lecklider v. Chicago City R. Co.* 142 Ill. App. 139, the cases of *Springfield Consol. R. Co. v. Hoeffner*, 71 Ill. App. 162, affirmed in 175 Ill. 643, 51 N. E. 884, and *Springfield Consol. R. Co. v. Welsh*, 155 Ill. 511, 40 N. E. 1034, were distinguished, the court saying: "The conditions and the nature of the declaration alleged to have been made by the conductor in the case at bar differ materially from the statements held *res gestæ* in those cases. In the *Welsh Case*, moreover, the declaration of the motorman that 'he could not reverse the car,' as a reason why he did not stop it, had a direct bearing on the question of the defendant's negligence."

And immediately after a collision, the motorman stated to the conductor that, on

claimed conversation with Mr. Vos in the ambulance, and also that the verdict was against the weight of the evidence. This motion was denied and exceptions in writing taken by defendant.

The errors assigned cover the questions raised upon the motion for a new trial. This opinion will be confined to the principal errors relied on by defendant.

The court, in denying a motion for a new trial, relative to the conversation with Vos in the ambulance, held that it was part of the *res gestæ*. It has been settled upon the great weight of the authorities that, to make such statements admissible as *res gestæ*, they must be spontaneous, made at or near the time and place of the accident, and so closely connected with the oc-

currence as to be evoked and prompted by it. "On the other hand, narrations, not the natural and spontaneous outgrowth of the occurrence, and so far separated from the act they are alleged to characterize that they are not a part of it and so connected with it as to receive credit from it, are purely narratives of a transaction already past." *White v. Marquette*, 140 Mich. 310, at page 314, 103 N. W. 698, and authorities cited.

The plaintiff, immediately after the accident, was taken to another part of the factory, where his arm was temporarily dressed, and he waited for an ambulance. He said that he was unconscious part of the time. Fifteen or twenty minutes after

account of the wet rail, the brakes failed him and caused the accident. It was held admissible as *res gestæ*. *Cincinnati, L. & A. Electric Street R. Co. v. Stahle*, 37 Ind. App. 539, 76 N. E. 551. The court said: "The time occupied by the collision was very brief. The motorman was an actor in that occurrence. His expression was made in the presence of all concerned and under the immediate influence of the main event. It was interwoven with the surrounding circumstances so closely as that a presumption of spontaneity might reasonably arise."

And a statement made by a motorman, as soon as he had picked up a deaf mute who was injured, to the effect that the brakes were defective, was held part of the *res gestæ*. *Floyd v. Paducah R. & Light Co.* 23 Ky. L. Rep. 1077, 64 S. W. 653. The court said: "The declaration in question was made at the scene of the injury just after the wounded man was got from under the car, and was a verbal fact directly growing out of the transaction, and a part of it. It should have been admitted."

And the admission made by a motorman just after a collision with a vehicle, that the gong and brake were out of order, was held to be a part of the *res gestæ*. *Lexington Street R. Co. v. Strader*, 28 Ky. L. Rep. 157, 89 S. W. 158. The court said: "He left his car immediately after the collision occurred, and came to the appellees, who were being taken from the street where they had fallen. If he made the admission at all, it was within a few seconds after the accident, and before he had time to concoct or manufacture a false statement with regard to the cause of the accident."

And a statement that the brake chain broke, made by the driver of a car, in answer to a question by the superintendent, was held admissible as *res gestæ*. *Worms-dorf v. Detroit City R. Co.* 75 Mich. 472, 13 Am. St. Rep. 453, 42 N. W. 1000. It was made a few minutes after the accident. The car ran onto a team upon a descending grade.

A brakeman was thrown from the top of a car by a jolt. A declaration of the engineer in charge, when the body was dis-

covered, that there must have been something the matter with the air, was held to be part of the *res gestæ*. *Union P. R. Co. v. Edmondson*, 77 Neb. 682, 110 N. W. 650. The court said: "The exclamation, in our opinion, was a statement of a fact, or a declaration made under such circumstances as to raise the presumption that it was the unpremeditated and spontaneous explanation of the fatal accident."

And a statement by the engineer fifteen minutes after a collision, and after an examination as to its cause, attributing it to defective brakes, was held admissible as part of the *res gestæ*. *Missouri, K. & T. R. Co. v. Vance*, — Tex. Civ. App. —, 41 S. W. 167. The court said: "If the statements spring out of the transaction, and elucidate it, and if made at a time so near after the occurrence of the act then being considered as to reasonably preclude the idea of deliberate design, the doctrine of *res gestæ* applies, and such statements should be admitted."

In *Austin v. Nuchols*, 42 Tex. Civ. App. 5, 94 S. W. 336, it was held by the court of civil appeals that declarations as to an electric transformer being an old one, made by the foreman fifteen minutes after an accident from electric current, were admissible as *res gestæ*. These statements were made by the foreman in charge of the electric wires, whose duty it was to inspect them. In a similar case in the same court (*Austin v. Forbis*, 99 Tex. 234, 89 S. W. 405), the supreme court reversed the court of civil appeals, where the same witness had made declarations two hours after an accident, on the ground that the party making them was not authorized to bind the city. In discussing that case the lower court says: "But we expressed the view that the testimony was admissible, and are still of that opinion; but, however, the final authority has differed with us as to this question, and that settles the matter."

A piece of cleaver used in cutting rails flew and struck plaintiff's eye. A statement of the section master, immediately after the accident, "If they had sent me the cleaver I had sent in requisition for, we

the accident, the ambulance came, and Vos accompanied plaintiff to the hospital.

On the way, as plaintiff testifies, the following occurred:

Q. Did Peter Vos say anything to you, after your injury, while in the ambulance, while on the way to the hospital?

Mr. Bundy: Wait a moment; I object to that as incompetent and immaterial.

Mr. Kerwin: It is offered as part of the *res gestæ*. (Objection overruled and exception taken.)

A. I said to Mr. Vos, "What did you start that machine for?" Says he: "Henry, I started it with the intention of testing it out; but I should not have done it without putting a top on."

would not have had anything of this matter," was held to be part of the *res gestæ*, to show the bad condition of the cleaver and knowledge by the defendant. *Young v. Seaboard Air Line R. Co.* 75 S. C. 190, 55 S. E. 225.

But there are some cases which hold, under apparently similar conditions, that the declarant is not an agent authorized to bind the principal. This evades the *res gestæ* question, and is not of much value on that question. If the declaration is spontaneous and simultaneous with the accident, all courts would allow it to be proved, and the question of *res gestæ* then turns on the question of time or spontaneity.

A passenger was injured in stepping from a dark vestibule of a car by mistake while the train was going. A statement by a brakeman to other passengers after the accident, that they were short of gas, was held no part of the *res gestæ*, as it was not connected with the occurrence, and he had no authority to bind the company. *Wagoner v. Wabash R. Co.* 118 Mo. App. 239, 94 S. W. 293.

And in an action for injuries received by the fall of a shaft bucket, evidence "that about ten minutes after the occurrence, and as soon as he reached the top of the shaft [plaintiff] asked the brakeman, 'How did it happen?' The brakeman said . . . 'The clutch flew out, the machinery gave way,' and that the brake would not hold it. [The superintendent] replied, 'Yes, because I saw him put the clutch in place,—throw the clutch in place.'" This was held irrelevant, immaterial, and incompetent, and no part of the *res gestæ*, and merely the declaration of an agent. *Luman v. Golden Ancient Channel Min. Co.* 140 Cal. 700, 74 Pac. 307.

In an action for injuries caused by falling down a hatchway, a statement that "the hatch covers never did fit," made by the mate ten minutes after the accident, while the injured man was being assisted out of the hold, was held incompetent. *The Saranac*, 132 Fed. 936. The court said: "The declaration was made about ten minutes

This was not a voluntary, spontaneous statement. According to plaintiff's testimony, this statement resulted only from, and was in answer to, a direct question asked by him. It was drawn out by the direct interrogation of plaintiff. It was not the statement of an injured person who had been for a time unconscious. The condition of the plaintiff in the instant case has no relation to the statement of Mr. Vos. It was made after the occurrence and away from the place. It cannot be said to have been a part of the act it is claimed to characterize, and was therefore a narrative of a transaction already past and completed, and was hearsay. This statement, made by its agent under the circumstances already narrated, was not competent for

after the accident. In these circumstances, the statement was not a part of the *res gestæ*, and admissions of this character by an agent or employee cannot bind the respondents. Such declarations, designedly or thoughtlessly made, and which were not the natural utterances of the declarant at the time of the accident, are inadmissible. Furthermore, the witnesses between whom the conversation occurred did not represent the owner of the vessel, and hence the statements attributed to them are plainly hearsay, and were not made within the scope of their authority."

And declarations made by the conductor some time after an accident, to a third party, that the car and brake were no good, and that he had so notified the defendant, were held inadmissible. *Kay v. Metropolitan Street R. Co.* 103 N. Y. 447, 57 N. E. 751. The court said the conductor "could not bind or affect the defendant by any admissions or declarations after the accident, made to third parties."

Statements made by an engineer immediately after an accident, that the hoisting engine on a ship was out of order, were held inadmissible and no part of the *res gestæ*. *Fredenthal v. Brown*, 52 Or. 33, 95 Pac. 1114. He was not an agent authorized to bind the principal. The court said: "It was neither a spontaneous expression, impelled by the act while operating the winch, and characterizing it, nor was it such an expression of what took place in the hold of the ship as demonstrating its character; but it was a subsequent narrative or opinion, made in response to an inquiry."

A brakeman's foot was crushed on a stone car. The engineer reached him in about a minute, walking the length of the car. It was held that so much of the declarations of the engineer as did not refer to acts done or matters which happened prior to the collision which caused the injury were admissible as *res gestæ*. *Ohio & M. R. Co. v. Stein*, 133 Ind. 243, 19 L.R.A. 733, 31 N. E. 180, 32 N. E. 831. That part of the engineer's statement that a man had not fixed the cylinder cock was incompetent.

Declarations of a conductor immediately



the purpose of fixing liability upon defendant for plaintiff's injury.

The following excerpts from opinions of this court are in point: "The statements of an agent, when made in the course of his employment, and while engaged in the business of the principal, are binding upon the principal, because they are a part of the *res gestæ*; but no agent is employed to make admissions outside of his employment. . . . In the case of *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 105, 30 L. ed. 301, 7 Sup. Ct. Rep. 121, the court, quoting *Mr. Justice Strong* (*Northwestern Packet Co. v. Clough*, 20 Wall. 541, 22 L. ed. 406), states the reason of the rule to be that, 'the agent to do the act is not authorized to narrate what he had done

or how he had done it, and his declaration is no part of the *res gestæ*.'" *Hall v. Murdock*, 119 Mich. 391, 78 N. W. 329.

"We think there was no error in excluding this testimony. The injury had already occurred. It became a matter of narration, and was not even narration of the incident, but of the cause which led to the incident. We think the question was within the ruling of this court in *Andrews v. Tamarack Min. Co.* 114 Mich. 375, 72 N. W. 242; *Michigan C. R. Co. v. Coleman*, 28 Mich. 440." *Dompier v. Lewis*, 131 Mich. 144; 91 N. W. 152.

The court erred in admitting plaintiff's testimony of the statement of Mr. Vos.

The other contention argued on the motion for a new trial was that the verdict

after an accident, as to what transpired during the derailment of a train, and his directions to a passenger to jump, were held to be admissible. But his statements as to the condition of the track were held not to be a part of the occurrence, and not admissible. *Houston, E. & W. T. R. Co. v. Norris*, — Tex. Civ. App., 41 S. W. 708.

#### *k. Exonerating self.*

And statements made directly after an accident to a passenger while alighting from a car, when she asked, "Oh, conductor, why did you throw me?" and he said, "I have been on the road so many years and this is my third accident," and "Two of them have occurred since noon to-day" but "This one wasn't my fault, the motorman started the car without a signal," were held admissible as part of the *res gestæ*. *Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 Pac. 1051. The court said: "They were made at the very time, and in the very presence, of the accident, while the conductor was still in the discharge of his duties in that behalf, lending aid to the victim of the unfortunate happening."

A car of ice was being unloaded on a switch. A car was kicked in this switch, causing a workman's leg to be caught between the ice car and the slide. Statements made by the conductor when he reached the injured man, that he did not intend to kill a man on purpose, "that he thought, it being noon, we was to dinner," were held competent, as part of the *res gestæ*. *Kansas City Southern R. Co. v. Moles*, 58 C. C. A. 29, 121 Fed. 351. The conductor was on the cars kicked in, and he reached the injured man instantly.

Plaintiff, in a buggy, was run into by an ice cart. The driver of the latter, in an insolent manner, said to plaintiff that he could not help it. It was held that the statement and manner were competent evidence as part of the *res gestæ*. *Joslin v. Grand Rapids Ice & Coal Co.* 53 Mich. 323, 19 N. W. 17.

A boy had been struck by a street car and carried to the sidewalk. About one minute

after the accident, a passenger said to the conductor, "I suppose you are satisfied now; you have probably killed that boy." The conductor answered, "I have orders to drive those boys off, and I must do it." This was held inadmissible and no part of the *res gestæ*. It was history. *Chicago City R. Co. v. White*, 110 Ill. App. 23.

In an action for injuries caused by running a railroad car drawn by horses against plaintiff, evidence directly after the accident, on the arrest of the driver, that he assigned as a reason for not stopping the car that the brakes were out of order, was held inadmissible, on the ground that the fact in regard to the arrest was irrelevant to the case, and that declarations of an agent did not bind the principal. *Luby v. Hudson River R. Co.* 17 N. Y. 131.

Distinguished in *American Mfg. Co. v. Bigelow*, 110 C. C. A. 77, 188 Fed. 34, where the court said: "The statement was made by the driver of the horse-drawn railroad car which caused the injuries, after he had got off the car, been arrested by a policeman, and taken out of the surrounding crowd. To the policeman's inquiry he said that the reason he did not stop the car was because the brakes were out of order. Apparently his mental processes were not controlled by the nervous excitement of the event; as the court of appeals said: 'He was manifestly excusing himself and throwing the blame on his principals.'"

Also distinguished in *Sample v. Consolidated Light & R. Co.* 50 W. Va. 472, 57 L.R.A. 186, 40 S. E. 597, the court saying: "'He was manifestly excusing himself and throwing the blame on his principals.' Thus clearly showing that the court excluded it because the driver had had time to fix up a story to clear himself of blame, and cast it upon his principals. It was not a declaration made as in case at bar, which is clearly brought within the rule as laid down in the authorities cited as being a 'spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design.'"

of the jury was against the weight of the evidence.

Plaintiff was the only witness of the accident who testified in his behalf. Another witness, named Heth, who was an electrician, and had, on the day previous, installed the motor which furnished power to the shaft by which this dovetailing and other machines were operated, who just before the accident was near this machine, was called as a witness by plaintiff. He did not see any part of the accident, having gone a short distance beyond a partition which cut off all view of the plaintiff and his machine. He testified that plaintiff was hurt a very short time after he got out of sight. None of his testimony tends to prove how the accident occurred. It

related to his recollection as to whether this machine was running that morning before the accident.

On the part of defendant, plaintiff was disputed by three witnesses who saw the accident or the circumstances immediately preceding and following it. These witnesses were Vos, the foreman, whose testimony has already been given, and two men working in the same room on machines not far from plaintiff. One of them saw the accident, and testifies that plaintiff's sleeve caught in the knives, while he was reaching across to oil the arbor on the other side. The other saw plaintiff with an oil can in his hand oiling on the side near him, and then reach over the knives to oil on the other side. His attention was then

### 1. Opinions.

In matters of opinion the declarations are held to be inadmissible.

A statement by the conductor to plaintiff, about three quarters of an hour after an accident, "This motorman is green at the business," was held inadmissible as *res gestæ*. *Henry v. Seattle Electric Co.* 55 Wash. 444, 104 Pac. 776. This was on the ground that the statement was but an opinion.

And a declaration by the conductor, long after an accident, that he thought the driver did not look, or the child would not have been run over, was held inadmissible and could not bind defendant. *Furst v. Second Ave. R. Co.* 72 N. Y. 542.

Distinguished in *American Mfg. Co. v. Bigelow*, 110 C. C. A. 77, 188 Fed. 34, the court saying: "The statement was by the conductor of the car, after the accident, that 'if the driver had been looking, he would not have run over the child.' But the conductor was on the rear platform, where he could not see the boy nor the driver, and knew nothing at all about the circumstances under which the accident happened. His guesses as to its avoidance were admissible on no conceivable theory."

A passenger was hurt in boarding a train. A statement made by the brakeman a short time after the accident, that the cars should have stopped longer, was held no part of the *res gestæ*. *Michigan C. R. Co. v. Coleman*, 28 Mich. 440. It was an opinion and narrative.

And a declaration, "You must be injured," made immediately after an accident, by one of defendant's guards, was held inadmissible as *res gestæ*, being a mere statement of his opinion, in an action for injuries sustained by a fall by the sudden starting of an elevated railway train. *De Soucey v. Manhattan R. Co.* 39 N. Y. S. R. 79, 15 N. Y. Supp. 108. The court said: "The competency of such evidence depends not upon the proximity in time between the accident and the statement, but upon whether the statement be of the *res gestæ*. Such was not the declaration in question." 42 L.R.A. (N.S.)

A brakeman was knocked off a ladder on a car by a bridge. A statement by the conductor immediately after the train stopped after a run of a mile and a half, that the bridge "got him," was held inadmissible and not part of the *res gestæ*, as it was the expression of opinion, as he testified that he did not see the brakeman fall. *Hughes v. Louisville & N. R. Co.* 104 Ky. 774, 48 S. W. 671. But see *Leach v. Oregon Short Line R. Co.* 29 Utah, 285, 110 Am. St. Rep. 708, 81 Pac. 90.

A boy was told that he might pass through a freight train that was blocking a street. A statement made by the brakeman, two minutes after the boy was injured, "Kid, you are not to blame for this; you are innocent," was held inadmissible, as it was a conclusion. *Scott v. St. Louis, K. & N. W. R. Co.* 112 Iowa, 54, 83 N. W. 818.

An elevator in an ascent started suddenly, causing a child to fall in the shaft. A witness, hearing the scream, went up the stairs to the third floor, and asked the elevator boy what was the matter. His response that he did not know, that he supposed that somebody was hurt, was held not *res gestæ*. *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608. The court said: "In this case no connection whatever appears between the fall of the child from the elevator and the words spoken by the elevator boy."

A car started up suddenly, throwing a passenger to the ground and injuring her. Evidence as to a statement by the conductor some time after he had gone from the car to the place where plaintiff lay, that "these ladies seem to blame me,—seem to think it is my fault," was held not part of the *res gestæ*. *Boone v. Oakland Transit Co.* 139 Cal. 490, 73 Pac. 243. The court said: "It happened after the accident, and after a sufficient time had elapsed for the [conductor] defendant to walk almost half a block and back again. It was not even a relation of the facts which caused the accident, but was a mere statement of the opinion of third persons as to who was at fault. Its admission was against all the rules with relation to *res gestæ*."

taken by his own work, and he did not see his arm drawn into the machine. He was also disputed by the testimony of eight witnesses as to direct and positive statements made by plaintiff to them or in their presence, to the effect that the accident occurred in the manner claimed by defendant, and that it was his own fault. Two other witnesses who worked in this factory testified that plaintiff quite frequently used other machines, and had seen him start and stop them. One of them, who had worked on this machine, had seen him start and stop it. A witness who was employed by a firm of sawmakers which sharpened the knives for the machines in defendant's factory testified that he sharpened the knives on this machine a few days after the acci-

dent, and that they were only dull. The teeth were sound, and had no marks or nicks on them. If metal had struck these teeth, they would have been broken or bent. Five of these witnesses were not employees of defendant. They were disinterested witnesses, and not impeached. They were ordinary workmen of the same class as plaintiff. Of all these witnesses, Vos alone can be said to have been in any way an interested witness.

The plaintiff denied this testimony; and his wife and daughter denied that a certain statement by plaintiff, detailed by one of the witnesses, did occur. The eyewitnesses were not disputed, except by plaintiff; and none of them was impeached.

Under our practice, this court must ex-

And evidence that after an elevator had stopped in its fall, the elevator man declared that "he lost all control, and the connection cord got broke," was held inadmissible, as only an opinion about a past occurrence, and no part of the *res gestæ*. *Lissak v. Crocker Estate Co.* 119 Cal. 442, 51 Pac. 688.

***m. Statements before transaction had fully terminated.***

Plaintiff was injured by the starting of a loom which she had stopped to clean. A statement, "Well, it is too late now," made by defendant's superintendent while carrying plaintiff from the room, immediately after the injury, in answer to her charge that his act had caused it, was held admissible as part of the *res gestæ*. *American Mfg. Co. v. Bigelow*, 110 C. C. A. 77, 188 Fed. 34.

But a conversation between the fireman and engineer after deceased was struck, and after the train had stopped, "If you had stopped the train when I told you, you would not have killed him," and the other replied, "It cannot be helped now, it is too late," was held inadmissible as *res gestæ*. *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333.

Distinguished in *Leahy v. Pass. Ave. & Fair Grounds R. Co.* 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58, the court saying that the court in that case said: "Were the declarations connected with the calamity as a cause or concomitant? Were they contemporary with the principal transaction, and illustrative of its character, or merely a subsequent narrative of how it occurred, or an explanation of how it might have been avoided? If the latter, as we think, they were wholly inadmissible, and the court erred in permitting the evidence to go to the jury."

And declarations of a stevedore and winchman, made while another stevedore was being removed from the hold of a vessel, showing that he had fallen in through their carelessness, were held admissible against plaintiff, who claimed that the in-

jury was caused by defective machinery. *Westall v. Osborne*, 53 C. C. A. 74, 115 Fed. 282. The statements were nearly contemporaneous with the injury.

And evidence that a motorman stopped his car and asked plaintiff, who had fallen on the street, "Why she got off the car before the car stopped, or while the car was going, and why she didn't ring the bell," was held to be part of the *res gestæ*. *Cohodes v. Menominee & M. Light & Traction Co.* 149 Wis. 308, 135 N. W. 879.

A passenger was injured in attempting to board a car. On re-entering the car, the conductor asked her if she was hurt. This was held to be part of the *res gestæ*. *Nixon v. Omaha & C. B. Street R. Co.* 79 Neb. 550, 113 N. W. 117.

A boy was hurt by a telephone insulator falling on him in the street. The man on the pole followed the boy and mother home and said, "Don't worry, it is nothing to be worried about blood poisoning for. This is the kind that hit him," referring to a marble-like material that he had. It was held to be within the scope of his agency and admissible in evidence. *McNicholas v. New England Teleph. & Teleg. Co.* 196 Mass. 138, 81 N. E. 889. The court said: "There was evidence to show that it was the duty of a lineman of the defendant, in case of an accident, to report to the general or head foreman or superintendent, and get instructions, to send the injured person to a hospital, if necessary, and to take the names and addresses of injured persons. The person on the pole, whom the jury must have found, in view of their verdict, to have been an employee of the defendant, followed the plaintiff and his mother to their home, but left without doing anything, and a few minutes later returned with a man, who took upon himself the active performance of the duty, incumbent upon the lineman, of getting the name and address of the injured person. This circumstance fairly justified the inference that he was a superior to the lineman, upon whom devolved duties similar to those resting on the lineman respecting accident cases."

exercise its judgment as to the weight of the evidence in the instant case. We are satisfied upon this record that the verdict was against the clear weight of the evidence. We do not see how any other conclusion is possible. The instant case is of that class occasionally before the courts where, for some reason not always apparent, justice has miscarried, and a verdict has been found against the weight of the evidence. *Brassel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 101 Mich. 13, 59 N. W. 426;

*Gregory v. Detroit United R. Co.* 138 Mich. 368, 101 N. W. 546; *Crowe v. Michigan C. R. Co.* 142 Mich. 696, 106 N. W. 395.

We do not think that it is necessary to consider any other questions discussed in the briefs.

The judgment is reversed, and a new trial granted.

Under stipulation, Justice Stone is substituted for the late Justice Hooker, who sat in the case.

Plaintiff was injured at a crossing. He walked across the track to the switchman, and said: "Who is to blame for this?" The switchman answered: "It was the engineer. I told him to stop, and you to cross." This was held to be part of the *res gesta* and admissible. *Wilson v. Southern P. Co.* 13 Utah, 352, 57 Am. St. Rep. 766, 44 Pac. 1040. The court said: "All of these acts and declarations were the immediate expressions of the fears, the intentions, and the conflicting purposes brought into play by the occurrences of the occasion, the situations of the respective parties, and their dangers and emergencies, real or apparent."

And where plaintiff was struck by an engine while crossing a track, evidence that, immediately after the accident, the engineer asked the fireman, "Why didn't you tell me to stop?" was held admissible as part of the *res gesta*, where it was asked so near the time the accident occurred as to make it a part of the transaction. *Zipperlen v. Southern P. Co.* 7 Cal. App. 206, 93 Pac. 1049.

A miner was injured by a blast. Some twenty-five minutes thereafter, when he had been carried three miles, the foreman said, "How did this happen?" The miner who went with him said, "Rock came down the raise and struck him." This was held to be part of the *res gesta*. *Linderberg v. Crescent Min. Co.* 9 Utah, 163, 33 Pac. 692. The court said: "The foreman had a right to know, and while the declaration and the accident were not exactly contemporaneous, yet the circumstances were such as to closely connect them. The statement of the employee grew out of the main fact,—the accident,—and appears to have been made under circumstances which preclude the idea of design to misrepresent."

And in an action against a street railroad company for the killing of a hog, where a motorman remarked at the time "that the hog jumped on the track, right in front of the car," it was held that this declaration was a part of the *res gesta*. *Little Rock R. & Electric Co. v. Newman*, 77 Ark. 599, 92 S. W. 864.

In *The Schwalbe*, Swabey, Adm. 521, for collision, evidence of an able seaman that after the steamer was cut clear of the brig, she backed away: "and as she was so backing, the pilot of the steamer, who was on the bridge, stamped his foot and said, 'The damned helm is still a star-

board.'" This was held admissible as part of the *res gesta*.

An exclamation of the conductor to another brakeman, made a few seconds after an accident, "My God! go back and see if you can find L. The bridge knocked him off," was held admissible. *Leach v. Oregon Short Line R. Co.* 29 Utah, 285, 110 Am. St. Rep. 708, 81 Pac. 90. The court said: "The statements of Hawkins as to how the accident happened, which, the record shows, were made but a few seconds, at most, after the accident occurred, and while he was giving orders in the line of his duty respecting the accident, were admissible in evidence as a part of the *res gesta*."

And statements made at the opening of a door and then closing it on plaintiff's finger, made by a brakeman to the conductor, and then to the plaintiff, "Look—what this door has done to this man's hand. Turning that curve threw your hand off," were held admissible as part of the *res gesta*. *Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. 684. The court said: "Now it seems to us that these occurrences, commencing with the brakeman's opening of the door, and closing with his last ejaculation, constituted one continuous transaction, and that the declarations were the natural and spontaneous outcome of the principal fact."

And a conversation between plaintiff and the engineer, a few seconds after the accident, in which the engineer said how the accident was caused, was held admissible as *res gesta*, as it took place so near the time of the happening of the accident. *Union P. R. Co. v. Elliott*, 54 Neb. 299, 74 N. W. 627. The plaintiff, a brakeman, was struck by an engine on another track, that gave no signal.

A child was run over by a trolley car, which stopped, and the motorman asked a woman on the sidewalk if there was a dog under the car. It was held to be *res gesta*. *Knittel v. United R. Co.* 147 Mo. App. 677, 128 S. W. 5. The court said: "It appears to have been a spontaneous utterance of the motorman, made almost instantly after the boy had been run over, as the motorman was lowering the window to look out and ascertain what had happened, and it throws a vivid light on the state of the motorman's mind at the time."

A train struck some horses on the track, derailling the locomotive. What the engi-

neer said to the conductor immediately after the horses were struck and the train stopped, and while those in charge were examining to ascertain what mischief had been done, was held to be part of the *res gesta*. *O'Connor v. Chicago, M. & St. P. R. Co.* 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481. It was in direct connection in time with what had just occurred, and related to what they were then at.

A boy was injured by a train. It required less than sixteen minutes to make the run to Inslee, and less than fifty minutes to make the run and the engineer's report. It was held that the report would be *res gesta* and proper evidence against the company. *Keyser v. Chicago & G. T. R. Co.* 66 Mich. 390, 33 N. W. 867. The court said: "He was in the proper discharge of his duty all this time, having the injured boy on the train until he arrived at Port Huron, and what he did and said in the discharge of that duty, if no more than was required, I think should be regarded as proper evidence against the company, so far as it had any materiality to the case. It was the statements thus made to Inslee concerning the accident, and defendant's agency in causing the injury, upon which the plaintiff had most to rely."

A customer was scalded by the bursting of a vat. Statements by an employee who was in charge of the tank, and controlled access to it, for the sale of slops, made within five or ten minutes after rescuing plaintiff, were held admissible as part of the *res gesta*. *Hupfer v. National Distilling Co.* 119 Wis. 417, 96 N. W. 809. The court said: "The words must be part of the event, and to this end they must be so nearly concurrent in time as to warrant belief that they are spontaneous utterance of the thoughts instantly engendered by the event. They must not be in the nature of a narrative of the fact after it has fully transpired,—the fruit of memory, or possibly of fabrication after opportunity to deliberate."

And statements by an engineer immediately after running over a child were held to be admissible and *res gesta*. *Hermes v. Chicago & N. W. R. Co.* 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584. The court said: "The declaration of the engineer had, or might have had, a tendency to explain how it happened. It surely grew out of that transaction, and served to illustrate its character."

And declarations made immediately after an accident, by a master of a vessel, were held admissible as *res gesta*. *Lambert v. La Conner Trading & Transp. Co.* 30 Wash. 346, 70 Pac. 960. His steamer ran into a drawbridge, injuring plaintiff.

And a statement made by an employee on the engine, within a few minutes after a woman was scalded and otherwise injured by striking a post in her effort to escape, was held admissible as *res gesta*. *Gulf, C. & S. F. R. Co. v. Tullis*, 41 Tex. Civ. App. 219, 91 S. W. 317.

A father was hurt in trying to rescue

his child on a track. Evidence that within six minutes the engineer or fireman said, "They came near running over a man down there," was held admissible, as the circumstances showed that it was not prompted by any intention to misrepresent the truth. *San Antonio & A. P. R. Co. v. Gray*, 95 Tex. 424, 67 S. W. 763.

And in an action for negligently starting a fire, the declaration of defendant's employees, made just after it started, while one of them was trying to save property, was held to be part of the *res gesta*. *Paraffine Oil Co. v. Berry*, — Tex. Civ. App. —, 93 S. W. 1089.

And a statement made to an injured stevedore by his boss, immediately after an accident, was held admissible as *res gesta*. *Mullan v. Philadelphia & S. Mail S. B. Co.* 78 Pa. 25, 21 Am. Rep. 2. The injury was caused by a defective rope used in block and tackle.

A man with a conductor's badge rushed into a saloon, inquiring for a telephone. On being asked what the trouble was, he replied, "We struck a wagon." "We have smashed a wagon on Federal street." This was held admissible as part of the *res gesta*. *United R. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379. The only trouble was in proving that he was the conductor. But the witnesses ran to the place indicated, found a wrecked wagon and car, and motorman, but no conductor. This was held sufficient to identify him.

A passenger fell in attempting to board a moving train. What the brakeman said when he came back to him was held admissible as part of the *res gesta*, as the statement was made immediately after he fell. *Illinois C. R. Co. v. Cotter*, 31 Ky. L. Rep. 679, 103 S. W. 279. The train ran about 250 yards after he fell off.

Deceased was standing waiting for a west-bound car, which had stopped, and was then fatally injured by being struck by an east-bound car. A passenger thereon went to where he was lying, and met the motorman of the east-bound car, and had a conversation with him as to how the accident occurred. It was held to be *res gesta*, and should have been admitted, although there was no avowal made, as the testimony was a part of the transaction. *Kern v. Des Moines City R. Co.* 141 Iowa, 620, 118 N. W. 451.

A brakeman helping a passenger to alight caused both to fall. Statements made as both were arising from the ground were held to be part of the *res gesta*. *Louisville, N. A. & C. R. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107.

A statement made by an engineer, shortly after a collision at a crossing, that "if he had not applied his air, he would have killed the whole business," was held admissible, where the statement was shown to have been made at such a time and in such relation to the event as to render it a part of the *res gesta*. *International & G. N. R. Co. v. Bryant*, — Tex. Civ. App. —, 54 S. W. 364.

And evidence of what the foreman said at the time an employee fell from an electric light pole, killed by electricity, was held to be competent. *O'Donnel v. Louisville Electric Light Co.* 21 Ky. L. Rep. 1362, 55 S. W. 202.

A passenger in a "cab car" of a freight train jumped off after the conductor and brakeman had jumped. The train was off the track and was running. The brakeman was asked before the train stopped, why he jumped off, and answered that when he saw the conductor jump off, he thought it was time for him to go, too. This was held competent as part of the *res gestæ*, and tended to show that plaintiff was prudent. *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15.

A hook was used in hoisting from the hold of a vessel. A boy fell through the hatchway. A witness, who was working near, heard someone in the hold say, "The hook hit him." This was held *res gestæ*. *Johnson v. St. Paul & W. Coal Co.* 126 Wis. 492, 105 N. W. 1048.

A laborer in a coal mine, employed on an inclined railroad, was injured by reason of lack of brakemen for so large a train. Statements made by him at the place of the accident, within a few moments thereafter, inquiring for the brakeman, and the response of the mine boss that he had been sent to make a shift, were held part of the *res gestæ* and admissible. *Kingston Coal Co. v. Aaron*, 147 Ky. 480, 144 S. W. 371.

A boy was smothered in a bin of oats. A statement of the man in charge of the elevator, made to the father while efforts were being made to extricate the boy, was held admissible as *res gestæ*. *Meier v. Way, J. L. & Co.* 136 Iowa, 302, 125 Am. St. Rep. 254, 11 N. W. 420. He was the *alter ego* of defendant in ordering the boy to go to the unsafe place.

And statements of a hostler who sometimes had charge of a barn and was in it when plaintiff returned for his team, and found one of his horses dead, were held admissible as *res gestæ*. *McPherrin v. Jennings*, 66 Iowa, 622, 24 N. W. 242. It was claimed that the horse's head became fastened in the feed box, and, in struggling, it died.

Plaintiff was injured by foul air in a mine. As he was leaving the shaft, the superintendent said, "Don't go yet. We are changing the air, and can change it back again the way it was in three minutes. Wait until I go and hollow down to Bixley to turn the air,—to change the air back the way it was." This was held to be part of the *res gestæ*. *Mosgrove v. Zimbleman Coal Co.* 110 Iowa, 169, 81 N. W. 227.

And statements made by the driver of a car immediately after an accident, while the boy was under the car, were held admissible as part of the *res gestæ*, in an action for injuries caused by the alleged negligent driving of the car. *Quincy Horse R. & Carrying Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190. The statements were not shown.

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In attempting to avoid a collision with a hand car, the driver of a buggy whipped his horse, and the buggy was upset. In a suit against the section master who drove the car, and the railroad, evidence of statements made by the section master was held admissible against him. *Douglass v. Southern R. Co.* 82 S. C. 71, 62 S. E. 15, 63 S. E. 5.

Statements by a section master touching the origin of fire set out by him, and made the morning after, while the fire was burning, were held admissible as part of the *res gestæ*. *Yazoo & M. Valley R. Co. v. Jones*, 73 Miss. 229, 19 So. 91.

But in *Tyson v. Union Traction Co.* 199 Pa. 264, 48 Atl. 1078, declarations of a motorman, made immediately after an accident, were held inadmissible. The court said: "It is doubtful if the declarations of the motorman and conductor, which were sought to be proven, were, in any proper sense, part of the *res gestæ*. But even if admitted, the evidence could not affect the result, as the contributory negligence of the plaintiff is established beyond question."

An employee was set at new work in a mill on "jiggers" which carried cloth, and was injured by his hand being caught in the roller. Declarations made by the overseer in charge of the room, immediately after the accident, while plaintiff was lying on the floor, after being removed from the machine, were held to be "rightly excluded." *Richstain v. Washington Mills Co.* 157 Mass. 538, 32 N. E. 908. The quotation was all the ruling made. But it was held as a matter of law that he assumed the risk, and that therefore there was no negligence on the part of any superintendent in failing to warn or instruct him. The declarations were not stated in the case.

A porter was injured in an accident. Within five or ten minutes after, while plaintiff was on the ground, the engineer, on being asked how it happened, said: "The trouble was from the careless negro brakeman; that no reliance could be placed in the damned negro brakemen on the road; that, if the brakeman had done his duty, and signaled, it would not have happened." This was held to be no part of the *res gestæ*. *De Walt v. Houston, E. & W. T. R. Co.* 22 Tex. Civ. App. 403, 55 S. W. 534. The court said: "The true reason for the admission of declarations made subsequent to the occurrence to which it relates would seem to be that, being shown to be an utterance instinctively made as the result of impulses produced by the occurrence to which it related, and under circumstances showing it not to be the result of premeditation or design, it is clothed with a reliability which would render it safe to receive it as original evidence without requiring the oath of the declarant in support of its truth."

A child was struck and injured by a train. A statement made by a brakeman, a few minutes after the accident, in re-

sponse to a question as to how the injury occurred, that he signaled to the engineer in time to stop the train before hitting the child, but the engineer was looking the other way, and did not see him until too late, was held mere narration of past events, and therefore not part of the *res gestæ*. St. Louis, I. M. & S. R. Co. v. Kelley, 61 Ark. 52, 31 S. W. 884. The court said: "The acts to which it referred were completely past. The injured child had been borne away from the place of the accident. It was not a spontaneous utterance, called forth by the accident, but was made in response to an inquiry, and was only a narration of past transactions by which McFadden was endeavoring to show that not himself, but another, was to blame for the accident."

A pedestrian was killed at a crossing. A statement made by the flagman immediately after the accident, showing why he did not flag the train, was held inadmissible. Tyler v. Old Colony R. Co. 157 Mass. 336, 32 N. E. 227. The court said: "As a declaration of the defendant's servant, the evidence was inadmissible." This ruling evidently was made on the ground that it was assumed that it was customary to flag at this crossing, and the flagman testified he had not flagged trains within a year and a half. But it was held that flag or no flag, plaintiff was guilty of such contributory negligence as barred a recovery, and that if she had used her faculties, she would not have been hurt.

A horse was fatally injured by reason of a steam roller in the street. A few minutes after the accident the engineer said to the flagman, "Where were you at the time this occurred?" This was held to be no part of the *res gestæ*. Hall v. Uvalde Asphalt Paving Co. 92 N. Y. Supp. 46.

And in an action for loss of goods, caused by a steamboat sinking, the declarations of the master, made directly after the boat struck, that the grounding of the boat was an act of carelessness, were held inadmissible. Small v. Belyea, 24 N. B. 16.

And declarations made by defendant's section foreman, as to the killing and disposition of plaintiff's animal, made at the time of removal from the track, were held inadmissible and no part of the *res gestæ*. Smith v. St. Louis, I. M. & S. R. Co. 91 Mo. 58, 3 S. W. 836.

Where a section boss pointed out to a third party the place where an animal was struck by a train, and said that he had killed it to end its sufferings, it was held no part of the *res gestæ*. Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co. 33 Mont. 338, 83 Pac. 886. Mont. Code Civ. Proc. (§ 3126) 7867, provides where also the declaration forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration is evidence as part of the transaction.

#### *n. Principal and agent.*

In many cases the declarations of the party charged with neglect were held in- 42 L.R.A.(N.S.)

admissible, and it was said that it was not *res gestæ*, because he was not an agent authorized to bind. This depends on another principle of law,—that of admissions to bind principal,—and is different from that of *res gestæ*, and the cases are not of much value on the subject of *res gestæ*, except that, by implication, they mean that the time elapsing was so great that the declaration became narrative and past history.

Declarations made shortly after an accident, by the defendant's son, who had been in charge of the horse that day, and had left him standing in the street, by the curbstone, just before he ran away, injuring plaintiff, were held inadmissible, as they were not part of the *res gestæ*, but merely narrative and made by an agent. Haywood v. Hamm, 77 Conn. 158, 58 Atl. 695.

And statements made by a chauffeur after a collision, were held no part of the *res gestæ*, so as to bind his master, where he was using the car contrary to his master's order. Riley v. Roach, 168 Mich. 294, 37 L.R.A.(N.S.) 834, 134 N. W. 14.

A physician, on coming out of a house, found his buggy upset, and near it a wagon, the driver of which said he had smashed the buggy. It was held that the negligence of the corporation owning the wagon could not be established by admission of its driver. It was not *res gestæ*. Burns v. Borden's Condensed Milk Co. 93 App. Div. 566, 87 N. Y. Supp. 883. This was because it was a narrative of a past event.

A pedestrian was killed at a railroad crossing. What a passenger heard the train hands say of the killing was held inadmissible. Petrie v. Columbia & G. R. Co. 27 S. C. 63, 2 S. E. 837. The court said: "He did not show that they were a part of the *res gestæ*, nor did he show that they were made by an agent in the course of his agency; and we think, therefore, that they were properly excluded."

And statements by a motorman "right after" an accident at a crossing, that it was raining and his head was down, and he never saw them, as the reason why it occurred, were held not admissible as *res gestæ*. Mobile Light & R. Co. v. Baker, 158 Ala. 491, 48 So. 119. This was on the ground that they were declarations of an agent, which are admissible as to matters which are part of the *res gestæ*, but not as to past transactions. The court said: "The declarations made by the motorman were subsequent to the collision, were not part of the *res gestæ*." The question of length of time seems to have made no difference, but they are condemned solely on the ground that they were subsequent. The case cited to sustain this is Memphis & C. R. Co. v. Womack, 84 Ala. 149, 4 So. 618, but that case rejected the declarations on the ground that they were not connected with the main fact, or contemporaneous therewith.

And declarations of the motorman as to

how the accident happened, made two or three minutes after the car had left the place where it had struck a child, were held inadmissible, on the ground that they were in no way part of the *res gestæ*. *Morse v. Consolidated R. Co.* 81 Conn. 395, 71 Atl. 553. He was not an agent authorized to make admissions.

A passenger on a train was injured in alighting. Evidence of statements made thereafter by the brakeman, showing that he had pushed the passenger off, was held inadmissible as *res gestæ*, as he was not an agent authorized to bind the company. *Pittsburgh, C. & St. L. R. Co. v. Theobald.* 51 Ind. 246.

And statements made by an engineer after a hog had been killed by a railroad train were held inadmissible, as he was not an agent authorized to bind his principal, after the act was done. *Chicago, B. & Q. R. Co. v. Riddle,* 60 Ill. 534. Statement was not given.

Plaintiff was injured by a set screw on a blower, started by the superintendent while plaintiff was on an errand. The darkness of that part of the building prevented plaintiff from seeing that the shaft was in motion. A statement made by the superintendent shortly after the accident was held inadmissible, as it was a mere narration, and not made within the scope of his authority. *McKenna v. Gould Wire Cord Co.* 197 Mass. 406, 83 N. E. 1113.

A misplaced switch caused a wreck. The fireman and engineer were brought into a car, and while plaintiff was washing the head of the fireman, a brakeman came in and said, "I am the man that caused the accident. I am the man that opened the switch." This was held to be no part of the *res gestæ*. *Patterson v. Wabash, St. L. & P. R. Co.* 54 Mich. 92, 19 N. W. 761. It was claimed by defendant that he was not in its employ. The court said: "The statement made by the brakeman, after the accident, as to his own acts as the producing cause, is not competent evidence as an admission to fix liability upon the company. It was no part of the *res gestæ*, for the reason that such admission was not made while in the execution of his duty, or while the act to which it referred was being performed, and he was not so connected with the corporation defendant as to make his admissions the admissions of defendant. If it be conceded that the person making the statement was the brakeman for defendant, yet, so far as this record shows, he may have done the act through malice, and entirely outside his duty, and one for which he might be personally liable, but for which defendant was in no manner responsible."

That case was distinguished in *Keyser v. Chicago & G. T. R. Co.* 66 Mich. 390, 33 N. W. 867, the court saying: "But it will appear by examination of the opinion, it was held that the statement of the brakeman was no part of the *res gestæ*, for the reason that such admission was 42 L.R.A.(N.S.)

not made while in the execution of his duty, or while the act to which it referred was being performed, and he was not so connected with the corporation defendant as to make his admissions the admissions of the defendant.' Not so in this case. At the time and place this accident occurred, the engineer had complete control of his engine, and management of the same."

And the statement of the driver of a sleigh that overturned, injuring plaintiff, made immediately after the accident, was held no part of the *res gestæ*, and would not bind his principal. *Ryan v. Gilmer,* 2 Mont. 517, 25 Am. Rep. 744. The court said: "In the case at bar, what the driver said to the appellants concerning the accident was the narrative of a past occurrence, and could not affect the liability of his principals. In the authorities which have been referred to, the number of hours or days that elapsed after the occurrence of the accident complained of, and during which the agent made certain admissions against his principal, is treated as an immaterial fact."

A mail agent was injured in a rear-end collision of a fast train and a freight train. Evidence of statements of a flagman, subsequently made, as to how far he had gone back to flag the fast train, were held to be no part of the *res gestæ*, and he was not an agent authorized to admit. *Pennsylvania R. Co. v. Books,* 57 Pa. 339, 98 Am. Dec. 229.

And declarations made by a conductor immediately after an accident, in reference to the same, were held inadmissible as *res gestæ*. *Nelson v. Georgia, C. & N. R. Co.* 68 S. C. 462, 47 S. E. 722. The court said: "The conductor was not shown to have been operating the cars which brought about the collision except through orders, and it is clear that the hearsay opinion of the conductor as to how the collision occurred was inadmissible."

And a conductor's statement to a passenger as to where he was when a passenger was thrown from a train, made shortly thereafter, was held inadmissible and no part of the *res gestæ*. *Jammison v. Chesapeake & O. R. Co.* 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758. The court said: "It was not admissible as an admission, because Capt. Berkeley was not the agent of the defendant in error in the sense that he could bind it by his admission. It was not a part of the *res gestæ*, because not sufficiently connected with it in point of time and circumstance, and its exclusion is in no event reversible error, because the declarations sought to be offered in evidence are not given."

A passenger was thrown or fell from a railroad train as it approached a station. Evidence that a few minutes after the plaintiff was hurt, the conductor asked the engineer why he did not respond to the bell call. This and the response were held inadmissible as part of the *res gestæ*. They were not made while in the discharge



of duties by an agent. Alabama G. S. R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403. The court said: "The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. . . . The time—'a few minutes'—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it, as an elucidating circumstance, as to justly authorize the conclusion that they are not merely narrative of a past occurrence, which, at the moment, was finished and complete."

And what one employee of a railroad said immediately after a fatal accident, to another employee, about the failure of the engineer to put on brakes, was held inadmissible as *res gestæ*. Marsh v. South Carolina R. Co. 56 Ga. 274. He was not an agent authorized to make admissions in narrating a past occurrence, more especially as he was not charged with causing the accident.

One of the night shift was killed while unloading a vessel. A trim board hanging over a hatchway was struck by a hoisting bucket, and fell on deceased. After the body had been placed in an ambulance, a short time after the accident, a conversation by the master with a foreman, showing an attempt by the latter to have this board fixed, earlier in the day, was held no part of the *res gestæ*. It was not shown to have been made by any authority of the defendant, or in the course of the servant's duty. Cyborowski v. Kinsman Transit Co. 102 C. C. A. 586, 179 Fed. 440.

And a statement made by a watchman, that when he got to the stable in the morning, he found the gate in a stall on top of the horse injured, was held not *res gestæ*, and the party making the same was not authorized to make it as agent. Caldwell v. Nichol, 97 Ark. 420, 134 S. W. 622.

Plaintiff was assisting the owner of freight to carry it across the platform of a railway company. He fell through a hole in the platform. The depot agent, who was also assisting, after plaintiff got up, said, "That hole ought to have been fixed." This was held inadmissible. St. Louis & S. F. R. Co. v. Barger, 52 Ark. 78, 20 Am. St. Rep. 155, 12 S. W. 156. The court said: "The only object of the testimony was to prove unreasonable delay upon the part of the company in repairing the platform, after the defect in it became known. The statement of the agent was incompetent for that purpose."

And where a pedestrian stumbled over a truck at a depot, and informed the telegraph operator of the accident, his reply was held no part of the *res gestæ*, in the 42 L.R.A. (N.S.).

absence of evidence that he had any control of the truck. Tiborsky v. Chicago, M. & St. R. Co. 124 Wis. 243, 102 N. W. 549.

And a statement made by a motorman of a car some seven minutes after an accident was held not a part of the *res gestæ*, as he was only an agent, without power to bind his employer. Kimie v. San José-Los Gatos Interurban R. Co. 156 Cal. 379, 104 Pac. 986.

A switchman was injured in coupling a defective car. An inquiry by another employee, ten minutes afterward, to the foreman of the repair shop, "Didn't you know that this car was in bad order?" and his reply, "Yes," were held inadmissible and no part of the *res gestæ*. Verry v. Burlington, C. R. & M. R. Co. 47 Iowa, 540.

Distinguished in McPherrin v. Jennings, 66 Iowa, 622, 24 N. W. 242, the court saying: "The declaration of the agent, which was admitted in that case, did not relate to any business which the agent was engaged in transacting at the time it was made, and it was held that it should have been excluded on that ground; while in this case the declaration related to the very business in which the agent was engaged at the time."

Plaintiff was hurt in a mill. He was carried to the office, and there told the foreman how the accident happened. The foreman said, "It was just like Rolf to set you at work at a dangerous machine you did not know anything about." This was held incompetent evidence. Leistritz v. American Zylonite Co. 154 Mass. 382, 28 N. E. 294. This statement, as to matters of fact, was based on plaintiff's previous account of the accident. Besides, it was the foreman's opinion.

And declarations of the master of a ship, shortly after an accident, that there should be a hand rail to protect passengers in the cabin, were held inadmissible, as he had no authority to bind his principal. American S. S. Co. v. Landreth, 102 Pa. 131, 48 Am. Rep. 196, reversing 11 W. N. C. 416.

A foreman, just after an accident which he did not see, said, when the plaintiff had been taken from under a car, "You all must be careful how you put the car on, or you are going to kill some man." This was held not *res gestæ*, but hearsay. St. Louis Southwestern R. Co. v. Brisco, 42 Tex. Civ. App. 321, 100 S. W. 989.

In the following cases the declarations were held inadmissible. They were clearly not within the time necessary to make them admissible.

Statements made by the superintendent of a fertilizer company the day after a cow had fallen in the company's pit were held inadmissible as only narrative, and not *res gestæ*. Jefferson Fertilizer Co. v. Houston, 3 Ala. App. 348, 57 So. 98.

And a statement made by a captain of a boat two days after an accident to a passenger caused by the gang plank, and before the boat reached its destination,

was held no part of the *res gestæ*, but narrative. *Northwestern Union Packet Co. v. Clough*, 20 Wall. 528, 22 L. ed. 406. He was not authorized to bind the company by his admissions as agent.

And a statement made by a section foreman, that "the colt had been knocked off the track," was held incompetent evidence, where it was made some time after the accident, and his only knowledge was his opinion, and the statement was not made in the transaction of any business with plaintiff, or in the discharge of any duty. It was only a narration of a past transaction. *St. Louis & S. F. R. Co. v. McLelland*, 10 C. C. A. 300, 27 U. S. App. 71, 62 Fed. 116. The court said: "It is a fundamental rule that statements made by an agent are not admissible against his principal unless they are made in the course of some business transaction in which the agent is authorized to represent his principal, or unless the statements made are so coincident with the act or event out of which the suit originates as to form part of the *res gestæ*."

And where a bridge tender failed to open a draw in time, and a steamboat struck the pier, evidence that, the morning after the accident, the bridge tender visited the vessel, and inquired if the owner would take a named sum and drop the matter, was held inadmissible as part of the *res gestæ*. *Southern R. Co. v. Reeder*, 152 Ala. 227, 126 Am. St. Rep. 23, 44 So. 699.

An action was brought to recover for injuries to plaintiff by the sudden starting of a train. Evidence that, subsequent to the injury, the conductor and division superintendent of appellant called a surgeon, and asked him to "rush on," and "to take charge of the injured man," and "render all necessary means he could," was held incompetent to show appellant's negligence. *St. Louis, I. M. & S. R. Co. v. Holmes*, 96 Ark. 339, 131 S. W. 692.

And in an action for the death of a passenger, caused by the derailing of a caboose in which he was riding, statements made some time after the accident, by some of the railroad employees, were held to be merely hearsay and incompetent. *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587.

And in an action for the killing of a servant caught by a screw in a cotton-seed mill, a statement made by the superintendent, that the accident would not have occurred if he had been present, was held inadmissible and no part of the *res gestæ*, but a mere expression of opinion. *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106. It was not made as part of his business, or while performing his duty, as it was remote in time.

And statements made twenty four hours after an accident, as to the carelessness of the foreman in running machinery at an unusual speed, or in operating it while out of balance, were held not *res gestæ*. The agent had no authority to make these admissions. *Stecher Cooperage Works v. Steadman*, 78 Ark. 381, 94 S. W. 41. 42 L.R.A.(N.S.)

And statements by a foreman the evening after an accident, to prove that an employee causing the same was negligent, were held inadmissible, as he was not authorized to bind his principal. Besides, it was only an opinion. *Beasley v. San José Fruit-Packing Co.* 92 Cal. 388, 28 Pac. 486.

A declaration of the captain of a vessel, when examining a broken rope after the accident, that "that looks pretty bad," was held inadmissible as part of the *res gestæ*, or as the declaration of an agent within the scope of his employment, and it could not bind the owner of the vessel. *Silveira v. Iversen*, 128 Cal. 187, 60 Pac. 687.

And statements made by the engineer six months after an accident, that there was a defective rail where the accident occurred, which, from all appearances, looked like an old break, were admitted to contradict a witness. *Colorado Midland R. Co. v. McGarry*, 41 Colo. 398, 92 Pac. 915. It was said that they would be inadmissible as *res gestæ*.

An official report of a claim agent, made to the superintendent of a street car company, giving the date of an accident, name of plaintiff, location and time of accident, and number of the car, was held inadmissible. *Weinstein v. Interurban Street R. Co.* 52 Misc. 468, 102 N. Y. Supp. 512.

A conductor's report, made the day after an accident, was held inadmissible against the railroad, as it was no part of the *res gestæ*, and was only narrative. *Carroll v. East Tennessee, V. & G. R. Co.* 82 Ga. 452, 6 L. R. A. 214, 10 S. E. 163.

And statements made by an employee, while investigating the cause of an accident, were held no part of the *res gestæ*. *Electric R. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156.

A statement made six months after an accident, by a trackman, that "there was a flaw in the end of the rail, and he thought he would put it out of the way," was held inadmissible as *res gestæ*, as he was not authorized to make any admissions, and it was not made while he was in the line of his duty. *Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 334.

A construction company was operating a railroad. In an action against the latter company for injuries received in a train wreck, it was held that statements made by the president of the construction company two hours after the accident were inadmissible as *res gestæ*, and he was not an agent of the defendant, authorized to bind it. *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 483, 21 Am. St. Rep. 169, 11 S. E. 853.

Horses crossed a railroad stock guard and were killed. Statements made the next day by the section boss, that the cattle guard should have been cleaned out the day before, were held inadmissible. *Chicago, B. & Q. R. Co. v. Kennedy*, 22 Ill. App. 308. This was only his opinion, and he could not bind his employer.

A workman's foot was caught by an ele-

vator counterweight, while working on a freight elevator. A statement made by a foreman or superintendent some time after, that it was a dangerous place, was held inadmissible. *Gould v. Aurora, E. & C. R. Co.* 141 Ill. App. 344.

And a statement made a month after an accident, by the secretary of a mining company, as to a defective piece of pipe that fell in the shaft on plaintiff, was held no part of the *res gestæ*. *Turner v. Lovington Coal Min. Co.* 156 Ill. App. 60.

And in an action for killing cattle, declarations of the engineer in charge, made subsequently, at a different place, were held inadmissible as *res gestæ*. *Michigan C. R. Co. v. Gougar*, 55 Ill. 506. He was not an agent authorized to bind the company.

In *Treager v. Jackson Coal & Min. Co.* 142 Ind. 164, 40 N. E. 907, a conversation with a mine boss as to the condition of the roof, where there had been a previous accident, was held inadmissible. No time was stated in the case, and the ruling was on admissions by an agent.

Statements made by a section foreman, not in regard to the roadbed, not made at the time of the accident, were held inadmissible in *Worden v. Humeaton & S. R. Co.* 72 Iowa, 201, 33 N. W. 629.

Declarations of the master of a boat, after a collision, as to how it occurred, were held inadmissible, on the ground that they were made after the transaction was past, and he was not a party or owner, and could not bind the principal. *Rogers v. McCune*, 19 Mo. 557. It was a narrative of a past transaction.

And a declaration of defendant's roadmaster, made several days after an accident, that the section foreman was incompetent, was held inadmissible as part of the *res gestæ*, where a laborer was injured in attempting to move a hand car from the track, while a train was coming. *McDermott v. Hannibal & S. J. R. Co.* 73 Mo. 516, 39 Am. Rep. 526.

And statements made the day after an accident, by a superintendent, as to an engineer disobeying orders, were held inadmissible. *Huntingdon & B. T. M. R. & Coal Co. v. Decker*, 82 Pa. 119. The court said: "It is a well-established rule that the declarations of an agent, made at the time of the particular transaction which is the subject of inquiry, and while acting within the scope of his authority, may be given in evidence against his principal, as a part of the *res gestæ*. It is equally as well settled that the declarations of an agent, made after the transaction is fully completed and ended, are not admissible."

A conversation some time after an accident, with a section master who was on a special train, going back to the point of accident, "He (Burroughs) expected an accident on that part of the road where said accident did take place," was held inadmissible as not *res gestæ*, and he was not an agent authorized to bind. *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 351. 42 L.R.A. (N.S.)

The afternoon subsequent to killing an employee by discharge of electricity, the president of defendant stated that it was the intention of the company to have the current off during repairs. This was held to be no part of the *res gestæ*. *Zentner v. Oshkosh Gaslight Co.* 126 Wis. 196, 105 N. W. 911. The court said: "These statements made by Mr. Sawyer did not relate to a present transaction while he, as an officer, was acting within the scope of his duty, and as a part of the *res gestæ*. They were not declarations respecting present occurrences, and part of the *res gestæ*, but in the nature of a narrative of past events, and not competent as evidence against the defendant, and should have been excluded."

A compressed-air company was experimenting with some cars, the street car company co-operating. Statements made by officers of the latter company at different times after an accident, that their company was in control of the apparatus, were held inadmissible, as they were not authorized to bind the company, and the statements were not *res gestæ*. *Goetz v. Metropolitan Street R. Co.* 54 App. Div. 365, 66 N. Y. Supp. 666.

But in some cases the declarations were held admissible as *res gestæ*, where it would seem that the proper ground would be that they were admissions made by an agent authorized to speak for the defendant. Declarations might be *res gestæ* of an investigation, but not of an accident.

A report of a conductor, fifteen minutes after a fire, to the agent, at the next station, was held not *res gestæ*, nor an admission. But it was held that since the statute making the railroad liable for all fires, the report was in the line of his duty, and admissible. *Lemen v. Kansas City Southern R. Co.* 151 Mo. App. 511, 132 S. W. 13.

A declaration made by a general superintendent within three hours after an accident occurred, "I heard him say,—he was looking at the flanges, and he said,—if the company used any more Tacoma wheels, he would not work any longer for them," was held admissible as *res gestæ*, in an action for the death of a conductor of a logging train, caused by the derailment of the train. *Roberts v. Port Blakely Mill Co.* 30 Wash. 25, 70 Pac. 111. The court said: "The declarations of Mr. Tew were not the narration of a past event, but were the natural declarations growing out of the event, and were so nearly contemporaneous with the accident as to be held in the presence of it, and were made under such circumstances as necessarily to exclude the idea of design or deliberation. They were made by one having the control and management of the road. Under these circumstances we think the declarations were admissible."

That case was distinguished in *Havens v. Rhode Island Suburban R. Co.* 26 R. I. 48, 58 Atl. 247, 3 Ann. Cas. 617.

In an action for injuries caused by a runaway team, the defendant's superin-

tendent was at the place a few minutes after the accident and said, "This is Armour's team that has done this, and we are liable." Evidence of this statement was received *de bene*, with the caution that as to liability, it had no value, and in the instruction the statement was limited to the admission that the team belonged to the defendant. This was held not error, as it was conceded on the trial that the team belonged to Armour. *Armour & Co. v. Skene*, 82 C. C. A. 385, 153 Fed. 241.

The statements of a general manager, made while investigating the cause of a wreck, that a curve was too much elevated, were held admissible as part of the *res gestæ*, and as admissions made by one authorized to speak for the company. *Krogg v. Atlanta & W. P. R. Co.* 77 Ga. 202, 4 Am. St. Rep. 79.

Distinguished in *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 483, 21 Am. St. Rep. 169, 11 S. E. 853; *Electric R. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; and in *Carroll v. East Tennessee, V. & G. R. Co.* 82 Ga. 452, 6 L.R.A. 214, 10 S. E. 163, the court saying: "An officer so high in power and position, and so comprehensive in his duties, as is the general manager of a railroad, might possibly be competent to affect the company by his admissions or declarations, when like admissions or declarations proceeding from subordinate officers or agents, or from mere servants and employees of the company, would be attended with no such admissible quality."

Statements made by the conductor or baggage master and by the station master the next morning after a trunk was lost, explaining how it was taken by someone else, were held competent. They were admissions made within the scope of their agency. *Morse v. Connecticut River R. Co.* 6 Gray, 450.

A statement made by a baggage agent in regard to the burning of plaintiff's goods, the day after it occurred, was held admissible as *res gestæ*, in *Illinois C. R. Co. v. Tronstine*, 64 Miss. 834, 2 So. 255. The court said: "Walmsley was the proper person of whom to make inquiry respecting the lost baggage, and what he said was part of the evidence of the loss, and admissible as *res gestæ*."

A twelve-year-old child was directed by one of several defendants to watch a fire he had left smouldering in a yard. The child was burned. It was held that statements made by him at the time of the injury, which were a part of the *res gestæ*, would bind all the defendants. *Arkansas Valley Trust Co. v. McIlroy*, 97 Ark. 160, 31 L.R.A.(N.S.) 1020, 133 S. W. 816. In this case the statements were not given, but that made after the accident, that he had left the girl there to watch the fire, was held inadmissible to bind the others.

## II. Statements of bystanders.

The general question as to the admissibility of statements of bystanders made 42 L.R.A.(N.S.)

after an accident is treated in a note in 20 L.R.A.(N.S.) 133. The cases gathered here deal merely with the effect of time on the question. Of course, the nearer the declaration is in point of time with the main act, the more likely it will be admitted. The real difficulty is to establish the vanishing point, where it recedes and is relegated to the realm of hearsay. The cases that admit the declarations of third parties do so because they recognize that the declarations are a part of the whole, just as though made by the factor that caused the accident. The cases that deny the admissibility of declarations of third parties do so generally because they are declarations of bystanders, and when put on that ground the proximity of time does not seem to cut any figure.

In *Milne v. Leisler*, 7 Hurlst. & N. 786, it was said: "No doubt, for that reason, in the case of an exclamation by anyone in a crowd when an accident occurs, and the conduct of a particular person is in question, it may be asked whether someone did not call out 'shame,' for it is part of the *res gestæ*. The exclamation may be the result of prejudice or passion, but it is admissible in evidence, and the jury must judge whether it did not proceed in the ordinary course of events, or whether any reliance can be placed upon it."

A lineman riding on a motor car saw a man trip and fall on the track, and rushed to extricate him, but did not succeed. Evidence of what the lineman said immediately after the accident was held admissible, as his acts were part of the occurrence, and could have been proved if done by an entire stranger. *Coll v. Easton Transit Co.* 180 Pa. 618, 37 Atl. 89.

And the statement of a bystander to the engineer, "You have done a damn fine job. Why didn't you stop before you ran over him?" was held admissible as *res gestæ*. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.* 37 Utah, 475, 109 Pac. 10. *Straup, Ch. J.*, said: "If, as the courts and the text writers say, the test of admissibility of a declaration as of the *res gestæ* is whether the declaration is the result of the transaction talking through the declarant, or the declarant taking about the transaction, then what does it matter whether the transaction talks or speaks through the passive instrument of an actor or participant therein, or of one witnessing or observing the transaction?"

In an action for injuries caused to a child by the explosion of gasoline sold for kerosene, statements of the mother of plaintiff made within ten minutes after the accident, as to how it occurred, were held admissible as *res gestæ*, in behalf of the defendant. *Du Bois v. Luthmers*, 147 Iowa, 315, 126 N. W. 147. The court said: "It is not necessary to the admissibility of such testimony that the declaration be made by a party to the action. Other things being shown, the declarations of a third party are competent."

Declarations of the grandmother of the

plaintiff's intestate, who was with him at the time of the accident, made soon after the accident, were held admissible, where she was deceased. *Hayes v. Pitts-Kimball Co.* 183 Mass. 262, 67 N. E. 249. This was under Mass. Rev. Laws, chap. 175, § 66, providing that the declaration of a deceased person shall not be inadmissible as hearsay, if the court finds that it was made in good faith, before the commencement of the action, and upon the personal knowledge of the declarant.

In an action on an accident policy for death, it was shown that the insured was hunting with two others, that he was in a boat, and they were on the land. Both of them heard a shot, and one heard a splash and saw the insured falling into the water. His hat and gun were in the boat. The gun had been discharged. Both hunters joined in an effort to locate their missing companion. It was held that the declarations of the party who called his companion, made during the search, were part of the *res gestæ*. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18.

A conductor and plaintiff's husband were engaged in an altercation in a street car. The conductor tried to strike the husband, and in the affray the conductor's elbow struck plaintiff, throwing her against a seat. Plaintiff, her husband, and a friend left the car immediately. Then the friend "invited the conductor off the car." There being no objection, this evidence was not error. *McMahon v. Chicago City R. Co.* 239 Ill. 334, 88 N. E. 223.

And after a brakeman had fallen in making a coupling, what was said by passengers on a train in the presence of the conductor, brakeman, and engineer, to show that they knew the perilous situation of plaintiff, was held *res gestæ*. *Dale v. Colfax Consol. Coal Co.* 131 Iowa, 67, 107 N. W. 1096.

And evidence of what the driver of a wagon said while the other occupant was lying on the ground, fatally injured by a collision at a crossing, was held part of the *res gestæ*, and admissible. *Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 685.

A motorman ran into an automobile. He instantly opened the door of the car and profanely and insultingly charged the driver of the automobile with running into the car, and stated that he had sounded the gong. This was held to be admissible as part of the *res gestæ*, as was also the reply of the passengers at the time, contradicting the motorman. *Hedlund v. Minneapolis Street R. Co.* — Minn. —, 139 N. W. 603. The court said: "In regard to the statements of bystanders made in reply to the motorman's declaration, they appear to be, as far as admitted, simply a denial of the statement that the gong was sounded. We think these statements were admissible as spontaneous declarations, tending to throw light on the accident."

In *Champlin v. Pawcatuck Valley Street R. Co.* 33 R. I. 572, 82 Atl. 481, the state-

ment of a bystander made some three or four minutes after a collision of a trolley car and wagon was held admissible and part of the *res gestæ*, where such remark was necessary to understand a statement of the motorman. The court said: "The answer could injure the defendant only when taken in connection with the statement of the motorman, viz., 'There has no one denied it, has there?' Possibly this might be regarded as a statement by the motorman that he was to blame for the accident. As a participant in the transaction, would not his statement to that effect made six or seven minutes after the accident, when the car was at a standstill by reason of the accident, and the plaintiff was just being picked up, or had just been picked up, be admissible as a part of the *res gestæ*? We think it would."

And evidence that, as a car was leaving a corner where it had stopped, someone hallooed to the conductor, "Stop the car! You have left a lady," was held admissible. A lady had placed her child on the platform of the car, and it started so suddenly that the mother was left in the street, and sustained injuries caused by chasing the car. *Citizens' R. Co. v. Farley*, — Tex. Civ. App. —, 136 S. W. 94.

In *Britton v. Washington Water Power Co.* 59 Wash. 440, 33 L.R.A. (N.S.) 109, 140 Am. St. Rep. 858, 110 Pac. 20, a statement of a third party, "The boy is off," made when the conductor started to open the door, was held competent, where the boy had stated that he was kicked off by the conductor.

But in quite a number of cases the rule is asserted that statements of bystanders made immediately after an accident are not admissible as *res gestæ*. This was held in the following cases:

Statements made by a third party immediately after an accident, as to declarations of the injured party made before the accident, which was caused by the overturning of a wagon while attempting to cross a ditch, were held inadmissible as *res gestæ*. *Austin v. Ritz*, 72 Tex. 391, 9 S. W. 884.

A mother and son were thrown from a wagon by reason of a defective bridge. While the mother was on the ground, the son admitted to third parties that the accident was caused by the harness, and not the bridge. This was held to be no part of the *res gestæ*. *Downer v. Stafford*, 47 Vt. 579. The court said: "Such statements are not admissible because they are made about matters so recent that the witness cannot have forgotten, nor have had time to concoct the statement, but only because they are material parts of a transaction then going on, or would qualify or modify something then being done."

A woman in a store with her daughter stepped into a stairway and fell. A conversation between the mother and daughter, made when the latter reached her mother at the foot of the stairs immediately after her fall, was held inadmissible as part of

the *res gestæ*. Potter v. Cave, 123 Iowa, 98, 98 N. W. 569.

In an action for an injury to plaintiff caused by a defective road, statements made by his driver after the accident, and before they had left the scene, were held no part of the *res gestæ*. Barns v. Rumford, 96 Me. 315, 52 Atl. 844. The court said: "It appears from the testimony in this case that the declaration in question must have been made three or four minutes after the accident happened. The driver was not then performing any act. The occurrence had terminated. His statement was not a spontaneous exclamation accompanying an act, and tending to explain or illustrate it, but a simple narration of a past event. It was not a part of the *res gestæ*, and was only admissible for the purpose of impeaching the testimony of the driver given upon the stand."

And declarations by the mother of a child who was run over by a train, made immediately after the accident, were held inadmissible as *res gestæ*, and could not bind the estate of the deceased child. Norfolk & W. R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454.

In Jewell v. Excelsior Powder Mfg. Co. 166 Mo. App. 553, 149 S. W. 1045, Dunlap v. Chicago, R. I. & P. R. Co. 145 Mo. App. 221, 129 S. W. 262. It is intimated that such evidence is excluded when there is such a brake in the chain of events immediately relating to the injury, and such an opportunity for the intervention of other influence over the mind of the person making the declaration than that of the main event, that the declaration could not be considered either as wholly spontaneous or as a part of the injurious transaction.

And a statement by a third party immediately after an accident, No wonder he was hurt, the way you fellows were wrestling," was held inadmissible as part of the *res gestæ*, as he was a bystander. Louisville R. Co. v. Johnson, 131 Ky. 277, 20 L.R.A.(N.S.) 133, 115 S. W. 207. The court said: In our opinion, it would be a dangerous enlargement of the *res gestæ* rule to permit the declarations of bystanders in cases like this to be received as evidence. It would open wide the door for the admission of reckless or thoughtless or ill-considered exclamations, and at the same time would put it out of the power of the party whose interest they adversely affected to investigate, impeach, contradict, or explain the situation, temperament, character, or position of the declarant. To permit a person to testify that he heard a bystander state how or what cause an accident would sanction the admissibility of hearsay evidence of the most unreliable and unsatisfactory character."

Eight men were ordered out to a steamboat wheel. The plank was poplar, 16 feet long, 11 inches wide, and 3½ inches thick. After it broke and the men were in the river, an ash hauler on the boat said: "I knowed them fellows would break that plank with all of them on it, because it

cracked with four of us. I didn't think about telling you all right away." This was held inadmissible as part of the *res gestæ*, as it was the statement of a bystander. Louisville & C. Packet Co. v. Samuels, 22 Ky. L. Rep. 979, 59 S. W. 3.

And evidence of declarations of bystanders as to the bell not being rung, made immediately after an accident to a pedestrian by the train, was held inadmissible. Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

In Butler v. Manhattan R. Co. 143 N. Y. 417, 26 L.R.A. 46, 42 Am. St. Rep. 738, 38 N. E. 454, where a brutal remark of the guard after closing a gate on plaintiff was held inadmissible, the court said: "*Res gestæ* in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time." This was not a declaration of a third person, because it was made by the man who did the injury.

After a stock car had caught on fire, either from an engine spark or from a lantern, and a boy in the car had escaped to the caboose, a dispute between the boy and the man in charge of the stock car, as to the lantern having been extinguished, was held no part of the *res gestæ*. St. Louis, I. M. & S. R. Co. v. Pape, 100 Ark. 269, 140 S. W. 265. It was an opinion or a narration, and made by each to exculpate himself.

Plaintiff was allowed by a section master to ride with him on a hand car. There was a collision with a train. A conversation between the section master and the conductor right after the accident was held inadmissible and no part of the *res gestæ*. Willis v. Atlantic & D. R. Co. 120 N. C. 508, 26 S. E. 784.

So where some time had elapsed before the statement was made, it was properly held to be inadmissible.

A statement made by one fellow passenger when the car had proceeded a block after an accident to another was held inadmissible and not *res gestæ*. Chicago Union Traction Co. v. Lowenrosen, 125 Ill. App. 194. The daughter said to the conductor, "He jumped off." This action was by the father for throwing him off by the sudden starting of the car.

And statements made about ten minutes after an accident, by a third party in the presence of plaintiff, who was at that time unconscious, were held inadmissible as *res gestæ*, in an action for injuries caused by a collision between a hack and a train at a railroad crossing. Gulf, C. & S. F. R. Co. v. Moore, 69 Tex. 157, 6 S. W. 631. The court said: "The declarations of strangers are sometimes admissible, but they should be shown to be a part of the thing done, contemporaneous with it, or so connected with it as to give it character; they should amount to verbal acts, that could be attributed to the party whose acts or conduct they explain."

And a conversation with the husband in the presence of plaintiff, in which the husband said that the back seat had tipped up and thrown her out backwards, was held inadmissible as *res gestæ*, as it did not show what length of time had elapsed after the accident and before the conversation. *Tinker v. New York, O. & W. R. Co.* 92 Hun, 269, 36 N. Y. Supp. 672, affirmed in 157 N. Y. 312, 71 N. Y. S. R. 840, 51 N. E. 1031. The husband and wife were in a wagon which was struck by cars at a railroad crossing.

A conversation between the defendant and the child's father was held inadmissible and no part of the *res gestæ*, where the child had been struck by an automobile, and the defendant had walked some 60 feet, and had had a prior conversation with a policeman. *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648.

And where a father within three minutes after an injury to his child charged the driver of the street car with careless driving, the statement was held inadmissible. *Senn v. Southern R. Co.* 108 Mo. 142, 18 S. W. 1007. The driver made no answer.

A husband and wife were injured while passengers on a train. A statement by the husband made to a hotel keeper who had taken some guests to his hotel, some 25 rods distant, and returned to the train, was held inadmissible as evidence and no part of the *res gestæ*, in an action by the wife. *Keller v. Sioux City & St. P. R. Co.* 27 Minn. 178, 6 N. W. 486. It was merely narrative, in response to a question to satisfy curiosity.

A statement made by one of the injured parties, twenty minutes after a collision between a buggy and a railroad train, as to the occupants of the buggy being intoxicated, was held inadmissible as *res gestæ*. *Roach v. Western & A. R. Co.* 93 Ga. 785, 21 S. E. 67.

And declarations of a train crew made soon after an accident to a woman whose frightened horse caused her to step in front of a car were held inadmissible and not *res gestæ*. *Grant v. Oregon R. & Nav. Co.* 54 Wash. 678, 25 L.R.A.(N.S.) 925, 103 Pac. 1126.

Injuries were caused to a child and its grandmother by their stepping on a railroad track to avoid a fractious team. A statement made by the grandmother soon after the injury, that "the accident was her fault," was held inadmissible in an action for causing the death of the child, as it was no part of the *res gestæ*, but mere hearsay, and could not bind the plaintiff, and was only an opinion. *Wheeler v. Oregon R. & Nav. Co.* 16 Idaho, 375, 102 Pac. 347.

At a railroad crossing the driver of a buggy was killed. A statement by one of the occupants of the buggy at the place, before she had been removed, and from thirty to sixty minutes after the accident, was held inadmissible and no part of the *res gestæ*. *Steinhofel v. Chicago, M. & St. P. R. Co.* 92 Wis. 123, 65 N. W. 852. 42 L.R.A.(N.S.)

In an action against a carrier for a jack that had died in transportation, which had been found in the car with blood coming from its mouth and nose, statements made to the conductor by a tramp who was taken from that car to a caboose, "If it had not been for lopping them mules over the head, I would have froze to death," were held inadmissible and no part of the *res gestæ*. *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134.

And in an action for the killing of a passenger by the derailing of the train, statements as to the cause and results of the accident, in a telegram sent by plaintiff's administrator to the doctor, were held inadmissible, as not part of the *res gestæ*. *Fordyce v. McCants*, 51 Ark. 509, 4 L.R.A. 296, 14 Am. St. Rep. 69, 11 S. W. 694.

And entries on police records as to reports of a policeman who had not witnessed an accident, but reported what others said, were held inadmissible as a part of the *res gestæ*. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 189, 50 N. E. 713.

And an arrest of the motorman and conductor several hours after an accident was held no part of the *res gestæ*. *Chicago City R. Co. v. Uhter*, 212 Ill. 174, 72 N. E. 195.

A train parted, and a brakeman was thrown off in a collision of the parts, and was badly injured. Within two minutes a witness came to him and said that "the train had parted when it passed me." This was held inadmissible and no part of the *res gestæ*. *Bumgardner v. Southern R. Co.* 132 N. C. 438, 43 S. E. 948. The court said: "We are satisfied that the time at which declarations are made is most material, and that they are not admissible as evidence in our courts unless they are made during the happening of the main transaction, or immediately and instantly after the transaction and in direct connection with it. They must be forced out, as it were, as the utterance of truth; they must be declarations as to something being done, and not as to what has been done."

And the statements of a coemployee in a mine thirty minutes after an accident, showing the negligence of a deceased miner, were held to be no part of the *res gestæ*. *Coalgate Co. v. Hurst*, 25 Okla. 588, 107 Pac. 657. The statements might have been an attempt to exonerate the party making them.

In *Murray v. Salt Lake City R. Co.* 16 Utah, 356, 52 Pac. 596, it was said: "It is further insisted that the court erred in not permitting the witness Needham to state what was said on the car by Mrs. Phelps after the accident. Whatever may have been said by her on the car was not shown to have been a part of the *res gestæ*, and anything which may have been said after the occurrence by mere bystanders was wholly immaterial, and properly excluded."

And statements made by a witness at the time of the accident, in regard to the

habit of the injured party going home intoxicated, were held inadmissible. Chicago, R. I. & P. R. Co. v. Bell, 70 Ill. 102.

### III. Statements made by injured party.

#### a. Admissions as *res gestæ*.

In most of the cases allowing statements made by the injured party to be used in evidence as *res gestæ*, the statements would also have been admitted as admissions, but where the time of the declarations is not simultaneous with the accident, or where the action is not brought by the injured party, such declarations are held inadmissible as *res gestæ*.

And a statement by a man struck by a car, that he did not see it as the headlight of an engine blinded him, that it was his fault, was held admissible as an admission. Chicago, M. & St. P. R. Co. v. Clarkson, 77 C. C. A. 575, 147 Fed. 307. The court said: "The exclamations of persons in moments of sudden disaster are impressive. They are unpremeditated and ought to be presumed free from pretense. They reflect the truth of nature, first impulse. We fail to discover any incoherence, or external evidence of unconsciousness, to justify the rejection of the statements of Clarkson made within a few seconds or a minute after the accident."

And in an action for injuries to a passenger on a boat, it was held that evidence of what the plaintiff said when asked whether he blamed anybody on the boat should not have been stricken out, as evidence of what he said in regard to the occurrence would be admissible for the defense. Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981. The court said: "If he expressed an opinion as to who was to blame, the defendants were entitled to have the benefit of it."

And statements made by the plaintiff after he was removed from the room after an accident, as to the cause, were held admissible as part of the *res gestæ*. Chielinsky v. Hoopes & T. Co. 1 Marv. (Del.) 273, 40 Atl. 1127. These statements must have been admissions, as they were received in evidence over the objections of plaintiff.

A passenger on a railroad was hurt in alighting. Statements made by him while lying on the ground, that "it was all his own fault," and that "he was in the act of jumping or jumped off and fell," were held competent as admissions, and statements of his companion made at the time in his presence, without contradiction, were held part of the *res gestæ*. Oliver v. Louisville & N. R. Co. 43 La. Ann. 804, 9 So. 431.

Evidence that plaintiff, a flagman, who was hurt, stated immediately after an accident caused from obstructions negligently placed near the track, that it was purely accidental and no one was to blame, was held admissible, not to show that the road had been properly ballasted, but as an admission. Southern R. Co. v. McLellan, 80 42 L.R.A. (N.S.)

Miss. 700, 32 So. 283. He had stumbled on some slag near the end of the ties. The court said: "It perhaps did not relate to the question whether the track constituting Huntington switch was or not negligently constructed by reason of too large pieces of slag used in ballasting it; which is the gravamen of the complaint, the servants of appellant being entitled to a reasonably safe roadway."

A passenger on the front platform of a car was crushed. What he said as to his own negligence was allowed to go to the jury, to be given its proper weight. Zemp v. Wilmington & M. R. Co. 9 Rich. L. 84, 64 Am. Dec. 763. The court said: "Those made at the time of the accident, when the plaintiff was kept alive by pouring brandy down his throat, ought not to weigh a feather."

Statements made by deceased about an hour after an accident, showing that it was accidental, were held admissible as *res gestæ*, where he claimed to have been run over by a train. Starr v. Etna L. Ins. Co. 41 Wash. 199, 4 L.R.A. (N.S.) 636, 83 Pac. 113. The court said: "In this case, considering the facts that the man's associates had left him, and that he was so mangled and crushed that an amputation of his arms was necessary, and that he died within thirty-six hours of the accident, it would be a violent presumption to indulge that the statement was made for a self-serving purpose; and we think that the refusal of testimony under such circumstances would tend to work an injustice by excluding testimony which would have a tendency to throw light on a transaction which would otherwise be obscure for want of evidence."

But where it was not shown that the time was simultaneous or nearly so, the declarations were ruled out as not *res gestæ*, especially where the action was brought by another than the injured party.

A statement of deceased made after the accident, that it was due to his own carelessness, and that nobody was to blame for it but himself, was held inadmissible and no part of the *res gestæ*. Friend v. Burleigh, 53 Neb. 674, 74 N. W. 50. It did not appear how soon after the accident the statement was made. The court said: "It is not necessary to determine whether this declaration of the deceased was admissible in evidence on any other principle, since the record discloses that the court permitted witnesses for the city to detail alleged conversations had with the deceased, in which he stated all the facts relating to his injury."

In an action for injuries caused by an accidental shot from a revolver, statements made after the wound was dressed, absolving the party from blame, were held inadmissible and no part of the *res gestæ*. Mutch v. Pierce, 49 Wis. 231, 35 Am. Rep. 776, 5 N. W. 486. The court said: "What the exact length of time was between the happening of the accident and the conversation sworn to by the witnesses does not



appear. It is insisted by the learned counsel for the appellant, that the evidence was a part of the *res gestæ*, and he cites some cases which give considerable force to the argument. But we are of the opinion that this court has settled the question against the appellant, and it is immaterial, therefore, what rule may have been established by the courts of other states, or of the United States."

Deceased was injured while working under a locomotive. Statements made by him when he reached a chair thirty steps away, showing that he was to blame, were held inadmissible in an action by his father for loss of services. *Louisville, E. & St. L. Consol. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646. It was claimed that the case should be reversed, because this statement showed contributory negligence. But it was held that other evidence showed the employee was free from fault.

Statements made by a driver a half hour after a collision of a train with the horse and wagon were held not *res gestæ*, and did not bind the owner. *Pittsburgh, C. & St. L. R. Co. v. Wright*, 80 Ind. 182.

And in an action for injuring a team at a railroad crossing, a conversation between the brakeman and the driver of the team, to the effect that the latter was not looking, was held incompetent evidence. *Kelly v. Chicago & A. R. Co.* 88 Mo. 534. But this was immaterial error as plaintiff was not entitled to recover.

Cattle were injured at a crossing by a train. Statements of the driver showing contributory negligence were held inadmissible. *Jungworth v. Chicago, M. & St. P. R. Co.* 24 S. D. 342, 123 N. W. 695. The court said: "It seems that the term *res gestæ* has reference and applies to a condition of affairs,—a condition of fact,—rather than to any rule of evidence. . . . At the time this conversation took place, although but a very short time after the accident, it was impossible that the statements of the boy could have been any part of the contributory negligence which produced the injury, because at the time the contributory negligence, if any existed, had fully spent itself, and had fully and completely ended with the instant of the accident."

Statements by the driver of a wagon made several minutes after a collision with a street car, after the street car had left the scene, and after he had been carried from the place of the accident, tending to show that the motorman was blameless, were held inadmissible, and not *res gestæ*. But they were admissible for the purpose of contradiction. *Hot Springs Street R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245.

Plaintiff's wife testified that after the horse was extricated from a defective bridge, and the plaintiff had hitched up and started to drive home, he said that the horse had hurt his arm, and that he could not hold the lines. This evidence was held inadmissible, as no part of the *res gestæ*, as it did not occur at the time of injury. 42 L.R.A. (N.S.)

*La Duke v. Exeter Twp.* 97 Mich. 450, 37 Am. St. Rep. 357, 56 N. W. 851.

Declarations by deceased offered by defendant, made some time after the accident, as to how he had been injured, were held inadmissible as *res gestæ*, in an action by the father for injuries resulting in the death of his son, caused by his stepping into a hole in a plank sidewalk. *Bradford v. Downs*, 126 Pa. 622, 17 Atl. 884. The court said: "They were not part of the *res gestæ*; and, as the action was by the father for the loss of services, we do not see how his rights can be affected by the declarations of the son."

And statements made by a boy the day after an accident, that he was violating orders, were held inadmissible in an action by his father for loss of services. *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371. He was an employee, and was killed while riding on an engine which was derailed.

Where a woman, in endeavoring to save a child from being run over by a train, had her arm badly broken, her declaration made at the time of the accident that "she alone was to blame for it," was held admissible as part of the *res gestæ*. *De Mahy v. Morgan's L. & T. R. & S. S. Co.* 45 La. Ann. 1329, 14 So. 61.

#### b. Explaining accident.

In nearly all the cases in which statements by the injured party explaining the accident were received, the declarations were made so close in point of time to the accident, that they were treated as simultaneous. In a few cases long time elapsed. It is believed that these cases were peculiar and exceptional, and would not now be followed. The rule as to the admissibility seems to depend on the relation of the declarations to the accident, and whether they were explanatory or not, and were made under such excitement as to show spontaneity and that they were not concocted or deliberately designed. Of course, time is a large factor in determining the admissibility, but this is not considered of as much importance as the fact that under the circumstances there was no deliberation.

A wife testified "that the assured left his bed Wednesday night, the 18th of July, 1866, between 12 and 1 o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs." This was held admissible as *res gestæ*. *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437. The court said: "In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. . . . The *res gestæ* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine."

This is the leading case on this question, and the exact time that elapsed is not definitely stated.

In *Travelers' Protective Assn. v. West*,

42 C. C. A. 284, 102 Fed. 226, it was said: "The ruling seems to be justified by the decision of the Supreme Court in *Travellers' Ins. Co. v. Mosley*, supra. That case does not seem to us to have been overruled by the decision in *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 104, 30 L. ed. 300, 7 Sup. Ct. Rep. 118. See *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774."

The case of *Travellers Ins. Co. v. Mosley*, supra, was distinguished in *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608, the court saying: "The declarations which were held admissible in those cases were declarations of the injured persons made sometime after the injuries were received, but while suffering from their immediate effects; so that it was without doubt considered that the mental and physical condition of the parties, resulting directly from the injuries, furnished the necessary connection between the transactions and the statements."

And also in *Sullivan v. Oregon R. & Nav. Co.* 12 Or. 392, 53 Am. Rep. 364, 7 Pac. 508, the court saying: "That decision and all of a kindred nature cannot, in my opinion, be maintained without doing violence to the law of evidence. It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction, made after it has ended, are a part of it. It would be a moral impossibility."

In *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333, it was said: "The cases of *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437; *Com. v. M'Pike*, 3 Cush. 181, 50 Am. Dec. 727, and *Brownell v. Pacific R. Co.* 47 Mo. 243, relied upon by respondent's counsel, were not cases in which the declarations of agents were introduced as evidence; but the declarations offered and received were made by the persons injured, or by persons laboring under some disease, and the statements related to the cause of, or to the persons who had inflicted, the injury, or to the symptoms and suffering of the invalid."

In *Patterson v. Hochster*, 38 App. Div. 398, 56 N. Y. Supp. 467, it was said: "The admissions of declarations as part of the *res gestæ*, and the effect of such evidence, have been the subject of much conflict among the courts and among text writers. *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437, would sustain a recovery for the plaintiff based on the declaration of her intestate alone. *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 10 N. E. 453, and *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 15 Am. St. Rep. 701, 18 Atl. 759 are to the same effect. But these cases are not authority in this state, and the court of appeals in the *Waldele Case*, 95 N. Y. 274, 47 Am. Rep. 41, has expressly repudiated the doctrine of the *Mosley Case*."

An accident happened in consequence of a switch being left open on defendant's track, and plaintiff's intestate, on the en-

gine, was killed. Immediately after the accident, when he was restored to consciousness and just before he died, he said: "If it had not been for that man who left the switch open." This was held admissible as part of the *res gestæ*, but not as a dying declaration. *Brownell v. Pacific R. Co.* 47 Mo. 239. It grew directly out of, and was made immediately after, the happening of the fact.

That case was distinguished in *Corbett v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 621, the court saying: "It was a dying declaration, made as to the cause of the accident which resulted in the death of the plaintiff's husband, and the matter discussed was whether declarations of the character are ever admissible in a civil case, and it was held that, while not admissible as a dying declaration, it was clearly admissible as a part of the *res gestæ*."

And also in *Hooper v. Standard Life & Acci. Ins. Co.* 166 Mo. App. 209, 148 S. W. 116, the court saying: "In that case the time of *Brownell's* declaration is not given any more definitely than as 'shortly after the accident,' and, again, as 'immediately after the accident, when *Brownell* was restored to consciousness.'"

In *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333, it was said: "The case of *Brownell v. Pacific R. Co.* 47 Mo. 243, has never been satisfactory to the bar or bench of this state."

A party going from his mill to his hotel fell in an unguarded and unlighted excavation in the street. As soon as he was able he returned to the mill, sat down in a chair, and, in response to what was the matter, replied that he had fallen into an excavation and was hurt. It was held that the declaration was so connected in point of time with the main transaction, and came so spontaneously, that it was admissible as part of the *res gestæ*. *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227.

The statement of a witness who saw an accident that: "I don't remember plaintiff saying anything as he rose, except that he was hurt on his shoulder and leg and hip," was held admissible, where there was nothing to indicate that this was an afterthought. *Atlanta & W. P. R. Co. v. Haralson*, 133 Ga. 231, 65 S. E. 437.

The step (running board) of a car was folded up, and a hand rail let down in crossing a bridge. The bar was raised after crossing, but the step was not lowered. A passenger stepping out fell, causing injury. She exclaimed: "Yes, let the step down after I fall." This was held admissible as part of the *res gestæ*. *Hutcheis v. Cedar Rapids & M. C. R. Co.* 128 Iowa, 279, 103 N. W. 779.

And declarations made by deceased immediately after receiving injuries were held admissible as *res gestæ*. *Entwhistle v. Feighner*, 60 Mo. 215.

Distinguished in *Corbett v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 621, the court saying: "It did not appear in that case

what the declarations were, or to what they related; but it is fairly presumable that they referred to facts in connection with the accident."

A workman fell through a shed roof. As soon as he could speak, he said to the superintendent: "I asked him what kind of a trap this was to set for a man?" This was held admissible as part of the *res gestæ*. *Moulton v. St. John's Lumber Co.* 61 Or. 62, 120 Pac. 1057.

A man on a log incline was hurt by reason of the carelessness of a fellow workman. That day the injured man had complained to the superintendent, who had promised to remove the workman. Immediately after the accident a statement made by the injured man to the superintendent, "Frank, I would not have lost my leg if you had done as you had agreed to and put another man in his place," was held to be part of the *res gestæ*. *Cross Lake Logging Co. v. Joyce*, 28 C. C. A. 250, 55 U. S. App. 221, 83 Fed. 989. This was because the statement was made so nearly coincident with the occurrence that it was involuntary, and without time for reflection.

A collision of a train and wagon occurred at a crossing. The refusal to allow a witness to answer what conversation he had with the driver of the wagon at the time of the accident was erroneous. *Tolledo & W. R. Co. v. Goddard*, 25 Ind. 185. The court said: "Driving the team was the business of Gilpin's agency, and it was his duty to use ordinary care to prevent injury, and if immediately upon the occurrence of the accident, he made statements in reference to it, as to how it happened, such statements would constitute a part of the *res gestæ*, and should have gone to the jury."

Where a witness found deceased injured and in pain, he asked, "What is the matter with you, Dave? In a very faint voice, he said, 'I was getting down this berth, and it came down and struck me in the head, . . . I think he said his foot slipped, or something like that; he said something about the berth coming down and his foot slipping, I think he said, and before he could recover himself, the berth caught him and struck him.'" This was held admissible as the natural spontaneous expression of the deceased, issuing directly from, and produced solely by, the accident. *Union Casualty & Surety Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677. The court said: "Apparently it was unmediated, and the natural spontaneous expression of the deceased, issuing directly from, and produced solely by, the accident and its results. No reason appears for rejecting it as a statement concocted by deceased in his own behalf; apparently it was a natural, unbiased, truthful statement given in explanation of his then injured condition and pain."

A brakeman on a car ladder struck a car on a siding. What he said immediately after he fell was held admissible as part of the *res gestæ*. *Louisville & N. R. Co. v.* 42 L.R.A. (N.S.)

*Earl*, 94 Ky. 368, 22 S. W. 607. This was first brought out by the defendant, and it was held that all the conversation at that time would be admissible.

In an action on an accident policy, a statement made by the insured on coming up from the basement, that "he had bumped his head on the gas fixture down there," was held to be admissible, as, when made, it was so nearly connected with the occurrence as to be part of the *res gestæ*. *Travelers' Protective Asso. v. West*, 42 C. C. A. 284, 102 Fed. 226.

And declarations of pain made by a wife to her husband where he, hearing her scream, ran back about 30 feet to where she had stepped in an excavation, were held admissible, as they were made immediately after the injury. *District of Columbia v. Dietrich*, 23 App. D. C. 577.

Plaintiff was knocked off of the top of a car by a water spout. His declaration that "they left it down, and it struck me and knocked me off," was held admissible to show defendant's negligence, under Ga. Code § 5179. *Southern R. Co. v. Brown*, 128 Ga. 1, 54 S. E. 911. The court said: "When first seen by these employees he was on the side of the track, without his hat, staggering, falling down, and getting up, and, upon being approached by them and asked what was the matter, made the statements above referred to."

Plaintiff, in alighting from a car, fell, sustaining injuries. The question, "Are you hurt?" was asked immediately after the accident, and her answer, "Yes," was held admissible as part of the *res gestæ*. *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884, affirming 71 Ill. App. 162.

Where defendant was negligent in allowing tracks in a mine to become covered with slate, and in not notifying the drivers of cars, evidence that when witness heard the cars bump, he jumped up and ran over to deceased, who said he could not get out on account of the slate,—he said he could not make it,—was held admissible as part of the *res gestæ*. *Muren Coal & Ice Co. v. Howell*, 217 Ill. 190, 75 N. E. 469. The injury and explanation were almost simultaneous.

A factory boy was hurt, and a second or two thereafter he run out of the room crying, "My God; what will my poor mother do?" This was held competent as part of the *res gestæ*. *Thomas Madden Son & Co. v. Wilcox*, 174 Ind. 657, 91 N. E. 933 reversing — Ind. App. —, 88 N. E. 871.

A brakeman was fatally injured coupling cars. Declarations of the injured made while he was being extricated, immediately after the accident, were held part of the *res gestæ*. *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 19 N. E. 453. The court said: "The declarations under consideration were made within not to exceed two minutes of the occurrence, while the declarant remained in the presence of the train and the alleged defective machinery which was instrumental in producing his hurt, and before he had

been removed from the spot where he received his fatal injury."

And a statement of plaintiff immediately after a fall on a defective sidewalk was held to be part of the *res gesta*. *Styles v. Decatur*, 131 Mich. 443, 91 N. W. 622.

A passenger was jerked from a train, and both legs were cut off. As she was being helped up, and before she was removed, she stated the particulars. This was held to be *res gesta* and admissible. *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913. She died within one week thereafter. The court said: "The consensus of the authorities seems to be that a declaration, to be a part of the *res gesta*, need not be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible."

An exclamation, "Oh, George, I am scalded; the plank slipped off and threw me in," made immediately after an accident, was held admissible as part of the *res gesta*, where deceased fell into a vat of tanning liquor. *Soheir v. Quirin*, 77 App. Div. 624, 78 N. Y. Supp. 956. The court said: "In order to make a declaration of this kind competent, it seems to be settled that it must bear a close relation to the principal transaction, and that it must be a spontaneous exclamation, an outburst of the feelings, and not a mere narration of a past event."

And a declaration immediately after an accident from a cutter upsetting on a defective highway, and just as the occupants got back into the cutter, that the speaker was badly hurt, was held admissible as *res gesta*, as not sufficient time had elapsed for reflection or concoction. *Powers v. West Troy*, 25 Hun, 561.

And where plaintiff immediately after an accident exclaimed: "Take these splinters out of my leg; take these splinters out," this was held to be admissible. *West v. Manhattan R. Co.* 24 Jones & S. 590, 1 N. Y. Supp. 519. The court said: "As to the third point, 'that the words were admissible under the rule that allows exclamations. A strict grammatical construction should not be used. The jury might find the words were exclamatory in reality. There were, as matter of fact, no splinters in his leg. The words were not received as evidence of there being splinters. The jury might find that pain forced out the words.'"

And declarations made by plaintiff immediately after the train had passed, and while he was lying upon the platform where he had fallen, were held admissible as *res gesta*. *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 15 Am. St. Rep. 701, 42 L.R.A. (N.S.)

18 Atl. 759. The passenger was injured in alighting from a train.

And declarations made by an injured person immediately after an accident, as to how he was hurt, were held admissible as *res gesta*, where deceased was killed at a railroad crossing. *Williams v. Southern R. Co.* 68 S. C. 369, 47 S. E. 706. One of the witnesses saw the accident and rushed to his help, when the declarations were made.

Immediately after an accident, plaintiff was asked if he was hurt, and replied that he was. This was held to be part of the *res gesta* and admissible. *Runnells v. Pecos & N. T. R. Co.* 49 Tex. Civ. App. 150, 107 S. W. 647.

And statements made by a boy immediately after an accident, and before he was removed from the ground where he had been injured by a train, were held admissible as *res gesta*, in an action brought by his parents for injuries resulting in death. *Texas & P. R. Co. v. Hall*, 83 Tex. 675, 19 S. W. 121.

A brakeman climbing a car fell. Statements by him while lying on the ground, made immediately after the accident, as to a defective stirrup, were held *res gesta*. *Galveston, H. & S. A. R. Co. v. Davis*, 27 Tex. Civ. App. 279, 65 S. W. 217.

A statement by a switchman made immediately after he was run over by a train, in answer to a question, "I slipped and it hit me," was held admissible. *Armstrong v. Canada Atlantic R. Co.* 2 Ont. L. Rep. 219.

So, statements made before the injured person is completely extricated are clearly admissible.

In an action for the killing of an employee of a railroad company while engaged in uncoupling cars, statements of the manner in which he was injured, made to his brother while he was still under the car, were held admissible as part of the *res gesta*. *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50. The court said: "It was an emanation of the act in question, and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy."

Distinguished in *St. Louis, I. M. & S. R. Co. v. Kelley*, 61 Ark. 52, 31 S. W. 884, the court saying: "The statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gesta*, and fairly goes to explain the cause of the condition in which he was at the time it was made.' We do not think the case here falls within the rule laid down and followed in that case."

In *Heckle v. Southern P. Co.* 123 Cal. 441, 56 Pac. 56, deceased was caught under a wheel, and while held there he made statements. It was held that the court erred in refusing to allow the statements to be given. The court said that it might be possible that the lapse of time would

render them incompetent, but that did not appear from the record. If the statements were narrative, they would have to be stricken out.

And statements made by a little boy as they were taking his body from under a street car were held admissible as part of the *res gestæ*. *Di Prisco v. Wilmington City R. Co.* 4 Penn. (Del.) 527, 67 Atl. 906.

A coach was overturned and plaintiff was injured. What he said at the time, while his hand was fast and crushed, was held part of the *res gestæ*. *Frink v. Coe*, 4 G. Greene, 558, 61 Am. Dec. 141. It was contemporaneous with the injury, and illustrated its character.

And statements by an injured passenger while he lay on the ground where he had fallen from a train, made in answer to questions not calculated to suggest a particular answer, were held to be part of the *res gestæ*. *International & G. N. R. Co. v. Hugen*, 45 Tex. Civ. App. 326, 100 S. W. 1000.

A switchman was run over by an engine. Statements made by him while he was under the wheels, attributing the cause to loose cinders, were held to be part of the *res gestæ*. *Missouri P. R. Co. v. Bond*, 2 Tex. Civ. App. 104, 20 S. W. 930.

A helper jumped to the side of a train to attach a hose to the engine tender, and stumbled on a piece of coal and was run over. A conversation between the engineer and deceased immediately after the discovery of the latter was held admissible as *res gestæ*. *Missouri, K. & T. R. Co. v. Jones*, 35 Tex. Civ. App. 584, 80 S. W. 852.

And statements made to witnesses by an injured brakeman while lying on the ground, as to a defective hand-hold, were admitted as *res gestæ*. But statements made after inspection by these witnesses were held inadmissible, as it was not shown that they were spontaneous, or related to the accident. *Riggs v. Northern P. R. Co.* 60 Wash. 292, 111 Pac. 162.

A helper on a switch engine, a half hour after going to work, was found near the track with his legs mangled. On being questioned as to how the accident happened, he stated that the footboard on the engine was loose, and that it tipped, causing his fall. This was held to be part of the *res gestæ*. *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. 503.

And in an action against an insurance company, evidence that where a man was repairing a gutter, his companion heard a grating sound like the fall of a ladder, and the workman was lying on the ground; that on his going to him, he said, "I fell from that ladder," was held competent as part of the *res gestæ*. *North American Acci. Asso. v. Woodson*, 12 C. C. A. 392, 24 U. S. App. 364, 64 Fed. 689. The injured man subsequently died from the injury.

In an action for causing death of an 42 L.R.A. (N.S.)

employee, his statement made to the engineer, "My God, Ben, they broke in two," to which the engineer responded, saying, "Yes," was held so closely connected with the main event, so spontaneous, and so descriptive, as to be a part of the *res gestæ*. *Gordon v. Chicago, R. I. & P. R. Co.* — Iowa, —, 134 N. W. 1057, former trials, 129 Iowa, 747, 106 N. W. 177; 146 Iowa, 588, 123 N. W. 762.

A passenger fell in alighting from a street car. After she was assisted to her feet, she said that her fall was caused by the driver of the car starting it while she was in the act of alighting therefrom. This was held to be part of the *res gestæ*, as it was made without time for reflection. *Brown v. Louisville R. Co.* 21 Ky. L. Rep. 995, 53 S. W. 1041.

And a declaration made by a dying switchman after he was carried 400 feet, that he had caught his foot in a hole in the platform scales before he was struck by the train, was held part of the *res gestæ* and competent evidence. *Gilbert v. Ann Arbor R. Co.* 161 Mich. 73, 125 N. W. 745.

A man at a circus was hurt by a giant firecracker. An exclamation, "Ed, that put my eye out," was held admissible as part of the *res gestæ*. *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

A workman caught fire from an electric switch. In running for water he passed open doors and the fire from his person exploded dust from powder mills. His explanation to those who ran to him was held admissible as *res gestæ*. *Jewell v. Excelsior Powder Mfg. Co.* 166 Mo. App. 555, 149 S. W. 1045.

And declarations made by a boy as to how he got under a car, when first picked up, were held to be part of the *res gestæ*. *Leahey v. Cass Ave. & F. G. R. Co.* 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58. The court said: "He was then at the scene of the accident, surrounded by persons who witnessed the calamity, and his declarations then made were verbal acts, though made after the accident had happened."

A horse was shocked by escaping electricity. A call by the driver to his associate, that the horse was shocked and to help hold the horse, was held to be part of the *res gestæ*. *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L.R.A. 637, 64 Am. St. Rep. 592, 37 Atl. 730.

And statements made by an injured person after he was carried 150 feet to the depot, that his foot was caught in a crossing and the wheel caught him, were held admissible as *res gestæ*. *Houston & T. C. R. Co. v. Weaver*, — Tex. Civ. App. —, 41 S. W. 846.

As a train passed the house of witness he heard cries for help. He got out of bed, dressed, and hurried to the place of the accident, between 150 and 200 yards distant. The plaintiff stated that a brakeman had knocked him off the train. This was held to be part of the *res gestæ*. In-

ternational & G. N. R. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039. The court said: "Another rule, applied in many of the American courts at least, is to admit as parts of the *res gestæ* not only such declarations as accompany the transaction, but also such as are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design. . . . In most of the cases cited the declarations admitted were the relation of past occurrences. This line of decision has been followed in this court (Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519), and in view of the great array of authority in support of that ruling, we deem it best to adhere to it in this case. The declarations under consideration were made at the place of the accident and within a very few minutes after it occurred, and while the plaintiff was still writhing under the pain inflicted by it."

That case was distinguished in *De Walt v. Houston, E. & W. T. R. Co.* 22 Tex. Civ. App. 403, 55 S. W. 534, the court saying: "Among the cases cited in support of this rule is *Hanover R. Co. v. Coyle*, 55 Pa. 396, where it was held that the declaration of the engineer at the point where the goods of a peddler had been scattered along the track as a result of a collision with his engine, and a few minutes after the collision, was admissible as part of the *res gestæ*, as tending to explain the cause and character of the accident. This decision is by no means satisfactory as the rule is stated in its restricted sense; but the evidence was admitted, notwithstanding the declaration was not contemporaneous with the accident. Some authorities declare that such declarations are admitted, not as tending to prove the truth of the thing declared, but as a fact in itself, a part of the occurrence. This seems to the writer to be inconsistent with the reason of the rule as declared to exist in this state."

A brakeman on a railroad was killed. A witness hearing his cries ran 60 yards to him. His statements as to the cause of his injuries were held to be part of the *res gestæ*. *Texas & P. R. Co. v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 929, 17 S. W. 1041. The court said: "It may be that the admission of such evidence is hard to reconcile with the principles of evidence, and could we deem it an open question, the writer would be inclined to reject it; but the great weight of American authority is in favor of its reception, and the former decisions of this court are on the same line."

A bridge fell with a team; plaintiff was asked if he was killed. He said: "No, but I am terribly hurt." This was held admissible *res gestæ* as to bodily condi-

tion. *Hawkes v. Chester*, 70 Vt. 271, 40 Atl. 727.

And an exclamation made by deceased at the time of the accident, "My God," followed by the statement as witness rushed out and put her hands under her head or neck, "Never mind my head, my leg is in the scuttle hole, and it is broke," was held admissible as *res gestæ*. *Patterson v. Hochster*, 38 App. Div. 398, 56 N. Y. Supp. 467.

Deceased, while attempting to pass between cars, was caught between them and bruised and wounded so that he died two days after the accident. Evidence as to statements made by deceased shortly after the accident was held competent when offered by the defendant. *Lord v. Pueblo Smelting & Ref. Co.* 12 Colo. 390, 21 Pac. 148. The statement and time when made are not given.

And the declarations of a motorman fatally injured, made within one minute after the accident, with both legs severed from his body, that "he should have had a clear track until 7:30," were held admissible as part of the *res gestæ*. *Ft. Wayne & W. Valley Traction Co. v. Roubush*, 173 Ind. 57, 88 N. E. 876. The court said: "The principle is well settled in this state, and very generally approved elsewhere, that declarations of an injured party which are the natural outgrowth of, and tend to illustrate or explain, the occurrence giving rise to litigation, made so nearly contemporaneous therewith as to be in the presence of the transaction and under such circumstances as necessarily prevent deliberation and preclude any imputation of design, though not precisely concurrent in point of time, are admissible as part of the *res gestæ*."

So, statements were held admissible as *res gestæ* when made within a few minutes of the accident.

A train despatch gave a train until "ten, 10 o'clock A. M.," to make a point. There was a collision, and the engineer and conductor were both injured, the latter fatally. It was held that their statements made within a few seconds of the casualty, in view of the wrecked train, amidst the search for others, and while the conductor was dying, to the effect that this despatch meant 10 o'clock and ten minutes, were held admissible as *res gestæ*. *McLeod v. Ginther*, 80 Ky. 399. The court said: "The declaration related alone to the declarant's state of mind when he received the despatch, and the continuance of that state of mind while he was acting under it, and it was made before the expiration of the fatal ten minutes in question, and prior to any knowledge on his part that he, and not the agents on the west-bound train, had misconstrued the despatch."

In *Floyd v. Paducah R. & Light Co.* 23 Ky. L. Rep. 1077, 64 S. W. 653, it was said: "There is some conflict of authority as to what is admissible evidence as *res gestæ*; but in this state the more liberal

rule has been adopted. In *McLeod v. Ginther*, supra, the statement of the conductor just after the collision, and by the side of the wreck, as to why it occurred, was admitted. In *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866, the statements of the car inspector, ten minutes after the accident, were held competent, on the ground that the declaration was the result or consequence of feelings or motives coexistent with the injury, and without time or incentive for calculation as to effect or influence it would have upon the rights of the parties. In *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. 607, a statement of the wounded man, made where he fell to the ground, immediately upon the heels of the occurrence, was held admissible as *res gestæ*. This rule has been followed in several subsequent cases. *Brown v. Louisville R. Co.* 21 Ky. L. Rep. 995, 53 S. W. 1041; *Louisville & N. R. Co. v. Shaw*, 21 Ky. L. Rep. 1041, 53 S. W. 1048."

And in an action on an insurance policy, where a conductor fell in a turntable pit and contracted pneumonia, statements made by the injured party to the first person reaching him, after he had climbed out of the pit, and within a few seconds of the accident, were held admissible as part of the *res gestæ*. *Fidelity & C. Co. v. Cooper*, 137 Ky. 544, 126 S. W. 111.

And statements made by an injured boy while going from the sidewalk up the stairway leading to his home, within a few seconds after the accident, that he was hurt by falling through the broken iron grate next door, was held admissible as *res gestæ*. *Stevens v. Walpole*, 76 Mo. App. 213.

Within fifteen seconds from an injury to a fireman on an engine, he said: "The jar in the coupling caused me to lose my balance, and I fell from the running board to the ground, and struck on my back." This was held to be a part of the *res gestæ* and admissible. *Galveston, H. & S. A. R. Co. v. Mitchell*, 48 Tex. Civ. App. 381, 107 S. W. 374.

And where witness reached plaintiff a few minutes after a horrible accident, where part of the flesh was on the rails, what the child said was held admissible as part of the *res gestæ*, under Ga. Code, § 3773. *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637 (*Approving Augusta Factory v. Barnes*), 72 Ga. 217, 53 Am. Rep. 838. Distinguished in *Roach v. Western & A. R. Co.* 93 Ga. 785, 21 S. E. 67, on the ground that "in the latter case, the declarations admitted occurred only a few minutes after the injury occurred, and were made at the very place of the injury."

And declarations by a mule driver in a mine, made within a few minutes after he was fatally injured by being squeezed between the car and the mule, were held admissible as part of the *res gestæ*. *Spevack v. Coaldale Fuel Co.* 152 Iowa, 90, 131 N. W. 653.

A statement made by plaintiff within a 42 L.R.A. (N.S.)

minute after she had fallen, that the driver of the car had started it while she was in the act of alighting, was held admissible as part of the *res gestæ*. *Brown v. Louisville R. Co.* 21 Ky. L. Rep. 995, 53 S. W. 1041.

A switchman at night fell over some planks and was fatally injured by a train. A witness reached him in less than two minutes, and the injured man said: "I fell over these old planks." This was held to be a part of the *res gestæ*. *Murray v. Boston & M. R. Co.* 72 N. H. 32, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289. The court said: "It cannot be said, therefore, as a matter of law, that his remark did not derive credit from the occurrence with which it was so intimately connected, or that it was not in a reasonable sense a part thereof and admissible in evidence. Although in form it was a narrative, it could not be excluded for that reason alone, if in other respects it was competent. Nor does the fact that it was made in answer to the witness's question deprive it of its character as a part of the *res gestæ*."

A boy five and one-half years old was run over by an electric car. His statement a few minutes thereafter that the car ran over him was held admissible. *Dorr v. Atlantic Shore Line R. Co.* 70 N. H. 160, 80 Atl. 336. The court said: "There is no rule of law that determines with precision the number of minutes after an accident that may elapse before one's declaration of the occurrence ceases to have the character of *res gestæ* and becomes mere narrative. Much must be left to the discretion of the court in admitting or rejecting such testimony."

And declarations by deceased made within a few minutes after he was found enveloped in the flames of oil from a lamp were held admissible as *res gestæ*. *Elkins v. McKean*, 79 Pa. 493. This was an action for selling impure oil, which caused an explosion.

A passenger was hurt after alighting in the dark at an unsafe place. Statements made by him within a few minutes after he was hurt, to the effect that the conductor had made him get off there, were held to be part of the *res gestæ*. *International & G. N. R. Co. v. Smith*, — Tex. —, 14 S. W. 642. The record failed to show exactly how long after he was hurt the statement was made, and the presumption on appeal was in favor of its being within a short time.

And under the rule adopted in Texas, statements made by deceased in response to an inquiry, some minutes after he was injured while engaged as a brakeman, were held to be part of the *res gestæ*. *Houston & T. C. R. Co. v. Loeffler*, — Tex. Civ. App. —, 51 S. W. 536.

In *Gulf, C. & S. F. R. Co. v. Willoughby*, — Tex. Civ. App. —, 81 S. W. 829, an employee of a railroad was injured at a repair shop. The court said: "The evidence objected to under the third assignment of error was admissible on the ground

that, in our opinion, it came within the rule of *res gestæ*." The statement was made within a few minutes after the accident.

And a statement made by an injured brakeman to a third person about one minute after the accident, that the foreman had changed his mind as to the cut of the cars, was held admissible as part of the *res gestæ*. Missouri, K. & T. R. Co. v. Schilling, 32 Tex. Civ. App. 417, 75 S. W. 64. The cars should have been cut on a switch in blocks of five, but were cut once by one, and this caused the accident.

In response to a question as to how the accident happened, a statement by an injured brakeman that he "stumbled on a stone; he was getting the pin," made about two minutes after the accident, while deceased was lying on his side 4 or 5 feet from the rail, was held admissible as *res gestæ*. Fish v. Illinois C. R. Co. 96 Iowa, 702, 65 N. W. 995.

A passenger fell from a car. Testimony that the conductor came back in a couple of minutes, before the injured man was raised up, and said: "That's what you get for stepping off of the train backwards." Haislup said: 'I didn't step off the train backwards, you pushed me off;' and that the conductor made no reply," was held admissible. Pittsburgh, C. C. & St. L. R. Co. v. Haislup, 39 Ind. App. 394, 79 N. E. 1035. The court said: "The facts are on the borderland between *res gestæ* and hearsay. Had the trial court excluded the evidence, we are not prepared to say that such ruling would have been erroneous. Being admitted, the presumptions require us to hold that there was no reversible error therein."

And statements by deceased, who had been crushed against a gravel bank by a car, made while he was being removed, within two or three minutes after the injury, "My God, it came unawares to me. I did not hear anything until it struck me," were held admissible as *res gestæ*. Sullivan v. Salt Lake City, 13 Utah, 122, 44 Pac. 1039.

And statements made within five or ten minutes after the accident have been held admissible as part of the *res gestæ*.

In an action for the death of intestate, a statement made by the injured person within five minutes after the accident, and while the excitement was unabated, so connected with the cause of his injuries as to preclude any idea that it was the product of a calculated policy, was held admissible. Kansas City Southern R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618.

And where, within four or five minutes after a train passed, decedent was found near the track in great suffering, his statement that he had been kicked off the train was held part of the *res gestæ*. Louisville & N. R. Co. v. Shaw, 21 Ky. L. Rep. 1041, 53 S. W. 1048.

And where a passenger was hurt in a railroad collision, and was lying down next to the steps of the car, and within 42 L.R.A.(N.S.)

five minutes stated: "I am hurt, my head is hurt," the statement was held admissible as *res gestæ*. St. Louis Southwestern R. Co. v. Coats, — Tex. Civ. App. —, 103 S. W. 662.

A spike was thrown by a passing train and struck plaintiff, working in a field, injuring him. Statements made to a person reaching him four or five minutes thereafter were held to be part of the *res gestæ* and admissible. Blackshear v. Trinity & B. Valley R. Co. — Tex. Civ. App. —, 131 S. W. 854.

And declarations of a boy made to a third person about five minutes after he had been run over and his arm crushed under the wheels, that he had been kicked off a train by the brakeman, were held admissible as *res gestæ*. Dixon v. Northern P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620.

Of that case Britton v. Washington Water Power Co. 59 Wash. 440, 33 L.R.A. (N.S.) 109, 140 Am. St. Rep. 858, 110 Pac. 20, said: "In that case it was said that 'there is no showing that the stranger who was not able to be found at the trial was in any way connected with the accident.'"

And a statement made five or ten minutes after an accident, while deceased was lying between the tracks with his legs nearly severed, in response to questions as to how the accident happened, that "he shoved me off," and, when asked who, his reply "Conductor Fleming," were held admissible as part of the *res gestæ*. Washington & G. R. Co. v. McLane, 11 App. D. C. 220. The court said: "The declarations made by the deceased at the place of the accident were made so recently after the injuries received, and under such distressing circumstances, as to preclude the idea of design or deliberation, and would seem to be but the natural expression of the impressions made upon his mind by the actual occurrence. The age and suffering of the boy, and all the surrounding circumstances, utterly exclude all idea of calculation or ability to manufacture evidence for ulterior purposes."

A person on the right of way was run down by a train. Statements made by him to the first person reaching him, within ten minutes after the accident, explaining the cause, were held to be part of the *res gestæ* and admissible in evidence. Missouri, K. & T. R. Co. v. Williams, 50 Tex. Civ. App. 134, 109 S. W. 1126.

Statements have been received as part of the *res gestæ* though made from fifteen to thirty minutes after the accident.

A statement made fifteen or twenty minutes after an accident, in response to a question by a passenger in a train wreck, "I do not know; . . . I feel very strange; I do not feel right in here; I am afraid I am hurt," was held admissible as *res gestæ*. Texas & P. R. Co. v. Barton, 78 Tex. 421, 14 S. W. 698.

And declarations by an osteopath that he had accidentally strained his back while



treating a patient, made within one half an hour after commencing such treatment, were held admissible as part of the *res gestæ*, to show pain, and also that he had had an accidental strain. *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46.

And upon running home about half an hour after injuries received by a young girl, she stated to her father that she was put to work on new frames in the factory; that she refused to go to work, and the second hand cursed her and told her to go to work; that when she did, the machine was started without signal. This was held admissible under the Code, § 3773, and also at common law. *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838. The court said: "Considering the circumstances, the terrible suffering the child was then and had been enduring from the frightful injury that had so recently occurred, we think a case was presented where a judge should have paused long before rejecting it; the propriety of the rejection would have been, to say the least, doubtful, and in cases where the competency of evidence is doubtful, it should go to the jury, that they may consider how far its force is impaired by these incidents."

In *Augusta & S. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674, the court said: "That case must rest alone upon its own peculiar facts, and will not be extended beyond them; but it differs widely from this case in all respects, except in point of time in which the declarations were made. The proximity of time in which declarations are made to the main transaction is not the only test of their admissibility in evidence, but they must be also free from all suspicion of device or afterthought."

In *Roach v. Western & A. R. Co.* 93 Ga. 785, 21 S. E. 67, the court said: "This court in *Augusta Factory v. Barnes*, supra, has gone quite as far, we presume, as it will ever go in sanctioning the admission, as a part of the *res gestæ*, of evidence of this character. We are not disposed to extend in the least degree the doctrine of that case."

It was again distinguished in *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. 608, the court saying: "In which the facts were similar, the admission of the declarations of the injured party, made a half hour after the accident, and at a different place, was placed upon that precise ground. These decisions go to a length which, in other cases, is pronounced unwarranted; still, although the connection between the events and the utterances seems vague, the necessity of a connection is recognized, and it is not incumbent upon us to take issue with them, for any purpose connected with this decision."

Declarations of deceased made within a half hour after she had fallen on a slippery walk and fractured her skull, from which injury she died, were held admissible. 42 L.R.A. (N.S.)

sible as part of the *res gestæ*. *Rothrock v. Cedar Rapids*, 128 Iowa, 252, 103 N. W. 475.

Some cases have held declarations admissible although made far beyond the time allowed by any rule, and these cases would probably not now be followed.

In *Harriman v. Stowe*, 57 Mo. 93, a woman fell through a trapdoor about noon, and was injured. A physician came between 1 and 4 o'clock that day. She stated to him that the trapdoor in the kitchen had been left in an insecure condition, and that she stepped on it and fell through. It was held that this was admissible as part of the *res gestæ*. The court said: "The accident and the declarations formed connecting circumstances, and in the ordinary affairs of life no one would doubt the truth of these declarations, or hesitate to credit them as evidence. I can perceive no valid objection to their admissibility."

Distinguished in *Corbett v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 621.

In *Barker v. St. Louis, I. M. & S. R. Co.* 126 Mo. 143, 26 L.R.A. 843, 47 Am. St. Rep. 646, 28 S. W. 866, Macfarlane, J., dissenting, said: "That coincidence of time is not the true test may be drawn from our own decisions. In *Harriman v. Stowe*, supra, admissions made an hour or more after the accident were admitted. This case goes beyond any recognized rule, and would not probably be followed under any circumstances. In *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333, after deceased had been struck, after the train had been stopped, two of the trainmen went back to the place of the collision. Held, that statements then made by them were not admissible. And generally it has been said, though probably unnecessary to the particular decision, that such declarations, to be admissible, should be coincident with the events to which they relate. *Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545; *Aldridge v. Midland Blast Furnace Co.* 78 Mo. 565; *McDermott v. Hannibal & St. J. R. Co.* 87 Mo. 298."

In *Van Eman v. Fidelity & C. Co.* 201 Pa. 537, 51 Atl. 177, declarations made to a wife, some hours after an injury to the husband, explaining how it occurred, were admitted. It was held immaterial error, if any, as the proof was only cumulative.

But in the bulk of cases refusing to allow statements of the injured person, it was clearly apparent that the statements were not made near enough in point of time to be *res gestæ*.

Statements made by a boy the day after an accident, as to his having been hurt by a bolt in the curbing, were held no part of the *res gestæ*. But statements made by the boy to his mother immediately after the injury were held admissible. *Galveston v. Barbour*, 62 Tex. 175, 50 Am. Rep. 519.

And under Ga. Code, § 3773, providing that declarations accompanying an act, or

so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ*, it was held that statements made a half hour after a passenger was injured in alighting from a train, to the first person coming to him, were inadmissible as *res gestæ*. *Savannah, F. & W. R. Co. v. Holland*, 82 Ga. 257, 14 Am. St. Rep. 158, 10 S. E. 200.

Three quarters of an hour after a mine explosion the victims were taken out of the mine. Statements then made by the injured persons, giving an account and the place of the explosion, were held incompetent, as they were merely narrative and no part of the *res gestæ*. *Gowen v. Bush*, 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349, 18 Mor. Min. Rep. 433.

In an action for injuries while employed as an engineer's helper or oiler in the engine house of a mine, the plaintiff testified that the engineer stated immediately after the accident, and at the place thereof, that "he couldn't help it." On cross-examination as to when he first conceived the idea that the engineer was negligent, he answered: "He told me it was his fault down at the hospital." This should have been stricken out as not part of the *res gestæ*, as it was ten hours after the accident. *Kyner v. Portland Gold Min. Co.* 106 C. C. A. 245, 184 Fed. 43.

And the statements of deceased made after he had been extricated from machinery and borne a block away, in response to a question twenty five minutes after the accident, were held not admissible. They had no causal relation to the act, and were not so connected with the principal fact or such immediate accompaniments of it as to constitute *res gestæ*. *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106.

In an action for causing death by carelessly managing a locomotive, dying declarations of the injured person were held inadmissible. *Marshall v. Chicago & G. E. R. Co.* 48 Ill. 475, 95 Am. Dec. 561.

And dying declarations of one killed by a train while walking on the track were held inadmissible. *Daily v. New York & N. H. R. Co.* 32 Conn. 356, 87 Am. Dec. 176.

A railroad whistle frightened a horse. What the plaintiff said after the occurrence in respect to the engineer's fault, and what the engineer said on reaching the station, was held inadmissible as *res gestæ*. *Newsom v. Georgia R. Co.* 66 Ga. 57.

And declarations made by plaintiff to her sister-in-law shortly after an accident, stating how she was thrown from a street car, were held inadmissible as part of the *res gestæ*. *Augusta & S. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674. Plaintiff had gone home and then went to her sister-in-law's house, where she made the declarations. This was under Ga. Code, § 3773.

In an action for death resulting from injuries received by the rider from a mule's getting its foot caught in a hole at a railroad crossing, declarations made a half 42 L.R.A.(N.S.)

hour after the accident were held not admissible. *Pool v. East Tennessee, V. & G. R. Co.* 92 Ga. 337, 17 S. E. 267.

And a statement made by a person one half hour after he was hurt in alighting from a train was held inadmissible as part of the *res gestæ*. *White v. Southern R. Co.* 123 Ga. 353, 51 S. E. 411.

A driver of a hose carriage was killed in a collision with a street car. Evidence of groans and exclamations of the deceased was held no part of the *res gestæ*. *Donnelly v. Chicago City R. Co.* 131 Ill. App. 302. They were said to be self-serving declarations. The time was not stated.

And statements made by deceased a short time after an accident from coupling cars were held inadmissible and no part of the *res gestæ*. *Winn v. Christian County Coal Co.* 156 Ill. App. 179.

And statements of a brakeman fatally injured, made after he had been moved to another place 200 feet distant, and ten minutes after the injury, were held inadmissible as part of the *res gestæ*. *Cleveland, C. C. & St. L. R. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174.

In *Hancock County v. Leggett*, 115 Ind. 544, 18 N. E. 53, it was said: "An injured person may show in evidence declarations connected with existing suffering and expressive of it, but he may not give an account of the manner in which he received his injuries, nor recount what is past."

And declarations of a person butted by a ram were held properly excluded as not a part of the *res gestæ*, where it was not shown that they were made within the required time to make them competent. *Gray v. McLaughlin*, 26 Iowa, 279.

And statements made by a husband to his wife after he came home injured by a train on the street were held inadmissible as part of the *res gestæ*. *Armil v. Chicago, B. & Q. R. Co.* 70 Iowa, 130, 30 N. W. 42.

In *Rothrock v. Cedar Rapids*, 128 Iowa, 252, 103 N. W. 475, it was said: "The conclusion reached in *Armil v. Chicago, B. & Q. R. Co.* supra, does not seem to be consistent with our conclusion. But in that case there was a dissent, and we think that in the later decisions of this court the rule of that case has not been followed."

And the statements made by an employee one hour after he had been crushed between the car bumpers were held inadmissible and no part of the *res gestæ*. *Koke v. Andrews Steel Co.* — Ky. —, 149 S. W. 968.

A passenger from a train was found dying at a railroad trestle. Statements made by him some hours afterwards, that he just stepped off the train, and did not know where he was stepping, were held inadmissible and no part of the *res gestæ*. *Marler v. Texas & P. R. Co.* 52 La. Ann. 727, 27 So. 176.

A boy was run over by an engine backing on a street. A statement made by him

some time afterwards at another place was held inadmissible and not part of the *res gestæ*. State use of Welch v. Baltimore & O. R. Co. — Md. —, 83 Atl. 166.

Plaintiff was thrown from his vehicle, his horse having become frightened by getting in a ditch, and, on being carried a block to a drug store, made a statement of the accident. This was held no part of the *res gestæ*. Baltimore v. Lobe, 90 Md. 310, 45 Atl. 192. The court said: "Moreover, time enough had passed for a crowd to assemble at the drug store, and for the druggist to be quietly engaged in 'fixing up' Lobe's head."

And declarations as to the cause of an injury, made by deceased after he had returned home, thirty minutes after his hand had been crushed by a car, were held inadmissible as *res gestæ*. Armil v. Chicago, B. & Q. R. Co. 70 Iowa, 130, 30 N. W. 42. The court said: "In this case it does not appear when the deceased left home, or that he left there for the accomplishment of an avowed purpose. He did not voluntarily, and of his own accord, return home after the accident, but he was taken home by others; and the declaration sought to be introduced was not made on his own motion, as explanatory of either his absence or the condition he was in."

A team shied at a hole in a bridge and ran away. The injured owner made a statement a long distance away from the scene of the accident, about an hour after it occurred, and he was not unconscious during all of this interval. This was held to be a narrative and hearsay, and not part of the *res gestæ*. White v. Marquette, 140 Mich. 310, 103 N. W. 698.

And statements made a mile away from the place of the accident said to have been caused by a team being frightened by a hole in a bridge, which statements were in response to questions after the decedent had been washed and put in bed, were held not a part of the *res gestæ*. Ibid. The statements were not spontaneous or voluntary.

In an action on an insurance policy, the question was whether he accidentally fell in the car, causing the rupture of a blood vessel, whereby apoplexy resulted. Evidence as to statements he made within thirty minutes of the occurrence, when he had been carried into his house, was held no part of the *res gestæ*. Hooper v. Standard Life & Acci. Ins. Co. 166 Mo. App. 209, 148 S. W. 116.

A pedestrian was run down by a horse and wagon. The injured man was carried to a drug store, and the driver was arrested. Self-serving declarations made by the injured party, and those made in the presence of the driver at the police station, were held no part of the *res gestæ*, and inadmissible. Lehey v. William Ottmann & Co. 73 Hun, 61, 25 N. Y. Supp. 897.

And declarations made by means of signs by a deaf-mute, about thirty minutes after an accident, that there was a long train; that deceased waited for it to go by, and 42 L.R.A.(N.S.)

was struck by an engine which followed, were held inadmissible as part of the *res gestæ*. Waldele v. New York C. & H. R. R. Co. 95 N. Y. 274, 47 Am. Rep. 41, reversing 29 Hun, 35. Former trial, 19 Hun, 69. The court said: "But the point of inquiry was how he came to be hit by the engine, with the view of ascertaining whether the accident was solely due to the negligence of the defendant, or partly or wholly due to the negligence of the intestate. The manner of the accident was, therefore, the *res gestæ* to be inquired into; and these declarations, made after the accident had happened, after the train had passed from sight, and the whole transaction had terminated, were no part of that *res gestæ*, had no connection with it, and were purely narrative. It has been well said that *res gestæ* must be a *res gestæ* that has something to do with the case, and then the declaration must have something to do with the *res gestæ*. It cannot be said that these declarations were in such manner connected with the *res gestæ* as to constitute one transaction, so that they and the *res gestæ* were parts of the same transaction. They were not made under such circumstances that they are in any way confirmed by the *res gestæ*, and they had no relation to what was then present, or had just gone by."

In American Mfg. Co. v. Bigelow, 110 C. C. A. 77, 188 Fed. 34, the Case of Waldele, 95 N. Y. 274, 47 Am. Rep. 41, was distinguished, the court saying: "The statement was that of the injured party, a deaf mute, made in the sign language, to his brother, half an hour after the accident."

In Scheir v. Quirin, 77 App. Div. 624, 78 N. Y. Supp. 956, it was said: "In Waldele v. New York C. & H. R. R. Co. 95 N. Y. 274, 47 Am. Rep. 41, there is an elaborate discussion of the authorities, and the declaration in that case was held to be incompetent; but it occurred some time after the transaction, and was a narrative of how it occurred. There was nothing ejaculatory or involuntary in the statement, and we think the case is clearly distinguishable from the present one."

And complaints of pain made by plaintiff, not to a physician, a couple of hours after an accident, were held to be no part of the *res gestæ*. Kennedy v. Rochester City & B. R. Co. 130 N. Y. 654, 29 N. E. 141, reversing 54 Hun, 183, 7 N. Y. Supp. 221. The court said: "While evidence of the character of that under consideration was admissible prior to the statute allowing parties to be witnesses, it is now definitely settled that a party cannot support his own testimony by proof of declarations to the same effect, made to persons other than a physician, who is, at the time, in attendance professionally."

In Ogden v. Pennsylvania R. Co. 1 Monaghan (Pa.) 249, 16 Atl. 353, a boy was hurt by a train not at a crossing. The court said: "We need not discuss the question of the admissibility of the boy's

declarations, made shortly after he was injured, for the reason that the evidence fails to disclose any such negligence on the part of the defendant company as would render them liable in this action."

In *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113, 15 Am. St. Rep. 701, 18 Atl. 759, the court said this case "differs from the declaration which was rejected in *Ogden v. Pennsylvania R. Co.* 44 Phila. Leg. Int. 133, as that was made after the removal of the injured party from the place where he was found; in this case, it was made while the party was lying where he fell, and an instant after his fall."

And where a pedestrian fell while walking, and, on arising, returned a distance of several hundred feet, and fifteen minutes or more elapsed, his declarations were held inadmissible, in an action on an insurance policy. *Keefer v. Pacific Mut. L. Ins. Co.* 201 Pa. 448, 88 Am. St. Rep. 822, 51 Atl. 366.

And declarations of the plaintiff, made after an accident on a sidewalk, and not at the same place, were held inadmissible as *res gestæ*, and were immaterial and self-serving declarations. *Tanney v. Rapid City*, 17 S. D. 283, 96 N. W. 96.

A pedestrian was injured by reason of a hole in the sidewalk. Statements made after she had gone to the postoffice and back to her home were held to be no part of the *res gestæ*, and were inadmissible. *Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009.

And declarations by an injured passenger, made some time thereafter, to his mother, as to the cause of injury, were held to be no part of the *res gestæ*. *Hicks v. Galveston, H. & S. A. R. Co.* — Tex. Civ. App. —, 71 S. W. 322. These statements were made after his arrival at his destination, and the plaintiff claimed to have been hurt on the train by the jerking of the cars.

And in an action against a railroad, statements made by plaintiff several hours after an accident, that he had been knocked off a bridge by a train, were held inadmissible and no part of the *res gestæ*. *McCowan v. Gulf, C. & S. F. R. Co.* — Tex. Civ. App. —, 73 S. W. 46. They were offered to support plaintiff's testimony, where other evidence had been given that he had stated that he had been thrown from the bridge by robbers.

A party entering a car claimed to have been thrown by a jerk of the cars. Statements made by him to his physician, a half hour after the accident, giving the cause, were held inadmissible and no part of the *res gestæ*. *Ft. Worth & D. C. R. Co. v. Stone*, — Tex. Civ. App. —, 25 S. W. 808.

A statement made to a physician by deceased one half hour after an accident, that it was dark and he stumbled, or was crowded off the platform, was held to be no part of the *res gestæ*. *Gebus v. Minneapolis, St. P. & S. Ste. M. R. Co.* — N. 42 L.R.A. (N.S.)

D. —, 132 N. W. 227. It was only a guess or an opinion.

And statements to a physician as to the cause of the injury from a defective bridge were held inadmissible as *res gestæ*, where enough time had passed for him to be removed to a house 20 rods from the bridge, and to get a doctor. *Merkle v. Bennington Twp.* 58 Mich. 156, 55 Am. Rep. 666, 24 N. W. 776.

Statements made by the injured party to a physician, several hours after an accident, as to the cause of the injuries, were held inadmissible, as they were no part of the *res gestæ*. *Globe Acci. Ins. Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563, reversing 61 Ill. App. 140. This was an action on an insurance policy.

And the same was held in *Aurora v. Plummer*, 122 Ill. App. 143.

Plaintiff's physician stated that when called to attend him, soon after the accident, "He simply made a statement of falling off in a ditch on the night before, or previous night; that he fell off the ditch, coming home." This was held incompetent; but as the fact of falling in the ditch was proved by other evidence, it was held immaterial error. *Harrington v. Hamburg*, 85 Iowa, 272, 52 N. W. 201.

And statements made by the injured party to a physician, five days after an accident, as to how it was caused, were held inadmissible, and not *res gestæ*. *Weber v. St. Paul City R. Co.* 67 Minn. 155, 69 N. W. 716.

And declarations of a miner to his physician, explaining how he had been hurt in a mine, thirty-six hours before, were held inadmissible. *Equitable Mut. Acci. Asso. v. McCluskey*, 1 Colo. App. 473, 29 Pac. 383. The court said: "It is not a matter of discretion with the presiding judge, to determine whether or not the declarations are admissible. That is determinable by well-settled principles of law, which must be applied to each case as it arises, the restriction being that the declaration must be contemporary with the principal transaction, and derive some degree of credit from it."

And a statement of a five-year-old boy, made on the way to the hospital, ten minutes after being run down by a street car, was held inadmissible as *res gestæ*, as it was a narrative. *Citizens' Street R. Co. v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723.

And statements made after deceased, injured by a fall, alleged to have been caused by his lines breaking, had been taken to a hospital were held not *res gestæ*. *Sullivan v. Henry Guth & Co.* 148 Ill. App. 538. He was driving a wagon, and fell in front of the wheels.

And what was said by an injured brakeman after his removal to a hotel, in regard to the manner in which his injuries were received, was held inadmissible. *Matthews v. Louisville & N. R. Co.* 130 Ky. 551, 113 S. W. 459.

But in the following cases the declarations of the injured party were held inadmissible, although made almost immediately after the accident. Some were rejected because a question to the sufferer preceded the statement. Some were rejected because containing also exclamations of distress. Others were rejected because not exclamatory. In this condition of the decisions it is impossible to formulate a rule, or to define a condition of circumstances, or to give the time within which the statement must be made in order to be *res gestæ*.

Declarations of plaintiff, made soon after injuries, were held inadmissible to corroborate his evidence on the stand. *Downs v. New York C. R. Co.* 47 N. Y. 83.

And an exclamation made by plaintiff after she had fallen on defective stairs was held no part of the *res gestæ*. *Moorhead v. Eckert*, 61 Misc. 612, 114 N. Y. Supp. 31. The court said: "There was nothing in the record, when that testimony was offered, to justify an inference that a remark then made was spontaneous in character. From the plaintiff's own testimony it appears that she was fully conscious and in no condition of distress such as would take from her utterances the quality of deliberation. Hence any statement by her, bearing upon the cause of the accident,—which the question involved,—would have been but a narration of past events, a self-serving declaration, and not of the character of proof admissible as part of the *res gestæ*."

And where an accident was caused to a workman on a hand car, because no flagman had been put out, the declarations of the injured man, giving the cause, made within five minutes of the time of the accident, which was fatal, were held inadmissible. *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577. The court said: "They were made five minutes or more after the collision; were not spontaneously made, but in answer to the question, 'how it happened,' propounded by some one present, after a conversation with the witness as to the extent of his injury; and do not illustrate or explain, or receive support from, the transaction itself, unless it be as to his supposition that it happened from the carelessness of Hackett, in not having out a flagman."

And while an injured employee was being taken to a switch house, he said, "I pulled the pin and made a grab for the car, and there was nothing there for me to grab." This was held inadmissible and no part of the *res gestæ*. *Martin v. New York, N. H. & H. R. Co.* 103 N. Y. 626, 9 N. E. 505.

An employee attempting to make a coupling on cars was killed. His declarations a short time after the injury, accounting for the same, were held inadmissible and no part of the *res gestæ*. *Texas & N. O. R. Co. v. Crowder*, 70 Tex. 222, 7 S. W. 709.

In *Gulf, C. & S. F. R. Co. v. Finley*, 11 42 L.R.A. (N.S.)

Tex. Civ. App. 71, 32 S. W. 51, a brakeman was killed. Immediately after he was injured, he said: "That link went clear through me; I am killed." Right after he said this, he said: "Oh, my God! My poor wife and children, if I could see them before I die!" It was held that part of this was inadmissible. No ruling appears as to the other part. The court said: "Any words or exclamations of the deceased at the time he was killed, tending to throw light on the transaction, or to show how he was killed, were a part of the *res gestæ*, and, as such, admissible in evidence; but the exclamation, 'Oh, my poor wife and babies!' while extremely touching, as his last words, yet do not relate in any way to the manner of his death, or tend to throw light upon the transaction, and were not admissible in evidence."

A witness who was 30 yards off, saw an accident, heard deceased call for help, ran to him, saying, "What in the world?" the deceased said: "The hand hold let me down." This was held to be more in the nature of a response than a demonstration of the main fact, manifesting itself in the declaration, and was held not *res gestæ*. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176.

And a declaration of the plaintiff to her mother, made within five minutes of the injury, that a dog had bitten her, was held inadmissible as part of the *res gestæ*, on the ground that it was narrative and hearsay. *McCarrick v. Kealy*, 70 Conn. 642, 40 Atl. 603.

And what an injured man said to witnesses was held inadmissible as a mere narration of a past occurrence, in an action for injuries sustained by falling from a train. *Western & A. R. Co. v. Beason*, 112 Ga. 553, 37 S. E. 863. The court said: "His statements, notwithstanding the fact that he was suffering great pain, were made deliberately and connectedly. They were in no sense exclamatory, and manifestly did not proceed from him as part and parcel of the catastrophe. It is true these statements were made within a few minutes thereafter; but, in determining whether declarations should be received as a part of the *res gestæ* of an occurrence, the mere question of the lapse of time is not controlling."

A husband said, "I knew my wife was hurt, because she complained immediately after the accident." This was held not to be a part of the *res gestæ*, under Ga. Code, § 5179, requiring the statement to be "so nearly connected therewith in time as to be free from all suspicion of device or afterthought." *Pool v. Warren County*, 123 Ga. 205, 51 S. E. 328. The court said: "The word 'immediately' is a relative term. It may mean a minute, an hour, a day, or a week, according to the circumstances of the case, or other periods of time which the witness has in mind when speaking. In the present case it was incumbent upon the plaintiff to show that the declarations sought to be introduced were so closely con-

nected with the incident of her precipitation through the bridge as to be free from any suspicion of device or afterthought. We cannot say that this was done by the use of the word 'immediately.' The witness could easily have told, approximately, at least, how long after the accident it was that his wife made the complaints as to which he testified."

In *Chicago & N. W. R. Co. v. Howard*, 6 Ill. App. 569, in attempting to board a moving train, a person fell under the cars. When he was being removed from under the train, he said he should never forgive the conductor for pushing or putting him off the train. This appears to have been received without objection. On being taken to a hotel, he repeated these statements while in a dying condition. This was held inadmissible, and not *res gesta*.

And a statement made by a passenger in the presence of the conductor, just subsequent to an accident, "he (meaning the conductor) let me fall," was held not *res gesta*. *Chicago. B. & Q. R. Co. v. Johnson*, 36 Ill. App. 564 (former report, 24 Ill. App. 468). It was not explanatory of an act then transpiring, but of a recent occurrence.

A boy was pushed or thrown from a car. He rose from the ground in the middle of the street and walked to the sidewalk and sat down. One of the witnesses said, "I went to him and asked him what was the matter." The other witness said, "We saw a little fellow getting up; we ran over to him and asked what was the matter." His response that the conductor caught him by the arm and threw him off was held inadmissible as *res gesta*. *Chicago West Div. R. Co. v. Becker*, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. 524. The court said: "They were not made at the time of the accident, nor did they explain or characterize the manner in which the accident occurred. They were not concurrent with the injury, nor uttered contemporaneously with it, so as to be regarded as a part of the principal transaction. They were made after the injury was received, and were merely narrative of what had taken place. They were spoken by the deceased as his answer, when he was asked 'what was the matter.'"

In *East St. Louis Connecting R. Co. v. Allen*, 54 Ill. App. 27 the case of *Chicago West Div. R. Co. v. Becker*, supra, was distinguished, as there the declarations were made by the injured party after the car on which he was riding had gone some distance from the place of the accident.

A freight conductor's foot was caught in an unblocked guard rail and injured by the cars. While lying on the ground, within five minutes after the accident, he made a statement as to how it happened, while he was being taken up. It was held that this was not *res gesta*, but a narrative of what had happened, and was inadmissible. *Eastman v. Boston & M. R. Co.* 165 Mass. 342, 43 N. E. 115. 42 L.R.A. (N.S.)

Where a physician was called immediately after an accident, complaints of pain were held admissible, and as no motion was made to strike out "telling me I think it was from the effects of a fall," it was held that objection could not be made on appeal. *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141. Plaintiff was injured by reason of a hole in a sidewalk.

A mail agent was injured by reason of a transom of a car striking him on the foot. A statement made by him to the baggage man after the rough handling of the cars had ceased was held not to be *res gesta*, but merely narrative. *Dunlap v. Chicago, R. I. & P. R. Co.* 145 Mo. App. 215, 129 S. W. 262.

And a statement by deceased, made immediately after an accident, "that he was afraid his skull was broke," was held inadmissible, as it was no part of the *res gesta*. But as no motion was made to strike out, it was immaterial error. *Corbett v. St. Louis, I. M. & S. R. Co.* 26 Mo. App. 621.

And in an action against an insurance company, where the question was as to whether deceased tried to board a moving car, statements made by him as he was being helped up from the ground, immediately after the accident, offered by the defendant, were held not a part of the *res gesta*, as they were narrative. *Hill v. Aetna L. Ins. Co.* 150 N. C. 1, 63 S. E. 124. A passenger on a train was thrown out of the car by its sudden starting. Her statements as to the cause of the accident, made as she was being helped out of a ditch, were held not admissible, as they were no part of the *res gesta*, although made immediately after the accident. *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185.

And where the question was as to whether a passenger jumped or was thrown off a moving train, statements made by him shortly after the train passed, showing that he was thrown off, were held inadmissible and no part of the *res gesta*. *Sullivan v. Oregon R. & Nav. Co.* 12 Or. 392, 53 Am. Rep. 364, 7 Pac. 508. The court said: "It is very easy to say that the statements and declarations of a party who has received an injury, made after its occurrence, as to how it was occasioned, are a part of the *res gesta*, but extremely difficult to explain it, and many times wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes be explained, or its nature and quality be ascertained, by an accompanying declaration which may be properly regarded as a part of the transaction in which it occurred; but it is never the act itself, nor the mere evidence of it."

A statement made by deceased at the time of the injury, as to the cause thereof, was held inadmissible. *Johnston v. Oregon Short Line R. Co.* 23 Or. 94, 31 Pac. 283. A switchman was thrown off and under a car by a switch target.

Statements made by a person injured at a railroad crossing, as to how the accident occurred, were held to be inadmissible. *St. Louis & S. W. R. Co. v. Gill*, — Tex. Civ. App. —, 55 S. W. 380. Citing *Houston & T. C. R. Co. v. Shafer*, 54 Tex. 648; *Texas & P. R. Co. v. Barron*, 78 Tex. 421, 14 S. W. 698; *Wheeler v. Tyler Southeastern R. Co.* 91 Tex. 356, 43 S. W. 876.

Cases in regard to declarations of pain are not intended to be included in this note.

### c. Effect of unconsciousness.

A foreman was run down by a switch engine as he was going on the track to the tool house. What he said immediately on consciousness being restored, some time after the accident, as to his going under orders of the roadmaster, was held part of the *res gestæ*. *Christopherson v. Chicago, M. & St. P. R. Co.* 135 Iowa, 409, 124 Am. St. Rep. 284, 109 N. W. 1077.

A trackhand at work was struck by a train. On regaining consciousness he said, "What hit me?" This was held to be evidence tending to show that he had not seen the train before he was struck. *Hinzeman v. Missouri P. R. Co.* 182 Mo. 621, 81 S. W. 1134. The engineer and fireman both saw him at work, and failed to warn him by whistle.

A passenger was injured in a rear-end collision. Statements as to his condition, made immediately on being restored to consciousness, were held admissible as part of the *res gestæ*. *Sutton v. Southern R. Co.* 82 S. C. 345, 64 S. E. 401.

A horse was frightened by a whistle from an engine at a crossing, and ran away, colliding with the train. As soon as one of the party regained consciousness, she stated that the whistle was not blown for the crossing, but at the crossing, frightening the horse. This was held *res gestæ* and admissible. *Paris & G. N. R. Co. v. Calvin*, — Tex. Civ. App. —, 103 S. W. 428, affirmed in 101 Tex. 291, 106 S. W. 879.

And the declaration of an injured brakeman, immediately on gaining consciousness, "the hand hold gave way," was held admissible as part of the *res gestæ*. *Missouri, K. & T. R. Co. v. Moore*, 24 Tex. Civ. App. 489, 59 S. W. 282.

And a declaration by an injured party immediately after becoming conscious, but about twenty minutes after the accident occurred, "Thank God, my children are saved, though I am killed," was held admissible as *res gestæ*. *Ft. Worth & D. C. R. Co. v. Partin*, 33 Tex. Civ. App. 173, 76 S. W. 236. This was evidence of pain and suffering.

And a statement by a boy claiming to have been kicked from a trolley car while stealing a ride, made eight days after the accident, as soon as he regained consciousness, was held to be part of the *res gestæ*. *Britton v. Washington Water Power Co.* 59 Wash. 440, 33 L.R.A.(N.S.) 109, 140 42 L.R.A.(N.S.)

Am. St. Rep. 858, 110 Pac. 20. The court said: "There had been no opportunity for reflection or deliberation. They were as much a part of the occurrence as if they had been made when the boy was raised from the street, immediately after falling. So far as he was concerned, there was no conscious intervening time between the injury and the declaration."

But statements of a boy killed by a train, made after recovering consciousness, were held inadmissible and no part of the *res gestæ*. The length of time was not stated. When found by the witness, he was entirely conscious. *Bionto v. Illinois C. R. Co.* 125 La. 147, 27 L.R.A.(N.S.) 1030, 51 So. 98. The court said: "The statement of deceased was not the immediate outcome of the facts, nor was it contemporaneous, nor did it succeed the facts under circumstances rendering the words uttered part of the transaction, to use a word sometimes used in defining *res gestæ*. It was a narrative." I. T.

## IOWA SUPREME COURT.

### STATE OF IOWA

v.

JOE SAMPSON, Appt.

(— Iowa, —, 138 N. W. 473.)

### Larceny — single transactions — property of different persons.

1. One who takes from different receptacles in the same room, as one continuous transaction, a watch belonging to one person and money belonging to another, can be convicted of but one offense.

### Judgment — conviction before justice — ingredient of offense beyond his jurisdiction — effect.

2. A conviction of simple larceny before a justice of the peace will bar a subsequent prosecution for larceny from a dwelling based on the same transaction, although the justice had no jurisdiction of the latter offense.

### Same — estoppel of state.

3. The state cannot, after prosecuting before a justice of the peace for an offense within his jurisdiction, avoid the effect of the judgment upon the theory that such an offense was an ingredient of a higher crime of which the justice had no jurisdiction.

(November 19, 1912.)

### Note. — Larceny: stealing property from different owners at the same time as distinct offenses.

Upon the general question as to the right to convict for several offenses growing out of the same facts, see note to *Hughes v. Com.* 31 L.R.A.(N.S.) 693, which contains, in the subdivision at page 723, cases upon one phase of the present subject.

**A**PPEAL by defendant from a judgment of the District Court for Cerro Gordo County convicting him of larceny from a dwelling. Reversed.

Statement by Ladd, J.:

From a judgment convicting him of larceny from a dwelling the defendant appeals.

Mr. F. A. Ontjes, for appellant:

The offense charged in the indictment was the same offense for which the defendant was sentenced to the county jail, and the defendant could not be again put in jeopardy for that transaction.

State v. Congrove, 109 Iowa, 66, 80 N. W. 227; State v. Gleason, 56 Iowa, 203, 9 N. W. 126; State v. Murray, 55 Iowa, 530,

8 N. W. 350; State v. Larson, 85 Iowa, 659, 52 N. W. 539; Lorton v. State, 7 Mo. 55, 37 Am. Dec. 179; State v. Pierce, 77 Iowa, 245, 42 N. W. 181; State v. Emery, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432; State v. Wiles, 26 Minn. 381, 4 N. W. 615, 2 Am. Crim. Rep. 621.

Messrs. George Cosson, Attorney General, and John Fletcher, Assistant Attorney General, for the State:

If property belonging to different persons is in the possession of one, then there is but one larceny; but where each is in possession of his own property, the taking from each constitutes a separate and distinct larceny.

State v. Bynum, 117 N. C. 752, 23 N. E. 219; Morgan v. State, 34 Tex. 677; Alex-

The clear weight of authority is to the effect that the stealing of several articles of property at the same time and place, as one continuous act or transaction, may be prosecuted as a single offense, although the property belongs to several different owners. Clemm v. State, 154 Ala. 12, 129 Am. St. Rep. 17, 45 So. 212; Hoiles v. United States, 3 MacArth. 370, 36 Am. Rep. 106; Lowe v. State, 57 Ga. 171, 2 Am. Crim. Rep. 344; Dean v. State, 9 Ga. App. 571, 71 S. E. 932; Furnace v. State, 153 Ind. 93, 54 N. E. 441; State v. Larson, 85 Iowa, 659, 52 N. W. 539; State v. Congrove, 109 Iowa, 66, 80 N. W. 227; Nichols v. Com. 78 Ky. 180; State v. Warren, 77 Md. 121, 39 Am. St. Rep. 401, 26 Atl. 500; People v. Johnson, 81 Mich. 573, 45 N. W. 1119; Dalton v. State, 91 Miss. 162, 124 Am. St. Rep. 637, 44 So. 802; State v. Quintini, — Miss. —, 51 So. 276; State v. Mjelde, 29 Mont. 490, 75 Pac. 87; State v. Douglas, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802; State v. Clark, 46 Or. 140, 80 Pac. 101; Fulmer v. Com. 97 Pa. 503; Addison v. State, 3 Tex. App. 40; State v. Mickel, 23 Utah, 507, 65 Pac. 484; State v. Newton, 42 Vt. 537; Alexander v. Com. 90 Va. 809, 20 S. E. 782; State v. Butts, 42 Wash. 455, 85 Pac. 33.

Thus, in Reg. v. Bleasdale, 2 Car. & K. 765, 4 Mor. Min. Rep. 177, it was held that the stealing of coal of several different owners in the course of the continuous working of a mine constitutes one continuous taking, and may be charged as a single offense, so long as the coal is all taken from one shaft.

And the stealing of property from each of two persons assaulted and robbed at one and the same time constitutes a single offense, and may be prosecuted as such, though, if there is an interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other, the felonies are distinct. Reg. v. Giddins, Car. & M. 634.

Likewise, the embezzlement by a tax collector at one time, of an undivided sum of money, may be charged as a single offense, although a part of the money belongs to 42 L.R.A.(N.S.)

the state and a part to the county. People v. De La Guerra, 31 Cal. 416.

And an agent of several persons, who, as such, receives from them severally, at the same time, certain sums of money, by their placing the several sums at the same time on a table in his office, from which he takes the whole amount, may be prosecuted as for a single offense, in appropriating the whole amount to his own use, under a statute providing, in substance, that any person is guilty of larceny who, with wrongful intent, appropriates to his own use property of another in his possession. State v. Mjelde, 29 Mont. 490, 75 Pac. 87.

And in Com. v. Ault, 10 Pa. Super. Ct. 651, the court said: "One offense may be committed to the injury of two or more persons, and where several chattels, the property of different owners, are stolen or feloniously received, at the same time and place, the whole may be considered as one taking and embraced in one count of the indictment."

If several articles, each belonging to a different person, be stolen at the same time, from the same place, by one act in law, though they are taken one by one into the possession of the thief, the taking may properly be charged as one offense. Nichols v. Com. 78 Ky. 180.

So, the stealing of property of several different owners from different conveyances of the several owners may be prosecuted as a single offense, if the stealing of all the property is one transaction, and the taking of the several parts of the property is with the same intent to steal, and is one continuous act, with no other intention and with no more delay in getting the property from the places where found than is indispensable to the taking of it, and the conveyances at the time the property is taken therefrom are on the same lot, without any separation or division of one part of the lot from the other, so that the several articles of property are comparatively near together, though part of the conveyances are nearly 300 feet from the remainder. State v. Smith, 10 Ohio Dec. Reprint, 682.



ander v. State, 21 Tex. App. 406, 57 Am. Dec. 617, 17 S. W. 139; Davidson v. State, 40 Tex. Crim. Rep. 285, 49 S. W. 372, 50 S. W. 365; Loveless v. State, 45 Tex. Crim. Rep. 261, 76 S. W. 756.

An acquittal or a conviction by a justice of the peace, police judge, or other court not having jurisdiction to try an offense, does not constitute former jeopardy, and is not a bar to a subsequent trial in a court having jurisdiction.

State v. Jamison, 104 Iowa, 343, 73 N. W. 831; Siebert v. State, 95 Ind. 471; 12 Cyc. 293.

Ladd, J., delivered the opinion of the court:

The accused, with Charles Bergman and

Hans Olson, occupied the same room at 205 Hoyt street, in Mason City, and had done so for several weeks. In the evening of February 17, 1911, he retired at about 10 o'clock, and the others shortly afterwards, and, after they had fallen asleep, he arose, dressed, and seizing Olson's watch from the dresser and Bergman's purse, containing \$42, from his trunk, departed. He was subsequently arrested and two informations filed with a justice of the peace, the one, sworn to by Olson, charging him with petit larceny of the watch, and the other, sworn to by Bergman, alleging the larceny of the money from a dwelling. He pleaded guilty to both informations, and was immediately sentenced to serve a term of thirty days in the county jail on the former charge,

But in *Nichols v. Com.* supra, it was held that stealing the separate property of two different owners, from places 200 yards apart, constitutes two distinct offenses, and cannot be prosecuted as a single offense, though the two offenses are committed on the same night, at only a short interval of time, and from the same plantation,—the separate acts of taking from the two places being as distinct as if separated by a longer time and greater distance.

In some jurisdictions it seems clear that the stealing of property of different owners at the same time and place, by the same act, may be charged either as one single offense or as separate and distinct offenses, at the pleasure of the government. Thus, in addition to the cases to that effect cited in the above referred to subdivision of the earlier note, the court said in *Long v. State*, 43 Tex. 467: "When a party by one act drives from their range cattle owned by different persons, or by one act steals the property of different persons, . . . on authority as well as principle we think the state is not bound to divide the single act into all the separate charges which might be formed out of it, but may charge the taking by one act of the property of different persons as one offense."

And in *Territory v. Heywood*, 2 Wash. Terr. 180, 2 Pac. 189: "While it is true that the taking of two horses, the property of different persons, might constitute two separate offenses, yet if they were taken at the same time, the prosecutor could elect to treat it as one transaction and charge it as a single offense."

And of the cases above cited in the first group, to the proposition that the stealing of property of different owners at the same time may be prosecuted as a single offense, only two (*Hoiles v. United States*, 3 Mac-Arth. 370, 36 Am. Rep. 106; *Dean v. State*, 9 Ga. App. 571, 71 S. E. 932) are necessarily inconsistent with the proposition that such stealing may be prosecuted as separate and distinct offenses,—most of the cases merely sustaining, in this respect, the validity or sufficiency of indictments charging the stealing as a single offense. 42 L.R.A. (N.S.)

But in *Hoiles v. United States*, and *Dean v. State*, supra, it is expressly held that the stealing of property belonging to different owners, at the same time and place, and by the same act or transaction, constitutes only one entire larceny, and cannot be prosecuted as separate and distinct offenses.

In the former case, where the defendants had been convicted on three several informations charging them with three several larcenies, and sentenced on each of said informations, it was held that if the larcenies set up in the three several informations were of goods stolen at the same time and place, and by the same act, although of different owners, two of the convictions were wrong, and the prisoners should be discharged upon the expiration of the sentence upon the first information. The court said: "To divide one larceny into several, because there were several owners of the property, is contrary to the constitutional guaranty and the spirit of the common law; . . . there can be but one judgment and one term of imprisonment." *Hoiles v. United States*, supra.

This case also discusses and expressly disapproves the case of *United States v. Beerman*, 5 Cranch, C. C. 412, Fed. Cas. No. 14,560, cited in the subdivision of the earlier note in 31 L.R.A. (N.S.) 723, and holding that if the goods of several persons are stolen at the same time, the stealing of each person's goods constitutes a distinct offense, and may be the subject of a distinct and separate indictment. The court said: "We are unable to recognize that judgment as law, for it authorizes in the practice of this court the doctrine that for one offense a prisoner may be tried and punished three times, or as many times as there are distinct owners of goods stolen at the same time." *Hoiles v. United States*, supra.

In *Dean v. State*, supra, a prosecution for larceny, where "the plea of *autrefois convict* clearly alleged that the accused had stolen at the same time and place, as a part of the same transaction, and constituting only one larceny, five cows belonging to different owners, and that he had been indicted and

and bound over to the grand jury on the latter, and was later indicted for the offense of larceny from a dwelling house. When put on trial, he pleaded his conviction of larceny of the watch by the justice as a bar to his prosecution under the indictment. On this issue, the court instructed that, "if, in point of time and circumstances, the taking of the watch and money was done on a single act or transaction, then there was but one crime, and your verdict must be for the defendant. But if you find from the evidence that, in point of time and circumstances, the taking of the watch and money were done as separate acts and transactions, and not a single act or transaction, then the conviction of the crime of larceny of the watch

would not bar a conviction of larceny of the money described in the indictment." Appellant insists that no such issue was raised by the evidence, and in this we concur. The taking was from the same room, and, though the watch was stolen from the dresser and money from the trunk, these were parts of the same transaction perpetrated at the same time. That an instant or several minutes may have intervened between seizing the watch and the purse can make no difference, if these were a part of the same transaction wherein the accused carried out his design of stealing these articles. Nor does the circumstance that the property belonged to different persons render the transaction divisible into two offenses. The state may not split up and

convicted for stealing one of the cows, and that this conviction was a bar to any further prosecution for the theft of any of the other cows which had been stolen at the same time, although belonging to different owners; and the demurrer admitted the truth of these allegations,"—the court, after quoting with approval from 2 Bishop, New Crim. Law, to the effect that the stealing at one time of several articles owned by different persons constitutes but one offense, and that, after the thief has been in jeopardy for any part of the one larceny, the prosecution is exhausted, and he cannot be indicted for anything omitted from the first indictment, said: "And a large preponderance of the decisions of the courts is to the effect that the larceny of articles belonging to different owners, if committed at the same time and place, constitutes but one offense; and that while the state can, if it chooses, include all these offenses in one indictment, yet if it chooses to indict the thief for stealing only one of the articles belonging to one of the owners, it cannot subsequently be allowed to indict for the larceny of any of the other articles taken at the same time and in the same transaction, but which had been omitted from the previous indictment. . . . In this state, where the 'same transaction test' is the rule for determining the question of jeopardy, we are clear that one larceny cannot be divided into several, because there were several owners of the goods stolen at the same time. To allow a separate prosecution in each case of distinct ownership would be to regard the larceny as simply a trespass against the individual owner, and not a trespass against the public law, and would be contrary to both the letter and the spirit of the constitutional guaranty."

While, as above stated, most of the cases cited in the first group, in view of the question actually before the court, are not necessarily authority against the position that the state may elect to prosecute the stealing as two distinct offenses, yet in most of them the opinions put the decisions upon grounds that are inconsistent with 42 L.R.A.(N.S.)

that position, and indicate that, in the view of the court, the taking of the property of different persons at the same time and place, and by a single act or transaction, constitutes but a single offense, and can be prosecuted only as such, and that a conviction or acquittal upon a charge of taking the property of one of such persons would be a bar to a prosecution for taking the property of another.

Thus, in *Furnace v. State*, 153 Ind. 93, 54 N. E. 441, *supra*, although the only alleged error urged by the defendant appellant's counsel in their brief related to the trial court's overruling a motion to quash the information on the ground that it was bad for duplicity, the court said: "The complainant below in this case was the state of Indiana, and the stealing of several articles of property at one and the same time, as a part of the same transaction, can constitute but one offense against the state, notwithstanding the fact that such articles belonged to several owners. Under such circumstances the state could not split up the offense or crime, and make distinct parts thereof the basis of separate prosecutions. If it elected to prosecute the accused for a part of the crime, it would not thereafter be permitted to prosecute him for other parts not included in the first prosecution."

And in *State v. Douglas*, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802, *supra*, where the defendant appellant complained that the trial court erred in overruling his demurrer to the indictment on the ground that it charged four distinct larcenies, and in refusing his request that the state be directed to elect as to which of the offenses charged he should be placed upon his trial for, although the court, in sustaining the action of the trial judge, referred to its *obiter* intimation in *State v. Lambert*, 9 Nev. 324, quoted in the above referred to subdivision of the note in 31 L.R.A.(N.S.) 723, to the effect that the state may elect to prosecute the stealing of property of different persons at the same time and place, and by the same act, either as one offense or several distinct offenses, it relied,

prosecute separately distinct parts of the same crime. Undoubtedly, many authorities may be found holding that where a man simultaneously takes two or more articles belonging to different persons, even though at the same time, he may be separately prosecuted for the taking from each owner.

In *State v. Thurston*, 2 McMull. L. 382, the prisoner stole cotton belonging to three different persons, and the conviction of larceny in stealing that of one was held not to be a bar to prosecutions for theft from the others, saying "the stealing of the goods of different persons is always a distinct larceny, or may at least be so treated by the solicitor, if, in his discretion, he thinks proper so to do." See also, *Com. v. Sulli-*

*van*, 104 Mass. 553; *United States v. Beer-*  
*man*, 5 Cranch, C. C. 420, Fed. Cas. No. 14,560. But these and like decisions in England have not been followed generally in this country. In *State v. Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432, the court states the rules sustained by the clear weight of authority as follows: "The theft of several articles at one and the same time and place, and by one and the same act, constitutes but one indivisible crime, even though the articles belong to different owners; and that a judgment of conviction or acquittal of the theft of one of the articles is a bar to a prosecution for the theft of the others. A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution

in its decision here, upon the Indiana case of *Furnace v. State*, supra, quoting with approval therefrom, and further said: "It seems to us that the language used in the indictment in the case at bar, charging the defendant, at the same time and place, with having stolen the property of different persons, charges but one offense; one act or transaction in violation of law. . . . Not only does the indictment sufficiently charge one act of larceny by which the property of different persons was taken, but the evidence submitted to the jury shows that there was but one offense committed. The witness . . . to whom appellant made his confession while still in possession of part of the stolen property testified that appellant stated to him that he rode down in the night and sorted out of a band of cattle the eighteen head, and drove them away."

Likewise, in the following cases it has been said: "The rule is well established that, when articles belonging to different owners are stolen at the same time and place, the offense is single, and must be charged in the same count." *Clemm v. State*, 154 Ala. 12, 129 Am. St. Rep. 17, 45 So. 212. supra.

"It is therefore held by the weight of authority that the stealing of articles belonging to two or more persons at the same time and place constitutes but one offense." *State v. Clark*, 46 Or. 140, 80 Pac. 101, supra.

"The great weight of authority sustains the principle that, where several articles of property . . . are taken at the same time and place, the act is a single transaction, and constitutes but one larceny. Although the information may charge the taking of a particular article, or all the articles stolen, a trial for stealing a part is a bar to any subsequent action for the stealing of the remainder." *State v. Mjelde*, 29 Mont. 400, 75 Pac. 87, supra.

"The criterion is, was the larceny one act, committed at one time and place? If so, the property stolen may be of different kinds and values, and belong to dif-

ferent persons." *People v. Johnson*, 81 Mich. 573, 45 N. W. 1119, supra.

"That the property stolen was owned by different persons does not make the felonious taking separate offenses. If, in point of time and circumstances, the taking was done as a single act, then it is but one offense." *State v. Larson*, 85 Iowa, 659, 52 N. W. 539, supra.

"Larceny is an offense against the public, and the offense is the same whether the property stolen belongs to one person, or to several jointly, or to several persons, each owning distinct parcels. If a flock of sheep of which A owns five, B five, and C five, be feloniously asported by one and the same act, there are three trespasses, but only one larceny. Each proprietor of a portion of the stolen sheep has sustained a civil injury, and may, indeed must, sue separately for the wrong suffered by him; but the public has sustained but one wrong, and cannot maintain more than one prosecution, and if it attempt to do so, the judgment in the case first tried may be pleaded in bar of the remaining prosecutions." *Nichols v. Com.* 78 Ky. 180, supra.

"The names of the owners of stolen property constitute no part of the offense. They are stated in an indictment as matter of description, for the purpose of identification, and such a statement or description does not constitute a distinct charge, or render the indictment bad for duplicity, or subject to demurrer. 'Where many articles are stolen at one time, there is only one theft, whether the ownership is in one person or many. And where the thief has been in jeopardy for any part of the larceny, the prosecution is exhausted, and he cannot be indicted for anything the state chose to omit.' Bishop, New Crim. Law, § 888, subd. 3." *State v. Mickel*, 23 Utah, 507, 65 Pac. 484, supra.

"The particular ownership of the property which is the subject of a larceny does not fall within the definition, and is not of the essence of the crime. The gist of the offense consists in feloniously taking the property of another; and neither the legal

based upon the whole or a part of the same crime. It is equally well settled that if, on the same expedition, there are several distinct larcenous takings, as taking the goods of one person at one place, and afterward taking the goods of another person at another place, and so on, as many crimes are committed as there are several and distinct takings." In *Lorton v. State*, 7 Mo. 55, 37 Am. Dec. 179, the larceny was of goods belonging to Curle and Gibson, and instructions embodying the above principles

were refused, and this was held to be error. See also, *State v. Morphin*, 37 Mo. 373. In *State v. Hennessey*, 23 Ohio St. 339, 13 Am. Rep. 253, conviction was reversed on the same ground, the court saying: "The particular ownership of the property which is the subject of a larceny does not fall within the definition, and is not of the essence of the crime. The gist of the offense consists in feloniously taking the property of another; and neither the legal nor the moral quality of the act

nor the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one or by two or more jointly, is the several property of different persons. The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense." *State v. Hennessey*, 23 Ohio St. 339, 13 Am. Rep. 253. And to the same effect is *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87, *supra*.

"However diverse may be the ownership of property which is the subject of larceny, if the act of taking constitutes but a single act, but one offense is committed. The allegation of ownership in the indictment is merely descriptive of the offense committed. The prosecution is not conducted in the name of the owner, nor for his benefit; but it is conducted in the name of the state, and the state alone, in so far as the prosecution is concerned, is the aggrieved party. An offense is committed against the state whenever there is an act of larceny, and there are just as many offenses as there are separate and distinct acts of larceny; but whenever, by a single act, property belonging to different owners is the subject of the theft, there is but one offense committed. This holding is in accord with almost the unanimous authority on this subject." *Dalton v. State*, 91 Miss. 162, 124 Am. St. Rep. 637, 44 So. 802, *supra*.

And "upon principle . . . it would seem clear that the stealing of several articles at the same time, whether belonging to the same person or to several persons, constituted but one offense. It is but one offense, because the act is one continuous act,—the same transaction; and the gist of the offense being the felonious taking of the property, we do not see how the legal quality of the act is in any manner affected by the fact that the property stolen, instead of belonging to one person, is the several property of different persons. The offense is an offense against the public, and the prosecution is conducted, not in the name of the owner of the property nor in his behalf, but in the name of the state, the primary object being to protect the public against such offenses by the punishment of the offender. And, although it is necessary to set out in the indictment the ownership of the property, this the law requires in order that the prisoner may be

informed as to the precise nature of the offense charged against him; and further, to enable him to plead a former conviction or acquittal in bar of a subsequent prosecution for the same offense." *State v. Warren*, 77 Md. 121, 39 Am. St. Rep. 401, 26 Atl. 500, *supra*.

So, in *People v. Johnson*, 81 Mich. 573, 45 N. W. 1119, *supra*, where the testimony showed the taking of grain from the first floor of a granary, and of other property from the second floor of the same building, and the carrying away thereof at the same time by the same persons, the court said: "The testimony in this case shows but one larceny. The property was stolen from the granary on one occasion, and time and place so concurred that it cannot be said that there were two distinct offenses."

And in *State v. Congrove*, 109 Iowa, 66, 80 N. W. 227, *supra*, where evidence of the several ownership of stolen property had been stricken on the ground that it did not tend to support an indictment alleging joint ownership, the court said: "The articles described in the indictment were together in a shed, and the evidence tended to show that the defendant stole all of them at the same time and in the same act. Though these belonged to four different persons, severally, and not jointly, the transaction constituted but a single offense."

And in *Bell v. State*, 42 Ind. 335, holding that an indictment charging the defendant in two counts with stealing property of two different owners will not be quashed on the ground that two offenses are impliedly included therein, where there is nothing in the indictment showing that the taking of the property was at different times, the court said: "The time and place are the same in both counts, and the property is of such a character that it might have been taken at the same time, and thus really constitute but one offense, so that a conviction for the larceny of one would operate as a bar to the other."

And in *State v. Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432, a prosecution for larceny in which the defendants, having previously pleaded guilty to a similar indictment, urged that the larceny of several articles at the same time is but one offense, and a conviction for the theft of one bars a prosecution for the theft of others, although the case did not even show that the larceny charged in the indictment was committed on the same expedition as

is at all affected by the fact that the property stolen, instead of being owned by one or by two or more jointly, is the several property of different persons. The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense." In *Hudson v. State*, 9 Tex. App. 151, 35 Am. Rep. 732, the prisoner was accused of the theft of a gold watch of Mrs. Hurndall taken from her room, and pleaded in bar a

conviction of the theft of money and goods of her son taken from another room in the same house on the same night. On the trial the prisoner requested the court to instruct that, "when a variety of articles are stolen at the same time and from the same place and from the same or different persons, it is only one offense." The court gave the instruction with this qualification added: "The proof must show, before the jury can consider a transaction to constitute only one offense, that the articles stolen were in

the crime for which the defendants had previously been convicted and sentenced, the court said: "It is an elementary rule in criminal law, that the theft of several articles at one and the same time and place, and by one and the same act, constitutes but one indivisible crime, even though the articles belong to different owners, and that a judgment of conviction or acquittal of the theft of one of the articles is a bar to a prosecution for the theft of the others. A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." But the court adds: "It is equally well settled that if, on the same expedition, there are several distinct larcenous takings, as taking the goods of one person at one place, and afterward taking the goods of another person at another place, and so on, as many crimes are committed as there are several and distinct takings."

Considering, however, only the cases necessarily involving the question whether a conviction or acquittal upon a charge of taking the property of one of the persons will constitute a bar to a prosecution upon a charge of taking the property of another, and disregarding *diota* on the point, it will be found that the cases are quite evenly divided on the point.

Some of those holding the affirmative have already been cited in this note, and others will be found in the note in 31 L.R.A. (N.S.) at pages 724 and 725. That note, however, at pages 723 and 724, discloses a number of cases to the contrary, and thus opposed to *STATE v. SAMPSON*; and other cases on that side of the question will now be cited.

Thus, an acquittal upon an indictment for burglary in breaking and entering a house and stealing therein certain goods of the owner is not a bar to a subsequent prosecution for stealing in the same house at the same time, certain other property of another person (*Turner's Case*, J. Kelyng, 30; *Com. v. Hoffman*, 121 Mass. 369), though it is a bar to another indictment for the same burglary in breaking the house and taking the property of the latter person (*Turner's Case*, *supra*).

And where an indictment charges in several counts the larceny of property of several different persons, and it does not appear on the record whether the larcenies were or were not distinct, the court is not

bound to assume, upon a plea of guilty, that they were one and the same offense, though alleged to have been committed on the same day. *Bushman v. Com.* 138 Mass. 507.

In Tennessee, also, it has been expressly held that the stealing of property of two different owners constitutes two separate and distinct offenses. *Morton v. State*, 1 Lea, 498. The court said: "Every larceny includes a trespass to the person or property of the owner of the thing stolen. A larceny of the property of O'Brien was no trespass to the person or property of Corbitt, and *vice versa*."

And the robbery of different individual passengers upon a stage constitutes a distinct offense as to each, although committed at the same place and in rapid succession, and a conviction for robbing one is no bar to a prosecution for robbing the others. *Re Allison*, 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820.

And in *State v. Laughlin*, 180 Mo. 342, 79 S. W. 401, it was held that the embezzlement by a public administrator and guardian of funds in his hands belonging to different persons constitutes separate and distinct offenses, even though the conversion took place at the same time, the court saying: "Under the statute upon which this information is predicated, a trust relation must exist, and it is the violation of this relation and the conversion of the fund that constitutes the offense." And further: "No one will dispute the correctness of the principle announced and conclusion reached in those cases [cited by appellant]. They simply announce the well recognized doctrine that articles belonging to different individuals, stolen at the same time, constitute but one larceny. That is not this case. There is no trust relation violated in larceny, but in case of an official the fund is confided to his care, and if, by virtue of his position, he has in charge funds belonging to different persons, because he has been found not guilty of embezzling the funds of one of the individuals furnishes no reason why, if he is guilty of converting to his use the funds of the other, the prosecution should be barred. While it may be said that he was curator of both estates by virtue of his office, yet the administration of the estates is separate. The funds are separate, as much so as if there were two curators." A. C. W.

possession of the same party and taken from the same place and at the same time, and, if any reasonable space of time elapses between the taking of one and the taking of the other articles, or they are taken from different places, it will be two distinct offenses." The court disapproved of the modification, saying, in conclusion, that, "in order to avoid misapprehension, it may be well to say that, when various articles are stolen at the same time and place, the transaction is not divisible, but is one transaction, and that a prosecution for the theft of a portion of the articles so taken would bar a prosecution for the theft of another portion of the same articles, whether the property belonged to or was in the possession of the same person or different persons. But we must not be understood as holding that the different articles taken from different persons and from different places, as from different rooms of a house occupied by different persons, would necessarily be one transaction; but, on the contrary, that property thus situated would on proper averments and proof support different prosecutions. For example, if a thief should enter the room of one lodger at a hotel and should there perpetrate a theft, and should then pass to the room of another lodger and there commit another theft, these would be different thefts, and each might be prosecuted separately, and a conviction or an acquittal for the one would be no bar to the prosecution for the other. So, in case of one horse being taken from the inclosure of A, and another from the inclosure of B, these would be separate offenses. What the law prohibits is the cutting up of one transaction into different offenses, and holding one accused liable for more than one penalty when there has been but one violation." See also *Jackson v. State*, 14 Ind. 327; *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528; *State v. Williams*, 10 Humph. 101; *State v. Clark*, 32 Ark. 231; 2 Bishop, New Crim. Law, § 888. In *State v. Egglesht*, 41 Iowa, 575, 20 Am. Rep. 612, the holding was that, where one at the same time and by the same act passed to a teller of a bank four forged checks, he was guilty of but one offense, and that a conviction for altering one of the checks was a bar to a conviction upon the others. After referring to many of the authorities now cited, the court remarked: "It seems impossible to maintain the doctrine of the former cases upon principle. If the stealing of various articles owned by different individuals constitutes as many distinct offenses as there are owners, then they cannot be united as one offense in the indictment. If one should at the same time, and as one act, steal two watches, each of

the value of \$15, and owned by different persons, and another person should steal in the same manner two articles of like value owned by one person, it would be difficult to give a reason satisfactory to the legal mind why one should expiate his offense with a fine of \$200 or imprisonment in the county jail for sixty days, whilst the other should be sent to the penitentiary for the period of five years." See also *State v. Larson*, 85 Iowa, 659, 52 N. W. 539.

There is no logical escape from this conclusion that the theft of articles belonging to different persons at the same place and time constitutes a single offense. The matter of ownership does not characterize the crime. Neither the legal nor moral phase of the offense is affected by the fact that portions of property taken may have belonged to different persons; and there is no ground, on the one hand, for allowing the state to split up the single act of the accused into subjects for several prosecutions, nor, on the other, for denying it the right to prosecute for the entire transaction as a single offense, aggravated by increased value of all the property stolen. As the watch and purse were stolen at the same place and time, but one offense was committed.

2. It is argued that, as the accused is now charged with the commission of an offense of which a justice of the peace has no jurisdiction, the former conviction cannot operate as a bar. Simple larceny is an offense included within the compound larceny from a dwelling house (*State v. Nordman*, 101 Iowa, 446, 70 N. W. 621), and if, after having been punished for the simple larceny, he is again punished for compound larceny, in which the simple larceny is included and of which it is a necessary ingredient, he is twice punished for simple larceny,—once upon the conviction of simple larceny alone, and a second time upon the conviction of the same simple larceny as a part of a compound larceny. There are no degrees in the crime of larceny; the circumstances of the offense being recited in the several statutes by way of aggravation in fixing punishment, and manifestly a conviction thereof in the absence of allegation or proof of these attending circumstances is a conviction of precisely the same offense as when these are included. So it has been held that conviction of petit larceny is a bar to subsequent prosecution for grand larceny on the same facts. *State v. Murray*, 55 Iowa, 530, 8 N. W. 350. In *State v. Mikesell*, 70 Iowa, 176, 30 N. W. 474, an acquittal of a charge of larceny from a dwelling in the nighttime was adjudged a bar to a prosecution for robbery, for that he had been acquitted of larceny,

the essential element of both offenses. It is laid down in 1 Wharton, American Crim. Law, that, "If, on a trial of the major offense, there can be a conviction of the minor, then a former conviction or acquittal of the minor will bar the major." And, as applying the principle to cases like that under consideration, see *State v. Gleason*, 56 Iowa, 203, 9 N. W. 126; *State v. Wiles*, 26 Minn. 381, 4 N. W. 615, 2 Am. Crim. Rep. 621; *Floyd v. State*, 80 Ark. 94, 96 S. W. 125; *Powell v. State*, 89 Ala. 172, 8 So. 109; *State v. Paul*, 81 Iowa, 597, 47 N. W. 773; *State v. Blodgett*, 143 Iowa, 578, 121 N. W. 685, 21 Ann. Cas. 231. The same offense was charged in the information and the indictment. Though the latter included aggravating circumstances omitted in the former, the criminal intent was the same, and we are of opinion that the conviction of petit larceny under the information, in the absence of fraud or collusion, was a complete bar to the subsequent prosecution under the indictment for larceny from a dwelling house.

3. The attorney general suggests that, inasmuch as the larceny was from a dwelling, the justice of the peace was without jurisdiction in convicting the accused of simple larceny, even though he was charged with the latter offense in the information. The state in prosecuting may disregard or omit in the charge lodged against the prisoner any or all aggravating circumstances, and, having done so, is not in a situation to challenge the validity of a conviction of an offense which as charged was clearly within the jurisdiction of the court.

The plea of former conviction should have been sustained.

Reversed.

#### ARIZONA SUPREME COURT.

TERRITORY OF ARIZONA, Appt.,

v.

VICTOR GOMEZ.

(— Ariz. —, 125 Pac. 702.)

**Evidence — assault — burden of proof — condition of pistol.**

1. One accused of assault by pointing a

**Note. — Burden of proving that weapon was not loaded in prosecution for assault with firearm.**

For the substantive question whether pointing unloaded firearm constitutes an assault, see *Price v. United States*, 15 L.R.A.(N.S.) 1272, and *State v. Barry*, 41 L.R.A.(N.S.) 181, and notes appended thereto.

The decision in *TERRITORY v. GOMEZ* that 42 L.R.A.(N.S.)

cocked pistol at another has the burden of showing that it was not loaded to avoid liability.

**Trial — jury — pointing pistol.**

2. Failure of one accused of assault by pointing a cocked pistol at another, to assume the burden of showing that it was not loaded, will justify submission to the jury of the question whether or not it was so, so as to support the charge.

(Duffy, J., dissents.)

(July 6, 1912.)

**A** PPEAL by the Territory on questions of law from a judgment of the District Court for Yavapai County acquitting defendant of an assault with a deadly weapon. Reversed.

The facts are stated in the opinion.

Mr. George B. Bullard, Attorney General, for the Territory.

Franklin, Ch. J., delivered the opinion of the court:

The defendant was indicted for assault with a deadly weapon. From a judgment of acquittal the territory appeals on the questions of law.

In criminal actions the territory (now state) may appeal to the supreme court on questions of law alone. It is so provided by § 1038 of the Penal Code of Arizona of 1901. This is such an appeal. The determination of this appeal can, of course, have no effect on the acquittal of the defendant, which is a bar to any further prosecution.

The appeal is predicated upon the following state of facts, recited in the brief of the attorney general, to wit: "The defendant was indicted for an assault with a deadly weapon committed upon one J. E. Mahurin on July 9, 1910, in Yavapai county, Arizona. Mahurin and his wife were driving from their home to Del Rio, when they saw defendant herding a band of sheep upon Mahurin's homestead, whereupon the Mahurins drove off the road and in the direction of defendant some 50 to 70 feet. Mahurin then asked defendant whose sheep he had, and the defendant said, 'I no sabe.' Mahurin then said, 'Yes, you do. Aren't they Ben Yeager's?' and at the same time got out of his buggy, saying to defendant,

where one is accused of assault by pointing a cocked pistol at another the case may be submitted to the jury even in the absence of affirmative evidence in the first instance that the weapon was loaded is supported by the cases. Some of the cases state that the burden is upon the defendant in such case to prove that the weapon was unloaded, though it is not always clear whether they mean that accused must establish that fact to the reasonable satisfaction of the jury

'Here is my corner post,' and asked defendant to keep the sheep off his land. At this time defendant drew his pistol, cocked it, and pointed it at Mahurin, and advanced toward Mahurin from a distance of about 16 feet to within 6 feet, saying, 'Qui dado, qui dado.' Mrs. Mahurin, discovering the imminent danger in which her husband was, said to him, 'Come and get in the buggy, quick, he is going to shoot you.' Mahurin, looking at defendant, who was then pointing a pistol at him and advancing toward him, said, 'Don't shoot, I am not going to hurt you,' and retreated into his buggy. As the Mahurins drove away, the defendant returned the pistol to his scabbard. Both Mr. and Mrs. Mahurin say that defendant cocked the pistol, and held it on Mahurin until he got into his buggy, saying all the time, 'Qui dado, qui dado.' The exclamation "Qui dado, qui dado," being interpreted, means "Look out! look out!"

At the close of the evidence, the defendant's counsel moved for an instructed verdict of acquittal on the ground that "there

had been no assault with a deadly weapon proved." The motion was granted, the court observing: "It is a somewhat interesting case, but, under the evidence of the case, I am convinced that a conviction could not be sustained on a technical ground"—this observation on the part of the court evidently referring to the failure of the evidence to disclose any direct or visual proof that the pistol used at the time of the alleged assault was, in fact, loaded.

The territory assigns error: "(1) The court erred in holding that the pointing of a cocked pistol within 6 feet of the prosecuting witness in an angry and threatening manner and until the latter returned to his seat in his buggy, advancing on the prosecuting witness all the time, saying, 'Qui dado, qui dado!' (Look out, look out), was not an assault with a deadly weapon. (2) The court erred in directing the jury to return a verdict of not guilty under the evidence in this case."

In the adjudicated cases there is a sharp

by a fair preponderance of the evidence, or only that he must offer some evidence on the point in the first instance in order to raise a question of reasonable doubt.

Thus, in *Crow v. State*, 41 Tex. 468, it was said that as the pointing of a loaded gun at one, if unexplained or unexcused, of itself constitutes an assault, one pointing a gun at another in a threatening manner has the burden of proving that it was unloaded. And to the same effect are *Burton v. State*, 3 Tex. App. 408, 30 Am. Rep. 146, and *Clark v. State*, — Okla. Crim. Rep. —, 106 Pac. 803.

Proof that a gun or revolver was pointed at a person within shooting distance, with a threat or other words indicating an intention to fire, the person assailed not knowing but that it was loaded, makes prima facie proof that the gun or revolver was loaded and consequently a dangerous weapon, and it then devolves upon the accused to show that it was not loaded in order to meet the presumption that it was. *Lipcomb v. State*, 130 Wis. 238, 109 N. W. 986.

And so, also, one who points a gun at another, with manifestations of ill-will or under the influence of unfriendly feeling and within shooting distance, has the burden of proving that it was not loaded, and that he knew it at the time. *Caldwell v. State*, 5 Tex. 18.

And in *Keefe v. State*, 19 Ark. 190, it was said that one who, within shooting distance, points a pistol at another and threatens to shoot, has the burden of proving the pistol to have been unloaded.

In *Lockland v. State*, 45 Tex. Crim. Rep. 87, 73 S. W. 1054, a trial for aggravated assault with a pistol, a deadly weapon, it was said that as the pistol was not used or attempted to be used as a bludgeon it will

be presumed, in the absence of evidence to the contrary, that at the time defendant pointed it at the prosecutor it was loaded and was a deadly weapon.

The fact that a rifle was not loaded is a matter of defense upon a trial for attempt to commit assault with a deadly weapon, where the evidence showed that accused pointed the rifle at another in a threatening manner and accompanied the act with threats to shoot. *State v. Herron*, 12 Mont. 230, 33 Am. St. Rep. 576, 29 N. W. 819. *State v. Herron* was criticized in *State v. Barry*, 45 Mont. 598, 41 L.R.A.(N.S.) 181, 124 Pac. 775, as announcing a rule which would seem to be at variance with the other rule, that it is incumbent upon the prosecution to prove every material allegation of the information beyond a reasonable doubt.

Although there may be some question as to whether one who points an unloaded pistol at another and threatens to shoot is guilty of an assault, yet he cannot be excused unless he proves it to have been unloaded; and the state is not bound to prove it to have been loaded. *State v. Cherry*, 33 N. C. (11 Ired. L.) 475.

On the other hand, in *State v. Napper*, 6 Nev. 113, a trial for an indictment for assault with a deadly weapon, where the evidence showed that one who pointed a capped pistol at another and attempted to discharge it was not in striking distance, though he was within shooting distance, it was held that as under the circumstances the pistol could not have been a deadly weapon without being loaded with gunpowder and ball, the state had the burden of proving that the pistol was loaded. *State v. Napper* was cited in *Lipcomb v. State*, supra, as standing practically alone and disapproved, and is also disapproved in *State v. Herron*, supra.

J. H. B.



conflict of opinion as to whether the pointing of a firearm at another within shooting distance, in an angry and threatening manner, constitutes an assault with a deadly weapon, if there is no proof in the case that at the time of the alleged assault the firearm was in fact loaded. In *State v. Godfrey*, 17 Or. 300, 11 Am. St. Rep. 830, 20 Pac. 625, the evidence of the assault tended to prove that the defendant, when not less than 30 yards nor more than 70 yards, pointed a Winchester rifle at a man, and threatened to kill him if he did not turn back. There was no direct evidence that the rifle was loaded, or that the defendant cocked the trigger, or did anything except to point the rifle and express the threat. The court held that under such circumstances it was for the jury to determine the character of the weapon under appropriate instructions saying: "Some weapons under particular circumstances are so clearly lethal that the court may declare them to be such as a matter of law. Of this class are guns, swords, knives, pistols, and the like, when used within striking distance from the victim; all others are lethal or not according to their capacity to produce death or great bodily harm in the manner in which they are used, and of this the jury must always be the judges. It is a question of fact the termination of which properly belongs to them. In the case under consideration the gun was a lethal weapon if it was loaded, otherwise it was harmless. It was therefore the peculiar and exclusive province of the jury to say whether this was so or not, and the court erred in so refusing to instruct them." In the case of *State v. Herron*, 12 Mont. 230, 33 Am. St. Rep. 576, 29 Pac. 819, the supreme court of Montana, after reviewing many of the authorities, say: "Although there is a division of views in the decided cases, we think that the better opinion is that, if a firearm is the alleged deadly weapon—a weapon the only ordinary use of which is by its being loaded—if it be pointed at the complainant in a threatening manner, if defendant makes threats to shoot, if the circumstances are such as would exist if one were using a loaded gun—in short, that if all the elements of the offense be made out, as required by the criminal laws and procedure, except the direct, we may say visual, proof that the weapon is loaded—under these circumstances, a direction to the jury to acquit is error, and the fact that the gun was unloaded (if such be the fact) is a matter of defense. Such view seems to be held by the weight of authority, and such is the only practical view in the enforcement of the statute in reference to assaults with deadly weapons of this character." We 42 L.R.A. (N.S.)

approve the doctrine as quoted from the Montana court. If the pistol was unloaded, unless it was used within striking distance of the person of another, it was harmless; if loaded, or, if used within striking distance, it was of a deadly character. In either view, however, the court, with appropriate instructions, should have submitted the matter to the jury to determine under all the evidence of the case. A verdict of guilty as charged in the indictment if returned by the jury under the facts of this case would not be disturbed as unsupported by the evidence. Any other rule would practically prohibit the enforcement of the statute provided for punishing an assault with a deadly weapon under such a state of facts and circumstances as here presented.

It is not the purpose of this court to draw nice distinctions and announce a technical rule when such a technicality could only have the effect of encouraging the bully to intimidate whom he pleases with a show of apparent deadly force, and escape a merited punishment for his unlawful act, thus embarrassing the due administration of justice.

We are of the opinion that the court erred as a matter of law in not submitting the case to the jury under appropriate instructions.

**Cunningham, J., concurs.** **Ross, J.,** being disqualified and announcing his disqualification in open court, the remaining judges, under § 3 of article 6 of the Constitution, called in Honorable **Frank J. Duffy**, judge of the superior court of the state of Arizona in and for the county of Santa Cruz, to sit with them in the hearing of this cause.

**Duffy, J., dissenting:**

I do not approve the doctrine laid down by the supreme court of Montana in the case above cited. To hold, as in that case, that "the fact that the gun was unloaded (if such be the fact) is a matter of defense," is to put upon the defendant the burden of proving his innocence, because it compels him to prove the nonexistence of one of the material elements of the offense; viz., the present ability to carry into effect the unlawful attempt to injure. As defined by our statute, assault "is an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another." To constitute the crime of assault, there must be the unlawful attempt to commit a violent injury upon the person of another, and with the making of such attempt there must be co-existent the ability to carry such attempt into execution; i. e., to commit the injury.

Each is a necessary element of the crime, and both must concur. If either one is missing, the accusation fails. Each, then, is a necessary allegation of the indictment. Both must be alleged, and the existence of each must be established by competent evidence beyond a reasonable doubt. When the weapon used is a pistol, to presume or infer, or take for granted, that the pistol is loaded, is to presume the existence of one of the material elements of the offense, and to assume the truth of a material allegation of the indictment; in other words, it presumes the guilt of the defendant, and compels him to prove his innocence by proving the nonexistence of one of the material elements of the offense; to wit, the ability to inflict the injury.

In the case at bar there is no evidence whatever to prove that the weapon in the manner in which it was used was capable of producing death or great bodily injury. There is no evidence whatever, except the mere naked fact of the existence of the weapon, that at the time of the alleged assault the defendant possessed the ability to commit the violent injury essential to constitute the offense. The weapon may or may not have been loaded, and therefore the present ability essential to complete the commission of the crime may or may not have existed; but this court is not warranted, and neither was the lower court nor the jury warranted, in presuming such ability to exist. To do so is to presume the existence of one of the material elements of the offense, and therefore to presume the truth of material allegation of the indictment.

Under the evidence submitted in this case, the jury would not have been warranted in finding a verdict of guilty, and the trial court was therefore justified in directing a verdict of acquittal.

#### MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. JOHN  
F. KELLY, Appt.,

v.

HENRY WOLFER, Respnt.

(119 Minn. 368, 138 N. W. 315.)

#### Appeal — habeas corpus — errors.

1. Since an appeal in habeas corpus proceedings is, by Rev. Laws 1905, § 4602, required to be tried in this court in the same manner "as if the writ had originally issued out of this court," errors and irregularities occurring on the trial below need not be considered.

Headnotes by PHILIP E. BROWN, J.  
42 L.R.A. (N.S.)

#### Judgment — attack — habeas corpus.

2. Where a court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus.

#### Same — failure to state age — effect.

3. Under Rev. Laws 1905, § 5454, authorizing the court to sentence to the reformatory any person not less than sixteen nor more than thirty years of age, etc., and who has been convicted of a crime punishable by imprisonment in the state prison, the fact that a judgment of conviction of such a crime, upon which the defendant is sentenced to the reformatory, fails to state the age of the defendant, does not render it subject to attack on habeas corpus.

#### Constitutional law — board — authority over prisoners.

4. Rev. Laws 1905, § 5455, amended by Laws 1911, chap. 61, authorizing the Board of Control to transfer prisoners from the reformatory to the state prison, and *vice versa*, is not unconstitutional, as constituting a legislative attempt to vest administrative officers with judicial functions.

(November 15, 1912.)

**A** PPEAL by relator from an order of the District Court for Washington County quashing a writ of habeas corpus for his release from the reformatory, to which he had been sentenced on conviction of the crime of forgery, and remanding him to the custody of respondent. Affirmed.

The facts are stated in the opinion.

Mr. John F. Kelly for appellant.

Messrs. Lyndon A. Smith and C. Louis Weeks for respondent.

*Note.* — Delegation of power to determine place of confinement of prisoners committed for crime.

STATE EX REL. KELLY v. WOLFER is sustained by the practically unanimous decision of the authorities, the principles underlying the majority of these decisions, as in STATE EX REL. KELLY v. WOLFER, being that the statute conferring these powers was in force at the time of the sentence, and so was included in and became a part of such sentence, and also that the power conferred was disciplinary.

Thus, in Cassidy's Petition, 13 R. I. 143, it was held that the contention that the statute authorizing the Board of State Charities and Corrections to transfer an inmate of the reform school to the workhouse as an incorrigible was unconstitutional, as conferring judicial powers on such board and enabling it to alter sentences, was untenable for the reason that the statute was enacted before the sentence was pronounced, and the sentence must therefore be held to have been pronounced subject to its provi-

Philip E. Brown, J., delivered the opinion of the court:

On June 23, 1910, one Kelly was convicted in the district court of Hennepin county, of the crime of forgery in the second degree, and was then and there sentenced to imprisonment in the state reformatory until he should "thence be discharged by due course of law or by competent authority." On February 23, 1912, by order of the State Board of Control, made pursuant to the authority vested in them by Rev. Laws 1905, § 5455, the said Kelly was transferred to the state prison. On July 22, 1912, a writ of habeas corpus in his behalf was sued out of the district court of Washington county, the petition therefor alleging that his imprisonment was illegal and without

authority of law, in that (1) there was an agreement between the prisoner and the trial judge, prior to the former's conviction, which was upon a plea of guilty, that his imprisonment under such conviction should not exceed eighteen months, and that the plea of guilty was entered in reliance upon such agreement, and in order that the prisoner might be cured of a drug habit; (2) that the judgment of conviction did not state on its face that the prisoner was "not less than sixteen or more than thirty years of age," and thus failed to show the age limit of sentence to the reformatory, while in fact the prisoner was over thirty years of age at the time of his sentence; (3) that the law authorizing the prisoner's transfer to the state prison was and is unconstitu-

tions, and also that the power given was simply disciplinary, and not, in the constitutional sense of the word, judicial.

So, also, in *Rich v. Chamberlain*, 104 Mich. 436, 27 L.R.A. 573, 62 N. W. 584, it was held that the transfer of prisoners from one prison to another, by order of the governor acting under the authority of statute, was not a judicial act, to be performed only by an official clothed with judicial powers. The court said that "the legislature has full authority to provide prisons, and to determine where prisoners may be sent; and the courts have no discretion as to the place to which criminals may be sentenced, except as the legislature gives it. Such discretion is lodged with the circuit judges, and they act judicially in its exercise. But this doctrine is a qualified one, or rather the order of the judge is qualified by the law, and such rules and regulations of the prisons as may have been lawfully adopted. Every sentence is subject to these, although it does not mention them." Again it was said that the judicial act is fully performed by the sentence, which, although in form absolute, involves conditions imposed by law by which the prisoners' rights are limited and to which they are subject.

And also in *Rich v. Chamberlain*, 107 Mich. 381, 65 N. W. 235, it was held that a sentence to a penal institution was subject to the laws then in force for the transfer of convicts from one prison to another.

In *Re Linden*, 112 Wis. 523, 88 N. W. 645, it was held that a statute which provides that, with the approval of the governor, an inmate of the reformatory "belonging to class 1, whose continued presence there is considered detrimental to the other inmates, may be transferred by the board to the state prison," etc., is not unconstitutional as vesting judicial power in the State Board of Control and in the governor. The basis of the decision is similar to that in *Re Murphy*, *infra*, in that it was considered that, in the nature of things, there must be disciplinary power exercised by those who execute the sentence of the court, and certainly, where those powers are declared by legislation in advance, the court's judg-

ment must be deemed to be framed in contemplation thereof. And further, the separation and segregation of prisoners so that an obnoxious or pernicious one shall not unduly corrupt or disturb the conduct of the others is within the field, where the ordinary procedure and judicial attitude of the court is unnecessary, and from which cannot be excluded the executive officers.

And *Re Linden* was followed as authority in *Re Harrington*, 127 Wis. 241, 106 N. W. 851.

The transfer of an incorrigible prisoner from a reformatory to a penitentiary, under authority conferred by statute, was held not to be a judicial act, in *Re Murphy*, 62 Kan. 422, 63 Pac. 428. The court stated that the laws in force at the time the crime was committed and the trial and sentence therefor was had, regulating the punishment and term and conditions of the same, entered into and become a part of the record of the sentence, and so an order made for the transfer of the prisoners was merely done in the administration of the reformatory, and the transfer was an act which was within the contemplation of the law under which the prisoner was sentenced, and it inhered in and become a part of the sentence. This case in effect overrules *Re Dumford*, 7 Kan. App. 89, 53 Pac. 92, which held that the authority attempted to be conferred by such statute was in its nature essentially judicial, and therefore the act was unconstitutional and void. The court in the latter case stated that the contention that the transfer by the board of managers was disciplinary could not be sustained, but in *Re Murphy* the view was taken that it was disciplinary in character, as the act further provided that "such managers may by written requisition require the return to the reformatory of any person who has been transferred."

Fixing the particular penitentiary in which one convicted of crime shall be confined is not a part of the judgment. The effect and duration of confinement is all that is judicially determined by the judgment pronouncing sentence. *O'Brien v. Barr*, 83 Iowa, 51, 49 N. W. 68. And so an

tional and void, and that, as there is no law for his return to the reformatory, he should be discharged. The court below quashed the writ, and remanded the prisoner to the custody of the respondent; and this is an appeal from its order in such regard.

1. The appellant complains here of certain rulings below; but it is not necessary either to state or decide the questions thus sought to be raised, for under Rev. Laws 1905, § 4602, an appeal in habeas corpus proceedings is tried in this court in the same manner, to quote the statute, "as if the writ had originally issued out of this court." See Dunnell's Dig. (Minn.) § 4142; State ex rel. McDonald v. Riley, 116 Minn. 1, 133 N. W. 86. In view, however, of the fact that the case was submitted to this court upon the record made in the proceedings below, and precisely as if the trial here

were upon an ordinary appeal, we will consider the point most earnestly urged by the relator in this connection, namely, that the bill of exceptions states that the original "writ, warrant, or other written authority" under which the prisoner was detained was not produced and exhibited to the trial court, to the extent of saying that the record does not bear him out in this contention.

2. Coming, then, to the first and second grounds of discharge alleged in the petition, as above stated, we find that neither of them can be sustained. When one is confined under the final judgment of a court, he can be released on habeas corpus only for jurisdictional defects. Such writ cannot be allowed to perform the function of a writ of error or appeal. If the court has jurisdiction of the person and the subject-matter, and could render a judgment upon

act providing for the confinement in a newly established penitentiary, of such convicts as the "executive council" shall designate, was held not to be unconstitutional as a delegation of judicial powers to the executive council, for the reason that if the state were concluded by a judgment that the confinement be in a particular penitentiary, without providing for confinement elsewhere, then the humane provisions of the statutes for confinement elsewhere in cases of insanity or pestilence were for naught in such cases; and also that convicts would have to be turned loose if from fire or other casualty the prison named should become unsuitable as a place of confinement.

Nor did an order for the transfer of twenty convicts "whose removal will, in the judgment of the state warden, be most consistent with the interests of the state and the proper treatment of the convicts," etc., call upon the warden to exercise judicial powers, although it left to the judgment of the warden which convicts would come under the class designated in the order; and the selection and transfer were in nowise a modification or change of the judgment which had been pronounced against the convicts. Ibid.

In *Re Hartwell*, 1 Low. Dec. 536, Fed. Cas. No. 6,173, a prisoner was sentenced by a United States court to be confined in a "jail at Lennox, in the county of Berkshire," the state legislature had caused the jail to be removed to Pittsfield, in the same county, and the prisoner sought to be released. It was held that the state has a right to regulate the custody of prisoners within the state, including the removal from one jail to another when necessary, and of this necessity the state, acting by its legislature, is the sole judge.

The only jurisdiction which has dissented from the views of the preceding cases is that of Illinois. In *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 23 L.R.A. 139, 36 N. E. 76, it was urged 42 L.R.A. (N.S.)

that the act establishing a reformatory was invalid because a certain section of such act empowered the board of managers of the institution to transfer to the penitentiary of the proper district any prisoner sentenced to the reformatory, who, subsequent to his committal, was shown to have been at the time of his conviction more than twenty-one years of age, or to have been previously convicted of crime, or who was apparently incorrigible, and whose presence therefore in the reformatory appeared to be seriously detrimental to the well-being of the institution, and authorized the imprisonment in such penitentiary of such prisoner at hard labor, subject to all the rules and discipline of such penitentiary for the full maximum term provided by law for the crime for which he was convicted,—although the court refused to decide the question as to its validity, because it was not properly before it.

Yet, in *People ex rel. Martin v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 213, 63 N. E. 508, in construing such act with reference to the transfer to the penitentiary as incorrigible, of an inmate of the reformatory, it was held that the act was unconstitutional for the reason that the power so attempted to be conferred is judicial, and not executive or administrative, and further that it is not merely disciplinary as contended, and could be exercised only by a court vested with judicial power by the Constitution. The court attempted to distinguish cases in other jurisdictions which held to the contrary, by pointing out that, while the statutes in such jurisdictions were similar to the one under consideration, yet, under the laws of those states, the advantages of the reformatory over the penitentiary are not confined to minors, and the same distinctions do not exist between the two institutions as they do in Illinois, and the prisoner may by the courts in those states be sentenced directly to the penitentiary instead of to the reformatory, a thing which the courts in Illinois cannot do. J. H. B.

a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. *Dunnell's Dig.* (Minn.) § 4129; *State ex rel. McDonald v. Riley*, supra. Tested by these rules, the grounds stated in the first and second subdivisions of the petition for the writ in the instant case cannot be sustained.

Furthermore, in regard to the second of these contentions, the records show that the prisoner was examined by the court on oath concerning his age before imposing sentence, and that he stated it to be twenty-nine years. The relator contends that this cannot be considered, or is at least open to contradiction by evidence introduced by him below, to the effect that there was no such testimony; the basis of such contention being that the minutes of the court which showed such testimony were not signed by the judge. All that is necessary, however, to prove the minutes of a court, is a copy thereof, attested by the clerk and under the seal of the court, and this is what we find the record in the instant case.

And again, with regard to this second ground for a discharge alleged by the relator, we think that the customary presumption in favor of the regularity of a judgment must here prevail. See *Re Marlow*, 75 N. J. L. 400, 68 Atl. 171; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283. See also *Re Gregory*, 219 U. S. 218, 55 L. ed. 190, 31 Sup. Ct. Rep. 143. We have no statute in this state requiring that the judgment shall contain anything whatever concerning the age of the prisoner, and, in the absence of such a statute, we do not think any recital in this regard is necessary in order to validate a sentence to the reformatory. One might as well argue that, because our statutes forbid the sentence of a minor under a certain age to the state prison, every judgment of conviction for a crime punishable by confinement in such prison must show that the prisoner is over that age. There is nothing that militates against our conclusion in this regard in the cases cited and relied upon by the relator, namely, *State ex rel. Slayton v. Whittier*, 108 Minn. 447, 122 N. W. 319; *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794; *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830, and some others. None of these cases are in point, for all of them bear upon the question of jurisdiction of the proceedings. Here there was unquestionably jurisdiction of the person and the subject-matter, and if the sentence of the prisoner to the reformatory was improper, it involved

a mere error or irregularity, which is not ground for discharge on habeas corpus. *Ryan v. Rhodes*, 167 Ind. 121, 76 N. E. 249, 78 N. E. 330; *People ex rel. Mittleman v. House of Refuge*, 46 Misc. 131, 93 N. Y. Supp. 218.

3. The relator's last contention is that the statute Rev. Laws 1905, § 5455, authorizing the Board of Control to transfer prisoners from the reformatory to the state prison, is invalid under Const. art. 3, § 1, as being a legislative attempt to authorize purely ministerial officers to exercise judicial functions. The generic question raised by this contention is not a novel one. It is long since that criminology gave us our modern conception of criminality, from which has arisen an ever-increasing tendency to regard "punishment" for crime as being not so much compensatory as reformatory, and from this tendency, in turn, have sprung laws greatly amplifying and extending the administrative functions incident to the execution of the penalties prescribed by law for crime, and imposed by the courts upon those who have incurred the same. It is not at all strange, then, that, in the course of legislative attempts in the various states of the Union to meet the requirements of this extended administrative system, laws should sometimes be passed which at least seem to attempt to vest administrative officers with powers properly appertaining to the judicial or executive departments of the government. Bitter attacks have been made upon some of these laws, most notably upon the so-called indeterminate sentence system, with its credits for good behavior, upon the parole system, and upon the prison transfer system; such attacks being grounded variously upon the contentions that the legislation assailed attempts to vest administrative officers with the judicial power of sentence or the executive power of pardon, or else is an unauthorized delegation of legislative powers. See *Murphy v. Com.* 172 Mass. 264, 43 L.R.A. 154, 70 Am. St. Rep. 266, 52 N. E. 505; *Com. v. Brown*, 167 Mass. 144, 45 N. E. 1; *Re Marlow*, 75 N. J. L. 400, 68 Atl. 171; *Miller v. State*, 149 Ind. 607, 40 L.R.A. 109, 49 N. E. 894. In each of these cases the indeterminate sentence system was sustained, though not without serious consideration, and, in Indiana, some dissent. See also *Fite v. State*, 114 Tenn. 646, 1 L.R.A.(N.S.) 520, 88 S. W. 941, 4 Ann. Cas. 1108, where the credit system was sustained, subject to certain limitations, and the cases were reviewed; and *Re Convicts*, 73 Vt. 414, 56 L.R.A. 658, 51 Atl. 10, where the validity of the parole system was considered. Likewise see *Re Murphy*, 62 Kan. 422, 63 Pac. 428, upholding the Kansas prison transfer act, and

People ex rel. Martin v. Mallary, 195 Ill. 582, 88 Am. St. Rep. 212, 63 N. E. 508, declaring a somewhat similar law invalid. By citing these cases, however, we do not mean either to approve or disapprove of their holdings upon the specific questions therein involved. We cite them merely because they are pertinent to the considerations to which we have adverted, and involve the same general principles which we must apply in the instant case.

Coming, then, to the matter immediately before us, the argument against the validity of the law in question is, in substance, as follows: That the legislature has no power to vest a ministerial body with judicial functions; that the imposing of a statutory penalty for a crime is a judicial function, and where the statute prescribes alternate penalties the selection of the penalty which is to be imposed in a particular case is also a judicial function; that the Minnesota statutes under consideration authorize confinement either in the reformatory or the state prison, it being within the discretion of the court which punishment shall be inflicted; but that the statute assailed authorizes the Board of Control subsequently to transfer from the reformatory to the state prison, and hence the final choice between the two penalties provided by statute is left to such board, who, in effect, are thus authorized either to review the action of the court in choosing the reformatory instead of the state prison, as the place of the prisoner's confinement, or else to impose a new criminal penalty without judicial trial, for matters occurring subsequently to the original commitment.

We think, however, that this argument is fallacious. Rev. Laws 1905, § 5052, provides: "Forgery in the second degree shall be punished by imprisonment in the state prison for not more than ten years." Under this statute alone—Laws 1911, chap. 298, providing for indeterminate sentences, not being in force at the time of the conviction in the present case—it would have been the duty of the court, upon the prisoner's conviction, to sentence him to the state prison for a definite term of not more than ten years. But Rev. Laws 1905, § 5454, provides: "Any person not less than sixteen nor more than thirty years of age, convicted of a crime punishable by imprisonment in the state prison, and never before sentenced to a state prison or reformatory, may be sentenced to the reformatory, which sentence shall be without limit as to time. . . . Such imprisonment shall not exceed the maximum term." And § 5451 provides that in similar cases, with some slight difference as to age not material here, the sentence may be to the

state prison on the reformatory plan, "in like manner and on like conditions as are provided for sentence to the reformatory."

These two statutes, taken together, purport to authorize the court, in its discretion, to sentence the prisoner either to the reformatory or the state prison, for a nominally indefinite term, not to exceed ten years for the crime here involved; such term, however, being legally considered to be ten years, subject to a prior termination upon certain contingencies not necessary here to mention. See *Murphy v. Com.* 172 Mass. 264, 43 L.R.A. 154, 70 Am. St. Rep. 266, 52 N. E. 505; *Miller v. State*, 149 Ind. 607, 40 L.R.A. 109, 49 N. E. 894. Under the three statutes which we have cited, therefore, it appears that the penalty provided by law for the crime here involved was, to a certain extent, in the alternative thus calling for the exercise of judicial discretion in determining which should be imposed; but these statutes must be read in connection with still another statute, namely, Rev. Laws 1905, § 5455. This section, as it stood at the time of the prisoner's conviction, and also as amended by Laws 1911, chap. 61, is as follows: "The Board of Control may transfer from the reformatory to the state prison, from the state prison to the reformatory, and from the state training school to the reformatory, whenever, in its judgment, such transfer will be advantageous to the person transferred, or to the institution from which such transfer is made,"—with certain other provisions not here material.

Therefore, by reading this section into the sentence of the court, which must be done (*Miller v. State*, supra; *Rich v. Chamberlain*, 107 Mich. 381, 65 N. W. 235; *Re Murphy*, 62 Kan. 422, 63 Pac. 428), the only alternative feature of the penalty prescribed by the statutes lies in the length and character of the term, that is, whether for a definite period of not more than ten years, or for ten years subject to a possible prior termination; and when the prisoner in this case was sentenced to the reformatory, the court exercised all the judicial discretion vested in it by the statutes or the Constitution, for, whether the sentence is to the reformatory or to the state prison, the Board of Control, which has charge of both institutions, has power under § 5455 to transfer from the one to the other.

But it is this power of transfer that is attacked as involving an exercise of judicial functions, and if it really does call for the exercise of judicial, as distinguished from merely administrative or regulatory, functions, it cannot, of course, be sustained. We think, however, that the power of trans-

fer thus conferred upon the board is purely administrative. As we have already indicated, one of the principal aims, if, indeed, not the predominant one, of our penal system, is reform, and such is the policy which controls the conduct and management of the state prison no less than of the reformatory. Practically every law enacted in this state for many years, relative to sentence and imprisonment for crime, evidences this aim; and this conception of "punishment" of necessity involves an extension of the administrative side of the penal system, and imperatively demands greater freedom and wider powers on the part of the executive and administrative officers in carrying out the sentences of the courts. This new conception of punishment—new in the history of jurisprudence, but old and well established in this state—likewise has a direct bearing upon the office of a judicial sentence, which is now and always has been merely to direct that the punishment provided by the law be administered to the person convicted of the crime. Anciently, when, under the barbarous doctrine of an eye for an eye and a tooth for a tooth, punishment was deemed to be, as the word implies, largely compensatory, the natural and logical conception of a sentence for a crime was that the punishment should be nicely graduated to the nature and circumstances of the offense; this idea being reflected in the Constitutions of some of the states by a provision that the punishment shall be proportionate to the offense, and this provision likewise being interpreted as requiring that the prisoner should suffer in proportion to the lightness or the enormity of his crime. And so long as this compensatory conception of punishment obtained, it might seem logically to follow that the adjudging of the penalty with great certainty and precision was essential, and necessarily involved the exercise of judicial functions, and that any law attempting to deprive the courts of any of their powers in this regard would be an invasion of the province of the judiciary. The modern conception of punishment, however, and the one that, so far as we can ascertain, has always obtained in this state, takes practically no account of compensation; the only survival thereof being found in the attempt at prevention by means of deterring examples and by confinement of and restrictions upon criminals considered dangerous to be at large, which latter system, especially when viewed from the criminological view point, is closely analogous to the system of confinement of and restraint upon

persons of unsound mind. Obviously, then, the office of a judicial sentence for crime cannot, under this conception of punishment, be altogether the same as when society demanded payment, complete and more or less in kind, for infractions of its laws. No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of his criminal tendencies, with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man and a rehabilitated citizen.

Such is the province of judicial sentence for crime in many of the states, and it should be the same, we think, in all of them. In any event, we are satisfied that this conception of a sentence is the only one that can obtain in this state. Neither in our Constitution nor in our statute law do we find any remnant of the compensatory idea of punishment. Our Constitution does not contain any provision which, by any process of construction, requires penalties to be weighed in the balance with crime. It follows, then, that a much larger field of operation has necessarily been thrown open to those to whose charge criminals are committed for the purpose of the execution of the sentences pronounced against them, and we will say, without further preliminary, that so far as we have found it necessary in this case to examine our laws in this regard, including the transfer law herein assailed, we have not found them obnoxious to any constitutional objection. As we have had occasion recently to say: "Constitutions are not made for existing conditions only, nor in view that the state of society will not change or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men." *State ex rel. Simpson v. Mankato*, 117 Minn. 458, 465, 41 L.R.A. (N.S.) 111, 136 N. W. 264, 266, quoting from the opinion of Mr. Justice Brown in *Elwell v. Comstock*, 99 Minn. 261, 7 L.R.A. (N.S.) 621, 109 N. W. 698, 9 Ann. Cas. 270.

Failure to heed these weighty words would necessarily result in political and social stagnation. The changes in the conceptions of punishment and of sentence for crime, to which we have adverted at some

length, necessarily require that the constitutional division of the government into three departments should receive, so far as the question here under consideration is concerned, a more liberal construction than might have been logically possible when this provision was inserted in the first American Constitution, at which time the law had not, perhaps, abandoned the compensatory conception of punishment. We hold, therefore, that Rev. Laws 1905, § 5446, authorizing the Board of Control to transfer to the state prison a prisoner originally sentenced to the reformatory, or *vice versa*, does not violate Const. art. 3, § 1; for we consider this power to be a mere matter of administration and control, in thorough keeping with the broad and humane policy underlying our penal system. In support of this conclusion we might refer to the provisions of our statutes which indicate that the reformatory and the state prison are merely branches of one great institution, from which it might be argued that, as between the two, the place of confinement is not a judicial matter (see *Re Murphy*, 62 Kan. 422, 63 Pac. 428; *Rich v. Chamberlain*, 107 Mich. 381, 65 N. W. 235; *O'Brien v. Barr*, 83 Iowa, 51, 49 N. W. 68); and likewise we might, for the purpose of distinguishing them, discuss the case of *People ex rel. Martin v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212, 63 N. E. 508, and other cases which may seem to be more or less in conflict with the conclusion which we have reached. But to do so would be but to invite controversy, predicated largely upon technical refinements as to the meaning of words and terms, such as "penal" and "infamous." We will say, therefore, that while we have carefully examined these statutes and cases, as well as the other cases to which we have been cited, and also many additional cases which we have found in the course of our own research, we base our conclusion primarily upon an independent consideration of our own Constitution and statutes, which we have endeavored to interpret in the light of the ideals and conceptions of the people of this state as reflected in its written laws.

It appears from the record that the prisoner in this case was transferred to the state prison upon his own request; but we have not allowed this fact in any way to influence our determination of the case, and the conclusion which we have reached is in no wise based thereon.

Order affirmed.

Petition for rehearing denied.  
42 L.R.A.(N.S.)

**OKLAHOMA SUPREME COURT.**  
(Division No. 1.)

**CHICAGO, ROCK ISLAND, & PACIFIC  
RAILWAY COMPANY, Plff. in Err.,  
v.**

**W. W. BEATTY.**

(— Okla. —, 118 Pac. 367.)

**Carrier — duty to furnish cars — state requirement.**

1. The act of the legislature of Oklahoma territory of 1905 (§ 2, art. 2, chap. 10, p. 144, Session Laws of 1905), imposing upon railroad companies a penalty of \$1 per day for failure to furnish cars within four days after they are requested, but excusing a company "in case of fire, wash-outs, strikes, lockouts, or other unavoidable casualties," is not an infringement of the commerce clause of the Constitution of the United States (art. 1, § 8).

**Statute — construction.**

2. Where a statute is susceptible of two constructions, one of which will uphold it, while the other will strike it down, it is the duty of the court to accept the former construction.

**Witness — cross-examination.**

3. The cross-examination of a witness should be confined to the subject-matter of his direct examination.

**On Rehearing.**

**Carrier — state and Federal regulation.**

4. The act of the legislature of Oklahoma territory of 1905 (§ 2, art. 2, chap.

**Headnotes by AMES, C.**

**Note. — State regulations requiring carriers to furnish cars to shipper as interference with interstate commerce.**

This note supplements the note to *Southern R. Co. v. Com.* 17 L.R.A.(N.S.) 364, and the footnote to the case of *St. Louis, Southwestern R. Co. v. Arkansas*, 29 L.R.A.(N.S.) 802.

The case of *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088, held that the interstate commerce clause was not violated by a statute (chap. 23, p. 25, Laws 1907 [Minn.] [Rev. Laws Supp. 1909, §§ 2023—1 to 2023—13]) which required railroad companies to furnish cars ordered by shippers within forty-eight hours at terminal points and seventy-two hours at intermediate points, following the receipt of the order, Sundays and legal holidays excepted, under the penalty of \$1 a day for each car not furnished, but providing also that "the period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent,



10, Laws 1905), imposing upon railroad companies a penalty of \$1 per day for failure to furnish cars under the circumstances therein stated, is not in conflict with act Cong. June 29, 1906, chap. 3501, § 1, 34 Stat. at L. 584 (U. S. Comp. Stat. Supp. 1911, p. 1285), which requires cars to be furnished upon reasonable request.

**Conflict of laws — Federal and state.**

5. An act of Congress originating in its power to regulate interstate commerce does not annul an act of the state originating in its police power, unless there is such a conflict between the two as that the enforcement of the act of the state would be to frustrate the operation of the act of Congress, and to refuse to its provisions their natural effect.

(October 10, 1911.)

or during which the loading or unloading of freight by shipper or consignee is delayed by reason of inclement weather which would make loading or unloading impracticable, or any cause not in the power of said shipper or consignee to prevent, shall be added to the free time allowed in this act, and counted as additional free time." In its opinion the court set out that the enumerated defenses extended to any cause beyond the power of the railroad company to reasonably prevent; and, further, that "it conflicts with no congressional action previously taken or reasonably presumed; for the primary purpose of the interstate commerce act (act Feb. 4, 1887) chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, as amended by act June 29, 1906, chap. 3501, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1909, p. 1149 (the Hepburn law), was to secure reasonable rates and to prevent unjust discriminations." So the court also said: "The interpretation which other courts have placed on such a law has not been consistent, but taken as a whole tends to sustain this conclusion. *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 466, 117 S. W. 238, in an opinion by Norton, J. ('special judge'), *regraded Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, as refusing to enforce the law upon the ground that the requirement that cars be furnished transcended the rights of the state to burden interstate commerce. The law, therefore, was invalid as to interstate commerce, but valid as to intrastate commerce. We think that the opinion plainly misconstrued the *Mayes* Case. Cf. *Southern R. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, as to intrastate commerce."

In *Martin v. Oregon R. & Nav. Co.* 58 Or. 198, 113 Pac. 16, § 26 of the railroad commission law was held not repugnant to the Constitution as an attempted regulation of interstate commerce. It provided in part that if a railroad company should fail within a stipulated time to furnish cars to shippers who made proper written application therefor, the railroad company should be penalized in the sum of \$2 per 42 L.R.A.(N.S.)

**E**RROR to the Caddo County Court to review a judgment in plaintiff's favor in an action brought to recover the \$1 a day statutory penalty for failure of defendant to furnish cars to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. C. O. Blake, E. E. Blake, H. B. Low, and R. J. Roberts for plaintiff in error.

Mr. A. J. Morris for defendant in error.

Ames, C., filed the following opinion:

The question involved in this case is the constitutionality of § 2, art. 2, chap. 10, of the Session Laws of 1905 (Laws of 1905, p. 144, Snyder's Statutes, § 521). That section is as follows: "It shall be the duty of every railroad company operating a line of

day or fraction thereof for each car requested, except that in the words of the statute: "No charge for failure of any railroad to furnish a car or cars as herein required shall be made or enforced, or damages therefor claimed, when such failure is caused by public calamity, strikes, wash-outs, acts of God, the public enemy, mobs, riots, wrecks, fires, or accidents; but the lack of sufficient motive power, cars, equipment, other appliances, terminal facilities, roadbed, facilities for maintenance, repair or transportation, or any thereof, shall not be held to excuse the failure to furnish cars as herein required, or to exonerate any railroad from the payment of the damages and penalties herein prescribed, except during the times when the railroad commission of Oregon shall by order suspend the operation of those portions of this section of this act, requiring the furnishing of cars as herein stated, and then only during the time of such suspension." The court said that, if the word "accident," used in the statute, "be sufficiently broad to cover the contingency of traffic congestion, and defendant had the benefit of his defense on that ground, and is therefore not in a position as to that to complain. Whether the court was justified in so construing the act is not now before us, but we may say that if the word accident is not sufficiently comprehensive in meaning to include 'sudden congestion of traffic' then that contingency is provided for in the suspension clause of the statute." Of Federal legislation regulating the furnishing of cars, the court said: "Indeed, it can hardly be said that the Federal act attempts to regulate that matter. It declares the primal duty to furnish cars upon reasonable request therefor, and stops with that. The penalty for a dereliction of that duty is damages suffered and reasonable attorneys' fees. So far the two acts, Federal and state, are identical, but the state law goes further. It regulates the manner of making the request, the time within which cars shall be furnished, the excuses that may be made for a failure to deliver cars, and adds an additional penalty by way of demurrage for

road wholly or in part within this state for the transportation of freight, upon the verbal or written application of any shipper to its station agent or other agent in charge of transportation of freight for a car or cars to be loaded with freight other than perishable freight or live stock, stating the character of the freight and its final destination, to furnish said car or cars within four days from 7 o'clock A. M. of the day following such application. Or, when such application specifies a future day when said car or cars are required, giving not less than four days' notice thereof computing from 7 o'clock A. M. of the day following such application, it shall be the duty of said company to furnish said car or cars on the day specified in said application. For failure to comply with this section said company shall forfeit and pay to the shipper applying for said car or cars the sum of \$1 per car per day or fraction of a day's delay after free time, together with all actual damages said applicant may sustain thereby: Provided, that if in case of fire, washouts, strikes, lockouts, or other unavoidable casualties such railroad company shall not be able to furnish such cars within such time, then and in that event such time of demurrage shall not begin to run until such obstacles and hindrances are removed."

The argument is made that the section conflicts with the commerce clause of the Constitution of the United States, by which Congress is vested with power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Art. 1, § 8. It is, of course, thoroughly established that this power of Congress to regulate interstate commerce is exclusive, and as extensive as the commerce which is to be regulated. It is likewise thoroughly established that the state has full power to regulate intrastate commerce, and that neither the state nor the United States can enter upon or occupy the field exclusively committed to the other. It is likewise thoroughly settled that the states did not grant unto the United States their police power, and that, consequently, they

retained it, and, having retained it, it is a function which they not only have the right to exercise, but which it is their duty to exercise. The inquiry, therefore, is whether this statute regulates interstate commerce, or whether it is a mere exercise of the state's police power; whether its design is to obstruct interstate commerce, or merely to facilitate the movement of freight, both inter and intra state.

It seems clear to us that the purpose of the statute is the latter, and not the former. The prompt movement of the cars for interstate commerce cannot be a burden upon it, but an aid to it; and, if this statute affects interstate commerce, it is merely incidental and in aid of it. *Western U. Teleg. Co. v. Crovo*, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399, decided April 3, 1911, involved the constitutionality of a Virginia statute imposing upon telegraph companies the duty of transmitting despatches faithfully, impartially, and promptly, and imposing a penalty of \$100 for unreasonable delay. The action was brought by the plaintiff to recover the penalty for delay in transmitting a message from Richmond, Virginia, to Brockton, New York, and the telegraph company contended that the statute was a regulation of interstate commerce, and therefore void. In the opinion by Mr. Justice Lurton the court denied this contention, and said: "The requirement of the Virginia statute, as here applied, is a valid exercise of the power of the state, in the absence of legislation by Congress. It is neither a regulation nor a hindrance to interstate commerce, but is in aid of that commerce."

In *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 465, 55 L. ed. 290, 296, 31 Sup. Ct. Rep. 275, 278, 279, decided February 20, 1911, the Supreme Court upheld the statute of Arkansas prescribing a minimum of three brakemen for freight trains of more than 25 cars, and denied the contention that such a statute was a regulation of interstate commerce. In the opinion Mr. Justice Harlan says: "It is not too much to say that the state was under

a failure to comply with the terms of the statute. This statute, therefore, covers a field not occupied by the Federal statute."

In *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 466, 117 S. W. 238, act 193 of the Acts of 1907, providing a penalty of \$5 per day or fraction thereof for every failure of railroad companies to furnish cars to shippers within six days of the filing of an application therefor by shippers, the requirement stipulating absolutely that the cars must be furnished and suggesting no defenses, was conceded by counsel to be unconstitutional as to interstate commerce, but was upheld as to intrastate commerce. 42 L.R.A. (N.S.)

In *St. Louis, I. M. & S. R. Co. v. Hampton*, 162 Fed. 603, set out in the note to *Southern R. Co. v. Com.* supra, this statute was declared unconstitutional by a Federal court.

The case of *Gray v. Minneapolis & St. L. R. Co.* 110 Minn. 527, 124 N. W. 1100, was an action for a penalty founded upon a delay in the delivery of freight. The memorandum opinion in the Reporter merely sets out that the case is controlled by the opinion in *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* supra, but it seems that the actions in the two cases were founded upon different portions of the same enactment.

R. S. N.

an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers, while within Arkansas, are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state. Local statutes directed to such an end have their source in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court, unless they are clearly inconsistent with some power granted to the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature. The statute here involved is not in any proper sense a regulation of interstate commerce, nor does it deny the equal protection of the laws. Upon its face it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce."

In *Western U. Teleg. Co. v. Commercial Milling Co.* 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815, decided November 28, 1910, a statute of Michigan was upheld which prohibited telegraph companies from limiting their liability on account of a negligent failure to deliver a telegram, even though addressed to a person in another state; and the contention that such a statute was a regulation of interstate commerce was denied.

In *Atlantic Coast Line R. Co. v. Mazur-sky*, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378, a South Carolina statute was upheld which penalized the failure of a common carrier to adjust and pay, within a specified time, claims for loss or damage; and the contention that such a statute was a regulation of interstate commerce was denied. Mr. Chief Justice Fuller, in delivering the opinion of the court, quotes with apparent approval, on page 132 of 216 U. S. the following language from *Seegers Bros. v. Seaboard Air Line R. Co.* 73 S. C. 71, 73, 121 Am. St. Rep. 921, 52 S. E. 797: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end." 42 L.R.A.(N.S.)

And see same case, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

In *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, a statute of Georgia imposing a penalty for the failure to diligently deliver to the person addressed in Georgia an interstate message was upheld as a valid exercise of the state's power, and not a regulation of interstate commerce, and in the opinion Mr. Justice Peckham says: "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce."

In *Patterson v. Missouri P. R. Co.* 77 Kan. 236, 15 L.R.A.(N.S.) 733, 94 Pac. 138, a statute very similar to ours was considered and upheld. The Kansas statutes imposed a penalty of \$1 per day for failure to furnish the cars, but provided "that the provisions of this law shall not apply in cases of strikes, unavoidable accidents, and other public calamities," while the exception of our statute is that the penalty does not apply "in case of fire, washouts, strikes, lockouts, or other unavoidable casualties." In *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088, a similar demurrage act was sustained, which imposed a penalty of \$1 per day for delay, and the exception of the statute was in the case of "strikes, public calamities, accidents, or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee is delayed by reason of inclement weather which would make loading or unloading impracticable, or any cause not in the power of said shipper or consignee to prevent." In *Stone & Co. v. Atlantic Coast Line R. Co.* 144 N. C. 220, 56 S. E. 932, the validity of the North Carolina demurrage law was involved. By this law a penalty was imposed for unreasonable delay, and it was provided that a greater delay than two days at the initial point, and forty-eight hours at one intermediate point for each 100 miles, was prima facie unreasonable. This act was held valid. In *Southern R. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, a rule of the railroad commission of Georgia requiring railroads to furnish cars within four days after demand, under penalty of \$1 a day, was upheld.

In *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491, a demurrage act of Texas was held to

be an unconstitutional regulation of interstate commerce, which imposed a penalty of \$25 a day for each car not furnished, and which only excused the railroad for failure to furnish because of "strikes or other public calamity." The opinion was delivered by five of the justices; one not participating and three dissenting. The power of the state to compel the railroads to furnish adequate facilities for the movement of commerce, whether state or interstate, was conceded; but it was held that the imposition of the duty to furnish cars at a specified time, regardless of every consideration except "strikes or other public calamity," under a penalty of \$25 per day per car for failure to do so, was an unreasonable and arbitrary requirement. In delivering the opinion Mr. Justice Brown says: "Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

Under the authority of the *Mayes Case*, therefore, as well as all the other decisions on the subject, the subject-matter of this statute is rightfully within the power of the legislature, and in order for the courts to strike it down we must be able to say that it is so arbitrary and unreasonable as to transcend the limits of the state's power. We cannot reach this conclusion. Whether cars should be furnished within one day or four or six may be a matter upon which different men would have different opinions; but it is certainly a subject as fully within the knowledge of the legislature as it is that of the courts, and we cannot say that a requirement that they should be furnished within four days is arbitrary and unreasonable. It certainly is not a burden on interstate commerce. But the legislature has not made this an absolute requirement, but excuses the railroad in the event of the contingencies named in the statute.

We are asked to so construe these contingencies and exceptions as to make the act unconstitutional. But where two constructions are available, one of which will uphold the act, while the other will strike it down, it is the duty of the courts to take the former course. *Patterson v. Missouri P. R. Co.* 77 Kan. 236, 15 L.R.A.(N.S.) 733, 94 Pac. 138; *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; *Udall Milling Co. v. Atchison, T. & S. F. R. Co.* 82 Kan. 256, 263, 108 Pac. 137, 139. In the case at bar the defendant merely filed a general denial. It did not plead or undertake to prove any facts which would make

the application of the statute unreasonable, but merely stood upon the naked proposition that the statute, on its face, is so unreasonable and arbitrary as to be void. The meaning of the words "unavoidable casualty" can better be ascertained by applying them to concrete cases, and, as there are no facts before us, we cannot apply the words in this case; but it is manifest that the exceptions of our statute are so much broader than the exceptions of the Texas statute involved in the *Mayes Case* that that case is not controlling, and it is sufficient to say that, when a railroad company cannot furnish cars on account of any casualties beyond its control, the statute will not apply.

All the other assignments of error are disposed of by what we have already said, except the fifth, which attacks the rulings of the court on the admission of evidence. On the cross-examination of the plaintiff, the defendant inquired whether cars were scarce that fall, whether plaintiff had any trouble in getting cars, and whether he got as many as other dealers. This was objected to as improper cross-examination, and the objection was sustained. We do not think this was error. If the defendant relied upon such a defense, it should have been pleaded and proven; and this could not be done by the examination of the plaintiff, when his examination in chief did not legitimately present the matter.

For the reasons herein stated, the judgment of the trial court should be affirmed.

#### Per Curiam:

Adopted in whole.

A petition for rehearing having been granted, *Amcs, C.*, on August 8, 1912, handed down the following additional opinion (— Okla. —, 126 Pac. 736):

In our former opinion (118 Pac. 367) we held that the demurrage act under consideration was not a violation of the commerce clause of the Constitution of the United States. A petition for rehearing was filed, for the first time calling our attention to § 1 of the act of June 29, 1906 (chapter 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1285), and the petition for rehearing was granted in order that the case might be considered with that act of Congress in mind. At the oral argument it was suggested that the exact proposition was pending before the Supreme Court of the United States, and we have delayed further opinion in the matter awaiting the decision of that tribunal, as it would, of course, be controlling upon us. The exact question, however, has not been decided by that court at this term. Section 1 of the

act of June 29, 1906, is as follows: "The term 'common carrier,' as used in this act, shall include express companies and sleeping car companies. The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any [kind] of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto." It will be observed that this section provides that "the term 'transportation,' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage," and, further, that "it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor." The effect of the act of Congress, then, is to require the carrier to furnish cars for interstate commerce upon reasonable request, while the effect of the act of the legislature is to require such cars to be furnished within five days, under the penalty of \$1 per day per car for failure to do so.

Is there such a conflict between the two statutes that the state legislation must yield to the national legislation, or does the state legislation, in the exercise of the state's police power, merely incidentally touch the same subject as the national legislation in such a way as to aid, rather than hinder, its full operation? The act of Congress manifestly originates in the power to regulate commerce between the states. On the other hand, the act of the state originates in its police power. *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 328, 50 L. ed. 772, 775, 26 Sup. Ct. Rep. 491. We therefore have an act of Congress designed to regulate interstate commerce, and an act of the legislature passed under its police

power, both of which, as it happens, act upon the same subject-matter. This being true, the question arises whether there is such a conflict as compels the courts to say that the act of the United States strikes down the act of the state. Certain principles are elementary and fundamental. One is that the Constitution of the United States and laws passed in pursuance thereof are the supreme law of the land. Another is that the states did not grant unto the United States their police power, and consequently they retained it. Another is that the United States, within its sphere, is sovereign, but that the states within their sphere are equally sovereign. From these considerations it would seem to follow that where an act of Congress enacted pursuant to its lawful power touches the same subject as an act of the state enacted pursuant to its lawful power, that the question should be whether at the point of contact these two acts run parallel with each other, or whether they cross. If they cross each other, the supreme law, of course, must prevail. If they run parallel with each other, both may prevail, and, in the absence of necessary conflict, the courts will recognize the will of both bodies of lawmakers.

The act of Congress says that the cars shall be furnished upon reasonable request. This merely declares what was the law without the act. Such service was the common-law duty of the carrier. The act of the legislature requires cars to be furnished within five days. In our previous opinion we have held that this requirement is not so unreasonable and arbitrary as to be stricken down as matter of law. It follows, therefore, that it is reasonable. The act of Congress, therefore, and the act of the state, run parallel with each other, and the state enforces a penalty of \$1 per day for failure to discharge the duty which is enjoined both by the state and by the nation. There being no necessary conflict, we therefore conclude that § 1 of the act of 1906 does not operate to destroy the demurrage act of Oklahoma which was previously in existence. The principles upon which we rest this conclusion find support in many cases decided by the Supreme Court of the United States, two of which were decided at the last term,—one the *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140, striking down a statute of North Carolina relative to the receipt of freight for transportation; and the other *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, upholding a statute of Indiana regulating the sales of concentrated commercial feeding stuffs distributed by means of interstate commerce.

In the *Reid* case the validity of a North

Carolina act was involved which required carriers to receive freight for transportation, and forward the same by a route selected by the shipper, under penalty of \$50 per day for each day of refusal. It was held that this act was in conflict with the act regulating commerce, and was therefore invalidated by it. In that case, however, demand was made upon the carrier for a bill of lading reading from Charlotte, North Carolina, to Davis, West Virginia, and an offer was made to prepay the freight charges. The carrier declined to name a rate or permit the shipper to prepay the freight, and declined to issue a bill of lading as requested, because no through rate or route had been filed or published as required by the interstate commerce act. In determining whether both acts could stand, Mr. Justice McKenna, in delivering the opinion of the court, says (222 U. S. 437): "The principle of that case, therefore, requires us to find specific action either by Congress in the interstate commerce act, or by the Commission, covering the matters which the statute of North Carolina attempts to regulate." After, then, reviewing the general scope of the commerce act and of the North Carolina act, it is said (222 U. S. 442): "The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties." And again on the same page: "If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law." Having found this direct conflict between the two laws, it necessarily followed that the state law would have to yield, and the court so held.

*Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, involved certain Indiana legislation prohibiting the sales by importing purchases of concentrated feed stuffs in the original packages without a compliance with the requirements of the statute as to inspection, analysis, the disclosure of the ingredients, and the filing of a certificate of registration and for labels and stamps. It was contended that the act was invalid, because Congress, by the passage of the food and drugs act of June 30, 1906 (chapter 3915, 34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1911, p. 1354), to prevent the adulteration and misbranding of foods and drugs, had covered the same field, and therefore excluded the act of the state. It was held by the court that there was no necessary conflict between the two acts, and that, therefore, the state act might still stand. In delivering the opinion Mr. Justice Hughes states certain well-established principles, supported by the elaborate cita-

tion of authorities, which we think uphold the act under review in this case. He says (225 U. S. 524): "The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce." In support of this statement he cites the following cases: *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Rep. 757; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633. He next says: "But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority." Supporting this proposition, he cites the following cases: *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Patpsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Crossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep.

275. He then points out (225 U. S. 532) that, in the enumeration of the acts which constitute a violation of the statute, Congress has required packages to disclose the ingredients when containing morphine, opium, cocaine, and other similar substances, but has not required this to be done in all cases. The Indiana act goes a step further, and requires other ingredients to be disclosed. He then says: ". . . Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect." It might have been argued in that case, and doubtless was, that Congress, by expressing its will on the subject, had taken it out of the jurisdiction of the state, but the court evidently did not entertain that opinion. The court, however, at page 533 of 225 U. S., says: "Is, then, a denial to the state of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For, when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." And again, in the next paragraph, it is said: "In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

Many cases are cited supporting this doctrine. At page 537 of 225 U. S., Mr. Justice Hughes quotes with approval from *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, as follows: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that, 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance 42 L.R.A. (N.S.)

or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'" The principles involved in the cases of *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140, and *Savage v. Jones*, are identical, and the two cases, approaching statutes from different points of view, disclose very clearly the principles which should apply.

Will the act of Congress "be frustrated and its provisions be refused their natural effect" by enforcing the act of Oklahoma? Can it be said that "the act of Congress, fairly interpreted, is in actual conflict with the law of the state?" Is there such a "repugnance or conflict" "that the two acts could not be reconciled or consistently stand together?" We think these questions must all be answered in the negative.

The statute of Oklahoma, passed in the exercise of its police power, does not conflict with the act of Congress passed in the exercise of its right to regulate interstate commerce. This Oklahoma statute, in so far as it affects commerce, facilitates intrastate commerce, and it seems to us that interstate commerce is entitled to the benefit of this statute as much as intrastate commerce. Many other decisions might be reviewed, but the *Southern R. Co. v. Reid*, supra, and *Savage v. Jones*, cite these other decisions and lay down the principles necessary to a decision of this case.

We adhere to the original conclusion, and think the judgment of the trial court should be affirmed.

Per Curiam:

Adopted in whole.

#### OKLAHOMA SUPREME COURT. (Division No. 1.)

WESTERN NATIONAL INSURANCE  
COMPANY, Plff. in Err.,

v.

HENRY A. MARSH.

(— Okla. —, 125 Pac. 1094.)

Insurance — concurrent — notice —  
waiver.

1. When a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy of insurance,

Headnotes by AMES, C.

Note. — As to effect of nonwaiver agreement on condition existing at inception of insurance policy, see note to *Gish v. Insurance Co. of N. A.* 13 L.R.A. (N.S.) 827.

As to power of agents to bind insurer by oral waiver or estoppel *in pais* as to

at and prior to the time of the delivery of the policy, is advised, and has full knowledge of the fact, that other insurance upon the property is in force, and with that knowledge accepts the premium and delivers the policy, such policy is binding upon the company, notwithstanding the fact that it contains a provision prohibiting the existence of concurrent insurance without written consent thereto indorsed on the policy, and notwithstanding it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy.

**Evidence — burden of proof — notice.**

2. The burden of proof in such cases rests upon the insured to show that the agent of the insurer was advised and had knowledge of the pre-existing insurance.

(April 9, 1912.)

**E**RROR to the District Court for Okmulgee County to review a judgment in plaintiff's favor in an action brought to recover the amount due on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Mr. George C. Beldleman, for plaintiff in error:

There is no evidence to show that the plaintiff had any amount of goods on hand at the date of the fire, and he who asserts a proposition must prove it by at least a fair preponderance of the evidence.

29 Am. & Eng. Enc. Law, 2d ed. 1095; Bishop, Contr. § 792; Missouri, K. & T. R. Co. v. Ward, 1 Ind. Terr. 670, 43 S. W. 954; Moore v. Adams, 26 Okla. 48, 108 Pac. 302.

The provision in the policy is valid, and has not been waived.

Commercial Union Assur. Co. v. Norwood, 57 Kan. 610, 47 Pac. 529; 2 May, Ins. § 364; Union Nat. Bank v. German Ins. Co. 18 C. C. A. 203, 34 U. S. App. 397, 71 Fed. 473; Rice v. Hartford Ins. Co. 50 Wash. 346, 97 Pac. 238; Warwick v. Monmouth County Mut. F. Ins. Co. 44 N. J. L. 83, 43 Am. Rep. 343; Turner v. Meridan F. Ins. Co. 16 Fed. 454; 19 Cyc. 764; Com. Mut. F. Ins. Co. v. Huntzinger, 98 Pa. 41; Merchants' Mut. Ins. Co. v. Lyman, 15 Wall. 664, 21 L. ed. 246; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 81; Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Northern Assur. Co. v. Grand

View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co. 11 Okla. 585, 69 Pac. 938; Gish v. Insurance Co. of N. A. 16 Okla. 59, 13 L.R.A. (N.S.) 826, 87 Pac. 869; Sullivan v. Mercantile Town Mut. Ins. Co. 20 Okla. 460, 129 Am. St. Rep. 761, 94 Pac. 676.

Mr. Joe S. Eaton also for plaintiff in error.

Messrs. Stanford & Cochran, for defendant in error:

Defendant is estopped from setting up breach of the policy.

German Ins. Co. v. Gray, 43 Kan. 497, 8 L.R.A. 70, 19 Am. St. Rep. 150, 23 Pac. 637; Continental Ins. Co. v. Pearce, 39 Kan. 396, 7 Am. St. Rep. 557, 18 Pac. 291; Phenix Ins. Co. v. Munger, 49 Kan. 178, 33 Am. St. Rep. 360, 30 Pac. 120; Rockford Ins. Co. v. Farmers' State Bank, 50 Kan. 427, 31 Pac. 1063; Capitol Ins. Co. v. Bank of Pleasanton, 50 Kan. 449, 31 Pac. 1069; Niagara F. Ins. Co. v. Johnson, 4 Kan. App. 16, 45 Pac. 790; Arkansas Ins. Co. v. Cox, 21 Okla. 873, 20 L.R.A. (N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552; Wheaton v. North British & M. Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758; Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464; Kruger v. Western F. & M. Ins. Co. 72 Cal. 91, 1 Am. St. Rep. 42, 13 Pac. 156; Farnum v. Phoenix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; Swain v. Macon F. Ins. Co. 102 Ga. 96, 29 S. E. 147; Germainia F. Ins. Co. v. Hick, 125 Ill. 361, 8 Am. St. Rep. 384, 17 N. E. 792; Havens v. Home Ins. Co. 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137; Erb v. Fidelity Ins. Co. 99 Iowa, 727, 69 N. W. 261; Aetna Live Stock, Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 246, 4 Am. Rep. 483; Beebe v. Ohio Farmers' Ins. Co. 93 Mich. 514, 18 L.R.A. 481, 32 Am. St. Rep. 519, 53 N. W. 818; Brandup v. St. Paul F. & M. Ins. Co. 27 Minn. 393, 7 N. W. 735; Wilson v. Minnesota Farmers' Mut. F. Ins. Asso. 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. W. 401; First Nat. Bank v. American Cent. Ins. Co. 58 Minn. 492, 60 N. W. 345; Quigley v. St. Paul Title Ins. & T. Co. 60 Minn. 275, 62 N. W. 287; Anderson v. Manchester F. Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 50 Am.

forfeitures occurring after issuance of policy and before loss, under policy requiring consent or waiver to be in writing, see note to Industrial Mut. Indemnity Co. v. Thompson, 10 L.R.A. (N.S.) 1064. And see Merchants' & P. Ins. Co. v. Marsh, post, 996.

42 L.R.A. (N.S.)

For parol evidence rule as to varying or contradicting written contracts, as affected by the doctrine of waiver or estoppel as applied to policies of insurance, see note to Haapa v. Metropolitan L. Ins. Co. 16 L.R.A. (N.S.) 1165.



St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; *Rivara v. Queen's Ins. Co.* 62 Miss. 720; *Mitchell v. Mississippi Home Ins. Co.* 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. 13; *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 So. 931; *Western Assur. Co. v. Phelps*, 77 Miss. 625, 27 So. 745; *Home F. Ins. Co. v. Hammang Bros.* 44 Neb. 566, 62 N. W. 883; *Spalding v. New Hampshire F. Ins. Co.* 71 N. H. 441, 52 Atl. 858; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *McBryde v. South Carolina Mut. Ins. Co.* 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729; *West v. Norwich Union F. Ins. Soc.* 10 Utah, 442, 37 Pac. 685; *Mutual F. Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *Mesterman v. Home Mut. Ins. Co.* 5 Wash. 524, 34 Am. St. Rep. 877, 32 Pac. 458.

Ames, C., filed the following opinion:

The policy sued on contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Also the following: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except as such, by the terms of the policy, may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." In the suit on the policy the company defended upon the ground that there was other insurance existing at and prior to the time the policy was delivered, and that consent thereto was not indorsed upon the policy. In avoidance of this defense, the plaintiff replied by saying that the agent of the company, at and prior to the time of the delivery of the policy, was advised and knew of the existence of this other insurance, and that on that account he was entitled to recover, notwithstanding the failure to indorse the consent in writing.

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This presents a question which is of first impression in this state. The territorial decisions, following those of the United States, have held that under these facts the company was not liable. *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 585, 60 Pac. 938; *Gish v. Insurance Co. of N. A.* 16 Okla. 59, 13 L.R.A. (N.S.) 826, 87 Pac. 869. Those cases were correctly decided, because the supreme court of the territory was bound by decisions of the Supreme Court of the United States, and that court had established the rule in *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133. Since the admission of the state, the question has arisen in several cases upon contracts arising prior to statehood, and this court has followed *Northern Assur. Co. v. Grand View Bldg. Asso.*, because it controlled the rights of the parties at that time, but has expressly reserved this question as applied to cases arising since statehood. In *Sullivan v. Mercantile Town Mut. Ins. Co.* 20 Okla. 460, 465, 129 Am. St. Rep. 761, 94 Pac. 676, this court, in referring to *Northern Assur. Co. v. Grand View Bldg. Asso.*, say: "While we do not wish to be understood as saying that it is our opinion that the doctrine announced in that case is in harmony with the weight of authorities upon this question, or that it is supported by the better reasoning, yet on account of the fact that the rule announced in said case was the law controlling the courts in the Indian territory at the time of the trial of the case at bar, we are constrained to follow in this case the rule announced therein." In *State Mut. Ins. Co. v. Craig*, 27 Okla. 90, 111 Pac. 325, the same conclusion was reached, but subject to the same reservation; the opinion in this case quoting the reservation from *Sullivan v. Mercantile Town Mut. Ins. Co.* supra. *Phoenix Ins. Co. v. Ceaphus*, 29 Okla. 608, 119 Pac. 583, follows this rule, but with the same reservation.

This case, however, arose after the admission of the state, and we are no longer bound by the decision in *Northern Assur. Co. v. Grand View Bldg. Asso.*, although we very frankly concede that the argument of that case is very powerful, and the persuasive force of the decisions of that eminent court have great weight with us as authority. Massachusetts adopts the same rule as the Supreme Court of the United States, *Parker v. Rochester German Ins. Co.* 162 Mass. 479, 39 N. E. 179; *Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co.* 145 Mass. 265, 13 N. E. 902; *Pendar v. American Mut. Ins. Co.* 12 Cush. 409; *Worcester Bank v. Hartford F. Ins. Co.* 11 Cush. 265,

59 Am. Dec. 145. We believe, though, that all the other states hold that, here the local agent is advised and has knowledge of the existing insurance at the time he writes and delivers the policy, the company is bound, notwithstanding the want of a written indorsement. Various reasons are assigned by the courts for this conclusion, and we do not feel that it is necessary for us to undertake to analyze the decisions. There are exhaustive notes on the subject in connection with *Gish v. Insurance Co. of N. A.* 16 Okla. 59, 87 Pac. 869, as reported in 13 L.R.A. (N.S.) 827, and the case of *Haapa v. Metropolitan L. Ins. Co.* 150 Mich. 467, 114 N. W. 380, as reported in 16 L.R.A. (N.S.) 1165, 121 Am. St. Rep. 627, and *Johnson v. Aetna Ins. Co.* 123 Ga. 404, 51 S. E. 339, as reported in 107 Am. St. Rep. 92, the note beginning on page 99.

It seems to us that the local agent of the company, who has authority to make the contract of insurance and to indorse the company's consent to this provision upon the contract, is the company's representative for the purpose of waiving such an indorsement. Indeed, in the policy sued on, which appears to be signed by the president and secretary of the company, it is expressly provided: "But this policy shall not be valid until countersigned by the duly authorized agent of the company at Morris, Oklahoma." If, therefore, this agent had authority to make the contract of insurance, and authority to indorse thereon the consent of the company to the existence of other insurance, it seems to us that when he is advised of this other insurance, and has full knowledge thereof, and executes and delivers the contract, and receives the premium from the insured, the company is bound by his knowledge, and that it is immaterial whether we call it a waiver or an estoppel, or any other name; and this conclusion has been reached by the highest courts of the following states: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Indian territory, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Cowart v. Capital City Ins. Co.* 114 Ala. 356, 22 So. 574; *Pope v. Glens Falls Ins. Co.* 130 Ala. 356, 30 So. 496; *Triple Link Mut. Indemnity Assn. v. Williams*, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 So. 379; *State* 42 L.R.A. (N.S.)

*Mut. Ins. Co. v. Latourette*, 71 Ark. 242, 100 Am. St. Rep. 63, 74 S. W. 300; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297, 35 S. W. 428; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016; *Allen v. Home Ins. Co.* 133 Cal. 29, 65 Pac. 138; *Breedlove v. Norwich Union F. Ins. Soc.* 124 Cal. 164, 56 Pac. 770; *Farnum v. Phoenix Ins. Co.* 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; *West Coast Lumber Co. v. State Invest. & Ins. Co.* 98 Cal. 502, 33 Pac. 258; *Kruger v. Western F. & M. Ins. Co.* 72 Cal. 91, 1 Am. St. Rep. 42, 13 Pac. 156; *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. 249; *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; *Farmers' & M. Ins. Co. v. Nixon*, 2 Colo. App. 265, 30 Pac. 42; *Hartford F. Ins. Co. v. Redding*, 47 Fla. 248, 67 L.R.A. 518, 110 Am. St. Rep. 118, 37 So. 62; *Johnson v. Aetna Ins. Co.* 123 Ga. 404, 107 Am. St. Rep. 92, 51 S. E. 339; *Swain v. Macon F. Ins. Co.* 102 Ga. 96, 29 S. E. 147; *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Mechanics' & T. Ins. Co. v. Mutual Real Estate & Bldg. Assn.* 98 Ga. 262, 25 S. E. 457; *German-American Ins. Co. v. Paul*, 5 Ind. Terr. 703, 83 S. W. 60; *Allen v. Phenix Assur. Co.* 12 Idaho, 653, 8 L.R.A. (N.S.) 903, 88 Pac. 245, 10 Ann. Cas. 328; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339; *Security Trust Co. v. Tarpey*, 182 Ill. 52, 54 N. E. 1041; *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Germania F. Ins. Co. v. Hick*, 125 Ill. 361, 8 Am. St. Rep. 384, 17 N. E. 792; *German-American Ins. Co. v. Yeagley*, 163 Ind. 666, 71 N. E. 897, 2 Ann. Cas. 275; *Farmers' Ins. Assn. v. Reavis*, 163 Ind. 321, 70 N. E. 518, 71 N. E. 905; *Havens v. Home Ins. Co.* 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Gurnett v. Atlas Mut. Ins. Co.* 124 Iowa, 547, 100 N. W. 542; *Erb v. Fidelity Ins. Co.* 99 Iowa, 727, 69 N. W. 261; *Hagan v. Merchants' & B. Ins. Co.* 81 Iowa, 321, 25 Am. St. Rep. 493, 46 N. W. 1114; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Hartford F. Ins. Co. v. McCarthy*, 69 Kan. 555, 77 Pac. 90; *Hulen v. National F. Ins. Co.* 80 Kan. 127, 102 Pac. 52; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L.R.A. 70, 19 Am. St. Rep. 150, 23 Pac. 637; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 557, 18 Pac. 291; *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *London & L. Ins. Co. v. Gerteisen*, 106 Ky. 815, 51 S. W. 617; *Brumfield v. Union Ins. Co.* 87 Ky. 122, 7 S. W. 893; *Mongeau v. Liverpool & L. & G. Ins. Co.* 128 La. 654,

55 So. 6; Bigelow v. Granite State F. Ins. Co. 94 Me. 39, 46 Atl. 808; Hilton v. Phenix Assur. Co. 92 Me. 272, 42 Atl. 412; Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; Maryland F. Ins. Co. v. Gusdorf, 43 Md. 506; National F. Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 280; Morgan v. Illinois Ins. Co. 130 Mich. 427, 90 N. W. 40; Beebe v. Ohio Farmers' Ins. Co. 93 Mich. 514, 18 L.R.A. 481, 32 Am. St. Rep. 519, 53 N. W. 818; Farmers' Mut. F. Ins. Co. v. Gargett, 42 Mich. 289, 3 N. W. 954; Michigan State Ins. Co. v. Lewis, 30 Mich. 41; Andrus v. Maryland Casualty Co. 91 Minn. 338, 98 N. W. 200; Parsons v. Lane (Re Millers' & Mfrs. Ins. Co.) 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 485, 7 Ann. Cas. 1144; Brandup v. St. Paul F. & M. Ins. Co. 27 Minn. 393, 7 N. W. 735; Southern Ins. Co. v. Stewart, — Miss. —, 30 So. 755; Home Ins. Co. v. Gibson, 72 Miss. 58, 17 So. 13; Equitable F. Ins. Co. v. Alexander, — Miss. —, 12 So. 25; Thompson v. Traders' Ins. Co. 169 Mo. 12, 68 S. W. 889; Cagle v. Chillicothe Town Mut. F. Ins. Co. 78 Mo. App. 431; Williams v. Bankers' & M. Town Mut. F. Ins. Co. 73 Mo. App. 607; Parsons v. Knoxville F. Ins. Co. 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; Hamilton v. Home Ins. Co. 94 Mo. 353, 7 S. W. 261; Hartford F. Ins. Co. v. Landfare, 63 Neb. 559, 88 N. W. 779; Home F. Ins. Co. v. Hammang Bros. 44 Neb. 566, 62 N. W. 883; Phenix Ins. Co. v. Covey, 41 Neb. 724, 60 N. W. 12; Spalding v. New Hampshire F. Ins. Co. 71 N. H. 441, 52 Atl. 858; Hadley v. New Hampshire F. Ins. Co. 55 N. H. 110; Patten v. Merchants' & F. Mut. F. Ins. Co. 40 N. H. 375; Redstrake v. Cumberland Mut. F. Ins. Co. 44 N. J. L. 294; Lewis v. Guardian Fire & Life Assur. Co. 181 N. Y. 392, 106 Am. St. Rep. 557, 74 N. E. 224; Benjamin v. Palatine Ins. Co. 177 N. Y. 588, 70 N. E. 1095; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; Forward v. Continental Ins. Co. 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615; Cowell v. Phenix Ins. Co. 126 N. C. 684, 36 S. E. 184; Clapp v. Farmers' Mut. F. Ins. Asso. 126 N. C. 388, 35 S. E. 617; Follette v. Mutual Acci. Asso. 110 N. C. 377, 15 L.R.A. 668, 28 Am. St. Rep. 693, 14 S. E. 923; Grubbs v. North Carolina Home Ins. Co. 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 236; Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Koshland v. Home Mut. Ins. Co. 31 Or. 321, 49 Pac. 864, 50 Pac. 567; Arthur v. Palatine Ins. Co. 35 Or. 27, 76 Am. St. Rep. 450, 57 Pac. 62; McGonigle v. Susquehanna Mut. F. Ins. Co. 168 Pa. 1, 31 Atl. 868; Mentz v. Lancaster F. Ins. Co. 79 Pa. 475; Davis v. Fireman's 42 L.R.A.(N.S.)

Fund Ins. Co. 5 Pa. Super. Ct. 506, Id., 28 Pittsb. L. J. N. S. 91, Id., 40 W. N. C. 569; Reed v. Equitable F. & M. Ins. Co. 17 R. I. 785, 18 L.R.A. 496, 24 Atl. 833; Fludd v. Equitable Life Assur. Soc. 75 S. C. 315, 55 S. E. 762; Pearlstine v. Phenix Ins. Co. 74 S. C. 246, 54 S. E. 372; McBryde v. South Carolina Mut. Ins. Co. 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729; Graham v. American F. Ins. Co. 48 S. C. 195, 59 Am. St. Rep. 707, 26 S. E. 323; Vesey v. Commercial Union Assur. Co. 18 S. D. 692, 101 N. W. 1074; Aetna L. Ins. Co. v. Fallow, 110 Tenn. 720, 77 S. W. 937; Home Ins. Co. v. Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705; Continental Fire Asso. v. Norris, 30 Tex. Civ. App. 299, 70 S. W. 769; Hartford F. Ins. Co. v. Post, 25 Tex. Civ. App. 428, 62 S. W. 140; Wagner v. Westchester F. Ins. Co. 92 Tex. 549, 50 S. W. 569; Morrison v. Insurance Co. of N. A. 69 Tex. 353, 5 Am. St. Rep. 63, 6 S. W. 605; Osborne v. Phenix Ins. Co. 23 Utah, 428, 64 Pac. 1103; West v. Norwich Union F. Ins. Soc. 10 Utah, 442, 37 Pac. 685; Tarbell v. Vermont Mut. F. Ins. Co. 63 Vt. 53, 22 Atl. 533; Ring v. Windsor County Mut. F. Ins. Co. 51 Vt. 563; Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co. 106 Va. 633, 56 S. E. 584; Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366; Mutual F. Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209; Mesterman v. Home Mut. Ins. Co. 5 Wash. 524, 34 Am. St. Rep. 877, 32 Pac. 458; Henschel v. Hamburg-Magdeburg F. Ins. Co. 4 Wash. 817, 30 Pac. 736; Medley v. German Alliance Ins. Co. 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99; Woolpert v. Franklin Ins. Co. 42 W. Va. 647, 26 S. E. 521; Coles v. Jefferson Ins. Co. 41 W. Va. 261, 23 S. E. 732; Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227; St. Clara Female Academy v. Northwestern Nat. Ins. Co. 98 Wis. 257, 67 Am. St. Rep. 805, 73 N. W. 767; Schultz v. Caledonian Ins. Co. 94 Wis. 42, 68 N. W. 414; Kahn v. Traders' Ins. Co. 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059.

We feel that this rule, established by such an overwhelming weight of authority, should be followed by us, and we are the more ready to do so because it accords with our sense of justice. Indeed, this result is foreshadowed by the decisions of this court in *Arkansas Ins. Co. v. Cox*, 21 Okla. 873, 20 L.R.A.(N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552, and in *Port Huron Engine & Thresher Co. v. Ball*, 30 Okla. 11, 118 Pac. 393. In *Arkansas Ins. Co. v. Cox*, 21 Okla. page 880, it is said: "Defendant insists that the answers of plaintiff in his application as to his interest in the dwell-

ling house and barn insured, and the land on which the same was situated, were false, and that he did not have the unconditional and sole ownership, both legal and equitable, of the property, and that he was not the owner of the fee simple title to the land on which said buildings were situated, and that, by reason of such facts, the policy, under the provision thereof quoted supra, was void. There was no misrepresentation by plaintiff in his application as to who owned the legal title to the land on which the property was situated. His answers to the questions in the application disclose that the same was held in the name of R. L. Folsom. This fact was known to the insurance company by the written application of plaintiff, containing such answer, being before the company at the time it issued the policy sued on; and the company, having with full knowledge issued the policy to plaintiff, cannot now insist upon the clause in the policy requiring the insured to be the unconditional and sole owner of the legal title, but will be held to have waived such condition. The law will not permit it, with full knowledge of the condition of the legal title to the land on which the insured's property was located, to accept the application and the premium note given by the insured and in payment of the premium on the policy, and to insert in the policy a provision contrary to the conditions of the title as represented by the application, by which it may defeat the right of recovery in case of loss. *German-American Ins. Co. v. Paul*, 5 Ind. Terr. 703, 83 S. W. 60; *Allen v. Phoenix Assur. Co.* 12 Idaho, 653, 8 L.R.A.(N.S.) 903, 88 Pac. 245, 10 Ann. Cas. 328."

In *Port Huron Engine & Thresher Co. v. Ball*, the second paragraph of the syllabus is as follows: "Provisions in a contract of sale of machinery, requiring the purchaser, if not satisfied with the machinery at the end of the first day, to notify the company at its home office and give it time to send mechanics to operate the machine, and further providing that, if the purchaser is not satisfied after the test is made by these mechanics, he shall procure some other machine for a competitive test, and further providing that none of the conditions of the contract may be waived except in writing signed by an officer of the seller, may all be waived by the seller, if, in response to an informal notice, it sends agents to examine and test the machinery, who make promises of repairs and adjustments, upon which the purchaser relies in future dealings with the seller."

Upon the importance of adopting a rule established by the great weight of authority, this court, in *Lutz v. Tahlequah Water* 42 L.R.A.(N.S.)

*Co. 29 Okla. 171, 173, 36 L.R.A.(N.S.) 568, 118 Pac. 128, 129*, observes: "True it is, as suggested by counsel, there are nearly fifty appellate courts in this nation, each and all industriously grinding out their grist of precedent. But the hopeful observation is to be indulged in this connection, that of late years the universal dissemination among these courts of the conclusions reached by all has had a very marked tendency toward bringing uniformity out of judicial precedents, where before there had been conflict. Thus, by the very force of the weight of authority and precedent, a uniform code and system of jurisprudence is being gradually evolved. As a political body or nation, we have numerous jurisdictions, yet the lines separating them are merely arbitrary and artificial. As a people, we have a common destiny; we are one, with one life, one language, one great system of commercialism, and, manifestly for the peace, tranquility, economy, and general welfare of all, but one set of laws or rules of action should obtain. There is no reason why the crossing of a state line should change the legal relations, obligations, or duties which one citizen owes to another, and that it does so is distracting and wasteful, and leads to loss, dissent, uncertainty."

The burden of proof, however, clearly rests upon the plaintiff to prove the facts upon which he relies for the waiver. 29 Am. & Eng. Enc. Law, 2d ed. 1095. As there was no evidence whatever upon the subject, it was error to submit the case to the jury, and for this reason the case must be reversed.

As the other errors assigned are not necessary to a decision of this case, and as they may not arise upon a new trial, it will not be necessary to consider them.

The case should be reversed, and remanded for a new trial.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied.

#### OKLAHOMA SUPREME COURT. (Division No. 2.)

MERCHANTS & PLANTERS' INSURANCE COMPANY, Plff: in Err.,  
v.

H. A. MARSH.

(— Okla. —, 125 Pac. 1100.)

**Pleading — departure — remedy.**

1. An objection to a pleading on the Headnotes by BREWER, C.

Note.—See note to *Western Nat. Ins. Co. v. Marsh*, ante, 991.

ground of a departure must, in this jurisdiction, be raised by a motion to strike. It cannot be raised by demurrer, or by an objection to the introduction of evidence.

**Insurance — waiver of conditions — power of agent.**

2. A local agent of an insurance company, who has authority from the company to solicit, execute, and deliver contracts of insurance, has power to waive the conditions of the policy, such as the "additional insurance clause" and the "encumbrance clause," at the time of the execution and delivery of the policy.

**Same — retroactive waiver — validity.**

3. A local agent of an insurance company, whose only power is to solicit applications for insurance, and forward them to the company for approval, when, if approved, the company issues the policy and causes it to be delivered to the insured, has no power to waive any of the provisions of the policy so delivered, and notice to such agent of "additional insurance" taken out by the insured after the delivery of the policy is not notice to the company.

(May 14, 1912.)

**E**RROR to the District Court of Okmulgee County to review a judgment in plaintiff's favor in an action brought to recover the amount due on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Davidson & Malloy for plaintiff in error.

Messrs. Stanford & Cochran, for defendant in error:

A condition in a policy of insurance which expressly provides that it can be waived only by an indorsement of the waiver written upon the policy may be waived by implication or orally by an agent.

Continental F. Ins. Co. v. Brooks, 131 Ala. 614, 30 So. 876; Germania F. Ins. Co. v. Hick, 125 Ill. 361, 8 Am. St. Rep. 284, 17 N. E. 792; Whited v. Germania F. Ins. Co. 76 N. Y. 415, 32 Am. Rep. 330; Horton v. Home Ins. Co. 122 N. C. 498, 65 Am. St. Rep. 717, 29 S. E. 944; American Cent. Ins. Co. v. McCrea, 8 Lea, 513, 41 Am. Rep. 647; Morrison v. Insurance Co. of N. A. 69 Tex. 353, 5 Am. St. Rep. 63, 6 S. W. 605; Stolle v. Aetna F. & M. Ins. Co. 10 W. Va. 546, 27 Am. Rep. 593; Rudd v. American Guarantee Fund Mut. F. Ins. Co. 120 Mo. App. 1, 96 S. W. 237; Home F. Ins. Co. v. Bernstein, 55 Neb. 260, 75 N. W. 839; Hunt v. State Ins. Co. 66 Neb. 121, 92 N. W. 921; British America Assur. Co. v. Francisco, — Tex. Civ. App. —, 123 S. W. 1144; Grubbs v. North Carolina Home Ins. Co. 108 N. C. 472, 23 Am. St. Rep. 62, 13 S. E. 226; Phoenix Ins. Co. v. Spiers, 87 Ky. 285, 8 S. W. 453; Thompson v. Traders' Ins. Co. 169 42 L.R.A.(N.S.)

Mo. 12, 68 S. W. 889; Lutz v. Anchor F. Ins. Co. 120 Iowa, 136, 98 Am. St. Rep. 349, 94 N. W. 274; Pearlstine v. Westchester F. Ins. Co. 70 S. C. 75, 49 S. E. 4; Swedish-American Ins. Co. v. Knutson, 67 Kan. 71, 100 Am. St. Rep. 382, 72 Pac. 526; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339; Phoenix Ins. Co. v. Grove, 215 Ill. 299, 25 L.R.A.(N.S.) 1, 74 N. E. 141; Willis v. Germania & H. F. Ins. Co. 79 N. C. 285; Westchester F. Ins. Co. v. Earle, 33 Mich. 143; Wheaton v. North British & M. Ins. Co. 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758.

An agent of an insurance company who takes out other insurance on property for another company, on which he has previously procured insurance, becomes thereby the medium of notice of that fact to the first insurer, and it cannot afterward defend on that ground, not having availed itself of the privilege to cancel or forfeit the policy for such over-insurance.

McCollum v. Hartford F. Ins. Co. 67 Mo. App. 76; Turner v. Providence-Washington Ins. Co. 86 Mo. App. 387; Gish v. Insurance Co. of N. A. 16 Okla. 59, 13 L.R.A.(N.S.) 826, 87 Pac. 869; Taylor v. Insurance Co. of N. A. 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354.

Brewer, C., filed the following opinion:

This is a suit brought to recover on a fire insurance policy. It was commenced in the district court of Okmulgee county on October 3, 1908. The policy was issued August 10, 1907. The property insured was destroyed by fire June 2, 1908. The plaintiff in the district court recovered the full amount named in the policy, and is defendant in error in this court.

In the petition filed below the plaintiff declared on the policy, attached copy to his petition as part thereof, alleged the loss of the insured property by fire, the value of the property destroyed, and "that more than sixty days have elapsed prior to the commencement of this suit, after sufficient proof of the loss and damage by fire as aforesaid, and that the plaintiff has duly complied with all the terms and conditions of said policy to be kept or performed." The defendant filed answer consisting of a general denial, and alleged, as special defenses, a violation by plaintiff of the conditions and terms of the policy, in that he had violated the clause prohibiting additional insurance without consent of the company indorsed on the policy; also that a portion of the goods insured had been removed from the premises without such consent; and also that the title to the property was not as stated in the policy, together with other defenses not

necessary to be recited here. To this answer the plaintiff filed a general denial by way of reply. Upon the issues thus presented, a jury was impaneled and the cause proceeded to trial. During the trial plaintiff filed an amended reply, in which he admitted the taking out of additional insurance, and that consent so to do had not been indorsed on the policy, but alleged that, because of the knowledge and the acts of the agent of the company, the said provision had been waived. The plaintiff also met the other special defenses by alleging waivers of the same. The defendant objected to the filing of this reply, and after it was filed moved to strike the same, because it was a departure and inconsistent with the allegations of the petition. Defendant also demurred to the reply. Both motion to strike and the demurrer were overruled by the court, to which exceptions were saved. At the close of the evidence defendant asked a peremptory instruction in its favor, which was refused.

Under our view of the case, only two propositions are necessary to be discussed. They are: First, the action of the court in refusing the motion to strike the reply on the ground of departure; second, the question of additional insurance, and the alleged waiver, and the evidence regarding same.

On the first proposition, that of departure, we think the court materially erred. This is manifest under the former decisions of this court. We are aware that in many Code states this practice is permitted; but in this state, under our Code, it has been held to be a departure, as inconsistent with the petition. The statute relative to what may properly be stated in a reply seems to confine the same to allegations not inconsistent with the petition. The statute is as follows: "Sec. 5642. When the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, and constituting a defense to such new matter in the answer. . . ." This statute was construed by this court in a case wherein the pleadings were in a state identical with the case at bar, except that the defect in the case decided was taken advantage of by an objection to the introduction of evidence and by a motion for a judgment on the pleadings. The case referred to is *St. Paul F. & M. Ins. Co. v. Mountain Park Stock Farm Co.* 23 Okla. 79, 99 Pac. 647. In that case the court held that there was clearly a departure, but that, inasmuch as it had not been taken advantage of in the proper manner, it was waived; and the 42 L.R.A. (N.S.)

court proceeds at length to discuss the question, and examines and collects in the opinion numerous authorities showing that, in case of a departure, the proper way to raise and save the question is by a motion to strike, as was done in the case at bar. It is almost as essential that there be rules regulating pleadings and the joining of issues, as that there be pleadings at all; and when a rule has been carefully considered and announced for the guidance of attorneys in an important matter of pleading, it will not do to say that it may be entirely ignored.

We quote somewhat extensively from the case cited above, believing such course to be of service to the bar of the state. After stating the facts as suggested above the court say: "That this was a departure there is no doubt, but neither method of assault called the court's attention to a departure in the reply, which could not be taken advantage of under our practice except by motion to strike, as the same is no ground for demurrer under our statute. 6 Enc. of Pl. & Pr. 468, lays down the general rule thus: 'In most of the United States departure may be taken advantage of by a general demurrer. In other states, however, it has been decided that advantage is to be taken of a departure in an opponent's pleading by a motion to strike out, or by an objection to its filing,'—citing authorities. We have examined all the works available on Code pleading, and in none of them find it laid down or intimated that this defect can be taken advantage of by objecting to the introduction of evidence under the pleadings. The only case called to our attention where it is so held is *Johnson v. State Bank*, 59 Kan. 250, 52 Pac. 860, which, while admitting the general rule to be as stated *supra*, cites no authority to support the rule laid down in that case, and we refuse to follow it. Rather will we follow the practice as indicated in a later case decided by that court, in *Union Casualty & Surety Co. v. Bragg*, 63 Kan. 291, 65 Pac. 272, in which was recognized the rule as stated in 6 Enc. Pl. & Pr. 468, *supra*. In that case the pleadings were in a state identical with those in the case at bar, except that the reply was assailed for a departure by both a demurrer and a motion to strike. The former the court refused to consider, because not filed in time. The latter was heard and overruled, which was so far held to be the proper practice that the same was not questioned. On appeal, the supreme court held that in failing to strike the reply the trial court erred, and for that reason reversed and remanded the cause for a new trial. In *Ma-gruder v. Admire*, 4 Mo. App. 133, the court held the reply to be a departure, and that

the trial court erred in refusing to strike it out. In *Freeman v. Speegle*, 83 Ala. 191, 3 So. 620, it is held that the proper mode of raising the question of departure is a motion to reject or to strike from the files, and that the same could not be raised by demurrer, citing *David Avenue R. Co. v. Mallon*, 57 Ala. 168. See also *Morris v. Beebe*, 54 Ala. 300. It is obvious that this is the better practice, as, in case the motion to strike is sustained, it calls attention sharply to the defect in the pleading, and gives the plaintiff an opportunity to amend his petition before going to trial."

There is nothing to be added to the above. It stands as a careful, well-considered construction of the statute. It imposes no hardship on the pleader; in fact, it was announced to obviate hardship. If the pleader unthoughtfully falls into this error, the motion to strike, stating the grounds, calls his attention pointedly to his mistake, at a time when he can correct it and save his case. If he does not care to do so, but rather prefers, because disagreeing with the wisdom of the rule, to risk his case on the theory that the court will overturn the same upon further consideration, he ought not to complain if the court disappoints him by not doing so.

Second. Our conclusions on the first proposition, as stated above, require a reversal of this case. But the requirements of justice and the rights of the parties in this suit compel us to go further and consider the second proposition. It is admitted that, long after the issuance of the policy, additional insurance on the property was taken out and was in existence at the time of the loss, and that the consent of the company had not been obtained and indorsed in writing upon the policy in suit; but it is attempted to be shown that the company through its local agent waived the same. The policy sued on is one sometimes called "a home office policy;" that is, one issued direct by the president and secretary of the company, as contradistinguished from one issued by a local agent, and which is required to be countersigned by such local agent. The policy provides: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Upon the question of changes, modifications, or waivers, affecting the same, the policy further provides: "And no officer, agent, or other representative of this company, except the president or secretary of this company, in Muskogee, Okla. 42 L.R.A.(N.S.)

homa, shall have power to waive, change, or modify any provision or condition of this policy, except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative, except the president or secretary of this company, in Muskogee, Oklahoma, shall have such power, or be deemed or held to have waived, changed, or modified such provisions or conditions, and such waiver, if any, shall be written upon or attached hereto. . . ."

The rule has been recently announced in this court that a local agent of an insurance company, clothed with authority to solicit and execute, by countersigning as agent a contract of insurance, has power to waive the conditions of the policy, such as the "additional insurance clause" and the "encumbrance clause," at the time of the execution and delivery of the policy. *Western Nat. Ins. Co. v. Marsh*, — Okla. —, ante, 991, 125 Pac. 1094; *Insurance Co. of N. A. v. Little*, — Okla. —, 125 Pac. 1098. But it will be observed, by referring to those cases, that they were predicated upon the fact that the agent had authority to execute and deliver the contract; that he was in fact, as has been sometimes said, the company's *alter ego*; and, further, that those cases do not extend the rule to cases of alleged waivers after the execution and delivery of the contract, although it is true that there is much authority extending the rule to that length. The case at bar has not been brought within the rule announced in those cases.

In this case the character of the alleged local agent, or the nature or extent of his power and authority as such, is not in any way made to appear. He did not countersign, nor does his name anywhere appear on, the policy, or on the written application upon which it was issued. No attempt is made to show that he was clothed with power to take risks, or execute and deliver policies, for this company. The policy was executed at the home office of the company, by the president and secretary of the company, upon the written application of the insured. It is not shown how, when, or by whom it was delivered. The company, in its brief, asserts, and it is not challenged, that the local agent was merely a soliciting agent, with no power except to take applications for insurance and forward them for approval to the home office, which, if approved, issued the policies and caused them to be delivered. The record supports this statement, although it is not clearly shown. This being the nature of the agency, at

least as far as the proof shows, the question of the knowledge and acts of such agent relative to implied waivers is very different than in cases where the agent has power to accept the risk, and countersign and deliver the contract of insurance.

The burden of showing the power and authority of the agent, and the nature and extent of his agency, was upon the plaintiff. He has not discharged it. This general rule is stated in Wood on Fire Insurance thus (§ 17): "The burden is upon the person seeking to enforce a parol contract of insurance to establish, not only the making of a contract, but also the authority of the agent to make it, and if any waiver is relied upon, both the waiver and the authority of the agent to make it. . . ." The general rule stated in 16 Am. & Eng. Enc. Law, 2d ed. 915, regarding the power of soliciting agents, seems to be supported by the current of decisions. It is: "A soliciting agent who is authorized to receive applications for insurance and to transmit them to the company for its approval, but who has no authority to pass on risks, or to make contracts of insurance, cannot bind the company by an oral agreement for, . . . or . . . consent to, additional insurance."

We are aware that there is much conflict in the authorities regarding the power of such agents relative to questions of waiver, where they arise, or grow out of the taking of the application; such, for instance, as misstatements made in the application, when written out by the agent for the insured, etc.; many cases holding the company liable upon the ground that the taking of the application, and matters done by him in connection therewith, are within his power. But in cases where the agent has only the power to take applications and forward them to the company for its approval, and after the policies have been issued thereon, deliver them, we think the great weight of authority supports the rule that such agent has no power to change, modify, or waive any of the conditions of the policy, and that, if he does so, it would not be binding on the company. In support of this general proposition we cite the following cases from fifteen states: O'Brien v. New Zealand Ins. Co. 108 Cal. 227, 41 Pac. 298; Smith v. Continental Ins. Co. 6 Dak. 433, 43 N. W. 810; Rockford Ins. Co. v. Boirum, 40 Ill. App. 129; Dryer v. Security F. Ins. Co. 94 Iowa, 471, 62 N. W. 798; Armstrong v. State Ins. Co. 61 Iowa, 212, 16 N. W. 94; Bowlin v. Heckla F. Ins. Co. 36 Minn. 433, 31 N. W. 859; Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co. 145 Mass. 265, 13 N. E. 902; Lohnes v. Insurance Co. of N. A. 121 Mass. 439; Embree v. German 42 L.R.A. (N.S.)

Ins. Co. 62 Mo. App. 133; Home F. Ins. Co. v. Garbacz, 48 Neb. 827, 67 N. W. 864; Heath v. Springfield F. Ins. Co. 58 N. H. 414; Bush v. Westchester F. Ins. Co. 63 N. Y. 531; Van Allen v. Farmers' Joint-Stock Ins. Co. 64 N. Y. 469; Healey v. Imperial F. Ins. Co. 5 Nev. 268; New York Union Mut. Ins. Co. v. Johnson, 23 Pa. 72; Hankins v. Rockford Ins. Co. 70 Wis. 1, 35 N. W. 34; Fleming v. Hartford F. Ins. Co. 42 Wis. 616; Duluth Nat. Bank v. Knoxville F. Ins. Co. 85 Tenn. 76, 4 Am. St. Rep. 749, 1 S. W. 689; Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 65; Critchett v. American Ins. Co. 53 Iowa, 404, 36 Am. Rep. 230, 5 N. W. 543; Stockton v. Firemen's Ins. Co. 33 La. Ann. 577, 39 Am. Rep. 277.

The pleading admitted a violation of a provision in the policy, which it is not doubted is a valid one. The evidence wholly fails to show a waiver of the provision by the company, or anyone shown to have authority to waive the same for the company. The court should have instructed a verdict for the defendant below.

The cause should therefore be reversed, and judgment entered for defendant.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied.

## UNITED STATES SUPREME COURT.

GERMAN ALLIANCE INSURANCE COMPANY, Plff. in Certiorari,  
v.

HOME WATER SUPPLY COMPANY.

(226 U. S. 220, 57 L. ed. —, 33 Sup. Ct. Rep. 32.)

**Water — municipal supply — breach of contract — liability.**

1. A contract by a city with a water company for a water supply will not sustain an action against the company for a breach of its contractual obligations to furnish water for fire protection, brought by a taxpayer whose property was destroyed by fire as the result of such breach.

**Tort — failure to furnish water — fire — liability.**

2. An action *ex delicto* cannot be maintained against a water company by a tax-

**Note.** — As to right of property owner to maintain action against water company for failure to supply sufficient water for fire purposes, as required by its contract with the municipality, see notes to Howsmon v. Trenton Water Co. 23 L.R.A. 146; Mugge



payer whose property has been destroyed by fire in consequence of the company's failure to comply with its contract with the municipality to furnish water for fire protection.

(December 2, 1912.)

**C**ERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment affirming a judgment of the Circuit Court for the District of South Carolina sustaining a demurrer to and dismissing the complaint in an action brought to recover damages for failure of defendant to furnish water for fire protection. Affirmed.

**Statement by Mr. Justice Lamar:**

"The Spartan Mills" owned a number of houses in Spartanburg, South Carolina. They were damaged by fire on March 25, 1907. The German Alliance Company, which had insured the buildings, paid \$68,000, the amount of the loss, took from the mills an assignment "of all claims and demands against any person arising from or connected with the loss or damage," and brought suit, in the United States court for the district of South Carolina, against the Home Water Supply Company, on the ground that the fire could easily have been extinguished and the damage prevented if the water company had complied with its contract and duty to furnish the inhabitants of the city with water for fire protection.

The complaint alleged that on February 14, 1900, the city council adopted an ordinance, ratifying a contract, previously prepared, between the city and the water company, by which the latter was empowered, for a term of thirty-three years, to lay and maintain pipes in the streets and operate waterworks with which "to supply the city and its inhabitants with water suitable for fire, sanitary, and domestic purposes." The city agreed to use the hydrants for the extinguishment of fires and sprinkling purposes only; to make good any injury which might happen to them when used by its fire department; to pay rent for said fire protection, for the term of ten years, at the rate of \$40 per year for each hydrant, and annually to levy a tax sufficient to pay what should become due under the contract.

The company agreed to lay at least 6 miles of pipe, but on sixty days' notice from the city would lay additional pipes and install hydrants, not less than ten to the mile, for each of which the city was to pay \$40 per year.

The company agreed to keep all hydrants supplied with water for fire protection, and to maintain a height of at least 70 feet of water in the standpipe. If any hydrant remained out of order for more than twenty-four hours, after notice, the company was to pay the city \$7 per week while each hydrant was unfit for use.

It was further alleged that in 1905 and 1906 the city ordered the company to "put in certain hydrants with connecting pipes," "which order, if obeyed, would have carried water protection to within about 200 feet of the building which first caught fire on March 25, 1907, instead of 650 feet, which was the distance of the nearest hydrant to the said fire on said day; that in violation of its duty and obligation to adequately protect the property from fire, and in defiance of the order of council, the defendant failed to make such extensions, and as a direct result there was no plug near enough to furnish water to extinguish said fire,—all due to the defendant's culpable and wilful negligence and disregard of duty and obligations to said city and its inhabitants."

Other breaches were charged, in laying 4-inch instead of 6-inch pipe; in neglecting to install the electric cut-off; and "in failing absolutely to furnish water with which to extinguish such fire and prevent its spreading to other houses."

The defendant made no question as to the right of the insurance company to maintain the action if the Spartan Mills could have done so, but filed a general demurrer which was sustained July 14, 1908. That judgment was affirmed November 4, 1909, by the circuit court of appeals (post, 1005, 99 C. C. A. 258, 174 Fed. 764), and the case was brought here by writ of certiorari.

**Messrs. Hartwell Cubell and Stanleyne Wilson**, for plaintiff in certiorari:

When an individual or a private corporation for valuable consideration has contracted to render services of a public na-

v. Tampa Waterworks Co. 6 L.R.A.(N.S.) 1171; and *Hone v. Presque Isle Water Co.* 21 L.R.A.(N.S.) 1021; and later case, *Lutz v. Tahlequah Water Co.* 36 L.R.A.(N.S.) 568.

The question not being one of Federal law, the decision of the Supreme Court in the reported case is not necessarily controlling upon the state courts; and it has therefore been deemed advisable to report 42 L.R.A.(N.S.)

the opinion of the circuit court of appeals in this case (see post, 1005), for the sake of its valuable discussion of the principles applicable to this much controverted subject.

The liability of a water company for destruction of municipal property in consequence of failure to maintain sufficient pressure is discussed in the note to *Milford v. Bangor R. & Electric Co.* 30 L.R.A.(N.S.) 526.

ture, such individual or corporation, by operation of law, becomes charged with a duty to the public, and may be held liable for the negligent discharge of that duty to any member of the public who may be injured thereby.

*Lyme Regis v. Henley*, 3 Barn. & Ad. 77, 5 Bing. 91; *Payne v. Partridge*, 1 Shower, K. B. 255; *Lyn v. Turner*, Cowp. pt. 1, p. 86; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686, L.R. 1 H. L. 93, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648; *Little v. Banks*, 85 N. Y. 258; *Lampert v. Laclede Gaslight Co.* 14 Mo. App. 376; *Appleby v. State*, 45 N. J. L. 161.

A private citizen has the right to recover as for a tort against a water company whose failure to furnish adequate water for a fire protection has caused damage.

*Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L.R.A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; *Fisher v. Greensboro Water Supply Co.* 128 N. C. 375, 38 S. E. 912; *Mugge v. Tampa Waterworks Co.* 52 Fla. 371, 6 L.R.A. (N.S.) 1171, 120 Am. St. Rep. 207, 42 So. 81.

When a company undertakes to supply a town with water, the ordinary methods to obtain water to extinguish fires are abandoned by the people, and under such circumstances it would be gross negligence in the company to permit the supply of water to be intermitted or diminished to any considerable extent and thus endanger the property within the town.

*State ex rel. Olmsted, Prosecutor, v. Morris Aqueduct*, 46 N. J. L. 495.

The assumption that water for fire purposes is furnished to the city, and not to its inhabitants, and that therefore the company is not engaged in a public service, is untenable.

*Planter's Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1250, 27 So. 684; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Bonaparte v. Camden & A. R. Co.* Baldw. 223, Fed. Cas. No. 1,617; *Kiernan v. Metropolitan Constr. Co.* 170 Mass. 378, 49 N. E. 648; *Washington v. Washington Water Co.* 70 N. J. Eq. 254, 62 Atl. 390; *Public Service Corp. v. American Lighting Co.* 67 N. J. Eq. 122, 57 Atl. 482.

Messrs. I. A. Phifer, Ralph K. Carson, and Thomas Ruffin, for defendant in certiorari:

A water company is not liable in tort for loss to one sustaining no contract relation with it, by its failure to comply with its contract with the municipality. 42 L.R.A. (N.S.)

*Mugge v. Tampa Waterworks Co.* 6 L.R.A. (N.S.) 1171 note; 3 Mich. L. Rev. 501-507.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court:

In *Ancrum v. Camden Water, Light & Ice Co.* 82 S. C. 284, 21 L.R.A. (N.S.) 1029, 64 S. E. 151, the supreme court of South Carolina, construing a contract much like the one here involved, held that a taxpayer could not maintain an action against a water company for damage due to its failure to furnish water as required by such an agreement with the city. The plaintiff, however, contends that although the present suit is for damage to property located in South Carolina, that decision is not of controlling authority, because it was rendered two years after this action was begun. Relying on *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, it insists that when the contract was made, February, 1900, there was no settled state law on the subject, and therefore the Federal courts must decide for themselves, as matter of general law, the much controverted question as to a water company's liability to a taxpayer for failure to furnish fire protection, according to the terms of its contract with the city.

The courts have almost uniformly held that municipalities are not bound to furnish water for fire protection. Such was the unquestioned rule when they relied, as some still do, on wells and cisterns as a source of supply; nor was there any increase of liability with the gradual increase of facilities; though, with the introduction of reservoirs, standpipes, pumping stations, and steam engines, cities were frequently sued for damages resulting from an inadequate supply or insufficient pressure. But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

If the common law did not impose such duty upon a public corporation, neither did it require private companies to furnish fire protection to property reached by their pipes. And there could, of course, be no liability for the breach of a common-law, statutory, or charter duty which did not exist. It is argued, however, that even if, in the first instance, the law did not oblige the company to furnish property owners with water, such a duty arose out of the public service upon which the defendant en-

tered. But if, where it did not otherwise exist, a public duty could arise out of a private bargain, liability would be based on the failure to do or to furnish what was reasonably necessary to discharge the duty imposed. The complaint proceeds on no such theory. It makes no allegation that the defendant failed to furnish a plant of reasonable capacity, or neglected to extend the pipes where they were reasonably required. Nor is it charged that what the company actually did was harmful in itself or likely to cause injury to others, so as to bring the case within the principal applicable to the sale of unwholesome provisions, or misbranded poisons, which, in their intended use, would be injurious to purchasers from the original vendee. So that, notwithstanding numerous charges of culpable, wanton, and malicious neglect of duty, this suit—whether regarded as *ex contractu* or *ex delicto*—is for breach of the provisions of the contract of February 14, 1900, which must, therefore, be the measure of plaintiff's right and of the defendant's liability.

Whether a right of action arises out of such a contract, in favor of a taxpayer, is a matter about which there has been much discussion and some conflict in decisions. Although for nearly a century it has been common for private corporations to supply cities with water under this sort of agreement, we find no record of a suit like this prior to 1878, when the supreme court of Connecticut, in a brief decision (*Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1), held that the property owner was a stranger to the agreement with the municipality, and therefore could not maintain an action against the company for a breach of its contract with the city. Since that time similar suits, some in tort and some for a breach of the contract, have been brought in many other states. In view of the importance of the question, the subject has been examined and re-examined, the contract subjected to the most critical analysis, and many elaborate opinions have been rendered. They are cited in 3 Dill. Mun. Corp. 1340, and in the *Ancrum Case*, supra.

From them it appears that the majority of American courts hold that the taxpayer has no direct interest in such agreements, and therefore cannot sue *ex contractu*. Neither can he sue in tort, because, in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action *ex delicto*. A different conclusion is reached by the supreme courts of three states, in cases cited and discussed in *Mugge v. Tampa Waterworks Co.* 52 Fla. 371, 6 42 L.R.A. (N.S.)

L.R.A. (N.S.) 1171, 120 Am. St. Rep. 207, 42 So. 81. They hold that such a contract is for the benefit of taxpayers, who may sue either for its breach, or for a violation of the public duty which was thereby assumed.

The plaintiff presses these decisions to their logical conclusion and sues not for negligence in operating the plant, but for breach of the contract of construction. The complaint charges that as a direct consequence of the refusal to lay the pipes, as provided by the contract, there was no plug near enough to extinguish the fire. The other allegations as to putting in 4-inch instead of 6-inch pipe, and failing to install the electric cut-off, are immaterial, except on the theory that if the property owner was indeed a beneficiary, it, after acceptance, would be entitled to all the rights of the original promisee, and if not otherwise injured, might at least recover nominal damages for any breach. By the same reasoning it, with the other members of the class, might release the company from liability already incurred, or even discharge it altogether from the duty of carrying out the agreement in the future. If this did not entirely substitute the taxpayer for the municipality, it would at least subject the promisor to liability to many, where it only had contracted with one. *Dow v. Clark*, 7 Gray, 201.

In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different states. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted, it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings . . . but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." *Second Nat. Bank v. Grand Lodge, F. & A. M.* 98 U. S. 124, 25 L. ed. 76, Cf. *Hendrick v. Lindsay*,

93 U. S. 149, 23 L. ed. 857; National Sav. Bank v. Ward, 100 U. S. 202, 205, 25 L. ed. 623, 625.

Here the city was under no obligation to furnish the manufacturing company with fire protection, and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect,—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

He is interested in the faithful performance of contracts of service by policemen, firemen, and mail contractors, as well as in holding to their warranties the vendors of fire engines. All of these employees, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue, though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine prove defective, resulting in his building being destroyed by fire. 1 Beven, Neg. 3d ed. 305; Pollock, Torts, 8th ed. 434, 547; Davis v. Clinton Waterworks Co. 54 Iowa, 61, 37 Am. Rep. 185, 6 N. W. 126.

Each of these promisors of the city, like the water company here, would be liable for any tort done by him to their persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and, in the nature of things, could not have been, in contemplation of the parties.

The result is that plaintiff cannot maintain this action, and though based upon the general principle that the parties to a contract are those who are entitled to its rights, is in accordance with the particular intent of those who made this agreement.

If the company had, indeed, made a valid contract for the benefit of a third person, the amount of the damages for which it might be liable would be immaterial. Yet, where there is no such express agreement, and liability to a taxpayer is 42 L.R.A. (N.S.)

sought to be raised by implication, it is proper to test the correctness of the proposed construction by noting the results to which it would lead. The contract was made in February, 1900. By its terms the city was, during a period of ten years, to pay \$40 per annum for each hydrant. During that time the property subject to damage by fire might double or quadruple in value. The failure to provide that the water rent of \$40 per hydrant should rise or fall with the increase or decrease in such values indicates that liability for damage to that property was not in the contemplation of the parties, and that no payment therefor was included in the price for each hydrant. Otherwise the amount of payment would naturally have varied with the risk assumed.

In some states it is held that, in the absence of a statute, a city can neither directly nor indirectly make a contract with a water company that the latter should pay private individuals for fire damage, since that would involve the use of public money to secure a private benefit to the owner of private property. *Hone v. Presque Isle Water Co.* 104 Me. 217, 21 L.R.A. (N.S.) 1021, 71 Atl. 769. In the *Ancrum Case*, supra, the South Carolina court held that the amount paid per hydrant was so insignificant by comparison with the enormous risk involved, as clearly to indicate that neither the city nor the water company intended that the latter should be liable to the taxpayer for a breach of the company's contract with the city.

This conclusion deprives the property owner of no right, for if the city had owned the works, and had been guilty of the same acts as are charged against the water company here, no suit could have been maintained against the municipality. There was no creation of a right to fire protection if, instead of doing so itself, the city contracted with a private company to furnish water. It bought the citizen no new right of action, and did not bargain to secure for him an indemnity against loss by fire, but left him to protect himself against that hazard by insurance, paying the premium direct to an insurance company instead of indirectly, through taxation. When, in pursuance of such precaution, the Spartan Mills insured the houses, and the plaintiff later settled the fire loss, there was no right of action in favor of the manufacturing company against the water company to which the insurance company could be subrogated.

The plaintiff urges that, whatever the rule elsewhere, it is entitled to recover under the decision in *Guardian Trust & D.*

Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186. But the facts there differ from those in this record. There the water company had an exclusive right to use the streets in the city of Greensboro; under an ordinance which, among other things, provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant." 58. Buildings were destroyed as a result of the negligent failure of the company to furnish sufficient water while operating its plant. The owner brought suit against the water company in the courts of North Carolina, where it had previously been settled that such actions could be maintained. He recovered a judgment "for the tortious injury and damage done to the plaintiff by the negligence of the defendant." 128 N. C. 375, 38 S. E. 912, 115 Fed. 187. Execution issued, but no levy could be made, because the property of the water company was in possession of a receiver, appointed in foreclosure proceedings pending in the United States court. The plaintiff intervened therein, claiming that he was entitled to be paid before the bondholders by virtue of the North Carolina statute, which provided that "judgments for corporate torts" should take priority over older mortgages.

It was urged, among other things, by the bondholders, that the suit in the state court was really for breach of contract, and that entering the judgment as for a tort did not change the nature of the action so as to entitle the plaintiff to the benefits of the North Carolina statute.

It was that question alone, as to the character of the suit and judgment, which was before this court. What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation. The Fisher Case could not have decided the primary question as to the right of the taxpayer to sue, for that issue had been finally settled by the state court. It raised no Federal question and was not in issue on the hearing in this court. Neither did the Fisher Case overrule the principle announced in Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 124, 25 L. ed. 76, that a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest. The judgment of the Circuit Court of Appeals is affirmed. 42 L.R.A. (N.S.)

## UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

GERMAN ALLIANCE INSURANCE COMPANY, Plff. in Err.,

v.

HOME WATER SUPPLY COMPANY.

(99 C. C. A. 258, 174 Fed. 764.)

### Water company — breach of contract — right of consumer.

1. A taxpayer has no right of action *ex contractu* against a water company for breach of its contract with the municipality to furnish water for fire purposes, which results in loss of his property, where the contract has no provision making it liable to him.

### Same — liability in tort.

2. A water company which contracts with a municipality to furnish a supply of water for fire purposes does not undertake a public duty a breach of which will render it liable in tort for loss of the property of a taxpayer.

(November 4, 1909.)

**E**RROR to the Circuit Court of the United States for the District of South Carolina to review a judgment sustaining a demurrer to the complaint and dismissing an action brought to recover damages for breach of a contract to furnish water for fire purposes. Affirmed.

The facts are stated in the opinion.

Argued before Pritchard, Circuit Judge, and Waddill and McDowell, District Judges.

Messrs. Wilson & Osborne, with Mr. Hartwell Cabell, for plaintiff in error.

Messrs. Kirkland & Smith, with Mr. Ralph K. Carson, for defendant in error.

McDowell, District Judge, delivered the opinion of the court:

This is an action at law, brought by an insurance company against a water company, the complaint being drawn in accordance with the Code of South Carolina. The facts may be very briefly stated. Under a contract between the city of Spartanburg, South Carolina, and a water company (defendant in error), the latter was, as is alleged, required to lay 6-inch water mains, to place hydrants at certain intervals, and to maintain a certain pressure. It is alleged that the water company failed to comply with its contract in the respects above mentioned, and that in consequence a fire which could have been readily extinguished in its incipency if the contract had been

Note. — See ante, 1000, for a report of this case in the United States Supreme Court, and footnote thereto.

complied with destroyed a number of houses belonging to the Spartan Mills, a corporation doing business in Spartanburg, with all of its property in the city, and a city taxpayer, entitled to protection from fire. The houses had been insured by the plaintiff below (plaintiff in error), and, after payment of the losses to the mill company by the insurance company, the former executed a "subrogation receipt" to the insurance company, whereby the rights of the mill company were assigned to the insurance company. A demurrer to the complaint was sustained and the action dismissed.

As no question is made as to the right of the insurance company to maintain an action where a property owner could maintain it, we shall consider only the alleged liability to the property owner. It should also be stated that we have here no contract between the water company and the property owner, and neither ordinance nor provision in the contract between the city and the water company to the effect that the water company shall be liable to the property owners.

In considering the question of the alleged liability of the water company to the property owner, let us first consider the action at bar as being *ex contractu*, founded expressly on breach of contract. The property owner is not a party to the contract, and it is conceded that the city does not owe him the duty of furnishing water. The benefit to him is clearly not a direct benefit. A mere supply of water, adequate in amount and under full pressure, would not of itself avail him anything. It seems to us that the overwhelming array of authority denying liability must be held sound in result on the accepted principles of the law of contract. The argument that the city acts as the agent of the property owners in making such contracts does not seem to us to be sound. The city is in some sense the agent of the citizens in the aggregate. It is not the agent of the citizens separately and individually. This theory, if carried to its logical conclusion, would result in intolerable conditions, and is subversive of thoroughly established principles. No further weight seems to us to be given the argument in behalf of the property owner, by the fact that the consideration for the water company's agreement comes in large measure from the property owners. The connection is too remote. The water company, in case of default in payment by the city, must sue the city and force it to collect from the citizens. The water company cannot sue the individual citizen.

For rulings in favor of the right of recovery, see *Paducah Lumber Co. v. Paducah* 42 L.R.A. (N.S.)

*Water Supply Co.* 89 Ky. 340, 7 L.R.A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249 (which has been followed by some subsequent cases in Kentucky); *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720 (which was followed in *Fisher v. Greensboro Water Supply Co.* 128 N. C. 375, 38 S. E. 914); *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1243, 27 So. 684; *Mugge v. Tampa Waterworks Co.* 52 Fla. 371, 6 L.R.A. (N.S.) 1171, 120 Am. St. Rep. 207, 42 So. 81. We are also referred to *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907, which we have not been able to see, but which is said to intimate that *Howman v. Trenton Water Co.* 119 Mo. 304, 23 L.R.A. 146, 41 Am. St. Rep. 654, 24 S. W. 784 and *Phoenix Ins. Co. v. Trenton Water Co.* 42 Mo. App. 118, are unsound.

A sufficient number of the decisions against the right of recovery are found in *Lovejoy v. Bessemer Waterworks Co.* 146 Ala. 374, 6 L.R.A. (N.S.) 429, 41 So. 76, 9 Ann. Cas. 1068; 1 *Farnham, Waters*, § 160b; 30 *Am. & Eng. Enc. Law*, 2d ed. 429 et seq. See also *Anerum v. Camden Water, Light & Ice Co.* 82 S. C. 284, 21 L.R.A. (N.S.) 1029, 64 S. E. 151.

Can a right of action be maintained on the theory that this is an action in tort? Having reached the conclusion that the property owner has no right of action *ex contractu*, it would seem to follow that no liability in tort can exist, because the assumed duty arises only from a contract by which the plaintiff is not given any right of action. However, the opinion in *Guardian Trust & D. Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. Rep. 186, seems to us to call for the discussion which follows, especially in view of the following: "If the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and, if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

The first inquiry, of course, is whether or not the Supreme Court, in the case above mentioned, has rendered a binding decision

on the right of the property owner to recover from a water company under the circumstances alleged in the case at bar. We are of opinion that the court did not in that case decide this question. In that case the Supreme Court did decide that the judgment in the state court was a judgment in tort, and also that the effect of § 1255, N. C. Code 1883, was to make a judgment in tort against the successor in interest of a corporation mortgagor as effective as such a judgment against the mortgagor. In the opinion it is said: "The statute subordinates the mortgage to judgments for torts. Now what is the judgment? It is a determination that upon the facts stated the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that upon those facts the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or, if not conclusive, at least *prima facie*, evidence."

We have therefore a case in which the mortgagee had in effect contracted that its property, so to speak, should be bound by any judgment obtained without fraud against the mortgagor (or its successor), if the judgment were in tort. It follows that the character of the judgment obtained by Fisher in the state court was the only question presented to and decided by the Supreme Court. In other words, the question before the court was this: It being conceded in effect that Fisher had a right of action against the supply company, can this right of action be properly classed as sounding in tort? It is also to be remembered that the judgment in *Fisher v. Greensboro Water Supply Co.* came from North Carolina, one of the few states holding that there is privity of contract between the water company and the property owner. *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720. Such being the fact, there being a conclusively adjudicated privity of contract and a liability *ex contractu*, the ruling that there is a liability in tort for neglect in the performance of the contract is simply affirmatory of all of the large class of cases illustrated by the liability in tort of a common carrier to its passengers.

The question before us is therefore not settled by *Guardian Trust & D. Co. v. Fisher*, *supra*; but in view of what is there said some discussion of the question is necessary.

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It can only tend to clearness of thought to lay out of consideration at the outset that large class of cases in tort in which there is a direct contractual relation between the plaintiff and the defendant; such as the liability in tort of a common carrier to its passenger, including the "invitation to alight" cases; of the blacksmith to his customer, where the blacksmith by incompetence or negligence lames the horse; of the attorney to his client; and of the physician to his patient, where the contract of employment is made by the patient. In all such cases there is a relation between the plaintiff and defendant such as does not exist here,—a clear privity of contract.

It will also tend to clearness to lay aside those cases in which liability in tort arises from a violation of statute or lawful ordinance by the defendant. For instance, cases in which the plaintiff is injured at a public crossing by the failure of a railway company's servants to sound warnings or to check the speed of the train, in violation of statutes or ordinances. In such cases there is no contract relation at all, but the duty owing by the defendant to the plaintiff is more readily referable to the statute or the ordinance than to the common-law duty.

Cases in which there is no statute or ordinance governing the duty of a railway company at public crossings will be considered later on. And it may not be amiss to here call attention to the fact that in such cases the complaint is of a misfeasance, while in the case at bar the complaint is for what is to be classed as a nonfeasance.

Can it be said that the defendant here has entered upon the performance of a public duty? If so, there is a liability in tort to the property owner specially injured by neglect in the performance of such duty.

We are cited to *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, and *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648. In the first of these cases the defendant had contracted with the state to keep in repair the locks on certain sections of the Erie canal, and it was held that "a public officer, or a contractor engaged to perform the duties of a public officer, is liable for negligence or malfeasance to anyone sustaining special damage in consequence thereof."

In the *Baldwin* Case the defendant had contracted to keep a section of the canal free from obstructions, and was held liable to an insurance company which had paid losses to the owner of a canal boat sunk by reason of a snag negligently left in the canal by the contractor.

In *Robinson v. Chamberlain*, *supra*, it is said: "The only question in this case is

whether an action will lie against a contractor employed by the state, pursuant to law, to keep a portion of the canals in proper condition and repair, who neglects his duty, whereby the plaintiff sustains special damage. It is a familiar doctrine that, 'when a corporation or individual is bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty' (per Nelson, J., in *People v. Albany*, 11 Wend. 539, 27 Am. Dec. 95). A navigable river is a public highway; our canals, open and free to all for navigation upon payment of the toll fixed by law, as our turnpikes are for travel upon like terms, are, I think, in every sense, public highways. A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of anyone who has sustained special damage."

In the cases above mentioned there are features which distinguish them from the case at bar. In them the contract serves no necessary purpose other than to identify the person who should perform the duty. The duty is created by law; existed before the contract was made; an indictment lies for failure to perform it; and the public is the direct, and the state the indirect, beneficiary. In the case at bar the duty, if it exists, did not exist until the contract was made; the contract alone furnishes the measure of the duty; no indictment lies for failure to comply with the contract; and the city is the direct beneficiary, while the property owner is only indirectly and incidentally benefited. We have said that the contract alone creates the duty, if it exists. This is true, because it is universally conceded that the city owes no duty to its property owners to establish water-works, and, if the city does establish such works, it is not liable to its property owners for neglect in operation. *United States v. Sault Ste. Marie* (C. C.) 137 Fed. 258; 2 Dill. Mun. Corp. § 975; 28 Cyc. 1303; *Boston Safe-Deposit & T. Co. v. Salem Water Co.* (C. C.) 94 Fed. 238; *Metropolitan Trust Co. v. Topeka Water Co.* (C. C.) 132 Fed. 702, 704. We have said that the contract alone furnishes the measure of duty, if it exists. In a case such as we have here it would be clearly erroneous to say that the duty is to lay reasonably large mains, to install hydrants at reasonable intervals, and to maintain a reasonable, or a reasonably adequate, pressure. Such requirements may exceed the requirements of the contract. Consequently, if a duty to the property owner exists, it is a 42 L.R.A. (N.S.)

duty to use care to perform the contract. No indictment lies for failure to perform the contract, because such breach of contract is neither a crime nor a misdemeanor.

The remaining distinction is obvious without elaboration. In a contract to perform a true public duty the citizen is benefited directly. In the case at bar the property owners are indirectly benefited, and only then in the event that the city properly utilizes the water supplied by the water company.

It would seem therefore that we could not consider the defendant here as having entered upon the performance of a public duty, even if the contract itself did not negative such hypothesis.

In so far as the expression "public calling" conveys any meaning other than that implied in the term "public duty," it may here be said that it seems to us that the defendant here has not undertaken a public calling. The contract restricts its calling, in respect to supplying water for combating fire, to that of supplying the city. The defendant distinctly has not entered upon the calling of supplying water for fire purposes to the public. In the sense that a public calling is one that brings the one following the calling into contact with the public, in the sense that the calling is such that the public has an interest (even an indirect interest) in the manner in which it is carried on, the defendant has entered upon a public calling. But the question remains whether this particular public calling is such that a liability in tort to the public arises for acts of nonfeasance.

Let us now consider some cases of liability in tort where there is no contract, or in which the contract can be disregarded. Such cases may be illustrated as follows: Where a surgeon is employed by the father of the patient (*Gladwell v. Steggall*, 5 Bing. N. C. 733, 8 Scott, 60, 8 L. J. C. P. N. S. 361, 3 Jur. 535), or by the husband (*Pippin v. Sheppard*, 11 Price, 400) of the patient, and is liable in tort at the suit of the patient for malpractice or neglect; or where the physician is employed by the county authorities to attend charity patients at the almshouse (*Du Bois v. Decker*, 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. Rep. 529, 29 N. E. 313), and is liable in tort to a charity patient for incompetence or neglect; where a manufacturing pharmacist negligently labels a poison as a harmless drug and is held liable in tort to one who is thereby injured and to whom it was administered by a remote vendee (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455); and the case of a railway company injuring a person at a crossing by neglect, in the absence of statute or ordinance (23 Am. & Eng.



Enc. Law, 2d ed. 756); or where it is held liable notwithstanding compliance with an ordinance (Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679).

The most noticeable feature of these cases, which is common to all of them, is the danger to the public from neglect by the defendant. In each of these cases we may with some propriety say that the defendant had entered upon a dangerous calling. See also *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 178, 53 L. ed. 453, 463, 29 Sup. Ct. Rep. 270,—an excellent illustration of a dangerous calling.

In considering whether or not the water company has entered upon a calling to be properly classed as "dangerous," we are confronted by some differences between the cases instanced above and the case at bar.

There is in marked degree a helplessness on the part of the physician's patient, of the one who takes a mislabeled drug, and of the traveler on a level crossing, which is far from being so pronounced in the case of the property owner. He still has fire insurance, chemical extinguishers, and the same crude methods of combating fires in their incipency that he had before the city water plant came into existence.

If the danger of neglect in water company cases were so imminent as in the cases above mentioned, in view of the length of time that water companies have been in existence, we should have a "cloud" of decisions asserting liability in tort to property owners on the ground of "dangerous calling;" whereas, the absence of authority for taking such position is most marked.

If neglect by a water company in respect to supplying water for combating fire is so dangerous to the public that the company must be held to have entered upon a "dangerous calling," it would seem that the courts would long since have swept away the defense on the part of the city (furnishing water for fire purposes) that it is performing a governmental function. *Salus populi suprema lex*. The very fact that such defense is so universally held good seems to us a strong argument for holding that the danger to the public from neglect in supplying water for fire purposes is not so imminent or so extreme as to justify the courts in classifying the calling as "dangerous." The citizens had no right of action when the city was doing itself what it has since engaged the water company to do, and they are in no worse plight now. No very good reason suggests itself for holding that danger to the public becomes suddenly the dominant feature of the calling, because a private person or corporation has undertaken it.

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There remains a further distinction between the case at bar and the "dangerous calling" cases. In the latter the duty is independent of contract. In the case at bar, if the duty exists, it is created by and originates in a contract made with someone other than the plaintiff, and is so entirely measured by the contract that the supposed duty is simply to perform the contract.

In *Longmeid v. Holliday*, 6 Eng. L. & Eq. Rep. 562, Baron Parke said: "There are other cases, no doubt, besides that of fraud, in which a third person, although not a party to the contract, may sue for damage sustained by him if it be broken. These cases occur where there is a wrong done to a person for which he could have a right of action, although no such contract had been made."

The very fact that the duty, if it exists, originates in, and is only to be measured by, the contract, forbids the conclusion that the duty arises in behalf of anyone not in sufficient privity with the contractor to maintain an action *ex contractu*. In other words, the want of privity which denies to the plaintiff a right of action *ex contractu* forbids a finding that a duty to the plaintiff is created by the contract.

A difference between the case at bar and the admitted liability in tort of a water company which, for instance, leaves a trench open in a street, is found in the respect last above mentioned. In leaving a trench open, the duty to the person injured thereby does not originate in and is not measured by the contract between the city and the water company. The duty exists independently of and without reference to the contract. And this difference exists without reference to the further fact that in the case supposed the act complained of is in a sense affirmative, a misfeasance; while in the case at bar the act is negative, a non-feasance.

Let us now mention a few decided cases, generally accepted as sound, which seem to us to afford precedents for denying the existence of a right of action in tort in the plaintiff here.

In *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621, an attorney at law, employed and paid solely by his client, and without knowledge as to the purpose for which it was obtained, gave to his client an opinion on the title of real estate which the attorney supposed belonged to his client, to the effect that the title was good and the property unencumbered. The client had previously conveyed the property to another, and this conveyance, although on record, was overlooked by reason of the negligence of the attorney. The client used the opinion and thereby obtained a loan

from the bank, mortgaging the real estate as security therefor. By reason of the unreported conveyance the bank lost the loan and thereupon sued the attorney. The court, although not unanimously, held that the attorney was not liable to the bank.

In *Winterbottom v. Wright*, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415, it was held that the driver employed by the owners of a coach line could not maintain an action in tort against the builder of the coach, whose negligence in the construction of the coach caused an injury to the plaintiff.

In *Longmeid v. Holliday*, 6 Eng. L. & Eq. Rep. 562, 6 Exch. 761, 20 L. J. Exch. N. S. 430, A sold a lamp manufactured by A, to B, and by reason of negligence in the construction of the lamp B's wife was injured. It was held that an action in tort by the wife against A did not lie.

It cannot be denied that an attorney who prepares an opinion on title must know that it may be used to the injury of some one or more of the public; the coach builder must know that negligence in the construction of a coach, especially if it is to be used in public service, may result in death or injury to some of the public; the manufacturer of lamps must know that a lamp sold by him is likely to be used by others than his immediate purchaser, and that negligence in construction is to such extent dangerous to the public. And yet in these cases liability in tort was denied. A duty to the plaintiff was in each case held not to have existed, and in each case the plaintiff was injured as the result of a breach by the defendant of a contract with a third party.

We do not think it necessary to discuss at length the liability of a water company in case it were under no contract to supply water for fire purposes, but nevertheless undertakes to do so. *Guardian Trust & D. Co. v. Fisher*, 200 U. S. 69, 50 L. ed. 367, 26 Sup. Ct. Rep. 186. We have no such case here, but still it seems not improper to say that in our opinion there would be no liability in tort to the property owner unless there were also a liability *ex contractu* upon an implied agreement between the company and the property owner. If the consideration was paid by the city, and not directly by certain property owners, it would assuredly prevent the implication of an agreement between the water company and the individual property owners. And inability to maintain an action *ex contractu* on the part of the property owner would defeat his right to maintain an action *ex delicto*. If the water company were to collect from certain property owners direct, it is inconceivable that there should not be 42 L.R.A. (N.S.)

first an agreement at least as to the amount to be charged, and an implied promise to render some ascertainable service to the property owners paying therefor. No such case is likely to arise; but if it should, it would be so unlike the case at bar as to afford us no aid in reaching a proper conclusion.

Among the water company cases in which the question of liability in tort to the property owner was considered and denied may be mentioned: *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1, 5; *Foster v. Lookout Water Co.* 3 Lea, 42 (see note 33 Am. Rep. 8); *Fowler v. Athens City Waterworks Co.* 83 Ga. 219, 20 Am. St. Rep. 313, 315, 9 S. E. 673; *Nichol v. Huntington Water Co.* 53 W. Va. 348, 44 S. E. 290; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; *House v. Houston Waterworks Co.* 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179; *Ancrum v. Camden Water, Light & Ice Co.* 82 S. C. 284, 21 L.R.A. (N.S.) 1029, 64 S. E. 151; *Fitch v. Seymour Water Co.* 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982.

Our conclusion is that the judgment below must be affirmed.

Affirmed by the Supreme Court of the United States December 2, 1912, 226 U. S. 220, 57 L. ed. —, ante, 1000, 33 Sup. Ct. Rep. 32.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

JOHN SULLIVAN

v.

R. L. SAUNDERS

and

L. W. SIMPSON et al., Appts.

(66 W. Va. 350, 66 S. E. 497.)

#### Judgment — payment — note.

1. A note taken by a judgment creditor in consideration of his judgment, although made by a person not bound by the judgment, will not extinguish the judgment without an agreement by the creditor that the note is to operate as a payment.

#### Trust deed — purchaser of trust property — merger — intervening lien.

2. When a trust deed creditor buys the trust subject and takes a conveyance there-

Headnotes by WILLIAMS, J.

Note. — For merger of mortgage by conveyance from mortgagor to mortgagee, or revival thereof after such conveyance, where there are intermediate encumbrances upon the property, see note to *Pugh v. Sample*, 39 L.R.A. (N.S.) 834.

for from his debtor, his lien is not thereby so merged in his estate as to make his entire estate in the land subject to an intervening lien. Equity will preserve the trust lien for his protection, notwithstanding he may have executed a formal release of it. Same—rights of grantee.

3. Such trust deed lien will be kept alive by a court of equity in favor of a grantee of such purchaser also, where no injustice will be done thereby.

(December 1, 1909.)

**A** PPEAL by defendants Simpson et al., from a decree of the Circuit Court for Cabell County in plaintiff's favor in a suit to enforce a judgment lien against certain land. Reversed.

The facts are stated in the opinion.

Mr. George J. McComas, for appellants:

In equity acceptance by the trust deed creditor of a fee simple title, as to other subsequent lienors or grantees, did not work a merger of his lien into his fee simple title, notwithstanding the parties had undertaken to release or discharge the lien.

15 Am. & Eng. Enc. Law, 328; Stanton v. Thompson, 49 N. H. 272; Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782; Duffy v. McGuiness, 13 R. I. 595; Worcester Nat. Bank v. Cheney, 87 Ill. 602; Brooks v. Rice, 56 Cal. 428; Fuller v. Lamar, 53 Iowa, 477, 5 N. W. 606; Richardson v. Hockenhull, 85 Ill. 124.

Mr. C. S. Welch, for appellee:

A note will not be regarded as an absolute extinguishment or payment of a pre-existing debt, unless it be so expressly agreed, whether the note received was that of one previously bound or a stranger.

Cushwa v. Improvement, Loan & Bldg. Asso. 45 W. Va. 490, 32 S. E. 259.

Whether there was a merger and extinguishment of the deed of trust lien is a question of intention.

20 Am. & Eng. Enc. Law, 1064.

The trust deed lien was extinguished, and equity will not restore it to priority over the intervening judgment lien.

Atkinson v. Plum, 50 W. Va. 104, 58 L.R.A. 788, 40 S. E. 587; Woodside v. Lipold, 113 Ga. 877, 84 Am. St. Rep. 267, 39 S. E. 400; James v. Morey, 2 Cow. 246, 14 Am. Dec. 475; 20 Am. & Eng. Enc. Law, 2d ed. 1067.

Williams, J., delivered the opinion of the court:

This is a suit to enforce the lien of a judgment in favor of John Sullivan against five eighths of an acre of land formerly owned by R. L. Saunders, one of his judgment debtors, and now owned by C. C. 42 L.R.A. (N.S.)

Rhodes. Previous to the judgment, Saunders had given a deed of trust on the land, which was duly recorded, to secure a debt he owed to L. W. Simpson, and later conveyed the equity of redemption to Simpson. Simpson then conveyed the land to Rhodes, and later executed a release of his trust deed lien. Sullivan then brought his suit against Saunders, Simpson, and Rhodes, and on the 17th of September, 1907, a decree was made renting the land to pay the judgment. From this decree Simpson and Rhodes have appealed.

On May 13, 1897, Sullivan recovered a judgment in a justice's court against Geo. M. McDermitt, Gordon O'Beirn, R. L. Blackwood, W. G. Seiger, H. L. Kirtley, and R. L. Saunders for the sum of \$242.08, which was docketed on the 22d of June, 1897. On the same date of the docketing of the judgment Seiger gave his note to Sullivan for the amount of the judgment, payable one month after date at the Huntington National Bank, indorsed by E. M. Greene and E. M. Cobb, strangers to the judgment. Various sums were paid on this note at different times, until July 18, 1898, at which time there appeared to be due a balance of \$200, and for this amount Cobb and Greene executed to Sullivan their individual notes for \$100 each. Greene paid his note, but Cobb failed to pay any part of his. This note, with its interest, represents the balance claimed by plaintiff on his judgment; and the purpose of this suit is to enforce collection of this amount as a lien upon the land above mentioned.

Appellants insist that the acceptance of this note from one of the judgment debtors by Sullivan for the amount of his judgment, with indorsers thereon who were strangers to the judgment, and the subsequent acceptance of the two notes by the individual indorsers, operated as a payment and release of the judgment. Was the note a payment of the judgment? This is one of the points presented for decision. Mr. Sullivan testifies that these notes were not taken in payment of the judgment, but were only intended as collateral security therefor. The settled rule in England, and in most of the states of the Union, is that, where a new obligation is taken in consideration of a prior one, it does not operate as a payment, or satisfaction of the old obligation, unless such was the agreement or intention of the creditor, notwithstanding the new obligation binds new parties. The question whether or not it operates as a novation of the old debt is one of intention by the creditor; and the burden of proving that such was his intention rests upon the one who asserts it. This rule applies in cases where the original obligation and the subsequent one

are of equal dignity. It has even greater force in cases where the original obligation is of greater dignity than the new one. In the present case the notes did not operate to discharge the judgment. There is no evidence that Sullivan consented, or agreed, to treat the notes as payment. Consequently the acceptance of them by Sullivan did not operate to discharge the lien of his judgment. 30 Cyc. 1194-1197; *Cushwa v. Improvement, Loan & Bldg. Asso.* 45 W. Va. 490, 32 S. E. 259; *Feamster v. Withrow*, 12 W. Va. 611; *Barnett v. Miller*, 23 Gratt. 551; *Coles v. Withers*, 33 Gratt. 186; *Gilbert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 586; *Karn v. Blackford*, — Va. —, 20 S. E. 149; *McGuire v. Gadsby*, 3 Call (Va.) 234. On January 9, 1899, more than two years after the judgment had been obtained and docketed, Saunders and wife, by deed with covenants of general warranty, conveyed the land to L. W. Simpson, the consideration recited being \$300. The proof shows that the actual consideration for the deed was the debt secured by the deed of trust, and a small amount of money besides. The exact amount of money is not proven. It is also proven that the \$300 recited in the deed was the true amount of the consideration. On February 13, 1899, Simpson and wife conveyed the land to C. C. Rhodes, with covenants of general warranty of title, the consideration recited in the deed being \$250; and on the 27th of November, 1900, the lien of the trust deed was formally released by Simpson. The decree found the amount then due on the judgment to be \$148.50, which the court held to be a valid and subsisting lien upon the land, and decreed that unless the debt was paid by Saunders, or someone for him, within thirty days, the land should be rented. The decree does not expressly decide that the trust deed lien is extinguished; nor does it expressly subordinate the right of Rhodes in the land to the extent of said lien, to plaintiff's judgment. But it does so in effect, because it directs the renting of the property to pay the balance due on the judgment without regard to the prior trust lien.

The trust deed lien in favor of Simpson is not extinguished in equity by the conveyance of the land to him, so as to let in a junior lienor in preference to him. Neither is the land in the hands of Rhodes rendered liable in any greater extent to the payment of plaintiff's judgment than it would have been if the land had still remained in the hands of Saunders, the judgment debtor. The trust lien should be treated as still existing, and Rhodes is entitled to the benefit of it. The general rule of law is that, where the holder of a lien upon land afterwards

acquires the legal title, the lien is merged in his estate, and is extinguished. But the rule is subject to exceptions, and courts of equity will not follow it when justice requires the lien to be preserved in order to protect a right. Simpson's trust lien was superior to plaintiff's judgment lien. Why should he be in a worse position after becoming the owner of the land on which his lien existed than he was before, or why should Rhodes, his grantee, be put in any worse position than Simpson himself would have been, had he remained the owner? There is no good reason why Simpson's lien should not be considered as still existing; indeed, it must be so considered in order to do justice in this case. There is a clear equity here in favor of upholding the lien of the trust deed and preventing a merger of the lien with the legal estate afterwards acquired by Simpson from Saunders; and this equity attaches to the estate in the hands of Simpson's grantee, Rhodes. The fact that the lien was formally released on the record by Simpson after he had conveyed the property to Rhodes does not destroy the equity. No one was misled thereby to his prejudice. The supreme court of New Hampshire in the case of *Stanton v. Thompson*, 49 N. H. 272, says: "Whether the mortgage shall be kept on foot or not depends ordinarily upon the intention of the parties, but, in order to protect the mortgage against an intervening title, the law will uphold the mortgage, even when the parties had undertaken to discharge it, unless injustice would be done thereby." To the same effect are the following authorities: 4 Kent, Com. 102; 2 Pom. Eq. Jur. § 734; *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Powell v. Bell*, 81 Va. 222; *Allen v. Patrick*, 97 Va. 521, 34 S. E. 451; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Duffy v. McGuinness*, 13 R. I. 595; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Richardson v. Hockenhull*, 85 Ill. 124; *Brooks v. Rice*, 56 Cal. 428.

We fail to see why the court decreed a renting of the land instead of a sale of it. The decree recites that it appears that the rents and profits of the land would satisfy the judgment in five years. But how does it appear? The bill alleges that it will not rent for enough in five years. The answers of Saunders and Simpson deny this, and there is no proof on the question, it is true. But, notwithstanding there is no proof, the bill is taken for confessed as to Rhodes, the owner of the land. It would therefore seem that the finding of the court should have been to the contrary, at least, so far as Rhodes is affected by the question of the

rental value; and it is on the owner's account that the law provides for a renting, instead of a sale, of his land. There is no doubt that the equity of redemption, or the surplus value of the property, over and above the amount of the Simpson trust debt, is subject to plaintiff's judgment lien. But the court, instead of renting the land to pay the balance due on the judgment, should have first ascertained the amount of the Simpson trust debt, and should have sold the land to pay the two liens in the order of priority. First, the Simpson trust lien now held by Rhodes; and, second, plaintiff's judgment.

Plaintiff having alleged that his judgment was the only lien against the land, and the two set up in the suit appearing to be the only ones, it was not necessary to refer the cause to a commissioner. *Anderson v. Nagle*, 12 W. Va. 98; *Bock v. Bock*, 24 W. Va. 586. The demurrer to the amended bill was properly overruled; the bill states a proper case; and all persons interested in the land seem to have been made parties.

Other errors assigned are cured by the supplemental record brought up after the appeal was granted.

The decrees of the Circuit Court of Cabell County, rendered on the 17th of September, 1907, will be reversed, and the cause remanded for further proceedings according to the principles herein stated, and further according to the rules governing courts of equity.

## GEORGIA SUPREME COURT.

R. A. WILKINSON, Plff. in Err.,

v.

J. R. LEE.

(138 Ga. 360, 75 S. E. 477.)

**Parent and child — relinquishing control of child.**

1. A father is entitled, *prima facie*, to the control of his minor child.

(a) But parental power may be lost "by voluntary contract, releasing the right to

Headnotes by HILL, J.

**Note. — Validity of contract for transfer of parental responsibility or authority.**

This note, which is a continuation of a note on the same subject appended to *Enders v. Enders*, 27 L.R.A. 56, does not purport to deal with the effect of a contract surrendering parental responsibility or authority, upon the ultimate question as to the custody of the child, in the determination of which the best interests of the child will ordinarily be consulted (on that point, see note to *Re Pryse*, 41 L.R.A. (N.S.) 578); but rather with the preliminary, and somewhat abstract, question as to the validity of the contract itself. The distinction thus suggested between the validity and the effect of the contract is not always easy to preserve, but it is believed that any omission in the present note due to that cause is supplied by the note just referred to

a third person," or "by failure of the father to provide necessaries for his child."

(b) A contract releasing the right of parental power over a child must be clear, definite, and certain.

**Same — transfer of custody.**

2. Where a father, a few days after the death of his wife, voluntarily told the great-grandfather of his child, three days old, that he might take and keep the child as long as he and his wife lived, or until the child was twenty-one years old, and the great-grandparent did take, keep, maintain, and protect it until it was abducted by the father, at three years of age, this was a voluntary contract on the part of the father releasing his right to the child to a third person, and it was sufficiently definite and certain to be enforced.

(a) In such a case the contract is not void as being unilateral.

(b) Nor is it void and unenforceable for want of consideration.

(c) The evidence is amply sufficient to support the finding in this case.

**Habeas corpus — custody of child — temporary award.**

3. In a habeas corpus proceeding by a great-grandfather to recover possession of a child alleged to have been given to him by its father, and also alleged to have been abducted from him by the father, it is not reversible error for the court, *pendente lite*, to award the temporary custody of the child to the grandparent from whom it had been so taken, upon his giving bond for its production in court, where it appears that the final judgment was right.

**Same — pleadings — discretion — appeal.**

4. As strict technical pleadings are not required in habeas corpus proceedings as in some others.

(a) Judges of the superior court are vested with large discretion in habeas corpus cases, and their judgment in such cases on questions of law and fact will not be interfered with by this court, unless manifestly abused.

(b) The court below did not abuse its discretion in this case.

**Appeal — absence of error.**

5. The other grounds of error assigned are without merit.

(July 10, 1912.)

**ERROR to the Superior Court for De Kalb County to review a judgment in**

tion of which the best interests of the child will ordinarily be consulted (on that point, see note to *Re Pryse*, 41 L.R.A. (N.S.) 578); but rather with the preliminary, and somewhat abstract, question as to the validity of the contract itself. The distinction thus suggested between the validity and the effect of the contract is not always easy to preserve, but it is believed that any omission in the present note due to that cause is supplied by the note just referred to

plaintiff's favor in a habeas corpus proceeding to recover possession of defendant's minor child. Affirmed.

The facts are stated in the opinion.

Messrs. Alonzo Field and Paul L. Lindsay, for plaintiff in error:

The discretion of the court did not authorize the award under the evidence. By concession of the defendant in error, the court was robbed of its discretion, and there was no contract, or agreement that amounted to a contract, sufficient in law in the premises.

Miller v. Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; Looney v. Martin, 123 Ga. 209, 51 S. E. 304; Sloan v. Jones, 130 Ga. 836, 62 S. E. 21; Moore v. Dozier, 128 Ga. 90, 57 S. E. 110; Richards v. McHan, 129 Ga.

275, 58 S. E. 839; Cormack v. Marshall, 211 Ill. 519, 67 L.R.A. 787, 71 N. E. 1077, 1 Ann. Cas. 256.

Messrs. Hooper, Alexander and J. D. Kilpatrick for defendant in error.

Hill, J., delivered the opinion of the court:

This is a habeas corpus proceeding commenced by J. R. Lee, the great-grandfather of Theodore Lee Wilkinson, a minor child three years old, to recover possession of the minor from his father, R. A. Wilkinson. The plaintiff in error, Wilkinson, married the granddaughter of the defendant in error. By this union the child in controversy was born. The mother died seven hours later. After the funeral of the mother, the

This note is not intended to include cases of apprenticeship or statutory adoption of children, or cases where there has been an attempt at adoption which failed by reason of noncompliance with statutory regulations, or cases of agreements to adopt; nor does it include contracts or agreements concerning the custody of children executed between husband and wife, nor cases where a contract for the transferring of parental responsibility to a third person has been performed upon the part of the infant and its parents, and the reciprocal contract obligation is sought to be enforced against the other party.

As to placing one's child in the custody of another as implying contract not to reclaim child, see note to *Staté ex rel. Kearney v. Steele*, 16 L.R.A. (N.S.) 1004.

An agreement may be contrary to public policy and illegal because it affects a duty which one person owes to another. A class of agreements of this character is that in which a father surrenders the custody of his infant child. 9 Cyc. 542.

Parent cannot relieve himself of his obligations.

In many jurisdictions, as stated in the former note, it is held that public policy forbids a parent to attempt by contract to shirk his responsibility for the support, education, or training of his child, and in such jurisdictions a contract having such an object will be held void.

Thus, it is said that children are not chattels that may be disposed of by parents to other persons like property. "The ancient Roman law holding children to be the property of their fathers and subject to disposition by them as things, and not as persons, does not obtain in this country, and it would be contrary to public policy to make such a disposition of a child, and any transfer of the custody by a parent of his child to another is presumed to be a temporary surrender, unless the contrary clearly appears, which the parent may terminate, and assert his parental rights and reclaim the child at any time when the well 42 L.R.A. (N.S.)

fare of the child is not thereby interfered with." *Montgomery v. Hughes*, — Ala. —, 58 So. 113.

And a contract made by a mother on her deathbed, and assented to by the father, whereby she gave the custody of her children to her relatives, is null and void as against public policy. *Hibbette v. Baines*, 78 Miss. 695, 51 L.R.A. 839, 29 So. 80.

Also, where a mother undertook by will to give her children to her mother, with whom she had been living separate from her husband, and later the father, upon taking the children from such claimant under the will, agreed with her that whenever he found that he could not support them as well as they had been supported by her, they should be returned to her, such agreement was said to be against public policy and nonenforceable as against him. *Hernandez v. Thomas*, 50 Fla. 522, 2 L.R.A. (N.S.) 203, 111 Am. St. Rep. 137, 39 So. 641, 7 Ann. Cas. 446.

Likewise, the right to the custody of children cannot be divested or forfeited beyond recall by a letter written by the mother in a moment of caprice or discouragement, indefinite in its terms, and plainly written in order to avoid the jeopardy of an attack by the father upon her rights, although it indicates an intention, at the time it was written, of surrendering the children permanently, especially where they have remained but a few months with the donee, and the latter has not expended largely of his time or means on the faith of his continued control of the children. *Norval v. Zinsmaster*, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373.

And an agreement by a mother whereby she gives her child to another, and is not to visit it without the written consent of the donee, the intention of the latter being that the mother shall not know where the child is taken, thus undertaking to destroy the identity of the child, to hide it from its mother and hide its mother and parentage from it, is contrary to public policy, directly tends to encourage illegitimacy, is a wrong to the child, and void. *Re Revocation of Adoption*, 6 Pa. Dist. R. 256.

question arose as to what should be done with the child. There is a conflict in the evidence, but the preponderance of it is to the effect that the father, the plaintiff in error, being consulted about the disposition of the child, said, in substance, to the great-grandfather, Lee, that he "couldn't just give the child away like a puppy," but that he might take the child and keep it as long as he and his wife lived, or until the child was twenty-one years old. The plaintiff in error insists that the child was left as a temporary loan, and that no definite contract was set forth. This old couple did take the child, cared for it, and paid all of its expenses, of whatever kind, including medical bills, etc. The wife of Lee was not related to the child, she being a second

wife; but the evidence discloses that she was kind and attentive, and loved and cared for the child as a mother. Some time after the death of his wife, Wilkinson moved from Henry county, where he had lived and worked around in various places, and in the neighborhood where the Lees lived, and sometimes for the Lees. He was frequently a visitor at the Lee home, and seemed fond of the child. He was permitted to see the child as often as he wished, and on one occasion was allowed to take the child away from the Lee home to a picnic. Leave to take the child to his home for a visit shortly thereafter was refused. At one time Wilkinson gave Lee \$2 for the child, which he loaned out for the latter, but would never accept any compensation for

Similarly, a mother of an illegitimate child has imposed upon her by law obligations in respect of the child and responsibilities in connection with its bringing up, and has the right *prima facie* to the custody and possession of the child, and she cannot transfer these rights and liabilities to another or devert herself of them by a contract enforceable as against the transferee. *Humphrys v. Polak* [1901] 2 K. B. 385, 70 L. J. K. B. N. S. 752, 49 Week. Rep. 612, 85 L. T. N. S. 103.

Parents cannot enter into an agreement legally binding them to deprive themselves of the custody and control of their children; and after having signed such an agreement they can at any moment, if they so elect, resume their control over them. *Re Davis*, 18 Ont. L. Rep. 384.

#### Exceptions.

In some jurisdictions, however, a different view is taken of such a contract, and effect is given to it, especially where the best interests of the child will be subserved thereby.

Thus, in *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, the following observations are made: It is sometimes said that such a voluntary transfer is void, or that it is contrary to public policy, but the cases using such language show that it is not used in an absolute sense, but in the sense that such transfer is no impediment to the action of the court in determining what is best for the child. The law does not prohibit such a transfer, but on the contrary allows the child to reap the benefit thereof when it is to its interest so to do.

And in *Smidt v. Benenga*, 140 Iowa, 399, 118 N. W. 439, it is said that although, generally speaking, the natural parents are entitled to the care, custody, and control of their minor children, they may by agreement or conduct deprive themselves of this natural right, and confer it upon others.

And in *Proctor v. Rhoads*, 4 Ky. L. Rep. 453, it is said that it is not against public policy to allow a father to transfer to another the right to the custody of his in-

fant children, to perform for them those natural offices which the law lays on him.

Also a parol arrangement by which a father gives his child into the custody of others, to be reared by them until it shall become fifteen years of age, which is carried out until the child is seven years old, will be given effect, especially where it is not shown that the new home offered by the father is suitable. *Re Soloth*, 157 Mich. 224, 121 N. W. 764.

And a mother who voluntarily enters into an agreement to transfer her right to the custody of her child to another, with the provision that she may regain such custody upon paying the other in part for her services and expenditures, will not be allowed to take the child from the transferee without showing that the best interests of the child would be subserved thereby. *Re La Croix*, 160 Mich. 531, 125 N. W. 389.

So, it is held that when a father has abandoned his wife and child, an agreement by the wife giving her child to another to raise until of age as his own, with the right of baptism and change of name, though verbal, is valid and binding upon the parents, and there is no legal right of revocation reserved in the mother. As against the will of the foster parent, the real parent can have revocation of her contract only by decree of court, and it is not enough for her to prove that she is a suitable person to have custody of the child, but she must also establish, to the satisfaction of the court, that the best interests of the child require the revocation of the contract. *Gray v. Field*, 10 Ohio Dec. Reprint, 170.

And it is said that the custody of a minor by virtue of a fair agreement with the parent, not prejudicial to the welfare of the minor, is not unlawful or against public policy, and it is not such an illegal restraint as a court must relieve at the will or caprice of the parent. *Anderson v. Young*, 54 S. C. 388, 44 L.R.A. 277, 32 S. W. 448.

It is the settled rule in Maine that a minor child may be emancipated from its

the rearing or expenses of the child. About a year before the bringing of the present action, Wilkinson, the father, married a second time, and his wife was received at the Lee home on the same terms as her husband had been. No claim to the child as a matter of right seems to have been asserted by Wilkinson; and Mrs. Lee testified that on one occasion she told Wilkinson she had heard of a threat on his part to take the child away, which he denied. He testified that he made no reply. No question is raised in the record as to the excellent character of either party to the case, or as to the ability of either to properly raise, maintain, and educate the child. On Sunday, the 28th day of August, 1910, the day previous to the suing out of the writ

of habeas corpus, Wilkinson with his wife came on a visit to the Lee home, and were received as usual. His two brothers came in a buggy, but concealed themselves in the woods near the house, where they could not be seen by the Lees. The Lees and the Wilkinsons sat on the porch and ate water-melons. A little later Wilkinson walked out in the yard with the boy, then about three years old, and placed him in a buggy from which the horse had never been unhitched. Suddenly and without any apparent warning he drove off with the boy at a rapid gait. His wife, seizing her hat, rushed out into the road and was taken in the buggy of the brothers and driven rapidly away. The two sons of Lee, as soon as a horse could be hitched to a buggy, gave

parent by the voluntary act of the latter in surrendering the rights and renouncing the duties of his position. *Carthage v. Canton*, 97 Me. 473, 54 Atl. 1104.

Although an agreement by parents to deliver their children to another for the purpose of rearing them is not a legal and binding contract, because against public policy and in opposition to express provisions of statute, there may be circumstances under which effect will be given to such an arrangement when it appears to be for the best interests of the children. But when this is done, the one so retaining the children is only a temporary guardian, and has no authority to retain the custody indefinitely. *State ex rel. Anderson v. Anderson*, 89 Minn. 198, 94 N. W. 681.

And in *Chisholm v. Chisholm*, 40 Can. S. C. 115, 11 Ann. Cas. 213, it is held that an agreement by a widow without means, to give the legal guardianship of her child over to its paternal grandfather, upon his promise to educate the child and provide an annuity for the widow, not involving a separation between mother and child, is valid and enforceable, the court saying that such a family arrangement is most natural and commendable.

Such contract, to be enforced, must be clear, definite, and certain.

Such a contract, however, in order to be enforceable as against the parent, must be clear, definite and certain. *Monk v. McDaniel*, 116 Ga. 108, 42 S. E. 360; *Looney v. Martin*, 123 Ga. 209, 51 S. E. 304; *Richards v. McHan*, 129 Ga. 275, 58 S. E. 839; *Ex parte Reynolds*, 73 S. C. 296, 114 Am. St. Rep. 86, 53 S. E. 490, 6 Ann. Cas. 936.

So, a court is not justified in depriving a parent of the right to the custody of his child on the ground of an agreement on his part to give up that right, except where the agreement is established by a clear preponderance of evidence. *Dunkin v. Seifert*, 123 Iowa, 64, 98 N. W. 558.

It will be presumed in all such cases that the surrender of custody is intended to be but temporary, unless the contrary 42 L.R.A.(N.S.)

is made to appear by proof clear, definite, and certain. *Miller v. Miller*, 123 Iowa, 165, 98 N. W. 631.

Evidence that a father was asked by the brother of his wife, while they were standing in the presence of her dead body, to give over to the brother and his wife the care and custody of the two-months-old motherless child, and that the father did not answer, but that, upon being asked to shake hands if he could not speak, he took the offered hand, and that he left the child with the brother twenty-one months, does not establish an agreement that will be enforced against the father, especially where he subsequently insisted on his parental rights at different times quite distinctly. *Markwell v. Pereles*, 95 Wis. 406, 69 N. W. 798.

Though a contract of relinquishment of the custody of a child must be so clear as to be understood, so definite as to be capable of enforcement, and so certain as not to leave the right to the custody of the child in doubt, it is not required that the evidence as to the existence or terms of the contract shall be undisputed. *Manning v. Crawford*, 8 Ga. App. 835, 70 S. E. 959.

#### Right to revoke.

In those jurisdictions which hold such agreements void, the parent has the right at any time to revoke; but see under "Estoppel of parent," below.

Thus, in *Ex parte Canova*, 84 S. C. 473, 65 S. E. 625, 67 S. E. 476, it is held that, as a matter of law, whatever may have been the intention of the parties at the time of the gift, a mother has the right to revoke the parol gift of her child to another, even after it has been in effect two years, and may take the child again into her own custody; the donee must be presumed to have known the law, and to have assumed the risk of the mother's change of mind.

Similar situations arose in the following cases with the same holding: *Re Galleher*, 2 Cal. App. 364, 84 Pac. 352; *Hussey v. Whiting*, 145 Ind. 580, 57 Am. St. Rep. 220, 44 N. E. 639; *Casanover v. Massengale*, —



pursuit and overtook Wilkinson about 2 miles from the Lee home. Being called on by them to stop, he informed the Lees he had a gun. The pursuit was there abandoned, and the present action begun the next day before the Hon. J. R. George, ordinary of De Kalb county, to recover possession of the child so taken. The trial was postponed several times at the instance of Wilkinson, in order to allow him to take the testimony of his mother, who was unable to attend court. A continuance later, in order to take the testimony of other witnesses as to Wilkinson's good character, was denied; the counsel for Lee stating that the character of Wilkinson was admitted to be good. The court, after hearing all the testimony in the case and argument

of counsel, awarded the custody of the child to the plaintiff, Lee. To this judgment Wilkinson applied for a writ of certiorari to the superior court. After the hearing upon the certiorari, the superior court declined to interfere with the judgment of the ordinary, and the present writ of error was sued out, excepting to the judgment of the superior court.

1. A father is entitled, *prima facie*, to the control of his minor child. Civil Code, § 3021. But parental power may be lost, among other ways, "by voluntary contract, releasing the right to a third person," "or by failure of the father to provide necessities for his child." Civil Code, § 3021; *Janes v. Cleghorn*, 54 Ga. 9; *Bentley v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *Miller v.*

Tex. Civ. App. —, 54 S. W. 317; *Farrell v. Wilton*, 3 Terr. L. Rep. 232.

So, a parent's oral agreement that another shall have his child until its majority is not binding upon him when the best interests of the child intervene. (*Kuhn v. Breen*, 101 Iowa, 665, 70 N. W. 772); or when the mother, who has made such an agreement, later evinces the natural desire to reobtain her child, and shows a willingness and ability to care for it (*Re Donnelly*, 70 Misc. 584, 129 N. Y. Supp. 120).

#### Children restored.

Where a wife, while living separate from her husband, just before her death gave her two-year-old child to her brother, and where the only consent on the part of the husband to this arrangement was his acquiescence therein for six years, the gift under those circumstances was said not to be sufficient to prevent the husband and father from retaking possession of the child; and the court adds that, had the father been present and consented to the wish of the mother, or otherwise verbally agreed that the brother should have the custody and maintenance of his child, such contract would not debar him from the right to reclaim the child, unless the best interests of the child demanded that he be denied its custody. *Parker v. Wiggins*, — Tex. Civ. App. —, 86 S. W. 788.

And a father who is a suitable and capable person is entitled to the custody of his three-year-old child, notwithstanding a verbal agreement made when the child was three months old that her maternal grandparents should keep her for compensation until she was six years old, and although they have carried out the agreement thus far. *Carey v. Hertel*, 37 Wash. 27, 79 Pac. 482.

Also evidence that a father upon the death of his wife, and at her request, gave his child and the birth papers to another, saying he would never consent to take the child from that other, but that he refused later to give formal adoption papers, shows an intention only to give over the mere custody of the child for the time being, 42 L.R.A.(N.S.)

and does not furnish such clear, definite, and certain proof of an absolute relinquishment of his rights as is necessary in order to prevent him from subsequently demanding possession of his child. *Miller v. Miller*, 123 Iowa, 165, 98 N. W. 631.

So, a parent cannot absolve himself from parental duties by an agreement, but so far as his personal rights are concerned, it is competent for him to enter into an arrangement with another whereby the right to the custody of the child shall alternate between them for specified periods, and by such agreement the parent surrenders at least a portion of his rights, but he may, under proper showing of material changes in the condition of the parties to the agreement, regain the right to the sole care and custody of the child. *Hohenadel v. Steele*, 237 Ill. 229, 86 N. E. 717.

Likewise, an arrangement made by a parent that his child shall remain with and be cared for by others for a fixed annual compensation will not prevent his retaking the child, if he is a proper and competent person. *Van Auker v. Wieman*, 128 Iowa, 476, 104 N. W. 464.

And the fact that a mother voluntarily committed her two-year-old child to his paternal grandparents, and permitted him to remain with them until mutual affection sprang up, will not prevent her from regaining her child, especially when she gave him up only when her husband refused longer to provide for him, and when the health of the child required a change of climate, in view of the fact that the mother thereafter contributed to his support. *Wilson v. Mitchell*, 48 Colo. 454, 30 L.R.A.(N.S.) 507, 111 Pac. 21.

And in *Re Porter*, 15 B. C. 454, 15 West. L. Rep. (Can.) 228, where the evidence of an agreement on the part of a father to surrender his paternal rights was considered inconclusive, the court says that, even if there was such an agreement, it could neither bind nor relieve the parent, and that restoration of the child to him would be denied in such a case only where such restoration would be hazardous to the child's welfare.

Wallace, 76 Ga. 479, 2 Am. St. Rep. 48; Townsend v. Warren, 99 Ga. 105, 24 S. E. 980; Lamar v. Harris, 117 Ga. 993, 44 S. E. 866; Eaves v. Fears, 131 Ga. 820, 64 S. E. 269. The contract releasing the right to the parental power and custody of a child must be clear, definite, and certain. Miller v. Wallace, 76 Ga. 479 (c), 2 Am. St. Rep. 48. The case last cited, relied on by the plaintiff in error, makes a very different situation from the present. In that case Miller was as much in possession of the child as the grandparents. And the court says of Miller, at page 488 of 76 Ga., that "he never at any time assented to claims set up by its grandmother, by act or word, to its exclusive custody and control, but always, when such issues were raised, denied

her authority by courteous and deferential conduct and language." Here the reverse is true. This stepgreat-grandmother asserted the right in her husband to the child, and the parent said nothing, according to her testimony. Wilkinson, it is true, denies this; but the great weight of evidence was with the Lees, that neither "by act or word" did Wilkinson ever assert any right to the power over or custody of the child, after making the contract, until the Sunday on which he abducted the child. See also *James v. Cleghorn*, 54 Ga. 13.

2. The main question in this case is whether there was a contract between the father of the child and the great-grandfather, and whether the contract was sufficiently definite that by its terms the parent-

#### Right under statute.

Under the Georgia Civil Code, § 2502, the father may, by voluntary contract, release his right to the control of his minor child to a third person without apprenticing it, provided such contract be definite and clear in its terms: and this contract will be binding upon the father. *Eaves v. Fears*, 131 Ga. 820, 64 S. E. 269.

And under § 3021, Georgia Civil Code (1910), a father may surrender and renounce his parental control of his child, and accordingly, where a mother gives her infant child to another who takes and cares for it, if the father acquiesces in this possession of the child, he is bound thereby. *Manning v. Crawford*, 8 Ga. App. 835, 70 S. E. 959.

It appears that in *Carter v. Brett*, 116 Ga. 114, 42 S. E. 348, the legality of a contract by a father relinquishing the custody and control of his child to another was sustained.

Under § 51 of the domestic relations law, a father cannot lawfully give his child to another without the consent of the mother if she is living. *People ex rel. Beaudoin v. Beaudoin*, 126 App. Div. 505, 110 N. Y. Supp. 592, affirmed in 193 N. Y. 611, 86 N. E. 1129.

Since, under the Constitution, a statute cannot confer upon a father the absolute and arbitrary power to dispose of the custody of his children regardless of the rights and welfare of such children, and of the family rights of the mother, a statute purporting so to do will be construed as intended merely to give effect, as against the father himself, to any deed of the children's custody made by him in accordance with the statute; and accordingly, while he, after making such a deed, cannot, as against the grantee therein, demand back the custody which he has voluntarily relinquished, the custody of the children and the rights of the mother are unaffected thereby, and upon a proper showing the paternal grandfather and grandmother, claiming under such a deed, will be ordered to deliver up the children to their mother. *Ex parte* 42 L.R.A. (N.S.)

*Tillman*, 84 S. C. 552, 26 L.R.A. (N.S.) 781, 66 S. E. 1049. In connection with this case, see note appended to *Kellogg v. Burdick*, 13 L.R.A. (N.S.) 288, as to the effect of an attempt by the father to appoint a guardian for his children as against the surviving mother.

#### Rights of third person.

Where a child was committed to an orphanage under an agreement with the mother, and subsequently the question arose as to the right of the orphanage as against a third party to whom it had committed the child, it is said that, while the agreement with the mother would not bind her, it would probably bind the orphanage, and that therefore the latter could not avoid the responsibility thereunder; that the agreement binds the orphanage and places it *in loco parentis* as against the world. *Re Williams*, 77 N. J. Eq. 478, 77 Atl. 350, 79 Atl. 686.

The fact that a widowed mother confides her child to another for nurture and education, until the child shall marry, does not give that other the absolute right to retake the child from an institution to which it has subsequently been committed, or any legal right at all over the infant's person where the infant's welfare would not thereby be subserved. *Re Ah Gway*, 2 B. C. 343.

#### Estoppel of parent.

Even where such agreements are held to be unenforceable generally, a parent may, by acquiescing in the arrangement, estop himself from reclaiming his child. But see under "Right to revoke," *supra*.

Thus, where a father, pursuant to the wishes of his deceased wife, states under his hand that he is willing that his child's maternal grandparents shall take such child absolutely under their care and control, the child being then three years of age and having been with such grandparents with the father's consent more than two years already, and where he leaves the child with them under the new arrangement near-

al power over the child was lost by the father and acquired by the great-grandparent. On the question of the existence of a contract the evidence is conflicting, but the great preponderance of it is in favor of the defendant in error. His testimony, corroborated by a number of witnesses, was to the effect that the father had told him when the child was but a few days old, that he might take and keep it as long as he and his wife lived, or until the child was twenty-one years old. The evidence shows that the great-grandparent did take and keep the child from that time until it was three years old, before the father asserted any positive claim of right to it. We think the evidence and all the circumstances of the case were sufficient to authorize the ordinary to award

ly a year more, and other circumstances favor its remaining there, he will not be awarded custody of the child. *Re Maris*, 7 Penn. (Del.) 242, 63 Atl. 197.

And where the evidence was in conflict as to the terms upon which a father committed his child to others, whether only as long as he might wish or until the child should be fully grown, upon a showing of the relative circumstances of the two claimants, the award of the child to the donees was held proper. *Townsend v. Warren*, 99 Ga. 105, 24 S. E. 960.

And a contract clear and definite in its terms, by which a father relinquishes his control over his child to its maternal grandfather, having been carried into effect for six years, in enforceable at the instance of the latter. *Gay v. Thompson*, 131 Ga. 694, 63 S. E. 133.

And where, in habeas corpus proceedings, it is shown that a father by contract with his child's maternal grandparents relinquished to them his parental control over the child, and that they have complied with their obligations under such contract and are fit and proper persons to care for the child, it is within the discretion of the court to award the custody of the child to them subject to subsequent reconsideration. *Hicks v. Williams*, 135 Ga. 433, 69 S. E. 547.

Although an agreement by a parent that another shall retain his child permanently is not obligatory upon such parent as a matter of law, yet if he dies without revoking his promise as to the future of the child, which continues to reside with the donee, the donee immediately assumes the position of parent as regards the domicile of the child. *Smith v. Young*, 136 Mo. App. 65, 117 S. W. 628.

The rule that a contract to transfer parental control, together with custody thereunder, for several years, is binding upon all adult parties thereto; and that no party has a reserved right of revocation, is well grounded on wisdom looking to the public good. It has been the incentive and security to charity in establishing and maintaining homes for children, and to foster parentage 42 L.R.A. (N.S.)

the custody of the child to its great-grandparents. Nor do we think the superior court erred in refusing to interfere with the judgment of the court of ordinary. *Townsend v. Warren*, 99 Ga. 105, 24 S. E. 960; *Eaves v. Fears*, 131 Ga. 820, 64 S. E. 269. See *Moore v. Dozier*, 128 Ga. 93, 57 S. E. 110. The contract was sufficiently definite and certain to be enforced. According to the contention of the defendant in error, the great-grandparent was to have the child as long as he and his wife lived, or until the child was twenty-one years old. If this contract be proved (and the preponderance of the evidence is to that effect), then the father has lost his power over and control of the child as long as the great-grandparent and his wife live, or until the child

in giving comfortable and affectionate homes for them, who either through misfortune or lack of natural affection on the part of the parents would otherwise be deprived of the care, education, and affectionate surroundings to which helpless childhood is entitled, and which the interest of the state demands. And if a mother has not herself made sacrifice for her child in its helpless babyhood, but has transferred it to another during that period of its life, the court ought not afterwards, against the best interests of the child, order it to make sacrifice for the happiness of the mother, in order that she may have the comfort of the child's affection and society and a child's care in her declining years. "Shall we treat the child as a shuttlecock weaving affection here and there with no permanency anywhere?" *Gray v. Field*, 10 Ohio Dec. Reprint, 170.

Although no right is conveyed by a contract, as such, of a parent transferring the custody of his child to another, yet when such a contract has been made and a changed condition of domestic life created thereunder, the possession and custody of the child held by virtue thereof is *prima facie* lawful, and such contract is not to be entirely ignored, and the parent who seeks to regain the care and custody of his child held by another by virtue thereof is invoking the equitable powers of the court, and the burden of proof is upon him to show that the welfare and interest of the child require that it shall be restored to him. *State ex rel. Wood v. Deaton*, — Tex. Civ. App. —, 52 S. W. 591.

An agreement made by a father to commit the custody of his children to their maternal grandmother as long as she might live, and acted on by her for nearly four years, is valid and binding on him, unless the welfare of the children demands that it be disregarded. *Fletcher v. Hickman*, 50 W. Va. 244, 55 L.R.A. 896, 88 Am. St. Rep. 862, 40 S. E. 371.

An agreement by the mother of an illegitimate child, whereby she gives and relinquishes him and all her rights in him unto another forever, the latter agreeing

becomes twenty-one years old. We do not see how the contract could be much more definite or specific.

Nor do we think there is any merit in the contention of the plaintiff in error that the contract is unilateral and without consideration. The parent gave up the possession of his child, with his right of power and control, and, on the other hand, the great-grandparent received the child and assumes all the responsibility of its maintenance, education, and protection, and thus stands *in loco parentis*; and such a contract entered into by a parent and great-grandparent cannot be said to be unilateral and without consideration. The evidence in the case shows there was a sufficient consideration to support the contract. See *Eaves v. Fears*, supra.

3. One ground of exception taken is that the ordinary, pending the hearing of the main issue of the case, after several motions had been made to continue the case and the same were overruled, awarded the temporary custody of the minor child to the great-grandparent upon his giving bond for the production of the body of the child in court. It is insisted that this action on the part of the court was a prejudgment of the case and disqualified the court from passing a final judgment awarding the child. We do not so consider. At the conclusion of the entire case, the ordinary awarded the custody of the child to its great-grandparent, and the judgment of the superior court was in effect the same; and on a careful review of the whole case, we cannot say that the temporary awarding of the custody

to maintain, care for, and educate the child, cannot be legally enforced against her; but where this agreement has been acted on for eleven years, the child will not be restored to her, except upon a clear showing that such action would be to the advantage and benefit of the child. *Re Slater*, 14 *Manitoba L. Rep.* 523.

#### Child's welfare will be regarded.

The main consideration that should influence the court is the best interest and well-being of the child. *Clark v. White*, — *Ark.* —, 143 *S. W.* 587.

The court must in such cases look solely to the good of the child. *Ex parte Canova*, 84 *S. C.* 473, 65 *S. E.* 625, 67 *S. E.* 476.

The welfare of the infant is paramount to the wishes of the parent, where it has formed a proper and natural attachment for another person, who has long stood in the relation of a parent, with the parent's consent, and under a contract with such parent awarding to the other its permanent custody. *Re Burdick*, 91 *Neb.* 639, 40 *L.R.A.(N.S.)* 887, 136 *N. W.* 988.

While not alone conclusive, the interest

of the child to the great-grandparent, *pendente lite*, is cause for a reversal where, upon a review of the entire record, the final judgment of the court of ordinary and of the superior court is found to be right.

4. Error is assigned on the refusal of the court to sustain a demurrer to the traverse of the answer to the writ of certiorari, and a motion to strike exceptions to the same. It is sufficient to say that technical pleadings in a case like this are not required. The necessity for strict technical pleadings do not apply to habeas corpus proceedings as in some others. As Mr. Justice Lumpkin well said in the case of *Robertson v. Heath*, 132 *Ga.* 313, 64 *S. E.* 74: "Still the rule is not arbitrary or inflexible in certain hearings. On the subject of writs of habeas corpus to test the legality of the detention of one deprived of his liberty, the Penal Code [1895] § 1222, provides as follows: 'If the return denies any of the material facts stated in the petition, or alleges others upon which issue is taken, the judge hearing the return may, in a summary manner, hear testimony as to the issue, and to that end may compel the attendance of witnesses, the production of papers, or may adjourn the examination of the question, or exercise any other power of a court, which the principles of justice may require.' The writ is also used as a means of determining the custody of minor children. The presiding judge often has to use great discretion in judging of the status of parties and what is for the welfare of the child. He needs all the light he can obtain for the just and faithful discharge of his duty. It

of the child is an important factor in the determination of the question whether the father should be given control of it. *Re Maria*, supra.

When the scales are equally balanced as to the fact of an agreement transferring the custody of an infant, or when the court is in doubt about the abstract right of control, the interests of the child are paramount and will prevail. *Smidt v. Benenga*, 140 *Iowa*, 399, 118 *N. W.* 439.

While the court should regard the natural rights of parents, and the rights of foster parents growing out of contract and actual custody, yet it will look chiefly to the best interests of the child. *Gray v. Field*, supra.

And it has been stated that, although in a certain sense it is no doubt true that the best interests of the child should always be accepted as the matter of controlling importance, yet that matter is always a relative one, and can never be wholly divorced from the question of the rights and interests of parents or of those standing *in loco parentis*, when that question is presented for consideration. *Miller v. Miller*, 123 *Iowa*, 165, 98 *N. W.* 631. H. C. Sh.

may be that a witness is beyond seas, or inaccessible, or for other reason cannot be put upon the stand. The writ is a speedy writ. The proceeding is summary in its nature. It is a judicial proceeding, and to be conducted in an orderly manner as such. But is not exactly a lawsuit in the ordinary sense of the term. *Simmons v. Georgia Iron & Coal Co.* 117 Ga. 309, 61 L.R.A. 739, 43 S. E. 780. To delay its hearing until a witness absent from the state or the country can return, or until interrogatories can be prepared, notice given, cross-questions propounded in writing, and commission forwarded to a distant state or country and there formally executed, might require so much time that the hearing under the writ would be unreasonably delayed. It may be necessary to admit an affidavit, or, in default of it, to exclude much needed light altogether. Or there may be other circumstances rendering the use of affidavits proper." In habeas corpus cases the judge of the superior court is vested with large discretion, and his judgment in such cases will not be interfered with by this court, unless it is manifestly abused. *Bently v. Terry*, 59 Ga. 555 (4), 27 Am. Rep. 399.

5. The other grounds of error assigned are without merit.

Judgment affirmed.

All the Justices concur.

#### IOWA SUPREME COURT.

CANTREL TELEPHONE CO. et al.

v.

BENJAMIN T. FISHER et al., Appts.

(— Iowa, —, 138 N. W. 436.)

Telephone — farm line — transfer of farm — effect on interest.

1. A warranty deed of a farm and its appurtenances does not carry the right of a grantor as a member of a telephone

*Note. — Conveyance of real property as carrying right to telephone service.*

While "it is a general rule that upon the conveyance of property, the law implies a grant of all the incidents rightfully belonging to it at the time of conveyance, and which are essential to the full and perfect enjoyment of the property" (13 Cyc. 639),—it seems clear, as held in *CANTREL TELEPH. CO. v. FISHER*, that this would not include a grantor's membership in a mutual telephone association, giving him the right to connect one telephone with the association's wires, although the grantee, under the articles of the association, has the first right to purchase the grantor's

company, each member of which had a right to place a telephone in his house, and to give the purchaser of his farm the first chance to purchase his interest, after which the company itself should have the right.

**Injunction — against connection with telephone line — purchase of lawsuit.**

2. A telephone company will not be denied a temporary injunction to prevent connection with its line, on the theory that it bought a lawsuit and undertook to make itself judge between two claimants, where the owner of a farm on its route, who was a member of the company, and who, by reason of his membership, had a right to connect a telephone with the line and to sell the right with the farm or to the company, failed to agree with his grantee as to the right to the telephone, which was claimed under the warranty deed of the farm, and sold the right under his contract to the company.

(November 15, 1912.)

**A**PPPEAL by defendants from an order of the District Court for Van Buren County overruling their motion to dissolve a temporary injunction in plaintiffs' favor, and a motion for the issuance of a temporary injunction on their own behalf, in a suit to enjoin them from using plaintiffs' telephone lines. Affirmed.

Statement by Evans, J.:

Suit in equity to enjoin the defendants from connecting with and using the telephone line of plaintiffs, appellees. A temporary writ was issued and served. The defendants filed an answer and cross bill. They also prayed in their cross bill for an injunction to enjoin the plaintiff from disconnecting them with the telephone line. Later the defendants filed a motion to dissolve the temporary writ of injunction issued upon the prayer of the plaintiffs, and a further motion asking for the issuance of a writ of temporary injunction in their own behalf. These motions came on for hearing in vacation. Both motions were

membership. Such membership and right to connect a telephone with the association's lines are not necessary incidents to the full and perfect enjoyment of the property. And it has also been said, generally, that "nothing passes by the word 'appurtenance,' except such incorporeal easements or rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted. A mere convenience is not sufficient to thus create such a right or easement." (*Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281).

No case, however, aside from *CANTREL TELEPH. CO. v. FISHER*, has been found passing upon this question, whether a conveyance of real property, as a matter of law,

denied, and the defendants appeal from such order.

Mr. Joseph C. Mitchell, for appellants: The plaintiff company was not entitled to the temporary injunction.

Spaulding Mfg. Co. v. Grinnell, — Iowa, —, 136 N. W. 649; Thomas v. Farley Mfg. Co. 76 Iowa, 735, 39 N. W. 874; Council Bluffs v. Stewart, 51 Iowa, 385, 1 N. W. 628; Bolton v. McShane, 67 Iowa, 207, 25 N. W. 135; Hall v. Henninger, 145 Iowa, 230, 139 Am. St. Rep. 412, 121 N. W. 6; D. C. Heath & Co. v. Board of Education, 133 Mich. 681, 95 N. W. 747; Lloyd v. Catlin Coal Co. 210 Ill. 460, 71 N. E. 335; Chicago Public Stock Exch. v. McLaughry, 148 Ill. 372, 36 N. E. 88, 22 Cyc. 769; Carney v. Hadley, 32 Fla. 344, 22 L.R.A. 233, 37 Am. St. Rep. 101, 14 So. 4.

Messrs. Robert Sloan and H. B. Sloan also for appellants.

Messrs. Walker & McBeth, for appellees:

Plaintiff was entitled to a temporary injunction.

Troe v. Larson, 84 Iowa, 652, 35 Am. St. Rep. 336, 51 N. W. 179; Price v. Baldauf, 82 Iowa, 677, 46 N. W. 983, 47 N. W. 1079; Wahle v. Reinbach, 76 Ill. 322; Camp v. Charles Thatcher Co. 75 Conn. 165, 52 Atl. 953; Clark v. Jeffersonville, M. & I. R. Co. 44 Ind. 248; Hill v. Schneider, 13 App. Div. 299, 43 N. Y. Supp. 1; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533; Clark v. Syracuse, 13 Barb. 32; German Evangelical Congregation v. Hoessli, 13 Wis. 348; 22 Cyc. 831; Ten Eyck v. Sjoburg, 68 Iowa, 625, 27 N. W. 785; Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655; Kilbourn v. Sunderland, 130 U. S. 505, 32

L. ed. 1005, 9 Sup. Ct. Rep. 594; Mann v. Appel, 31 Fed. 378; 1 Pom. Eq. Jur. 297; Nease v. Aetna Ins. Co. 32 W. Va. 283, 9 S. E. 233; Spotswood v. Higgenbotham. 6 Munf. 313; Swann v. Summers, 19 W. Va. 115; Hodges v. Kowing, 58 Conn. 12, 7 L.R.A. 87, 18 Atl. 979; Warner v. McMullin, 131 Pa. 370, 18 Atl. 1056; Des Moines City R. Co. v. Des Moines, 90 Iowa, 770, 26 L.R.A. 767, 58 N. W. 906; Holmes v. Calhoun County, 97 Iowa, 360, 66 N. W. 145; Lemmon v. Guthrie Center, 113 Iowa, 43, 86 Am. St. Rep. 361, 84 N. W. 986; Blennerhassett v. Forest City, 117 Iowa, 680, 91 N. W. 1044; State Security Bank v. Hoskins, 130 Iowa, 339, 8 L.R.A.(N.S.) 376, 106 N. W. 764; Ladd v. Osborne, 79 Iowa, 93, 44 N. W. 235; Halpin v. McCune, 107 Iowa, 494, 78 N. W. 210; Keil v. Wright, 135 Iowa, 383, 13 L.R.A.(N.S.) 184, 124 Am. St. Rep. 282, 112 N. W. 635, 14 Ann. Cas. 549; Tantlinger v. Sullivan, 80 Iowa, 218, 45 N. W. 765; Sullivan v. Jones & L. Steel Co. 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065.

Evans, J., delivered the opinion of the court:

We avail ourselves of the following statement of the case contained in appellants' brief:

"The plaintiff, the appellee, Cantril Telephone Company, is an unincorporated and acting association, claiming to be organized and acting under written articles of association, inaccurately called 'by-laws.' Those articles, signed by sixteen persons, are not only crude and inartistic, but in and of themselves alone fail to show the real purposes and objects of the organization, and are especially silent as to the

carries to the grantee a grantor's right to telephone service. A similar question was considered to some extent in the earlier Iowa case of Staples v. Hobbs, 145 Iowa, 114, 123 N. W. 935, cited in *CANTRIL TELEPH. CO. v. FISHER*, where it appeared that a member of a mutual telephone association similar to the *CANTRIL TELEPH. CO.* had sold his farm to the plaintiff, who, claiming that he had bought from the grantor the latter's telephone in the farmhouse, and inferentially his right to connect with the common line, subject to the consent of the telephone association, and that he had become a member of the association by resolution of its members, and was entitled to maintain the telephone connection for the benefit of himself and his family, brought action against the president and general manager and the lineman of the association, to restrain them from disconnecting his residence telephone from the lines of the association; and while the court said that it was impressed with the reasonableness of the plaintiff's claim that 42 L.R.A.(N.S.)

his grantor had inferentially sold to him, with the farm and the telephone instrument in the house, the grantor's interest in the telephone line, subject, it seems, to a formal transfer of the membership by the association, the case turned upon the holding that the resolution in question did not constitute the plaintiff a member of the association in lieu of his grantor; and the court added that it had no occasion to determine whether the merits of the dispute between the grantor and the grantee were with the one or the other.

As to a conveyance of land as passing a right to use water for irrigation, see note to *Hard v. Boise City Irrig. & Land Co.* 65 L.R.A. 409.

As to corporeal appurtenances to realty, generally, see note to *Badger Lumber Co. v. Marion Water Supply, Electric Light & P. Co.* 15 L.R.A. 652.

As to what articles will pass as appurtenances upon a sale of chattels, see note to *Gazzam v. Moe*, 8 L.R.A.(N.S.) 793.

A. C. W.

means and procedure by which the objects and purposes, whatever they may be, are to be effected. But, when the articles are supplemented by the acts and operations under them by the association, it quite fairly appears that the objects and purposes of the association are not pecuniary profit, but the supplying of telephone conveniences in the homes of members of the association at a price not exceeding actual cost. The terms 'stock of said company,' 'stock,' 'stockholders,' and 'share of stock,' are frequently used in the articles, but evidently inaccurately. Manifestly, by the term 'stockholders' is meant the members of the association, and by the term 'stock,' the privileges appertaining to membership. One becoming a member had to pay \$12 (afterwards seemingly raised to \$40), which should properly be styled a membership fee, and the money so raised was doubtless used in constructing the line, and any surplus applied on operating and other incidental expenses. A member had the right to connect one phone with the association's wires, and thus have the use of the association's lines and connections for such use, having from time to time to pay such assessments as the association should make to meet the expenses of maintenance and operation.

"The articles contain these provisions:

"Art. 2. The number of shares shall be limited to the number of phones said line will carry and do good service."

"Art. 3. Each stockholder shall have the right to put in but one phone, and shall have the use of said line for such phone under such regulations as may be adopted by the board of managers." Abs. 19, line 25.

"Art. 14. No member shall be allowed to own more than one share of stock, nor shall he be allowed to sell his share of stock until after he has offered it for sale to the company (except in case such stockholder should sell his farm, in which case the purchaser of the farm shall have the first chance to purchase such stock), at a price not to exceed the original cost of the share. Any share of stock so purchased by the company shall be held as common stock of the company, but can be sold or rented by the company to any person who is not a stockholder at the time of purchase."

"In the case at bar, at the time the line in question was constructed, one H. H. Barnett owned the W.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , section 7, township 67, range 10, in Van Buren county, and said line was constructed along the south end and east side of said land; and he, being a member of the association, by virtue of such membership, connected a

phone in the dwelling house on said lands with said line, and while he owned said lands continued to use said phone and line. On October 28, 1909, said Barnett entered into a written agreement with the defendant B. T. Fisher, whereby he sold said lands, 'together with all appurtenances thereto belonging,' to the defendant, and pursuant to said contract, on November 5, 1909, deeded, by warranty deed, and without any reservations, said lands to defendant Fisher, who, under said deed, went into possession and has ever since been in possession by a tenant."

We are asked by the appellants not to prejudge the final merits of the case, on the ground that the record is not sufficient for such purpose. It is the contention of the defendants that the plaintiff company knowingly bought a lawsuit, and that it undertook to make itself the judge of a controversy between Fisher and Barnett. The following excerpt from appellants' brief concisely presents their point of view:

"It, or its smart Alecs, thought the company could, by use of a pressure that Barnett could not bring to bear, bring Fisher to an unconditional surrender,—that is, Barnett could not disconnect the phone, the company could and, doubtless as the smart Alecs thought, Fisher would surrender before suffering disconnection. But they didn't know Ben Fisher. We now broadly assert that the granting of and the refusal to dissolve the injunction issued on the part of the plaintiff was an abuse of injunctive procedure, regardless of whether Fisher's good faith claim of ownership may or may not be finally determined in his favor. And it was, we assert, an abusive refusal to exercise a wholesome power, when the court refused to grant the temporary injunction prayed for by Fisher and Struble. Fisher and Struble have an unqualified right to a full final hearing without being forced to a choice of either renouncing their claimed right or of suffering irreparable injury. The company cannot be allowed to become the judge between Fisher and Barnett, and then decide in Barnett's favor, put itself in Barnett's place, and by a kind of duress force Fisher to yield,—enforce against Fisher a pressure Barnett could not enforce."

Careful examination of the record satisfies us that the defendants' view of the case as thus expressed is somewhat distorted. Barnett was a member of the plaintiff company. He sold his farm to the defendant Fisher, and executed a warranty deed therefor, in the latter part of November, 1909. The theory of appellants is that the warranty deed as a matter of

law carried to the grantee the membership in the plaintiff company as an appurtenance to the land. This claim is based to some extent, also, upon the provisions of § 14 of the articles of the company. It is clear that, in the absence of § 14 of the articles, the mere conveyance of the land by warranty deed could not of itself confer membership upon the grantee in the plaintiff company. It is conceded by appellees that the sale of the land to Fisher carried to him a right or option to purchase the "share" of Barnett, and to become a member of the plaintiff company. The trial judge was justified in finding for the affidavits before him, that in the negotiations for the sale of the land Barnett had solicited Fisher to buy his share in the plaintiff company, and that Fisher declined to do so. For the first year after the purchase, Fisher's tenant paid to Barnett the rental provided for in § 14. In the spring of 1910 the company refused to buy from Barnett, because it desired that Fisher should buy the same and become a member. One year later it bought the share from Barnett under the provisions of § 14, for \$24. It knew at this time that Fisher claimed that his warranty deed carried all of Barnett's rights to membership in the plaintiff company, and that he refused to purchase it in any other way, and refused to pay rent therefor. The plaintiff company has always been ready and willing to admit Fisher to membership upon payment for the share, and otherwise willing also to permit him and his tenant, Struble, to use the phone upon payment of the usual rent. The defendants refuse to do either. The sum of \$24 therefore measures the full substance of this controversy. If the plaintiff company made itself a judge of the controversy between Barnett and Fisher, it did no more than the defendants forced it to do in protection of its own rights. Under the provisions of § 14, an option was reserved to the company to purchase such share. A failure to exercise such option would amount, under such section, to an implied permission to Barnett to sell to whomsoever he could. The company had a right under such section to refuse such permission by exercising such option itself, and there is nothing in the record to impeach its good faith in such course. Such course on the part of the company did not settle or prejudice any controversy as between Barnett and Fisher. The plaintiff company was justified in refusing to become involved in such controversy, and to require the parties to it to settle it between themselves. If Fisher's contention is sound that he purchased the share from Barnett by force of

his warranty deed, he had an abundant remedy as for breach of warranty after the sale by Barnett to the company, and he could have safely paid the company the \$24 which it paid Barnett in exercising its option. By this manner he could have saved himself the complaint that the company made itself a judge of the controversy. On the other hand, if the company had assumed to accept his contention and to receive him into membership on the strength thereof, it could not escape a part in the controversy. In such case it must apparently decide to whom the share belonged. The company did not arbitrarily refuse membership to Fisher. It recognized his right under § 14 to purchase Barnett's share. But it insisted upon an uncontroverted purchase, and not a controverted one, before accepting Fisher into membership in lieu of Barnett. It was a bona fide and reasonable exercise of its power over its own membership. Presumptively it could not accept Fisher into membership in lieu of Barnett without Barnett's consent. It never had Barnett's consent. Section 8 of the articles provides for a record of stockholders, and that no stockholder shall be released from the liabilities of the company "until the change be indorsed on the records by the secretary." Whatever rights Fisher may have acquired under his warranty deed, it is clear that he did not thereby become a *de facto* member of this association. Further action was necessary on his part for that purpose. He could not be deemed a member against his will by mere force of his warranty deed. And in like manner some action was necessary on the part of the plaintiff company indicating its assent to the change of membership. We had occasion to consider this question to some extent in *Staples v. Hobbs*, 145 Iowa, 114, 123 N. W. 935. We there held that the alleged purchaser had not established his membership in the company. Applying to the case before us our holding in the *Staples* Case, it is quite clear that Fisher has never become a member of the plaintiff company. His right to connect with the telephone line is dependent upon his membership. The plaintiff company has been guilty of no arbitrary act or bad faith to prevent his acquiring membership in a proper way. The only relief he prays for in his cross bill is that the plaintiff company be enjoined from interfering in any way with his connections with the telephone line. Upon the record before us, he is not entitled to such relief and the trial judge properly so found.

2. It is strongly urged that the granting of a temporary writ of injunction was



an abuse of power, regardless of the final merits of the case, and that such writ should be dissolved. It will be noted that both parties prayed for such writ. From a bird's-eye view of the case it is quite apparent that one party or the other was entitled to the writ. If the defendants were entitled to it, the plaintiffs were not. And if the defendants were not entitled to it, there cannot be much substance to the claim that plaintiffs were not. The plaintiffs brought their suit in equity for an injunction as an independent remedy under the provisions of Code, § 4354. They prayed a temporary writ, and this was issued under the provisions of §§ 4355 and 4356. Our discussion in the preceding paragraph is a sufficient statement of the record to show that the trial judge was justified in granting the temporary writ of injunction. On this question we need add nothing to what has been said in our previous cases. *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Tantlinger v. Sullivan*, 80 Iowa, 218, 45 N. W. 765; *Price v. Baldauf*, 82 Iowa, 677, 46 N. W. 983, 47 N. W. 1079; *Troe v. Larson*, 84 Iowa, 652, 35 Am. St. Rep. 336, 51 N. W. 179; *Halpin v. McCune*, 107 Iowa, 494, 78 N. W. 210; *Keil v. Wright*, 135 Iowa, 383, 13 L.R.A.(N.S.) 184, 124 Am. St. Rep. 282, 112 N. W. 633, 14 Ann. Cas. 549.

No other question is presented for our consideration.

The order of the trial court is therefore affirmed.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

JULIUS MARQUESEE, Plff. in Err.,

v.

HARTFORD FIRE INSURANCE COMPANY.

(— C. C. A. —, 198 Fed. 475, 1023.)

**Insurance — ratification of unauthorized act of agent.**

A property owner may, after loss and before the insurer has withdrawn from the

*Note. — Ratification after loss of unauthorized act of another in securing fire insurance.*

This note does not include cases where trustees or bailees obtained insurance covering their own property, and also that held in trust or on commission by them. And for the reasons indicated in the reported opinion, cases of marine insurance are not included. The note is confined to the question as to the right of the owner of property to ratify, after a loss has occurred, a policy of fire insurance taken out in his

contract, ratify the unauthorized act of his agent in securing insurance upon his property.

(Lacombe, Circuit Judge, dissents.)

(July 10, 1912.)

**E**RROR to the District Court of the United States for the Southern District of New York to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due under a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Argued before Lacombe, Ward, and Noyes, Circuit Judges.

Messrs. Fried & Czaki for plaintiff in error.

Messrs. T. A. Hammond and Randolph W. Childs, with Messrs. Ivins, Mason, Wolff, & Hoguet, for defendant in error.

There is no principle of ratification under which the plaintiff's assignor can claim that it may avail itself of the benefit of McIntosh's act.

*Mechem, Agency*, § 179; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; 1 Am. & Eng. Enc. Law, 2d ed. 1194; *Dodge v. Hopkins*, 14 Wis. 631; *Atlee v. Bartholomew*, 69 Mich. 43, 5 Am. St. Rep. 103, 33 N. W. 110; *Atlanta Buggy Co. v. Hess Spring & Axle Co.* 124 Ga. 338, 4 L.R.A.(N.S.) 431, 52 S. E. 613; *Baldwin v. Schiappacasse*, 109 Mich. 170, 66 N. W. 1091; *Alliance Marine Assur. Co. v. Louisiana State Ins. Co.* 8 La. 1, 28 Am. Dec. 117; *Davis v. Walker*, 131 Ala. 204, 31 So. 554; *Shuttleworth v. Kentucky Coal Iron & Development Co.* 22 Ky. L. Rep. 1806, 16 S. W. 1013; *Grover v. Mathews* [1910] 2 K. B. 401, 79 L. J. K. B. N. S. 1025, 102 L. T. N. S. 650, 26 Times L. R. 411, 15 Com. Cas. 249; *Canning v. Farquhar*, L. R. 16 Q. B. Div. 727, 55 L. J. Q. B. N. S. 225, 54 L. T. N. S. 350, 34 Week. Rep. 423; *McCracken v. San Francisco*, 16 Cal. 591.

Ward, Circuit Judge, delivered the opinion of the court:

March 16, 1909, one McIntosh telephoned from his country place to Wilson, the agent

name by an unauthorized agent.

The cases upon the question under consideration are not in entire harmony. The holding in *MARQUESEE v. HARTFORD F. INS. Co.*, that a property owner may, after loss and before the insurer has withdrawn from the contract, ratify the unauthorized act of his agent in securing a policy of fire insurance upon his property, although no premium was paid prior to the loss, appears to be rather an extreme one. There being no payment of the premium in this case, nothing but an offer of insurance resulted prior to the property owner's attempted ac-

of the Hartford Fire Insurance Company (the defendant), at Quincy, Florida, asking him to cover the stock of tobacco belonging to Kline Bros. & Company (plaintiff's assignor) at that place, with insurance against fire for one year from March 16, 1909, for the sum of \$3,500. On the same day Wilson wrote the policy in suit for the defendant, and took it to the warehouse of Kline Bros. & Company with the intention of delivering it to McIntosh, and, not finding him, left the policy there for him. March 19th the property was totally destroyed by fire. Within a week thereafter McIntosh tended to the defendant's agent

the premium, which the latter refused to take; but the defendant did not deny liability until April 30, 1909, when it wrote:

Messrs. Kline Bros. & Company, Quincy, Fla.,

Gentlemen:—

This is to notify you that the paper which you hold, purporting to be a policy of insurance against loss by fire, dated March 16, 1909, No. 985, we have just learned after diligent inquiry is not and never was a contract of this company. In the event that it shall appear we are mistaken either as to the fact or the law upon which this

ceptance, and ordinarily it is held that an offer cannot be accepted after the subject-matter has been destroyed. It is also generally held that a person cannot ratify an agreement unless he could himself have made a like contract at the time of the attempted ratification, which he obviously could not do where no subject-matter then existed.

A number of cases have held that an agent's unauthorized act in obtaining a policy of fire insurance may be ratified after a loss has occurred. In nearly all of the cases so holding, however, it appears that the premium on the policy had been paid, or that the agent who secured the policy had bound himself for the amount of the premium so that the insurer had received a consideration prior to the loss.

The decision in *Kline Bros. & Co. v. Royal Ins. Co.* 192 Fed. 378, which is referred to in *MARQUESS V. HARTFORD F. INS. CO.* and which arose out of the same fire, is at variance with the conclusion reached in the latter case, and seems on the whole to be the more sound. It was held in that case that a corporation could not, after the goods intended to have been covered by the insurance were destroyed by fire, ratify the unauthorized act of the president of the corporation in obtaining the policy, on which it appeared that the premium had not been paid. The court said: "The next question is whether, if the contract was not binding upon either party until McIntosh tendered the premium, the occurrence of the fire terminated that possibility. I may assume . . . that the tender was sufficient, even though there is no evidence that even at that time McIntosh had been authorized to make it by the other two directors. If, however, the fire, which was known to both the insured and the insurer, terminated the possibility of binding the bargain by either ratification or tender, it was a nullity. An insurer's undertaking is a promise to pay upon a given event which either must happen *in futuro*, or, if it have already happened, must be still unknown. Were it not so, the promise would be merely to pay a large sum of money in consideration of a small one, which is an absurd intention to ascribe to anyone. In the case at bar, since the loss had happened 42 L.R.A. (N.S.)

before the policy became binding, the promise could only be to pay for an existing loss. Such promises are common enough in marine insurance when the policy reads, 'lost or not lost,' and they have been held to be binding in the case of fire insurance when the policy was antedated, and the loss occurred between the date and delivery of the policy. *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379. In all such cases, however, the policy at its inception must be construed as an insurance of a risk, not as a certain agreement to pay, for otherwise, as I have said, the contract becomes absurd. Thus, in a marine policy, though the loss may have in fact occurred, the fact is unknown, and there is the same aleatory element in the promise as though it might occur in the future. When that element disappears, the character of the contract goes with it, so that it may be said with accuracy that the element of some chance is a condition to the promise of the insurer, and if that element does not exist, his promise is made under a mistake of existing fact. It is of no consequence whether that fact be the actual loss, in a case where the insurance is of future loss, or of the insured's knowledge of the loss, in a case where the insurance is of an existing loss. In either case there must be some uncertainty as to the loss, or else the presupposition upon which the promise is made does not exist. In the case of *Commercial Ins. Co. v. Hallock*, *supra*, the loss occurred only two hours before the policy took effect, . . . and it did not appear when the insured learnt of it. Certainly the insured had no opportunity to withdraw the application before it was accepted. The court held that the antedating of the policy made it equivalent to an insurance 'lost or not lost,' and noted that there was no question raised of either fraud or concealment. If, however, the insured had known of the loss before making application, the contract would, of course, be fraudulent. But the same thing is true even though, when the application was made, the risk is as supposed, provided that the insured learns of the change before the policy becomes binding. *Wales v. New York Bowery F. Ins. Co.* 37 Minn. 106, 33 N. W. 322. . . .

There is no difference of judicial opinion,

conclusion is based, we further notify you that this company hereby specifically denies liability under such policy.

Yours very truly,

Hartford Fire Ins. Co.

Egleston & Prescott, General Agents.

The statement that the policy delivered "is not and never was a contract of this company" is founded upon the proposition that McIntosh had no authority to represent Kline Bros. & Company when he ordered the insurance. A great deal of evidence on this subject pro and con was offered at the trial. McIntosh was a stock-

holder, had been president, and was, at the time he ordered the insurance, in possession of the warehouse and claiming to act as president. The circumstance that the premium had not been paid is immaterial, because the delivery of the policy before receiving it amounted to a giving of credit. *Stewart v. Union Mut. L. Ins. Co.* 155 N. Y. 269, 42 L.R.A. 147, 49 N. E. 876.

The trial judge directed a verdict for the defendant, apparently upon two grounds, which he had passed upon in a previous action arising out of the same fire (*Kline Bros. & Co. v. Royal Ins. Co.* [C. C.] 192 Fed. 378), viz.: First, that McIntosh had

so far as I can find, upon the proposition that the insurer is not bound where the insured, at the time of the binding of the bargain, had learned that the loss has happened, or the risk has changed since the original application. The only difference between those cases and the case at bar is this: That here the insurer likewise knew that the loss had occurred, and nevertheless did not withdraw from the contract. This fact would perhaps be irrelevant in any case, even if the insurer did not formally withdraw his offer upon learning of the loss, for it might be held that to withdraw it after a loss has occurred would be an idle ceremony; but that question is not up at present, because the defendants had no knowledge that McIntosh had not bound the plaintiff to pay the premium, and that their own undertaking had therefore been without consideration from the outset. They certainly dealt with him in good faith, and were not called upon to disaffirm a contract which, so far as they knew, was binding upon them. If, however, it be once admitted that it was not binding upon them until ratified, it could not be ratified or accepted by paying a premium after the risk had ceased and the fundamental condition of the promise no longer existed. This would be quite obvious had the offer never been accepted at all before the loss, but if the policy was not binding while unratified, the situation was the same as though the offer had never been accepted." The decision in this case was reversed in 198 Fed. 468, on another point. It is, however, practically overruled by the decision in *MARQUESEE v. HARTFORD F. INS. CO.*

In *Ætna Ins. Co. v. Renno*, 93 Miss. 594, 46 So. 947, where an insurance agency which had been directed to obtain insurance upon certain property, after the cancellation of one policy, without authority from the owner, obtained another policy from a different company, but did not deliver the policy until after a loss had occurred, when the property owner, upon being informed of the facts, accepted the new policy and paid the premium upon it, it was held that the owner could not ratify the policy after the loss had occurred, it appearing that before the loss the premium was merely charged on the books of the different agencies, and 42 L.R.A. (N.S.)

against the property owner, as was the usual custom. The court said: "When Lake-Lott Agency procured the issuance of this policy, they were acting for themselves, without any authority from Renno, and were in no sense his agents. The true condition of affairs was not known to the Ætna Insurance Company until after the destruction of the risk, and at that time it was too late for Renno to ratify the unauthorized act of Lake-Lott Agency, so as to prejudice intervening rights and create liability under the policy, when there was in existence nothing on which that liability could attach."

So, in *Johnson v. North British & M. Ins. Co.* 66 Ohio St. 6, 63 N. E. 610, where an insurance agent who was authorized to obtain insurance in some good company, after the cancellation by the insurer of a policy written by him, without conferring with the property owner, wrote a policy in another company, of which the property owner had no notice until after the property had burned, it was held that he could not then ratify the policy thus obtained. It appeared that the agent had merely charged himself with the premium in this case, and that no other payment was offered until after the loss occurred. The court said: "Did the election of Johnson to sue on the North British policy have the effect to ratify the act of Chappell in entering a cancellation of the Hartford policy on his policy ledger, and if so, could that ratification affect the defendant company? We think this question, also, must receive a negative answer. Assuming, without holding, that such election to sue would in any case be a sufficient ratification, in the present case Chappell did not purport to act for Johnson, nor assume to have authority to do so. To cause an unauthorized act to be validated by subsequent ratification, it must appear to have been done in the name of, or for the benefit of, a principal. That a ratification is effectual only when the act is done by one professedly acting as the agent of the party claiming to have been the principal is held in *Mitchell v. Minnesota Fire Asso.* 48 Minn. 278, 51 N. W. 608. See also *Joyce, Ins.* § 463; *Huffcut, Agency*, 30; *Mechem, Agency*, § 127; and authorities cited; and *Wharton*,

no authority to make the contract for Kline Bros. & Company; and, second, that they could not ratify it after the fire had occurred.

No one disputes the general principle that one may ratify an unauthorized contract made on his behalf, and that the effect is the same as if he had himself originally made the contract. It is expressed in the Latin maxim, *Omnis ratihabitio retrotrahitur et mandato equiparatur*. The very idea of ratification implies that one party has an option to ratify or not, and that he has this advantage over the other party, to wit: That he may hold the other party whether the other party wish it or not, whereas the other party cannot hold him if he is not willing to be held. The English cases go so far as to hold that one may ratify even after the other party has withdrawn from the contract. *Bolton Partners v. Lambert*, L. R. 41 Ch. Div. 295, 58 L. J. Ch. N. S. 425, 60 L. T. N. S. 687, 37 Week. Rep. 434;

Agency, § 62. Another consideration deserves attention. At the time the claimed ratification took place, the rights and liabilities of the parties had, by the terms of the contracts themselves, become fixed, and whether, in any case, intervening rights of third persons could be injuriously affected by subsequent ratification, it is not much to say that, to have that effect, the intent to ratify, and the sufficiency of the ratification, should be clearly shown."

In *Grover v. Mathews* [1910] 2 K. B. 401, it was held that a contract of fire insurance which was taken out by an unauthorized agent could not be ratified by the property owner after a loss had occurred. The premium in this case had not been paid prior to the loss. *Hamilton, J.*, emphasized the distinction between the right to ratify marine policies and those issued to cover losses by fire, and said: "The ratification of March 27, 1909, whether it is considered as having taken place at the interview between Messrs. Grover and Mr. Browns on that evening, or by the letter written on their behalf on the same evening by Mr. Browns, was after the loss, and with knowledge of the loss on the part of the plaintiffs, and it appears to me that the judgments in *Williams v. North China Ins. Co.* L. R. 1 C. P. Div. 757, 35 L. T. N. S. 884, 3 Asp. Mar. L. Cas. 342, which is a decision of the court of appeal, compel me to say that it was too late for ratification; because, as it appears to me, the court of appeal in *Williams v. North China Ins. Co.* recognized that a rule which would permit a principal to ratify an insurance even after the loss was known to him was an anomalous rule which it was not, for business reasons, desirable to extend, and which, according to the authorities, had existed only in connection with marine insurance. No case has been cited to me which suggests that this anomalous rule ought to be ex-

*Re Tiedeman* [1899] 2 Q. B. 66, 68 L. J. Q. B. N. S. 852, 81 L. T. N. S. 191; *Re Portuguese Consol. Copper Mines* [1890] 62 L. T. N. S. 88.

It is not surprising that the trial judge refused to follow these cases, and it is not necessary for us to go so far in holding that the judgment below is erroneous. Before ratification, an unauthorized contract is not binding, because it is not mutual. The party discovering the lack of authority may therefore withdraw. When he has done so there is nothing to ratify. What shocks us at first blush is that one may ratify an unauthorized contract after he knows that it is to his own advantage to do so, and so bind the other party to his apparent disadvantage. Further reflection, however, causes this apparent unfairness to disappear. The other party, having agreed to be bound by this contract, and not having withdrawn from it, has no ground to com-

tended to fire insurance. I think the expressions used in the judgments in *Williams v. North China Ins. Co.* show that the court of appeal did not consider that the rule should be extended to cases beyond those to which it had been held to apply. In my judgment expressions which are to be found in the authorities and text books, and particularly in *Castellain v. Preston*, L. R. 11 Q. B. Div. 380, which refer to the application of the rules of marine insurance to fire insurance, only mean that both are contracts of indemnity; that marine insurance has been most fully dealt with in judicial decisions; and that therefore, although those decisions mainly refer to marine insurance, the principles involved in them may, so far as they are incidental to a contract of indemnity as such, and not to the special business of marine insurance, be applicable to both classes of transactions."

In *Todd v. German American Ins. Co.* 2 Ga. App. 789, 59 S. E. 94, however, where an insurance agency was directed to carry a certain amount of insurance on property, and several policies were written to cover the amount named, and the agency replaced one of the policies issued by a company which had become bankrupt, by writing a similar policy in another company, it was held error to grant a nonsuit against the insured in an action upon the latter policy, there being evidence that he had ratified the agency's act in substituting the new policy, although he was ignorant of the existence of such policy until after the fire, since he had the right, upon obtaining knowledge of the issuance of the policy, to ratify the agency's act in procuring the insurance. The insurer in this case had accepted the agent's promise to pay the premium, and this was held a sufficient consideration to support the policy.

And in *Watson v. Southern Ins. Co.* — Miss. —, 31 So. 904, where, at the sugges-

plain if compelled to perform; the original lack of authority having been cured.

The latest English case cited fully sustained the view of the court below. *Grover v. Mathews* [1910] 2 K. B. 401, 79 L. J. K. B. N. S. 1025, 102 L. T. N. S. 650, 26 Times L. R. 411, 15 Com. Cas. 249. In it the plaintiffs had a policy of the defendant on their factory for £1,000 for twelve months from March 26, 1908. It had been effected through their broker, Browns, by another broker, Dott, representing the defendant, March 4, 1909, Browns wrote to Dott asking that the policy be renewed. March 5th Dott sent a binder renewing it. March 27th the factory was destroyed by fire, and on that date two directors of the plaintiff company sent the premium to Dott, who declined to accept it. The question was whether, assuming that a valid contract for fire insurance had been made through Browns with the defendant, by Dott, on behalf of the plaintiffs, but without their au-

thority, the plaintiffs could ratify it after the loss occurred. Hamilton, J., held that they could not. We cannot approve this conclusion.

Cases arising out of policies taken out by carriers or bailees, and maritime policies for the benefit of whom it may concern, throw no light on the question under consideration, because in them the insurer must be held to have insured any person whose interest the insured intended to cover.

We agree with the court below that the plaintiff failed to prove that McIntosh was authorized to contract for Kline Bros. & Company. If they had been sued for the premium on the policy, they could have successfully defended, unless the company proved ratification. But as in this case their assignee is claiming on the policy, proof of ratification lay upon him. It is true that the record does not show expressly whether Kline Bros. & Company ratified the contract before April 30th, when the

tion of the husband and attorney in fact of a lessor, the lessee, without the lessor's knowledge, obtained a policy in the lessor's name, covering certain personal property belonging to the latter, and the building in which such property was contained, it was held, where the lessor submitted proof after loss, that she was entitled to sue on the policy and recover for the personalty, and that, by suing to recover for such loss, she had ratified the taking out of the policy. The premium here was apparently paid, although the fact does not clearly appear.

The effect of the ratification after loss of a policy obtained by an unauthorized agent has been discussed in a number of cases in which the right to ratify was apparently assumed. It seems to have been so assumed in the following cases, holding that the provision of a second policy against obtaining other insurance without the consent of the insurer was violated by the ratification after loss of another policy obtained by an unauthorized agent: *German Ins. Co. v. Emporia Mut. Loan & Sav. Assn.* 9 Kan. App. 803, 59 Pac. 1092 (where a husband after loss assigned a policy obtained by his wife in his name without authority); *McKelvey v. German American Ins. Co.* 161 Pa. 279, 28 Atl. 1115 (where a husband after loss did not promptly repudiate a policy obtained by his wife without authority).

And where an agent engaged to rent and look after insured property, without the knowledge of his principal, took out a policy, and the owner, upon learning of the existence of such policy after the loss, accepted a benefit thereunder, it was held that his ratification violated the provision of a pre-existing contract against obtaining other insurance without the first insurer's consent. *Hughes v. Insurance Co. of N. A.* 40 Neb. 626, 59 N. W. 112. The court said: "Here, then, was a ratification 42 L.R.A. (N.S.)

by Hughes of the act of Hynes in procuring this additional policy of insurance, and this ratification related back to the date of the issuing of the policy, and Hughes became bound by the effects thereof, and by the results flowing therefrom, as much as if he had himself procured the policy of insurance. The acceptance by a principal of the fruits of an unauthorized contract made by his agent, with full knowledge of all the facts, is a ratification of such agent's conduct."

And in *Larsen v. Thuringia American Ins. Co.* 208 Ill. 166, 70 N. E. 31, where an insurance agent was authorized to insure property to a certain amount against loss by fire, and he divided the risk between three companies, and subsequently, upon one of the companies notifying the agent that it did not wish to carry the risk, he transferred the insurance for a like amount to another company, without consulting the insured, it was held, where it appeared that the insured, upon being informed after the loss of the issuing of the new policy, consented to accept it and surrendered the former policy, that he could not hold the former company liable, notwithstanding the fact that, in adjusting the loss, the other insurers had treated the former policy as being in force in arriving at the total amount of insurance.

In *Motley v. Manufacturers' Ins. Co.* 29 Me. 337, 50 Am. Dec. 591, where the lessees of the mortgagor covenanted to keep the premises fully insured, and obtained a policy containing a provision that, in case of loss, it was to be paid to the mortgagee, it was held that the bringing of an action by the mortgagee to recover for a loss was a sufficient ratification of the lessees' act in procuring the insurance for his benefit. This note does not however purport covering the question of what is a sufficient ratification generally.

J. T. W.

defendant withdrew from it, although it may be inferred from the defendant's letter of that date, the pleadings, the conduct of the parties, and the course of the trial, that they had made claim on the policy before it. However, as the case was decided, so far as this question is concerned, on the ground that they could not ratify after the fire, we think there ought to be a new trial, at which the plaintiff will have an opportunity of showing, if he can, that they did ratify the contract before the defendant withdrew from it.

The judgment is reversed.

Lacombe, Circuit Judge, dissenting:

I am unable to concur with the majority of the court. It seems too clear for discussion that McIntosh, the old president of the company, had no authority—express, implied, or to be inferred—to make a contract of insurance binding on Kline Bros. & Company. He certainly had no such express power conferred upon him as president. The powers of the president as defined by the articles of incorporation were merely to preside at all meetings; to have supervision of the affairs of the company under the direction of the board of directors; to sign or countersign all certificates, contracts, and other instruments of the company, as authorized by the board of directors; and to make reports. When this strictly limited delegation of authority is compared with the paragraph in the fourth article, quoted *infra*, it is manifest that the corporation was scrupulously careful not to give the president the power to effect contracts of insurance which should be binding on it. That paragraph reads as follows: "All purchases and sales of any kind by the company, and all contracts or obligations of any kind which may be entered into shall be made by the board of directors, who, acting jointly, shall have the entire control and management of the affairs of the company, the receipt and disposal of its assets, and the payment of its obligations, and the incurring of any liabilities for the company."

Nor does the record disclose any delegation to McIntosh, by the board of directors, of authority to make this or any other binding contract. At a meeting of the incorporators held December 16, 1908, McIntosh, Rogers, and E. A. Kline were elected the board of directors. Subsequently, on the same day, the board elected McIntosh president, Kline vice president, and Rogers secretary and treasurer, "to hold office until the first regular election of officers under the by-laws of the company, and until their successors are chosen." At that same meeting the board passed a resolution providing

that McIntosh as president, for a period of four months from the date of the resolution, be paid a salary of \$62.50 per month, for acting as president of the company and giving his time and services towards the preservation of the assets of the company and their disposition, under the direction and control of the board of directors. This resolution reserved to the board their power to make contracts. The president could enter into any specific contract only when directed to do so by the board. The record is barren of any evidence tending to show that, prior to the attempted making of the contract in suit, he had undertaken to bind the company by making any contract which they had accepted. There is not a *scintilla* of proof on which plaintiff could ask a jury to infer that McIntosh was being held out to the world as a person authorized to make contracts beneficial to the company.

As to ratification I am in entire accord with Judge Hand's discussion of the question, and as to his conclusion that until after the fire "defendant had no knowledge that McIntosh had not bound the plaintiff's assignor to pay the premium, and that its own undertaking had therefore been without consideration from the outset." I cannot reach the conclusion that there is no unfairness in the application of the doctrine of ratification to the case at bar. It seems to be an element of that doctrine that the party sought to be bound by the ratification of a contract until then void because of lack of mutuality should have a fair and equal opportunity to withdraw at any time before ratification. It certainly is a very harsh rule which would allow Kline Bros. & Company to hold this policy, it may be for weeks, without ratification, able to defend against a suit for premium on the ground that it never made a contract, but with the privilege of consummating the contract by ratification as soon as a fire might break out. It can only be sustained on the theory that until ratification either side has the right to withdraw; but the insurance company's "right to withdraw" is a mere illusion, if it has no knowledge of the facts which would authorize it to exercise such right. The proposition is peculiarly wicked in this case, because of what happened at the trial to defendant's so-called "second defense." The trial judge struck it out entirely at the very outset of the trial. He did so because he understood that, by a prior decision of another judge upon a motion in reference to the pleadings, it had been held that the matters set up in this part of the answer constituted no defense. The policy contained a provision that "this entire policy shall be void if the insured has concealed . . . any material fact

or circumstance concerning this insurance or the subject-matter thereof."

The answer set up that McIntosh, when he applied for the policy, concealed the fact that there were internal dissensions within the company. These were not merely ordinary controversies between conflicting interests. They had reached such a stage that one party had secured an alternative mandamus to secure its possession of its property, books, and papers, and the leader of the other party had taken forcible possession of the personal property which was the subject of insurance at the point of a pistol. It is contended that these facts were material, that they had an important bearing upon the subject-matter, indicating the presence of what is called in insurance law a moral risk, of the existence of which good faith required that an applicant should advise the party with whom he seeks to effect insurance. It would seem that these circumstances might reasonably induce the underwriter either to decline to issue a policy, or to charge a premium commensurate with the increased risk.

Unadvised as to these circumstances, and as to the further fact that McIntosh's dealings with its agent had given it no right to exact payment of a premium from Kline Bros. & Company, the insurance company, it seems to me, was misled as to its right to withdraw before ratification, and has good ground to complain of the application of the doctrine of ratification.

A petition for rehearing having been granted, the following *Per Curiam* response was handed down on October 15, 1912:

In this case the trial judge directed a verdict in favor of the defendant, which the majority of this court held should be reversed, so that the plaintiff, if able to do so, could, on a new trial, prove that the insured had ratified the unauthorized contract made by McIntosh before the insurer withdrew. This was on the theory that the trial judge had refused to admit such proof, as the briefs of both parties show he certainly would have done. Further examination of the record shows that no such proof was offered, and that, if offered, it could not have been received, because the parties had stipulated to confine the proof to the agreed statement of facts. When we said that it might be inferred that the insured had made claim on the policy before the insurer withdrew, we were referring to moral, and not to legal, evidence.

As the record shows no error upon this point, the mandate must be amended so as to affirm the judgment.

42 L.R.A.(N.S.)

# UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES OF AMERICA, Plff. in Err.,  
v.

ASA E. RAMSEY, Receiver of the Oklahoma Central Railway Company.

(116 C. C. A. 568, 197 Fed. 144.)

**Master and servant — limiting hours of labor — applicability to receiver.**

The Federal statute limiting, under penalty, the hours during which a "common carrier" may keep an employee on duty, applies to a receiver appointed by a Federal court for an interstate railroad.

(May 27, 1912.)

**ERROR** to the District Court of the United States for the Eastern District of Oklahoma to review a judgment sustaining a demurrer to and dismissing a complaint filed to recover a penalty for an alleged violation of the hours of labor law. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Adams, Circuit Judges, and Wm. H. Munger, District Judge.

Messrs. William J. Gregg, and John B. Meserve, for plaintiff in error:

A receiver of an insolvent railroad company operating the same in interstate transportation is a common carrier and amenable to all the provisions of law regulating common carriers of interstate commerce.

The Neaffie, 1 Abb. (U. S.) 465, Fed. Cas. No. 10,063; United States v. Harris, 177

*Note. — What employers are within statute limiting hours of labor.*

The constitutionality of legislative limitation of hours of labor is discussed in a note to *People v. Elerding*, 40 L.R.A. (N.S.) 893, and in earlier notes referred to therein.

A search has disclosed no other cases as to the applicability of these statutes to receivers. The question has occasionally arisen with respect to other employers. Thus, it was held in *Re Martin*, 157 Cal. 60, 106 Pac. 239, that a statute limiting the hours of labor in "smelters and other institutions for the reduction or refining of ores or metals," included quartz mills, where the ore was extracted by crushing and pulverizing.

In *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, the woman's ten-hour law, prohibiting the employment of females in any "public institution, incorporated or unincorporated, in this state, more than ten hours during any one day," was held to apply to the Isolation Hospital owned and operated by the city of Chicago.

In *State v. Atkin*, 64 Kan. 174, 97 Am.

U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Taylor v. United States, 3 How. 210, 11 L. ed. 564; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; United States v. Geddes, 65 C. C. A. 320, 131 Fed. 452; United States v. De Coursey, 82 Fed. 302; Beers v. Wabash,

St. L. & P. R. Co. 34 Fed. 247; Little v. Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Huguelt v. Warfield, 84 S. C. 87, 65 S. E. 985; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587; Beach, Receivers, § 717; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612.

Mr. Dorset Carter, for defendant in error:

A receiver operating an insolvent railroad company is not a common carrier within the meaning of the act, and is not liable for the penalties prescribed by said act.

United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; Turner v. Cross, 83 Tex. 218, 15 L.R.A.

St. Rep. 343, 67 Pac. 519, affirmed in 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, an act providing that "eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons now employed, or who may hereafter be employed, by or on behalf of the state of Kansas, or by or on behalf of any county, city, township, or other municipality of said state," was held to apply to a contractor undertaking to pave a street under a contract with a city, who permitted his employees to work more than eight hours per day in carrying out such contract.

In *Com. v. Griffith*, 204 Mass. 18, 25 L.R.A.(N.S.) 957, 134 Am. St. Rep. 645, 90 N. E. 394, a general statutory provision that no child shall be employed at work after 7 o'clock in the evening is held to apply to theatrical performances in which the child has a speaking part; nor is the application of the statute prevented in such a case by the fact that another statute prohibits the employment of children in a certain class of theatrical exhibitions.

In *State v. J. J. Newman Lumber Co.* — Miss. —, 60 So. 215, under a statute prohibiting persons, firms, or corporations engaged in manufacturing, from working their employees more than ten hours per day, it was held that the question who is engaged in manufacturing within the statute is a question of fact.

A contractor for the construction of a filtration plant for a city was held, in *Com. v. Casey*, 43 Pa. Super. Ct. 494, to come within a statute providing that eight hours out of the twenty-four should constitute a day's work for mechanics, workmen, and laborers "in the employ of the state or any municipal corporation therein, or otherwise engaged on public works," so that he might be convicted for a violation of its provisions.

However, in *State v. Hughes*, 38 Mont. 468, 100 Pac. 610, it is held that a contractor who let a job for the construction of a city sewer to a subcontractor, having nothing further to do with the work except to see that the specifications were complied with, was not an employer of the subcon-

tractor's men, so as to be liable to prosecution for working them more than eight hours.

In *Downey v. Bender*, 57 App. Div. 310, 68 N. Y. Supp. 96, it was held that a statute requiring that no laborer, workman, or mechanic in the employ of a contractor, subcontractor, or other person doing public work, did not apply to the furnishing of gas and electricity for the state capitol and executive mansion by a company which furnished light for general consumption in the city of Albany and elsewhere.

In *Burns v. Fox*, 98 App. Div. 507, 90 N. Y. Supp. 254, it is held that a laborer employed in a state armory comes within an exception to the eight-hour statute, providing: "Nothing in this section shall be construed to apply to persons regularly employed in state institutions."

And in *People ex rel. Warren v. Beck*, 144 N. Y. 225, 39 N. E. 80, a charter provision of the city of Buffalo that a contractor submitting proposals for city work shall bind himself not to accept more than eight hours as a day's work was held not to apply in any way to the superintendent of a paving company having a contract for street paving, whatever effect it might have upon the company itself.

Dredging a channel in Boston harbor is not a public work of the United States within an act forbidding a contractor upon any public work of the United States to permit or require employees thereon to work more than eight hours each day. *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589.

Nor does this act apply to one building barges at his own risk to be purchased by the government when completed if satisfactory although they were built under government inspection. *United States v. Olinger*, 55 Fed. 959.

But a corporation comes within the criminal provision of the eight hour law, it not being exempt on the ground that a corporation as such is incapable of entertaining a criminal intent. *United States v. John Kelso Co.* 86 Fed. 304. R. L. S.



262, 18 S. W. 578; *Yoakum v. Selph*, 83 Tex. 607, 19 S. W. 145; *United States v. Harris*, 78 Fed. 290, 29 C. C. A. 327, 57 U. S. App. 259, 85 Fed. 533; *Taggart v. Republic Iron & Steel Co.* 73 C. C. A. 144, 141 Fed. 911; *Alderson, Receivers*, p. 409; *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 487.

Wm. H. Munger, District Judge, delivered the opinion of the court:

The United States brought an action in the district court for the eastern district of Oklahoma against the defendant, as receiver of the Oklahoma Central Railway Company, alleging that the defendant, Asa E. Ramsey, was, in June, 1908, duly appointed by the United States circuit court for the eastern district of Oklahoma receiver for the Oklahoma Central Railway Company, and duly qualified and entered upon his duties as such receiver; that the defendant, as such receiver, was a common carrier, engaged in interstate commerce by railroad in the state of Oklahoma; that in violation of an act of Congress, known as "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon" (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321), said defendant, beginning at the hour of 4 o'clock A. M., on April 1, 1910, upon its line of road at and between the stations of Ada, in the state of Oklahoma, and Chickasha, in said state, required and permitted its certain conductor and employee, to wit, N. L. Clift, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 4 o'clock A. M. of the said day, to the hour of 10:40 o'clock P. M. on said date; and that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's trains, moving between the aforesaid stations, drawn by its own locomotive engines, said train being then and there engaged in the movement of interstate traffic; that by reason of the violation of said act of Congress, said defendant is liable to plaintiff in the sum of \$500. The petition contained twenty-six other alleged causes of action of a similar nature and character, and prayed for payment in the sum of \$13,500 and costs. To the petition, the defendant, as receiver, filed a general demurrer, which was sustained by the court. Plaintiff electing to stand upon said petition, the cause was by the court dismissed, and the United States brings the case here for review, assigning as error the ruling of 42 L.R.A. (N.S.)

the court in sustaining said demurrer and dismissing the action.

So much of § 2 of the act of Congress above referred to, as is applicable to this case, reads as follows: "That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved, and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

In § 3 it is provided: "That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed."

A single question is presented to this court, to wit: Are these provisions of the statute applicable, and to be applied, to receivers operating a railway company engaged in interstate commerce? An answer to this involves the question: Is the receiver of a railway company, in the operation of the same, a common carrier? "A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him; and everyone who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier." Moore, Carr. p. 18.

In the case of *The Niagara v. Cordes*, 21 How. 7-22, 16 L. ed. 41, 46, it is said: "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to place."

In *Beers v. Wabash, St. L. & P. R. Co.* (C. C.) 34 Fed. 244-247, Gresham, Judge, said: "Although the property of the Wabash Company is in the custody of the court, it is operated by the receiver as a

common carrier, his rights and duties are those of a carrier, he is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic." "It has been repeatedly held that, in the operation and management of railroads by receivers in chancery, they sustain to persons dealing with them the character of common carriers." Alderson, *Receivers*, § 298. "Receivers of railroads are also liable in their official capacity to the same extent as the corporations whose roads they are operating, for damages arising from the negligence of themselves or their servants, or from delay, damage, etc., to freight committed to their care for transportation. In other words, they are accountable as common carriers of goods." Beach, *Receivers*, § 724. "The fact that they were acting as receivers under appointment from a court of chancery cannot be recognized as a defense to a suit at law for breach of any obligation or duty voluntarily assumed by them in conducting their business as such receivers, and their assumption of the duties and responsibilities of common carriers is not regarded as incompatible with any duty or responsibility imposed upon them as receivers." High, *Receivers*, 4th ed. § 398.

Congress, in passing the act in question, must have intended to use the term "common carrier" in the usual and ordinary acceptance of the term, to wit, as one engaged in the business of carrying persons and property from one place to another, for compensation, for all who should apply to have their goods transported or to be transported in person. The mere fact that the statute in question is a penal one does not require that the words "common carrier" should receive a restricted interpretation. The court, in *Johnson v. Southern P. Co.* 196 U. S. 1-17, 49 L. ed. 363, 369, 25 Sup. Ct. Rep. 158, 161, construing what is commonly known as the "safety appliance act," said: "The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, and it was in that aspect remedial, while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue and for the collection of customs; that rule not requiring absolute strictness of construction. *Taylor v. United States*, 3 How. 197, 11 L. ed. 559; *United States v. Stowell*, 133 U. S. 1, 12, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244, and cases cited. And see *Farmers' & M. Nat. Bank* 42 L.R.A. (N.S.)

*v. Dearing*, 91 U. S. 29, 35, 23 L. ed. 196, 198; *Gray v. Bennett*, 3 Met. 522. Moreover, it is settled that, 'though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature.' *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625. In that case we cited and quoted from *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said: 'I agree to that rule in its true and sober sense; and that is that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.'"

Defendants rely chiefly upon the case of *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609. That case simply held that a receiver of a railroad was not within the letter or spirit of the provisions of the act of March 3, 1873 (Rev. Stat. §§ 4386-4388, U. S. Comp. Stat. 1901, pp. 2995, 2996), as follows:

"Sec. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours. . . .

"Sec. 4388. Any company, owner, or cus-

todian of such animals, who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. . . .

The court in that case simply decided that a receiver did not come within the designation of "any company." The court said: "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. . . . It does not therefore follow that the statute in question would be without operation where railroads are in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed."

In referring to §§ 2 and 3 of the act of Congress of August 13, 1888 (25 Stat. at L. 436, chap. 866, U. S. Comp. Stat. 1901, p. 582), the court said: "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought."

The constitutionality of the act under consideration, which we are called upon to construe, was considered in *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612-618, 55 L. ed. 878-882, 31 Sup. Ct. Rep. 621, 625, and in that case it was said: "This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection of life and property necessarily depends."

The cases of *Turner v. Cross*, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578, and *Yoakum v. Selph*, 83 Tex. 607, 19 S. W. 145, cited by counsel for defendant, do not determine the question now involved. Those cases simply held that a receiver did not come within the statutory designation of "proprietor, owner, charterer, or hirer." Those were actions for death resulting from personal injuries, based upon a statute which, so far as applicable, reads as follows: "An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: 42 L.R.A. (N.S.)

1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents."

From a consideration of the foregoing authorities, it seems to us clear that the term "common carrier" had a well-defined meaning, and that the receiver of a railroad came within the designation "common carrier;" that Congress, in using the term "common carrier," used it in the sense in which such words are generally meant and understood; that the object and purpose of the statute would be entirely defeated in all cases in which a railroad or other common carrier is operated by a receiver, if the words "common carrier" should be given a more restricted meaning than generally understood. It seems clear that a receiver, in the operation of a railroad, is a common carrier within the meaning of the statute; and though he is not personally liable, he is liable in his official capacity, and the payment of any judgment obtained would be subject to the order of the court appointing the receiver, in the exercise of its equitable powers.

The petition, then, stated a good cause of action. The demurrer was improperly sustained. The judgment is reversed, and the cause is remanded, with directions for further proceedings not inconsistent with the views expressed herein.

#### OREGON SUPREME COURT.

MARY ARLIE JONES, Admr., etc., of  
John T. Jones, Deceased, Resp.,  
v.

UNION COUNTY, Appt.

(— Or. —, 127 Pac. 781.)

County — Liability for defective bridge — lawful use.

1. One attempting to drive a traction engine across a bridge without using planks under the wheels, as required by statute, cannot, although the failure to use them does not contribute to the injury, hold the

*Note. — Nonobservance of public regulations by one using highway or bridge as affecting recovery of damages caused by obstruction or defect therein.*

As to rules of the road governing vehicles proceeding in opposite directions, see note to *Smith v. Barnard*, 41 L.R.A. (N.S.) 323.

And as to the rule of the road governing vehicles proceeding in the same direction,

county liable for injuries caused by the fall of the bridge, under a statute making the county liable for injuries to persons lawfully using a bridge, because of its defective character, since he is not using the bridge lawfully.

**Constitutional law — class legislation — unusual use of bridge.**

2. Requiring one wishing to drive a traction engine across a bridge to lay planks under its wheels, to be entitled to the lawful use of the bridge for that purpose, does not render a statute making the county liable for injuries through defects in the bridge only to those lawfully using it invalid, so far as it excludes from its benefit one failing to use the planks, as class legislation.

(November 26, 1912.)

see note to *Hackett v. Alamito Sanitary Dairy Co.* 41 L.R.A.(N.S.) 337.

As to rules of the road governing vehicles at intersection of streets, and when turning across street, see note to *Molin v. Wark*, 41 L.R.A.(N.S.) 346.

As to effect of operating automobile upon highway without a license, see notes to *Dudley v. Northampton Street R. Co.* 23 L.R.A.(N.S.) 561; *Hemming v. New Haven*, 25 L.R.A.(N.S.) 734; and *Lindsay v. Cecchi*, 35 L.R.A.(N.S.) 699.

Other cases within the scope of the present note may be found under subdivision 10 of the note to *Lerner v. Philadelphia*, 21 L.R.A.(N.S.) 614, on the subject of "Contributory negligence as affecting liability of municipal corporations for defects and obstructions in streets."

The driver of a fire engine is governed by the same rules which govern an ordinary traveler on the highway as to racing or going at an immoderate gait, though under an ordinance, he may have the right of way, and, on driving on the street, he must use his senses and take reasonable care and caution to avoid and prevent injury to himself and to others. *Carswell v. Wilmington*, 2 Marv. (Del.) 360, 43 Atl. 169 (a nisi prius case), wherein the jury was charged that if the driver in question, who was alleged to have been killed on account of the city's negligence in leaving a trench in the street unguarded and unlighted, was racing with the driver of another engine, or was driving at an immoderate gait, at the time of the accident, he was thereby violating an ordinance of the city, and was guilty of negligence *per se*; and if his death resulted from such racing or immoderate gait, he could not recover. But if his death resulted from the negligence of the city alone, as the proximate cause, then he could recover.

A statute having prescribed the weight which might lawfully be transported across a toll bridge, if it appears that the plaintiff's load exceeded such weight, and thereby the bridge was broken down, with injuries to the plaintiff, he is prohibited from recovering for such injuries. *Dexter v. Canton Toll Bridge Co.* 79 Me. 563, 12 Atl. 547. 42 L.R.A.(N.S.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Union County in plaintiff's favor in an action brought to recover damages for the death of her intestate, alleged to have been caused by defendant's negligence. Reversed.

**Statement by Moore, J.:**

This is an action by Mary A. Jones, as administratrix of the estate of her husband, John T. Jones, deceased, against Union county, to recover damages resulting from his death, which was caused by the falling of a bridge on a public highway. The negligence alleged as a basis for the recovery is the failure of the defendant to keep the bridge in proper repair, in consequence of which it fell. The answer denies

In *Pomeroy v. Fifth Massachusetts Turnp. Corp.* 10 Pick. 35, where recovery for damages to merchandise in consequence of the insufficiency of a bridge was denied, the evidence showing that the driver was on the bridge with a weight in excess of that allowed by statute, and was there without the permission of the toll gatherer, it was held that the driver's evidence to the effect that he had frequently driven loaded wagons over the road, which usually exceeded the prescribed weight, without having informed any toll gatherer of that fact, since that matter had not been inquired into, was not sufficient to authorize the jury to infer the required consent to his passing over the bridge.

It was held in *Tuttle v. Lawrence*, 119 Mass. 276, that where a city ordinance prohibits the driving of any vehicle in the streets of a city at a greater rate of speed than 6 miles an hour, it is incumbent upon the plaintiff, who is seeking to recover for personal injuries occasioned by an alleged defect in a public street, to prove that she was not acting in violation of the ordinance when the alleged injury occurred. In this case the trial judge had ruled that the burden of proof was on the defendant to show that the plaintiff was violating the ordinance.

A city is not liable for injuries occasioned to one traveling in a carriage in the nighttime upon a narrow highway, the width of which is known to the driver, through a collision with a hitching post standing between the traveled part of the sidewalk and the carriage way, while the driver, being unable to distinguish the line of the sidewalk, in violation of a city ordinance, was driving upon the sidewalk in an attempt to pass another carriage going in the same direction. *Arey v. Newton*, 148 Mass. 598, 12 Am. St. Rep. 604, 20 N. E. 327, wherein it was said: "Undoubtedly, a person driving in a wagon on a dark night, and attempting to pass another wagon driven in the same direction, is more than likely to go beyond the limits of the traveled way if it is only 16½ feet wide than if it is twice that width; still, a traveler cannot

such want of care, and avers, *inter alia*, that the injury was caused by the failure of Jones to place planks beneath the wheels of a traction engine, the steering gear of which he was managing when he was hurt. The reply admits that no lumber was used except the decking of the bridge, but denies that the failure to place beneath the wheels of the engine any planks contributed to the injury sustained. The case was tried, and, a judgment having been rendered for the plaintiff, the defendant appeals.

Messrs. F. S. Ivanhoe and Crawford & Eakin, for appellant:

At common law the county was not liable

justify driving upon a sidewalk in violation of an ordinance, merely because it is convenient in order to pass at a particular place a wagon that is driven before him. If any necessity would justify violating an ordinance of this kind, mere convenience would not."

A statute providing that no town shall be liable for any damages resulting to person or property by reason of the breaking of any bridge caused by the transportation of any vehicle or load weighing 4 tons or over does not prevent a recovery for an injury received through the collapse of a bridge on an attempted crossing by a threshing engine and separator, which together weigh over four tons, but each of which weighs less, when only one was on the part of the bridge which collapsed. *Bush v. Delaware, L. & W. R. Co.* 166 N. Y. 210, 59 N. E. 838, affirming 54 App. Div. 616, 66 N. Y. Supp. 1128. To the same effect are *Vandewater v. Wappinger*, 69 App. Div. 325, 74 N. Y. Supp. 699, and *Lee v. Delaware, L. & W. R. Co.* 62 App. Div. 624, 71 N. Y. Supp. 120. And the latter case was affirmed upon the facts at a former term in 57 App. Div. 378, 68 N. Y. Supp. 407.

Under the New York statute as stated supra, it was held in *Heib v. Big Flats*, 66 App. Div. 88, 73 N. Y. Supp. 86, to be a question of fact whether a prudent man, in the light of evidence throwing doubt upon the safety of the bridge, would have deemed it safe to go across with a load approximating the weight allowed by statute, without first inspecting the size and condition of the stringers to the bridge.

So, in *Heib v. Big Flats*, supra, it was held to be a question of fact for the jury to say whether crossing the day previous to the accident, with a "vehicle and load" in excess of 4 tons, weakened the bridge, because, if in fact the 4 tons or more of weight put upon the bridge by plaintiff the day before the accident, in transporting the traction engine and thresher, so weakened the bridge as to be the cause of its breaking down on the day of the accident, then plaintiff cannot recover.

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for an injury resulting from a defect in one of its highways or roads.

*Templeton v. Linn County*, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795; *Schroeder v. Multnomah County*, 45 Or. 92, 76 Pac. 772; *Hoexter v. Judson*, 21 Wash. 646, 59 Pac. 498; *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290.

Where a party at the time of an accident is engaged in an act prohibited by a police statute of the state, the act being prohibited and made punishable by state law, the party is guilty of such contributory negligence as will bar his recovery.

*Peterson v. Standard Oil Co.* 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543; *Siemers*

Under a highway law becoming effective February 17, 1909, exempting a town from liability for injuries caused by the fall of a bridge while a traction engine or any vehicle or load weighing eight tons or more is upon it, it was held in *O'Bryan v. State*, 148 App. Div. 542, 132 N. Y. Supp. 1098, where a traction engine weighing 4½ tons, upon which the intestate was riding May 31, 1909, fell through a state bridge which was built about 1896, and inefficiently repaired in 1907 by a day laborer who had had little experience as to bridge work,—defendant showing no reason why it could not have rebuilt or strengthened the bridge subsequent to the operation of the highway law, or have given notice of its weakness,—that, even assuming the statutory load was applicable to the state bridge, the death of the intestate was due to the state's negligence, and plaintiff was entitled to recover. In this case the court said that the intestate had reason to believe that the state had performed its duty and that the bridge was reasonably safe for the load which he was putting upon it.

A boy over twelve years of age, who is riding a bicycle along a path used by pedestrians on a street without paving or sidewalk, in violation of an ordinance, and is thrown from his wheel and injured because of a defect in the street, is a trespasser, and not entitled to recover. *Williams v. St. Joseph*, 166 Mo. App. 299, 148 S. W. 459.

One who is injured while crossing a bridge in a city will not be precluded from recovery for the injury sustained, because of the fact that he was driving at a gait faster than a walk, in violation of a city ordinance, unless this contributed proximately to the injury. *Marshall v. McAllister*, 18 Tex. Civ. App. 159, 43 S. W. 1043. To the same effect is *Chesapeake & O. R. Co. v. Jennings*, 98 Va. 70, 34 S. E. 986, where the plaintiff was injured during the alleged violation of a statute.

So, where one was injured by driving upon a bridge at a rate faster than a walk, contrary to statute, he was held not entitled to recover, where it seemed clear that

v. Eisen, 54 Cal. 418; Hubbard v. Concord, 35 N. H. 52, 69 Am. Dec. 520.

A court of law will not aid a party whose claim is based upon his own unlawful act.

McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 119; Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350.

Mr. J. D. Slater, for respondent.

The violation of a statute will not deprive an injured person of his right to recover, unless such violation was a proximate cause of, and directly contributed to, the injury of which he complains.

Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404; Moran v. Dickinson, 204 Mass. 559, — L.R.A.(N.S.) —, 90 N. E. 1150; Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. W. 555; Lawrence v. Channahon, 157 Ill. App. 560; Hemming v. Haven, 82 Conn. 661, 25 L.R.A.(N.S.) 734, 74 Atl. 892, 18 Ann. Cas. 240; Forsythe v. Kluckhohn, 150 Iowa, 126, 129 N. W. 739; Tackett v. Taylor County, 123 Iowa, 149, 98 N. W. 730; Walker v. Ontario, 111 Wis. 113, 86 N. W. 566; Farrell v. B. F. Sturtevant Co. 194 Mass. 431, 80 N. E. 469; 7 Am. & Eng. Enc. Law, 401.

To bar a recovery, the negligent act of decedent must have contributed directly to the accident.

Gardner v. Wasco County, 37 Or. 401, 61 Pac. 834, 62 Pac. 753; Basler v. Sacramento Gas & Electric Co. 158 Cal. 514, 111 Pac. 532, Ann. Cas. 1912 A, 642;

his injury was due to a certain springing movement of the bridge. Abbott v. Wolcott, 38 Vt. 666, wherein it was also held that if the springing of the bridge was caused by a certain person who preceded the plaintiff with his team on a trot, which act on the predecessor's part was illegal, the town was not responsible for his misconduct.

But where a statute imposed a penalty upon any person driving a horse "faster than a walk" on a bridge with string pieces 30 feet long between the supports, and the evidence showed that the plaintiff was injured on the approaches to the bridge while going along at a fair trot (from 6 to 8 miles an hour), by his horse breaking through the planking and falling, it was held in Weeks v. Lyndon, 54 Vt. 638, that evidence was inadmissible to show that the main stringers of the bridge were 30 feet long, since the fast driving, as stated in the statute, must be upon the bridge itself, not on an approach or wharfing to it.

Where the owner of a threshing machine under 8 tons in weight was in the act of drawing it across a bridge without first

Moakler v. Willamette Valley R. Co. 18 Or. 189, 6 L.R.A. 656, 17 Am. St. Rep. 717, 22 Pac. 948; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816.

As originally passed, the statute requiring extra planks under the wheels of an engine while on a bridge was passed for the purpose of protecting the covering of the bridge.

Toedtemeier v. Clackamas County, 34 Or. 66, 54 Pac. 954.

If the engine was of the size and weight of engines in common use on the highway, the county was bound to provide bridges capable of sustaining its weight.

Kovarik v. Saline County, 86 Neb. 440, 27 L.R.A.(N.S.) 832, 136 Am. St. Rep. 704, 125 N. W. 1082; Central City v. Marquis, 75 Neb. 233, 106 N. W. 221; O'Chandler v. Dakota County, 90 Neb. 3, 132 N. W. 722.

The accident was the natural and expected result of the out-of-repair condition of the bridge, and but for such defect the accident would not have happened.

O'Chander v. Dakota County, 90 Neb. 3, 132 N. W. 722; Bell v. Lessor, 143 Wis. 557, 128 N. W. 53.

Moore J., delivered the opinion of the court:

The evidence tended to show that the bridge in question had been in use fifteen years; it had been replanked about two years before the accident, and none of the decking was broken by the fall. The engine referred to weighed 4 tons or more, and, after its front wheels had safely crossed the bridge and reached solid earth, the posts set to form the embankment gave

having put down planks, as required by statute, although the bridge as constructed was not of sufficient strength to sustain the weight of the engine, but would have been had the boards been used, thereby diffusing the weight of the engine, and it fell through the bridge, damaging it, it was held in Goodison Threshing Co. v. McNab Twp. 19 Ont. L. Rep. 188, affirmed in 14 Ont. Week. Rep. 25, where an action was brought by the owner of a machine against the municipality, that no liability was imposed thereon, but that the owner, on the other hand, was liable to the municipality upon a counterclaim for the damage so sustained.

The following cases, Welch v. Geneva, 110 Wis. 388, 85 N. W. 970; Walker v. Ontario, 111 Wis. 113, 86 N. W. 566, on a second appeal in 118 Wis. 564, 95 N. W. 1086; Stone v. Tilden, 122 Wis. 290, 99 N. W. 1026; Tackett v. Taylor County, 123 Iowa, 149, 98 N. W. 730, which are within the scope of the instant note, are sufficiently set out in JONES v. UNION COUNTY, and need no further recitation. E. M. S.

way, and that end of the approach to the bridge fell, causing the injury. It was maintained by defendant's counsel that an error was committed in denying their request to instruct the jury to return a verdict in favor of their client, to which action of the court an exception was taken. The statute permitting a recovery in actions of this kind reads as follows: "Whenever any individual when lawfully traveling upon any highway of this state or bridge upon such highway, the same being a legal county road, shall, without contributory negligence on his part, and without knowledge upon his part of the defect or danger, sustain any loss, damage, or injury in consequence of the defective and dangerous character of such highway or bridge, either to his person or property, he shall be entitled to recover of the county in which such loss, damage, or injury occurred, compensatory damages not to exceed the sum of \$2,000 in any case, by an action in the circuit court of such county, or in a justice's court therein, if the amount of damages sued for shall not exceed the sum of \$250." L. O. L. § 6375. The law regulating travel contains a clause as follows: "It shall be unlawful for any person or persons to drive any traction or portable engine over any bridge or culvert on any public street or highway within this state, without using on such bridge or culvert, for the purpose of securing its safety, four stout pieces of plank, each of which shall be at least 10 feet in length, 1 foot in width, and 2 inches in thickness, two of the said pieces of plank to be always under the wheels of said traction or portable engine while it shall be crossing said bridge or culvert." Id. § 6337. The penalty imposed upon a conviction for a violation of such provision is a fine of not less than \$10 and not more than \$50 for each offense, or imprisonment in the county jail for not less than five or more than ten days, in addition to which the person causing damage to such bridge or culvert is liable to the county for all injury which may result from the crossing of a bridge with such an engine. Id. § 6338.

It is argued by defendant's counsel that the enactment permitting the maintenance of an action against a county to recover damages sustained in consequence of a defective highway is in derogation of the principles of the common law, and should be strictly construed; and, as it is conceded that Jones placed no planks on the bridge at the time of the accident, he was unlawfully traveling on the highway, and, such being the case, no action can be maintained by his personal representative to

recover any part of the damages sustained by his estate. The plaintiff's counsel denies these assertions, and maintains that the object of the statute requiring the placing on a bridge of planks beneath the wheels of a traction engine is to protect the decking of the span, and as the testimony conclusively shows that such covering was not injured in any manner, but that the accident was caused by the decayed parts of the bridge giving way, there was no causal connection between the failure to place the planks as required by the enactment and the injury which resulted from the defendant's negligence, and hence no error was committed as alleged.

It has frequently been held that a county, as a quasi public corporation and subdivision of the state, cannot be sued for an injury resulting from a defective highway, unless the statute expressly authorizes the maintenance of an action to recover the damages sustained. *Templeton v. Linn County*, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795; *Schroeder v. Multnomah County*, 45 Or. 92, 76 Pac. 772; *McFerren v. Umatilla County*, 27 Or. 311, 40 Pac. 1013. In the last case cited it was ruled that statutes creating a liability where none would otherwise exist are to be strictly construed.

In support of the legal principle asserted by plaintiff's counsel, attention is called to the case of *Welch v. Geneva*, 110 Wis. 388, 85 N. W. 970, where, in construing a statute providing that the person in charge of a traction engine propelled on any highway shall be liable for all damages caused to any bridge therein, if the engine weighs over 5 tons, or if he attempts to cross without spanning the bridge with planks, it appeared that the plaintiff, with an engine exceeding the prescribed weight, attempted to cross a bridge without first overlaying it as required, and it was held that he could not recover for injuries caused by the breaking down of the bridge; and since it was evident that there was a direct causal connection between the excessive weight of the engine and the accident, and that plaintiff's act contributed to the result which followed, it was further determined that he took the risks of injury and was without remedy.

In *Walker v. Ontario*, 111 Wis. 113, 117, 86 N. W. 566, 567, in adverting to the conclusion announced in the preceding case, and commenting upon the requirement to span the bridge with planks, Mr. Justice Bardeen says: "The plain purpose of the law was to protect the covering of the bridge from injury by the projections or calks on the wheels of the engine." Fur-

ther in the opinion it is observed: "To make the failure to comply with the requirements of the statute a defense, it must be shown that there was some direct causal relation between such failure and the accident which followed." In that case, however, planks were used, but some of them were not of the prescribed widths.

In *Walker v. Ontario*, 118 Wis. 564, 95 N. W. 1086, on a second appeal of this cause, it was ruled that plaintiff's neglect to use planks of the required width did not show that there was any causal relation between the failure to comply with the requirements of the statute and the breaking of the bridge, thereby affirming a judgment given for damages suffered. In distinguishing the rule last announced it was determined, however, in *Stone v. Tilden*, 122 Wis. 290, 99 N. W. 1026, that the statute requiring a bridge to be spanned with plank upon which the engine wheels should rest was not solely to protect the bridge, but also to effect a distribution of the weight of the engine; and that, where it appeared that an engine broke through a bridge when such planking and consequent distribution were absent, the court should say, as a matter of law, that the failure to comply with the requirements of the statute contributed to the injury complained of. Whatever conclusion may have been reached by the supreme court of Wisconsin upon the question here involved is not controlling in the case at bar, for a statute of that state declares that the town, which in that commonwealth has supervision of highways, shall be liable "if any damage shall happen to any person, his team, carriage, or other property, by reason of the insufficiency or want of repairs of any bridge," in such town. *Ward v. Jefferson*, 24 Wis. 342; *Antidel v. Chicago & N. W. R. Co.* 26 Wis. 145, 7 Am. Rep. 44; *Burns v. Alba*, 32 Wis. 605; *Pitzner v. Shinnick*, 39 Wis. 129; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Peake v. Superior*, 106 Wis. 403, 82 N. W. 306; *Fehrman v. Pine River*, 118 Wis. 150, 95 N. W. 105.

Plaintiff's counsel also cites the case of *Perry v. Clarke County*, 120 Iowa, 96, 94 N. W. 454, where, in an action to recover damages for injuries sustained by the breaking of a highway bridge while crossing it with a threshing engine, a dispute in the evidence as to whether the wheels were running upon plank as required by the statute existed, and it was held that the question was properly submitted to the jury. Another case adduced is that of *Tackett v. Taylor County*, 123 Iowa, 149, 98 N. W. 730, where it was ruled that a

person conducting a threshing machine engine over a highway bridge might recover from the county for injuries sustained owing to defects therein, although he was at that time violating the statute requiring plank to be placed under the engine, where such transgression does not contribute directly to the injury. The decisions in these cases are not in point, for a statute of Iowa, prescribing the duties and responsibilities of the road supervisor with respect to bridges, contains a clause as follows: "But nothing herein contained shall be construed to relieve the county from liability for the defects of said bridge." Iowa Code 1897, § 1557.

A party disobeying a statute or an ordinance, when not otherwise in fault may recover from a quasi public corporation, when permitted by statute, or from a person, the damages sustained in consequence of the negligence of either of the latter, as appears from cases cited by plaintiff's counsel. Thus, in *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534, where the plaintiff, who was driving cattle to the market on Sunday, in violation of a statute, sustained loss by the breaking of a defective bridge on the highway, which the defendant was bound to keep in repair, it was ruled that such infringement of the law would not prevent a recovery upon due proof of the defendant's negligence in constructing and maintaining the bridge. It will be remembered, however, that in Wisconsin a statute makes the town liable if any damage results to a person or his property by reason of the insufficiency or want of repairs of any bridge. *Ward v. Jefferson*, 24 Wis. 342.

So, too, in *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, automobiles having collided, one of which was guided by the plaintiff, who, at the time, in violation of a statute, had no license to operate such a vehicle, it was held that a breach of the provisions of the enactment would not preclude him from recovering the damages sustained in consequence of the negligence of the other party. Whether or not the decision in the case last referred to is a correct exposition of the law applicable thereto is unnecessary to determine, for that case did not involve the construction of a statute authorizing a recovery against a county for an injury resulting from a defective highway.

In construing the provisions of § 6375, L. O. L., Mr. Justice McBride, in *Bailey v. Benton County*, 61 Or. 392, 122 Pac. 755, 756, speaking for the court, said: "In our opinion these are the plain conditions prerequisite to a recovery: (1) Plaintiff must



have been lawfully traveling upon the highway. (2) He must have received an injury by reason of a defect in the highway. (3) His own negligence must not have contributed to such injury. (4) He must have been ignorant of the defect." Under the legal principle thus announced, if the statute adverted to is valid, it follows that, when the plaintiff's husband undertook to guide the traction engine over the bridge without using any plank, as required by § 6337, L. O. L., he was not "lawfully" traveling upon the highway, and this action cannot be maintained.

It is insisted by plaintiff's counsel, however, that the qualifying word "lawfully," as used in the statute in question, makes the enactment violative of § 1 of the 14th Amendment of the Federal Constitution, and causes it to contravene § 20 of article 1 of the fundamental law of Oregon. "A statute which directly or by implication," says Mr. Justice Bean in *State v. Wright*, 53 Or. 344, 348, 21 L.R.A.(N.S.) 349, 100 Pac. 296, 298, "grants special privilege or imposes special burdens upon persons engaged in substantially the same business, under the same conditions, cannot be sound, because it is class legislation, and an infringement of the equal rights guaranteed to all." The statute under consideration imposes on all persons driving portable or traction engines over any bridge the obligation to use planks in order to protect the structure from the severe strain to which it is thus subjected. This enactment was evidently designed to prevent injuries to public highways, thus making the statute a proper exercise of the police power for the preservation of life and property. The duty to use planks for the purpose indicated is enjoined by law on all persons pursuing the same business under the same conditions, and, this being so, the statute does not make such a class distinction as to render the word "lawfully" violative of either the Federal or the state Constitutions invoked to defeat the term employed. Thus, as was said by Mr. Justice Field in *Barbier v. Connolly*, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357, 360: "Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." To the same effect with respect to the 14th Amendment, see also *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; 42 L.R.A.(N.S.)

*Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192. As interpreting § 20 of article 1 of our Constitution, see *Re Oberg*, 21 Or. 406, 14 L.R.A. 577, 28 Pac. 130; *State v. Randolph*, 23 Or. 74, 17 L.R.A. 470, 37 Am. St. Rep. 655, 31 Pac. 201; *State ex rel. Bell v. Frazier*, 36 Or. 178, 59 Pac. 5; *State v. Thompson*, 47 Or. 492, 4 L.R.A.(N.S.) 480, 84 Pac. 476, 8 Ann. Cas. 646; *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855, 11 Ann. Cas. 88.

Our statute permits a recovery against a county for an injury from a defective highway; but, in order to maintain an action for damages resulting from negligence to keep a bridge in repair, the party sustaining injury must come within the express language of the enactment. *Templeton v. Linn County*, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795; *Wilson v. Ulysses Twp.* 72 Neb. 807, 101 N. W. 986, 9 Ann. Cas. 1153; *James v. Wellston Twp.* 18 Okla. 56, 13 L.R.A.(N.S.) 1219, 90 Pac. 100, 11 Ann. Cas. 938.

As the answer admits and the evidence shows that there was a failure in the respect mentioned, the judgment must be reversed, and the cause remanded, with instructions to dismiss the action; and it is so ordered.

#### TENNESSEE SUPREME COURT.

M. G. WEIDNER et al.

v.

IRENE FRIEDMAN et al., Plffs. in Certiorari.

(— Tenn. —, 151 S. W. 56.)

**Injunction — against red light district.**

1. Equity will not take jurisdiction, at the suit of property owners affected thereby, of a bill to suppress a settlement of disorderly houses forming the red light district of a city.

**Same — laches — effect.**

2. Laches will defeat a bill by neighboring property owners to enjoin the maintenance of a collection of disorderly houses.

**Note. — Right of owner or occupant of neighboring property to enjoin the maintenance of a house of prostitution.**

This note is supplemental to the note to *Tedescki v. Berger*, 11 L.R.A.(N.S.) 1060.

"A public nuisance does not furnish grounds for an action, either at law or in equity, by an individual who merely suffers an injury which is common to the general public; but an individual who sustains an injury peculiar to himself may have relief

where they have been permitted to operate without molestation for twenty-five years. Contempt — violation of injunction — dismissal of bill — effect.

3. The dismissal of a bill for injunction will not affect contempt proceedings to punish defendant for violating it.

(November 23, 1912.)

**C**ERTIORARI to review a decree of the Court of Civil Appeals affirming a decree of the Chancery Court for Hamilton County in complainants' favor and adjudging defendants in contempt for disobedience of an injunction for the suppression of a settlement of disorderly houses. Reversed. Judgment in contempt proceedings modified. The facts are stated in the opinion.

Messrs. Murray & Latimore, for plaintiffs in certiorari:

Where the mere keeping and maintaining of a nuisance is alone averred, without more, a court of equity has no jurisdiction, and will not interfere.

Neaf v. Palmer, 103 Ky. 496, 41 L.R.A. 219, 45 S. W. 506; 5 Pom. Eq. Jur. § 478;

against a public nuisance, and is entitled to proceed in equity for the abatement of or an injunction against the nuisance." 29 Cyc. 1208.

So, a bill to enjoin the maintenance of a house of prostitution is maintainable if it avers special damage to the complainant and his property, distinct from that suffered by the public; and it is immaterial whether such house be considered a public or private nuisance. Barnett v. Tedescki, 154 Ala. 474, 45 So. 904.

And a neighboring property owner suffering damages from the maintenance of a house of prostitution may maintain an action to enjoin the same, although he maintains or allows a similar nuisance as near to his own residence and property as that carried on by the defendant. Tedescki v. Burger, 162 Ala. 534, 50 So. 150.

Under statutes providing that "a private person may maintain an action to abate a public nuisance, when specially injurious to him," and that "an action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened, by a nuisance, . . . and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered,"—an owner of neighboring premises who has suffered special injury may maintain an action to enjoin the maintenance of a house of prostitution. Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

And the owner of a business place diagonally across the street and nearly opposite a house of prostitution, the maintenance of which has contributed to the depreciation of the value of his property and the rental thereof, and has rendered his place of business an undesirable one, has prevented the extension of his local trade, and has been

Weakley v. Page, 102 Tenn. 178, 46 L.R.A. 552, 53 S. W. 551; Cranford v. Tyrrell, 128 N. Y. 343, 28 N. E. 514; Redway v. Moore, 3 Idaho, 312, 29 Pac. 104; Anderson v. Doty, 33 Hun, 160; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; 1 High, Inj. § 782; Ingersoll v. Rousseau, 35 Wash. 95, 76 Pac. 513, 1 Ann. Cas. 35; Smith v. Lockwood, 13 Barb. 209; Gilbert v. Mickle, 4 Sandf. Ch. 357.

Mr. T. Pope Shepherd also for plaintiffs in certiorari.

Messrs. Cooke & Swaney, Meachan & McGaughy, and Spears & Lynch for defendants in certiorari.

Neill, J., delivered the opinion of the court:

Bills, original, amended, and supplemental, filed against certain proprietors of disorderly houses and their inmates, and the owners of some of the houses wherein the illegal business is carried on, in Chattanooga, to suppress all of the houses as nuisances by permanent injunction, and to perpetually enjoin the owners from leasing the houses

and is a source of annoyance to him, his clerks, and customers,—may maintain an action to restrain the use of such premises as a house of prostitution, although they were so used before he purchased his neighboring property. Seifert v. Dillon, 83 Neb. 322, 19 L.R.A.(N.S.) 1018, 131 Am. St. Rep. 642, 119 N. W. 686, 17 Ann. Cas. 1126.

And the right of a specially damaged neighboring property owner to maintain an action to enjoin the maintenance of a house of prostitution is not affected by lapse of time. Ibid.

Nor is the fact that the authorities of a municipality tolerate the maintenance of a house of prostitution any defense to an action by a specially damaged neighboring property owner to enjoin such maintenance. Ibid.

And while, at common law, "it is absolutely essential to the right of an individual to relief against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which all the general public share alike, and the difference between the injury to him and the injury to the general public must be one of kind, and not merely of degree" (29 Cyc. 1210), a statute is not invalid which provides that any citizen of the state may sue in his own name to enjoin the use of any premises for the purpose of keeping a bawdyhouse, and that such citizen shall not be required to show that he is personally injured by the acts complained of. Ex parte Morgan, 57 Tex. Crim. Rep. 551, 136 Am. St. Rep. 996, 124 S. W. 99; Ex parte Lane. — Tex. Crim. Rep. —, 124 S. W. 100; Ex parte Patterson, — Tex. Crim. Rep. —, 124 S. W. 101; Lane v. Bell, 53 Tex. Civ. App. 213, 115 S. W. 918.

A. C. W.

for such unlawful purpose. These houses are located in what is known as the "red light district" of Chattanooga, covering parts of Florence and Helen streets, most of them adjoining each other, and all near together. The bill was filed by private citizens owning property in the neighborhood,—that is, within a block, or two or three blocks,—on the ground of special and peculiar injury to them, in marring the comfort of their homes, and injuring the rental and sale value of their property. Originally there were very many complainants, but as to most of them the bills were dismissed on their own motion, and they were taxed with all of the costs accrued to that time, by the chancellor. Others entered no formal dismissal, and, while remaining nominally complainants, have really abandoned the case, so that there are now left only five active complainants. Their names are H. A. Weidner, H. Fritts, Joseph Josephs, H. Koblentz, and F. E. Tyler. A decree according to the prayer of the bill was rendered against all of the defendants, but only the following of them appealed to the court of civil appeals, *viz.*: J. C. C. Garner, O. E. Pooler, Laura Hines, Bessie McBee, Ada Culver, Lucile Martin, Pauline Miller, Nellie Gray, Sallie Smith, Lillian Sterling, and Annie Bouley. The two first were proceeded against as owners of the property, or some of it. Laura Hines, Ada Culver, Lillian Sterling, and Annie Bouley were proceeded against as madames, or proprietors of houses, and the others as inmates.

The court of civil appeals affirmed the decree of the chancellor, and thereupon the case was brought to this court by the writ of certiorari. It is insisted in behalf of petitioners, defendants below, that the evidence is insufficient to support the decree, that the evidence does not sustain the charge that complainants suffered any injury in person or property different in kind from that suffered by the general public, and that, in any event, the evidence does not point particularly to any one of the several defendants sued as proprietors and inmates, but only in a general way to all of the "red light district."

It is claimed by defendants, as matter of law, that no judgment of abatement as to the individual houses can be rested on such general and indefinite evidence. On the other hand, it is averred by complainants that there is evidence in terms implicating all, at least in a general way, and that this must be held to include each. Likewise complainants put forward the proposition of law that all can be proceeded against as being jointly engaged in the commission of a nuisance, and held liable, even though

no conspiracy between them be proven, on the ground that they are so near together locally, and their operations are so synchronous, that they must be treated as together creating the nuisance complained of. The rule is also invoked that, where there is a concurrence between the chancellor and the court of civil appeals, this court will not reverse, if there is any evidence to support such concurrence. It is claimed by complainants that there is evidence to support such concurrence on the point of special damage peculiar to the complainants, as distinguished from the general public; and they point to the fact that defendants do not deny that they, respectively, are proprietors and inmates of disorderly houses on the streets mentioned.

There is no doubt that the keeping of a disorderly house is a nuisance. It was so at common law, and is so under our statute. It is a misdemeanor, and the ordinary remedy is in the criminal court, which court can act most effectively by fine and imprisonment, and judgment of abatement. The chancery court has only a limited jurisdiction, which is defined in *Weakley v. Page*, 102 Tenn. 179, 46 L.R.A. 552, 53 S. W. 551, as the power to grant relief at the suit of a private person only when he can prove special and peculiar injury to himself, different in kind from that suffered by the general public. That case is in accord with the weight of authority in other jurisdictions. Everywhere the powers of the court are confined within the narrow limits there laid down, and some cases take even a more restricted view. We are not disposed to expand and extend the doctrine further by construction. There would, by such course of decision, result extreme danger to the usefulness of the chancery court, the danger of overwhelming the court with a mass of litigation which would occupy its time to the exclusion of the vast range of its ordinary duties. The danger is well illustrated by the history of the present case as disclosed by this record. A preliminary injunction of a very drastic character was issued against defendants. They obeyed for a time, and left the district, that is, the "red light district," but afterwards returned, and renewed their former way of living. Then ensued two proceedings for contempt, preserved and presented here in four large volumes, in addition to the two large volumes embracing the main case. These contempt proceedings were brought to punish defendants for resuming their unlawful business in violation of the injunction. Fines and imprisonment were imposed. These proceedings are not distinguishable from ordinary prosecutions against such offenders in the criminal

court, except in the form of them, and the charge that they violated an injunction, instead of the criminal law. It is easy to see how the offense could be, and would be, again and again repeated, after receiving the punishment of \$50 fine, and 10 days' imprisonment,—all that the chancery court can impose for a contempt. It is true that this may be said of any case in which the chancery court undertakes to suppress a nuisance, particularly any nuisance of the kind involved in the case now before us. This should be a warning to the court to be extremely careful in assuming jurisdiction of such cases, confining the exercise of its powers in this regard within the narrowest limits consistent with duty.

Should it assume jurisdiction in one bill to suppress a whole settlement of such people? We think not. The task should be left to the criminal court, where it most properly belongs. It is one thing to bring before the court a single house of the kind, with its inmates, and quite another to hale before the court a congeries of such houses, and troops of women occupying them. In the first case the court can carefully and adequately examine into and decide the question whether the single house in question has been instrumental in causing damage to near-by owners, of a kind special and peculiar to them, as distinguished from that done to the public at large. But where a large number of such persons are brought before the court for several such houses, it is practically impossible to apportion the blame, or to ascertain from the evidence how much each house is responsible for the special injury claimed to have been inflicted; so that it must result, as in the present case, in a contention that all must be held equally guilty, because of the fact that the number of such houses so congregated causes crowds of men and boys to gather on the streets and go in and out of these resorts, the use of profane and vulgar language in the streets by men who gather there, the trapesing of the women, denizens of such houses, from one house to the other, or along the street, in pursuit of a man or men, the occasional exposure of person on the part of some woman in a house or houses not identified or distinguished from the mass of houses; in short, a jumbled aggregation of general evidence to no house in particular, but to all of the houses as an assemblage of illegal resorts. Relief in such a case must necessarily rest upon the postulate that the chancery court has power to break up and destroy such a nest of vice, although it is unable to see from the evidence from what special house the injury proceeded which is the necessary prerequisite to give the court jurisdiction.

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The task is too much for the chancery court. It cannot accomplish it. On the other hand, it can be accomplished by the criminal court. There is no special damage to private persons need be proven. The crime of conducting a disorderly house, or of acting as inmates of one, or of renting a house to be used for such purpose, is all that need be proven. All persons so offending can be punished, not merely by a small fine and short imprisonment, but by heavy fines, and imprisonment for any term less than twelve months, and the houses can be broken up.

We have proceeded thus far without mentioning another objection to complainants' claim to relief in the chancery court, if the other objections mentioned were out of the way. That is laches. This "red light district" has been in operation in Chattanooga twenty-five or twenty-six years, according to the witnesses for complainants themselves; some witnesses say, from thirty to forty years. Parties who apply to a court of chancery for injunctive relief must apply promptly, on the penalty of a refusal to entertain the bill because of laches. In *Caldwell v. Knott*, 10 Yerg. 210, 212, where the nuisance complained of was a milldam, the court held that a delay of ten years, without more, was too much, and the court referred with approval to the case of *Weller v. Smeaton*, 1 Cox, Ch. Cas. 103, 1 Bro. Ch. 572, and *Reid v. Gifford*, 6 Johns. Ch. 19, wherein it was held that three years' delay was too long. These cases were referred to and approved in the case of *Madison v. Ducktown Sulphur, Copper & I. Co.* 113 Tenn. 331, 351-355, 83 S. W. 658, in which many other cases were cited showing that even a much shorter time would serve to bar relief in equity under peculiar facts; and it was said in that case that, although the defense of laches had not been raised in the lower court by the parties, this court could itself raise it when it appeared on the record. In the present case there was a delay of, not three years, or of ten years merely, but for more than a quarter of a century.

The result is that the original, amended, and supplemental bills must be dismissed as to the complainants still remaining before the court. The dismissal of the said bills will have no effect upon the contempt proceedings. It was the duty of defendants to obey the injunction, and their failure to do so was a contempt of court, for which they should be punished. We are of opinion, however, that the imprisonment should be remitted, because the injunction order was such as would have been superseded, if timely application had been made therefor, since by this order the chancellor decided on the application for a temporary

injunction the merits of the cause in advance of a hearing thereon.

The cause will be remanded to the chancery court of Hamilton county for the enforcement of the judgment for contempt, as herein modified, and with directions to dismiss the bills when these matters are finally disposed of.

The defendants found guilty under the respective contempt proceedings will pay the costs of these proceedings in the chancery court in so far as they are unadjudged. Defendants to the respective contempt proceedings in this court will pay the costs of this court and the court of civil appeals.

The complainants still remaining such in the record will pay all of the unadjudged costs of the chancery court. The five active complainants, who have prosecuted the original cause in this court and in the court of civil appeals, will pay the costs of said original cause in both courts.

It follows that the decrees of the Court of Civil Appeals and of the Chancellor in the main case are reversed, while the judgments of both of these courts in respect of the contempt proceedings are modified and affirmed.

#### ALABAMA SUPREME COURT.

LEWIS TOONE, Appt.,

v.

STATE OF ALABAMA.

(— Ala. —, 59 So. 665.)

**Eminent domain — use of property in road work — validity.**

Subjecting, under penalty, all animals and implements suitable for road work in the county, to that duty a certain number of days each year, with an option to pay money in lieu of furnishing the stock or implements, violates a constitutional pro-

vision forbidding the taking or applying to public use of private property without just compensation.

(McClellan, J., dissents.)

(May 4, 1912.)

**C**ERTIFICATION by the Court of Appeals to the Supreme Court of questions arising upon appeal by defendant from a judgment of the Circuit Court for Limestone County convicting him of the alleged violation of an act for the improvement of public roads. Questions answered.

The facts are stated in the opinion.

The certificate to the supreme court of Alabama was as follows:

Under the provisions of the statute (act approved April 18, 1911; Acts 1911, p. 449, § 1), the following questions are hereby submitted to the supreme court for determination:

(1) Are §§ 7, 11, and 15 of the act entitled "An Act to Provide for the Maintenance, Construction, and Improvement of the Public Roads of Limestone County, Alabama, and to Provide a Special Fund Therefor," approved March 4, 1911, violative of the Constitution of the state of Alabama?

(2) Is said act of the legislature of Alabama, approved March 4, 1911 (Local Acts 1911, pp. 66-74), violative of the Constitution of the state of Alabama?

R. W. Walker,  
Presiding Judge.  
Ed. De Graffenried,  
Jno. Pelham,  
Judges.

Messrs. Kyle & Houston, and M. K. Clements, for appellant:

The state cannot lawfully take the citizen's property and place it upon the public roads, or force the citizen to place his

**Note. — Compulsory use of private property in road work.**

No case has been found similar to *TOONE v. STATE*, involving compulsory use in road work of animals and implements suitable therefor. In a few instances, however, the question has arisen as to the right to make compulsory use of materials in road work. The right to take gravel or other material within the limits of the highway for such purpose is not within the scope of the note. See, on that point, the note to *Hamby v. Dawson Springs*, 12 L.R.A. (N.S.) 1164.

In the absence of statutory authority.

It was held in *Ward v. Folly*, 5 N. J. L. 485, that in repairing a public highway, a road overseer has no right, except for purposes specified by statute, to take stones

and earth from land outside the limits of the road, to the injury of the owner, without his permission, and that for so doing the overseer is liable.

Also, in *Hawks v. Charlemont*, 107 Mass. 414, it was held that a landowner from whose premises, adjoining a public highway, stone had been taken without his consent, to repair a bridge, could recover the damages he had sustained in a tort action against the town authorizing the work.

In *Duryea v. Smith*, 62 Hun, 619, 42 N. Y. S. R. 565, 16 N. Y. Supp. 638, it was held that an adjoining owner might recover in trespass for the taking of gravel from his land against his will, for the repair of a public highway. It is said that the commissioner had no right to enter upon private lands and take gravel therefrom, to repair the road, without the owner's consent,

property upon the public roads, without first making just compensation therefor.

*Dorman v. State*, 34 Ala. 238; *Montgomery v. Townsend*, 80 Ala. 489, 60 Am. Rep. 112, 2 So. 155; *Memphis & C. R. Co. v. Birmingham, S. & T. R. Co.* 96 Ala. 578, 18 L.R.A. 166, 11 So. 642; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 639; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Elliot, Roads & Streets*, 1st ed. 155, 156; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Smith v. County Comrs. Court*, 117 Ala. 196, 23 So. 141; *Com. v. Fowler*, 96 Ky. 166, 33 L.R.A. 839, 28 S. W. 786; *Montgomery v. Kelly*, 142 Ala. 558, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67.

**Mr. W. R. Walker, for the State:**

The requirement that certain persons shall work on public roads for their construction and repair is in the nature of military or jury service, and can be required by the statute without payment therefor.

*State v. Sharp*, 125 N. C. 628, 74 Am. St. Rep. 663, 34 S. E. 264; *People ex rel. Scott v. Chenango*, 8 N. Y. 317; *State ex rel. Curtis v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310, 7 Am. Crim. Rep. 479; *State v. Rayburn*, 2 Okla. Crim. Rep. 413, 22 L.R.A.(N.S.) 1067, 101 Pac. 1029,

and that his office would not protect him in committing a trespass.

#### Statutory authority.

Frequently the question has been as to the construction of a statute giving authority to take materials from adjoining or near-by lands for use on public highways. Among this class of cases are *Jackson v. Rankin*, 67 Wis. 285, 30 N. W. 301 (holding that a statute authorizing the entry upon unimproved lands to cut stones and timber did not authorize entry upon land inclosed with a fence); *Goodman v. Bradley*, 2 Wis. 257 (where it was held that a statute giving authority to a road overseer to cut timber on adjoining land for use in the highway did not authorize him to take timber which the owner had set apart and prepared for a specific purpose); *Collins v. Creecy*, 53 N. C. (8 Jones, L.) 333 (holding that the statute did not restrict the cutting of timber to a location opposite the place where it was to be used in a bridge, but that it might be taken from another point along the road, so long as the power was not abused); *Hatch v. Hawkes*, 126 Mass. 177 (holding that under a statute giving the right to lay out land for gravel pits, from which earth and gravel might be taken, and providing a method for compensating the owner, stones from 3 inches to 2 feet in diameter might be removed without additional compensation to the landowner); *Kendall v. Post*, 42 L.R.A.(N.S.)

*Ann. Cas.* 1912 A, 733; *Leedy v. Bourbon*, 12 Ind. App. 486, 40 N. E. 649; 37 Cyc. 332; 27 Am. & Eng. Enc. Law, 2d ed. 916 and notes.

A law requiring persons to work on public roads is constitutional.

*Dennis v. Simon*, 51 Ohio St. 233, 36 N. E. 832; 2 *Abbott, Mun. Corp.* § 409 and notes.

Since Alabama became a state, it has been the law that persons subject to road duty may be warned for service and also to bring such tools, implements, and property as were subject to road duty.

*Chancey v. State*, 170 Ala. 83, 54 So. 522.

The court erred in holding the act unconstitutional.

*Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 285; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, *Ann. Cas.* 1912 A, 487; *Phoenix Assur. Co. v. Fire Dept.* 117 Ala. 631, 42 L.R.A. 468, 23 So. 843; *McDonald v. State*, 81 Ala. 279, 60 Am. Rep. 158, 2 So. 829; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 *Inters. Com. Rep.* 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. State*, 83 Ala. 71, 3 So. 702; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96,

8 Or. 141 (holding that under statute the road overseer alone is the judge of the materials to be taken from adjoining land for repair of the highway, and that so long as he does not wilfully oppress or annoy the owner, he may enter inclosed land for such purpose, even though the same is cultivated, although, by going  $\frac{1}{2}$  mile farther, he could have obtained the same kind of stone without breaking into an inclosure); *State v. Huffman*, 2 Rich. L. 617 (holding that after earth and gravel had been taken for ten years from land near a highway, it would be presumed that the same had been set apart for that purpose by the commissioner of highways, as required by statute); *Burrows v. Coaler*, 33 Ohio St. 567 (holding that the statute permitted a street commissioner to take gravel and dirt for the repair of a public road from lands near the same, even though situated in another road district).

It was said in *Posey Twp. v. Senour*, 42 Ind. App. 580, 86 N. E. 440, that the right given by law to road supervisors to enter land and appropriate materials for the repair of highways is the right to exercise the power of eminent domain; that in exercising the power the supervisor represents the state; that but for the limitations in the state and Federal Constitutions, the state might appropriate such property without compensation, and that, where the statute in conformity with those limitations provides a way in which compensation shall be made, the statutory provisions must be

32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; *Gibbons v. Mobile & G. N. R. Co.* 36 Ala. 410; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Swift v. Calnan*, 102 Iowa, 206, 37 L.R.A. 462, 63 Am. St. Rep. 443, 71 N. W. 233; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

Messrs. R. C. Brickell, Attorney General, and W. L. Martin, Assistant Attorney General, also for the State.

Anderson, J., delivered the opinion of the court:

Section 7 of the act says: "All horses, mules, oxen, wagons, scrapers, plows, and all other implements and machinery, suitable

complied with. Accordingly, it was held that while the statutory provisions with reference to notice and demand upon the landowner, of the intention to make the appropriation, might be waived, because for his benefit exclusively, yet the requirement that the damages should be assessed by the supervisor and two disinterested persons could not be waived and an agreement with the supervisor substituted.

Similarly, it was held in *Keene v. Chapman*, 25 Me. 126, that where a surveyor of highways takes from adjoining land rocks necessary for building a public road, and his acts are authorized by statute, the landowner has no remedy against the surveyor, but can obtain compensation only as provided by statute.

In *Reynolds v. Speers*, 1 Stew. (Ala.) 34, it was held that a road overseer had no right to take, without the owner's consent, timber from land adjoining a public highway to repair the same, the decision, however, being based on the ground that a statute authorizing the overseer to contract for timber necessary in the repair of highways virtually prohibited the taking of timber without contract.

In *Dronberger v. Reed*, 11 Ind. 420, it was held that a statute authorizing the road supervisor to take from land adjoining a highway gravel, stone, wood, etc., necessary for its repair, and providing that damages might be assessed therefor by three disinterested persons appointed by the township trustees, did not vio-

for use and work on the public roads, belonging to any individual or corporation in the county, or which, belonging to any nonresident of the county, but are in the county at the time notice is given to parties warning them to work the road, are subject to road duty in Limestone county, to be used in the precinct where the owner resides, or where such are kept for use. But if the owner is a nonresident of the county, to be used in the precinct where they are temporarily located, and they shall be subject to such duty for a time to be prescribed by the overseer: Provided, no wagon or team, horse or mule or oxen, shall be subject to road duty for more than four days during any year: Provided, further, that all wagons and teams, horses, mules, and oxen shall work an equal number of days." Section 11 provides a penalty for violating the act; and § 15 permits the payment of a fixed sum in lieu of furnishing the stock and vehicles as required by § 7.

If this act provides for the levy of a tax, and not the imposition of a duty essential to citizenship, then it is not such a uniform *ad valorem* one as is required by § 211 of the Constitution of 1901, and §§ 7, 8, and 15 of the act would fall under the influence of *Smith v. County Comrs. Court*, 117 Ala. 196, 23 So. 141. It may be con-

late a constitutional provision forbidding the taking of private property without just compensation, or, except in case of the state, without compensation first assessed, since the taking must be regarded as the act of the state for a public use under the right of eminent domain.

In *Jeffersonville, M. & I. R. Co. v. Daugherty*, 40 Ind. 33, under statutory authority providing compensation to the owner, the taking of gravel for repairing an adjacent public road, from land belonging to a railroad, was upheld, even though the railroad company contended that it had bought the gravel bed for the purpose of repairing its own tracks.

In *State v. Dawson*, 3 Hill, L. 100, it was held that a statute granting power to the commissioner of roads to cut timber in or near a highway, to repair the same, did not violate a constitutional provision forbidding the deprivation of property except by the law of the land, even though the statute did not provide a method of compensating the owner. It is said that the right of the legislature thus to exercise the power of eminent domain is a tacit condition of every grant of land in the state, and that, while the owner might have a just claim for compensation if he contributed beyond his equal portion of the public burden, yet he has no constitutional right to demand compensation as a condition precedent to the use of his property.

R. E. H.

ceded, however, that the act is not intended as the levy of a tax as covered by § 211 of the Constitution, but was enacted for the purpose of requiring persons to discharge their duties as to the maintenance of the public roads of the county. The authorities are numerous to the effect that the law requiring persons to work upon the public roads, in person or by a substitute, or authorizing a fixed sum by way of commutation, is not unconstitutional, and is not double taxation, even where the road is kept up in part by taxation. The theory is that requiring such labor is not taxation at all, but is the execution of a public duty. Elliott, *Roads & Streets*, 3d ed. § 480, and cases cited in note; 37 Cyc. 708, and note 16. This duty seems to be like unto that enjoined upon citizens to serve in person in the militia, etc., and seems to be a mere personal obligation due from the subject, and does not entail upon him the duty of furnishing his property in connection with his personal service, except, of course, by legal taxation. The books have been examined in vain for an authority which will authorize the exaction from a citizen of the contribution of his property for public service, under the theory that it is his duty as a citizen to so contribute. The state may exact the performance of this personal obligation, or provide a reasonable commutation for same by way of an assessment; but it cannot confiscate his property by devoting it to public use. Section 23 of the Constitution, among other things, says: "But private property shall not be taken for or applied to public use, unless just compensation be first made therefor." It may be true that the taking of the property under the act would be for only a few days; but this would nevertheless be a taking, or a compulsion to produce, under a penalty for a default. If the taking for but a few days could be legally sanctioned, the property could as well be impressed for two weeks, two months, or two years, and § 7 of the act is in the very teeth of the Bill of Rights. If the legislature can authorize the taking of a man's team and wagons to be used on the roads, and without compensation, it could as well authorize the road supervisors to get a certain number of trees on each piece of land along the road, or in the township, to be used for bridges and causeways, and without compensating the owners for said trees. Or it could require all millers to contribute meal to feed the road hands, all corn growers to supply corn to feed the teams, or all merchants to supply tools for working the roads.

It may be true that in the early history of this state, during a period when slaves were regarded by the law as property, there 42 L.R.A.(N.S.)

was a statute similar to the one in question, except that it required the owner to send his slaves to the road, instead of his teams and wagons, as here required, and that we also had at that time a constitutional provision similar to the quoted part of § 23 of the present Constitution; but we do not find that the constitutionality of said statute was ever raised or considered by the court. The case of *James v. Clarke County*, 33 Ala. 51, and *Barney v. Bush*, 9 Ala. 345, involved no constitutional question.

The act in question cannot be construed as providing a license tax, so as to bring it within the protecting influence of *Kenamer v. State*, 150 Ala. 74, 43 So. 482.

We are of the opinion that §§ 7, 8, and 15 of the act are repugnant to the Constitution, and, as they are invalid, § 11 can have no application to same.

**Dowdell, Ch. J., and Simpson, Mayfield, Sayre, and Somerville, JJ., concur.**

**McClellan, J., dissents.**

Petition for rehearing denied June 29, 1912.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

MARIANO DEMINICO  
v.

DAVID CRAIG et al.

(207 Mass. 593, 94 N. E. 317.)

#### Strike — deposition of foreman — justification.

1. The deposition of a foreman who is distasteful to some of the employees of a shop, merely because his enforcement of rules is too rigid to please them, is not a legal purpose for a strike.

#### Damages — loss of position — liability of strikers.

2. A foreman who loses his position as such, because of an unauthorized strike of employees to secure his removal, may recover damages against those who personally participated in it, not only for his loss of wages, but for any damage to his reputation as such employee, which is in fact caused by the strike.

(February 27, 1911.)

#### Note. — Forcing discharge of foreman or coemployee as justification for strike.

While every employee may refuse to work with any coemployee who is for any reason, however arbitrary, objectionable to him, and while he may act in combination with others in giving their employer the alternative of



**R**ESERVATION by the Supreme Judicial Court for Worcester County upon the report of a master of a bill brought by plaintiff to enjoin defendants from combining against plaintiff's employment as foreman of a quarry, and for damages for causing his removal. Decree for plaintiff.

The facts are stated in the opinion.

Messrs. Hallowell & Hammond, for plaintiff:

The plaintiff's right to the pursuit of his calling is a property right.

Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330,

continuing them in his service or retaining others, they may not combine with the chief purpose of causing another's discharge. In determining, then, whether a strike to cause another's discharge is justifiable, the inquiry is whether there is a bona fide exercise on the part of the members of the combination, of their right to say with whom they will be associated, in which case the strike is justifiable, even though they may have contemplated, as a probable consequence of the stand taken by them, the loss of employment of the objectionable co-employee; or whether the primary object is the infliction of injury upon such employee, in which case the strike is not justifiable. And since this object must be ascertained by a resort to the concomitant circumstances, the inquiry resolves itself into the question whether the object of the combination is the advancement of the legitimate interests of its members, or primarily to inflict injury upon another.

As various courts have found occasion to remark, the question as to what will constitute the justification which will exonerate a person from liability for the intentional infliction of loss upon another is one which does not admit of a categorical answer. It may sometimes be found in the motive, sometimes in the circumstances, and sometimes in the circumstances and motive combined. In the present connection, it has been held that one's habits or conduct or character may constitute a justification for a combination of his fellow workmen to refuse to work with him. As to whether they are justified by his refusal to become a member of their union is a point upon which there is a difference of opinion. Where the union procures the discharge of a member as a step toward enforcing union discipline, it has been held that the person so discharged cannot complain, having waived his right to object to interference from such source by becoming a member of the union; but the disciplinary measures must have been for proper cause, and have been properly taken. 42 L.R.A.(N.S.)

57 N. E. 1011; Beekman v. Marsters, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332.

It cannot be unlawfully interfered with.

Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Carew v. Ruth-erford, 106 Mass. 1, 8 Am. Rep. 287.

Mr. Frederick W. Mansfield, for de-fendants:

The defendants have a right to refuse to work under the plaintiff as a foreman.

Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Walker v. Cronin, 107 Mass. 555; Com. v. Hunt, 4 Met. 112, 38 Am. Dec. 346; Carew v. Ruth-erford, 106 Mass. 1, 8 Am. Rep. 287.

Right of individual to refuse to work with obnoxious coemployee.

It is within the legal rights of a single individual to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason, however arbitrary. Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638.

"It is the right of every workman, for any reason which may seem sufficient to him, or for no reason, to quit the service of another, unless bound by contract. This right cannot be abridged or taken away by any act of the legislature, nor is it subject to any control by the courts; it being guaranteed to every person under the jurisdiction of our government by the 13th Amendment to the Federal Constitution, which declares that involuntary servitude, except as a punishment for crime, shall not exist within the United States, or any place subject to their jurisdiction. Inci-dent to this constitutional right is the right of every workman to refuse to work with any coemployee who is for any reason objectionable to him, provided his refusal does not violate his contract with his employer; and there is no more foundation for the contention that the employee commits an actionable wrong by informing the employer, before he leaves the service, that he will not work with the objection-able coemployee, and thereby occasioning his discharge, than there would be for the contention that the employee would commit an actionable wrong by quitting the service and afterward stating to the em-ployer his reason therefor, if, as a result thereof, the employer should choose to dis-charge the objectionable coemployee. In either case, the employee is exercising a legal right, and although it results in dam-age to the objectionable coemployee, the latter has no cause of action against the former for causing his discharge." Per Cooke, J., in Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389.

A combination among persons merely to regulate their own conduct is within allowable competition.

*Vegelahn v. Guntner*, 187 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Reynolds v. Davis*, 198 Mass. 300, 17 L.R.A. (N.S.) 162, 84 N. E. 457; *Pickett v. Walsh*, 192 Mass. 582, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *L. D. Wilcutt & Sons Co. v. Driscoll*, 200 Mass. 114, 23 L.R.A. (N.S.) 1236, 85 N. E. 897.

*Loring, J.*, delivered the opinion of the court:

This bill is brought by a member of the Milford Branch of the Granite Cutters' International Association of America against

And see also *Walsby v. Anley*, 3 El. & Bl. 516, 7 Jur. N. S. 465, 30 L. J. Mag. Cas. N. S. 121, 3 L. T. N. S. 666, 9 Week. Rep. 271; *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995, *infra*.

Right of workmen to combine to refuse to work with another.

As above remarked, it has been held in various cases that workmen may act together in good faith, in giving the employer the alternative of continuing them in his service or of continuing to employ others.

Thus, in *Walsby v. Anley*, *supra*, it was said that 'if one man acting honestly, or several persons so acting, give their master the alternative of continuing them in his service or retaining others, it is not illegal.

And in *Giblan v. National Amalgamated Laborers' Union* [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708, it was strongly intimated (by Vaughan Williams, L. J., p. 617, and Stirling, L. J., at p. 622) that workmen may lawfully refuse to work with another, and may inform their employer of their decision, although in consequence thereof such other loses his employment.

The effect of a refusal of workmen to continue in their employment if certain coemployees are retained does not amount to unlawful coercion of their employer. *Reform Club v. Laborers' Union Protective Soc.* 29 Misc. 247, 60 N. Y. Supp. 388.

"Many decisions, and perhaps the weight of authority, uphold the right of employees, either individually or in combination, to quit working because some fellow servant is obnoxious to them, when they are not governed by a contract of service of definite duration. This is on the principle that employees may choose both their employer and their working associates; and it may well be that, if not under contract, they may leave an employment when they please, for any purpose they conceive to be for their welfare, or likely to aid in 42 L.R.A. (N.S.)

the president and secretary of the association and certain members of it who constituted its adjustment committee. The plaintiff seeks to have the defendants enjoined from combining against his employment as a foreman by Wells Brothers, and for damages. The case went to a master and is before us on his report.

The plaintiff and one Ardolino had been employed by Wells Brothers as the foremen of their stone quarry at Hopkinton, since March, 1909 (when work was begun there to furnish the stone for a building in process of erection in Boston), until the matters here complained of took place in the following June. On the evening of June 22, 1909, the Milford branch of the association voted to refuse to continue at

the amelioration of the lot of the laboring classes, if their conduct is dominated by such a motive, rather than by a malicious desire to injure someone else. In recognition of this principle, the right of artisans to strike for an increase of wages or for shorter hours, or because a coemployee is obnoxious to them, has been often adjudged, though perhaps it cannot be said that the current of authority is unbroken, in favor of the right to strike, when the immediate purpose is to cause the discharge of an obnoxious fellow servant, even though the ultimate purpose may be the attainment of better economic and social conditions." *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995.

In *Mayer v. Journeymen Stone Cutters' Asso.* 47 N. J. Eq. 519, 20 Atl. 492, it was held that neither workmen nor employers desirous of employing them may enjoin members of a union from peaceably withdrawing from their employment in pursuance of their rule not to work with any but members of the association, and not to work for any employer who insists on their doing so, although in consequence the workmen are unable to obtain employment, and the employers are unable to avail themselves of the services of nonunion workmen.

Nor are employees liable for loss of employment due to a stoppage of work consequent upon their quitting because of the employer's refusal to accede to their demand for the discharge of another employee.

Thus, in *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367, it was held that a compact or combination between two or more employees to quit the work at which they are employed if another employee is not dismissed, and quitting on the employers' refusal to discharge such other employee, by reason of which the whole work is stopped and the latter is thrown out of employment, did not constitute a conspiracy rendering the parties to such combination liable to such employee for being thrown out of work.

But the statement supported by the foregoing cases is subject to the qualification

work under the plaintiff and Ardolino as foreman, and, pursuant to the vote, none of the men employed by Wells Brothers went to work on June 23d, the next day. A meeting was had between Wells Brothers and the adjustment committee of the association on that next day, June 23d, and the result of it was an agreement between Wells Brothers and the officers of the association by which the men went back to work on the following day, June 24th, and the plaintiff and Ardolino were removed as foremen on Saturday night, June 26th. The plaintiff thereafter worked as a journeyman for Wells Brothers until January 10, 1910, when work at the quarry ceased.

The occasion for the strike was a discharge, or a supposed discharge, by the

plaintiff of one Tronconi, on the morning of June 22d. There was a rule of Wells Brothers forbidding the men to enter the blacksmith shop. On the day in question Tronconi went into the blacksmith shop to get some tools which were being sharpened for him, and was ordered out by Ardolino, the other foreman. Later the plaintiff gave Tronconi some instructions which Tronconi understood to mean that he was discharged. But the plaintiff always denied that he intended to discharge Tronconi. Thereupon, on the same day, the president and two members of the adjustment committee of the association had a conference with the plaintiff and Tronconi. At this conference Tronconi insisted that he had been unjustly discharged, the plaintiff denied that

that servants may not lawfully give the employer the option of dispensing with the services or with the services of another employee whom the employer is bound to retain for a definite period.

This is illustrated by *Read v. Friendly Soc.* [1902] 2 K. B. 732, 1 B. R. C. 503, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822, where it was held that an action will lie against a trade union for procuring an employer to break a contract of apprenticeship by giving a notice that if the engagement of the plaintiff as an apprentice should be continued, other employees who were members of the union would be called out, even though plaintiff's employment may have been believed, in good faith, to be in violation of a previous agreement between the union and the employer.

And where the conditions of employment were fourteen days' notice on either side, and, by consequence of a strike, because the employer would not discharge the plaintiff within seven days at the threat of the defendant union, the plaintiff could not get work, *Martell v. Victorian Coal Miners' Asso.* 29 Vict. L. R. 475, has been cited as authority that he had a cause of action against the union.

In accordance with the general principle supported by the foregoing cases, it has been held that union men may lawfully combine to refuse to work where men who do not belong to the union, or who are members of another organization, are employed. This class of cases should not be confused with those involving a combination to procure a person's discharge because of his refusal to become or remain a member of the union, in which the circumstances afford a basis for the inference of an intent to injure.

Thus, it has been held that members of trades unions, as well as other individuals, have a right to say that they will not work with persons who do not belong to their organization, and whether they say it themselves, or through their organized societies, can make no difference. *Davis* 42 L.R.A.(N.S.)

*v. United Portable Hoisting Engineers*, 28 App. Div. 396, 51 N. Y. Supp. 180; *Tallman v. Gaillard*, 27 Misc. 114, 57 N. Y. Supp. 419.

The continued expression by the members of a union of their refusal to work with members of another organization is not unlawful, although the natural effect of the express refusal will be to cause the dismissal of the latter. *Reform Club v. Laborers' Union Protective Soc.* 29 Misc. 247, 60 N. Y. Supp. 388.

Members of a union have a right to declare their unwillingness to work in the same shop or on the same job with any non-union man, and if, by threatening to strike unless the nonunion man is discharged, the nonunion man is thereby prevented from obtaining or continuing employment in any shop or on any job where union men are employed, no crime is committed, and no actionable injury done to the nonunion man. *People v. McFarlin*, 43 Misc. 591, 89 N. Y. Supp. 527.

In *Perrault v. Gauthier*, 28 Can. S. C. 241, it was held (affirming *Rap. Jud. Quebec* 6 B. R. 65) that members of a trade union were not liable to a nonunion workman in carrying out regulations of their union forbidding them to work in company with nonunion workmen, without threats, violence, or other illegal means, but merely by quitting work, in consequence of which, in order to avoid causing loss to his employers, one of whom was his brother, he voluntarily quit work. The decision, however, is not based on the absence of any causal connection between the act charged and the alleged injury, but on the ground that the union men had done only what they had a legal right to do.

In *Graham v. Knott*, 14 B. C. 107, an action for an injunction and damages sustained by reason of the defendants' interference with the plaintiff's employment, it appeared that the plaintiff, a stone mason, applied for admission to the defendant union; that, not being able to find two members to vouch for his workmanship, as required by a rule of the union, the union requested him to submit to a test

he had discharged him at all, and told him to go back to his work. The meeting of the association was held on the evening of that day, the strike followed the next day, and was ended by the agreement reached on the afternoon of the second day, as we have already stated.

We pass by certain findings made by the master on issues raised by the pleadings, which have now become immaterial, and come to his finding on the only issue now in dispute, namely, Was the strike for a justifiable purpose?

The master begins the part of his report in which that question is considered with this finding: "I find . . . that the respondents, in securing his [the plaintiff's] removal, were actuated by personal objec-

of workmanship; that he, considering the test an unfair one, declined to submit to it, and was consequently refused membership; that thereafter the union offered him a test on any kind of stonework he liked, which offer was not accepted; that the union notified his employer that it was against their rules to work with non-union men, and that the men would be called out if the plaintiff was kept at work; that, in consequence of this notice, the plaintiff's hiring was legally terminated, although but for this notice he would have been retained, and as a result he was unable to get employment at his trade. Under such circumstances, it was held that the plaintiff had not produced such evidence as to compel the court to conclude that the purpose of the defendants was to molest him in the peaceful pursuit of his calling, and, if possible, to prevent him from making his living thereby except on conditions of their own making, and therefore that he had failed to establish a cause of action.

But where the primary purpose of the interference is to injure the obnoxious employee, it does not constitute an exercise of the right above mentioned, to choose one's associates, and so is not justifiable.

Thus, in *Mills v. United States Printing Co.* 99 App. Div. 605, 91 N. Y. Supp. 185, it is held that a combination of workmen whose primary object is to procure the discharge of an outside workman and his deprivation of all employment is unlawful, its primary purpose being to impoverish and to crush another.

And in *Lucke v. Clothing Cutters' & T. Assembly*, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505, it was held that a trades union is liable in an action for damages, to a person whose discharge it and its officers had caused by threatening his employer, in the event of his not discharging him, to call out other persons in the service of the employer, it appearing that such action of the defendant and its officers was malicious; that plaintiff had endeavored to become a member of their union, but had been refused in con- 42 L.R.A. (N.S.)

tions some of them had against his continuance in the office of foreman."

We take this finding as to the respondents to be a finding as to the action of the members of the Milford branch of the association, of which branch the defendants were officers, and that the defendants were liable if the action of the association was illegal, because they personally participated in it. As is pointed out by the defendants in their answer, there are no sufficient allegations in the bill to make all the members of the association, as a class, parties defendant. See *Pickett v. Walsh*, 192 Mass. 572, 589, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638.

The Milford branch of the association

sequence of a resolution of the union not to accept any more members on account of so many union men being out of employment; and that, but for the interference of the defendant, the plaintiff would not have been discharged. In this case the court held that, although the employer had the legal right to terminate the employment, and in doing so he would have violated no right of the plaintiff, yet, inasmuch as it appeared that he was perfectly satisfied and desired to retain the services of the plaintiff, so far as he himself was concerned, and only dismissed him because induced to do so by the fear that the defendant would call out its members in his employ, the threat to do so by the defendant was a malicious and wanton interference on its part for the mere purpose of injuring plaintiff, and was not the exercise of a legal right.

The conduct of a building trades council in calling a strike on a building upon which the complainants, who were members of a plumbers' union which had refused to affiliate with the council, were at work, for the purpose of coercing their employers to discharge them, and in declaring an intention to continue such a course of action with the object of driving all plumbers not affiliated with the council out of the community or out of their trade, is unlawful and prejudicial to the interests of the community and the rights of the complainants, and the commission and continuance of such acts should be prevented and restrained by injunction. *Erdmann v. Mitchell*, 10 Pa. Dist. R. 701, s. c. on appeal 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327.

#### What constitutes justification.

As above stated, justification for procuring the discharge of a fellow employee may be found in habits or conduct or character which render him an undesirable associate.

In *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738, it is said

had a membership of 264 granite cutters and tool sharpeners, working in four different shops, one of which was the shop in question run by Wells Brothers. Ninety-seven of the 264 were employed by Wells Brothers, and of this number the master finds that probably not more than one third attended the meeting on the evening of June 22d.

The master's further findings on this point are in substance as follows: "While it is probable that the complainant made some minor mistakes, I am of the opinion that his work as foreman was acceptable to Wells Brothers Company, and that he was sufficiently competent to fill the position to the satisfaction of the company. No workman lost any pay or otherwise suf-

fered any actual damage by reason of any mistakes made by the complainant. In regard to the enforcement of the rules, I find that the rules were established by the company, and that it was the duty of the complainant as foreman to see that they were enforced. I am of the opinion that the real complaint of the majority of the men claiming to have a grievance against the complainant and his fellow foreman, Ardolino, was because of their enforcement of these rules, and that they did enforce them more strictly than the men had been accustomed to having them enforced." The master then states the attempts made by the plaintiff and Ardolino to enforce the rules of their employers, Wells Brothers. He finds that they (1) had attempted to

that if one's habits or conduct or character is such as to render him an unfit associate in the shop for ordinary workmen of good character, that will be a sufficient reason for interference by his shopmates with his employment.

And in *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, it was said *arguendo* that a laborer would not be liable to a journeyman who lost employment by reason of an agreement among the workmen that they would not work for an employer who should, after notice, employ a journeyman who habitually uses liquor, and the refusal of the employer any longer to hire him.

As to whether one's refusal to become or continue a member of a labor organization will constitute a justification for a strike against his employment is a point on which the courts are at variance, their respective positions being governed by their view of the immediate purpose of the combination. In *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011, it was held that members of a labor union were entitled to an injunction restraining the members of another union from which they had withdrawn, from doing acts in pursuance of a conspiracy to compel their reinstatement by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employers' business and property in case of a failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them. From this conclusion, Holmes, Ch. J., dissented upon the ground that the immediate purpose of the action of the union, to strengthen itself, was such as to justify its action.

In *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756, it was held that a strike to procure the discharge of a foreman be-

cause of his failure to join the union after the adoption of a resolution requiring all foreman to join, and fixing his initiation fee at an amount found to be unjust and unfair, was unjustifiable, and entitled the foreman to recover both past and future damages for the discharge and for his inability to procure other work.

In *Swaine v. Blackmore*, 75 Mo. App. 74, it was held that a labor union cannot lawfully procure any employee to be discharged by intimidation and threats, for the sole reason that he is not a member of their organization.

Members of a labor union are answerable for procuring a man's discharge because of his nonmembership, by notifying his employer to discharge him on pain of a strike and by the extortion of penalties for having hired him. *Carter v. Oster*, 134 Mo. App. 146, 112 S. W. 995.

In *Ruddy v. United Asso.* 79 N. J. L. 467, 75 Atl. 742, it was held that the finding of the court sitting as a jury, that the plaintiff was entitled to recover against the defendant union for inducing his discharge, was not error where there was testimony that plaintiff was discharged successively by two employers because each of them was successively warned by an agent of the union that if the employer kept the plaintiff in his service, all members of the union would quit his employment in a body, the object of this warning being to impress upon the employer the danger that he would be stripped of his ability to complete certain contracts unless he discharged the plaintiff, and the purpose was ultimately to coerce the plaintiff, who was a member of another union, to join the defendant union.

And see also *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327, *ubi supra*.

In *Schwarz v. International Ladies' Garment Workers' Union*, 68 Misc. 528, 124 N. Y. Supp. 968, an action brought by an employers' association for an injunction against a strike, it was held that a strike ordered by a labor union for the purpose of compelling nonunion employees to join

have the rule against going to the blacksmith shop strictly enforced; (2) to stop the men's knocking off work a few minutes before the working day ended; (3) to stop their using the compressed air to brush their clothes; and (4) in one instance to stop a man's eating his luncheon during working hours. The master's findings which follow are in these words: "I find that in doing these things the complainant did only what it was his duty as foreman to do, and while the enforcement of the shop rules may have been more rigid than what the men were accustomed to, the personal attitude and conduct of the complainant toward the men was not unduly severe or in any way oppressive, although some of the witnesses testified that they so considered

it. To attempt to give in detail the various reasons given by the witnesses for their dislike or objection to the complainant as foreman would require substantially a *résumé* of the entire testimony. Many of these objections appear to one not skilled in the trade as being trivial, and none of them were brought to the attention of the adjustment committee or any officer of the branch until June 22, 1909. At the special meeting the dislike and various objections of the men were voiced to some extent. It is quite possible that what appears to an outsider to be trivial in a single instance may, in the aggregate, have appeared to the men engaged in the work to be of more or less serious importance. I am quite strongly of the opinion that were it not for

the union, as a condition of continuing to exercise their right to work at their trade in the community, was against public policy and unlawful.

But in *Wunch v. Shankland*, 59 App. Div. 482, 69 N. Y. Supp. 349, appeal dismissed for want of jurisdiction in 170 N. Y. 573, 62 N. E. 1102, it was held that a machinist who was a member of a machinists' union, employed in a newspaper office to take care of and keep in repair the typesetting machines there in use, in consequence of whose refusal to become a member of a typographical union the members of such union notified the employer that unless the machinist complied with their request or was discharged the members of the typographical union would strike, had no right of action against the union for thereby occasioning his discharge. But inasmuch as here the plaintiff and defendants were not competing for employment, and it was not claimed that plaintiff was so careless or inefficient as to make him undesirable as a fellow employee, the decision goes beyond the authority (*National Protective Assn. v. Cumming*, 53 App. Div. 227, 65 N. Y. Supp. 946) cited in its support, and is manifestly erroneous.

In *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389, it was held by a bare majority of a divided court that an injunction should not issue to restrain a labor union and its officers from calling a strike for the purpose of compelling the employer to discharge complainants unless they would withdraw their resignations from the union, where the members of the union had voted not to work with men who, after receiving benefits through their organization, should refuse to continue members, and under the constitution and by-laws of the union no strike could be declared without the sanction of the officers.

But in view of the differences in opinion among the members of the court, the decision cannot be regarded as establishing, as the law of Illinois, that it is lawful to combine to interfere with another's employment for the sole reason that he refuses to become or continue a member of a labor

organization. *Cooke, J.*, in whose opinion two other members of the court concurred, conceded the case to be one in which the inadequacy of the remedy at law appeared from the bill; but held it not to be one in which the complainants would be entitled to maintain an action for damages against the union and its officers for accomplishing their discharge, on the ground that the object of the defendants, to strengthen and preserve the organization itself, was a proper one, as incident to the right to form labor unions, and kindred to the proper purposes of such organizations, *i. e.*, to maintain or increase wages or secure better working conditions.

*Carter, J.*, who cast the deciding vote, said that he concurred in the final conclusion, but not in all the reasoning of the foregoing opinion. His view appears to have been that the threatened injury to complainants was justifiable as an act of competition; but he put his decision on the further ground that, even if it were conceded that under the allegations of the bill the purpose of the proposed strike was unlawful, and that the defendants would be liable in a civil action for damages if, as a result of their threat to strike or of striking, the complainants were discharged and thereby damaged, still the law would not authorize an injunction restraining the members of labor unions from striking, as that would be in effect to compel them to continue in their employer's service unwillingly.

*Dunn, Ch. J.*, and *Cartwright and Hand, JJ.*, dissenting, said that they did not understand that the views of the three justices as expressed in the opinion of Mr. Justice Cooke, nor their own opinion as to the legal questions involved in the case, established the law of the state, but the concurrence of a fourth justice in the conclusion that the judgment of the appellate court should be reversed, and the decree of the circuit court affirmed, disposed of the case; and that the result reached was contrary to the law of Illinois declared in repeated decisions covering the period of fourteen years, including *Doremus v. Hennessy*, 176 Ill.

the existence of the present case, many of the complaints brought out by the testimony would not have received any consideration by the branch, or have been made the subject of a complaint to the committee or officers of the branch by the men themselves, yet it is clear that there was a substantial feeling of dislike and objection on the part of some of the men working at Wells Brothers to the continuance of the complainant and Ardolino as foremen." After a finding that a vote of the men on the evening of June 22d would not have been carried without the assistance of the votes from members not working for Wells Brothers, the master continues in these words: "I find that neither the complainant's habits, conduct, nor character were

such as to render him an unfit associate in the shop for ordinary workmen of good character, and that, but for the strike, Wells Brothers would not have removed the complainant from his position as foreman; that the strike was instigated by a comparatively few men who were successful in inducing other members to adopt their suggestions and join them in their purpose to secure the complainant's removal as foreman, although they testified that their purpose was to secure better conditions, regardless of the consequences which might ensue to the complainant."

In two instances in his report the master has made a distinction between what was testified to by the defendants or in their behalf, and what he finds to have been the

608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, and London Guarantee & Acci. Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526. They criticized the opinion of Mr. Justice Cooke as losing sight of the real issue, and as confusing the right of employees to combine to leave their service for any or no reason, as against their employer, with their right to do so as against a fellow employee. They further held that the facts of the case did not admit of the application of the doctrine of competition; that the right of a labor organization to enforce a closed shop for the mere purpose of strengthening the organization in future contests with the employer is not competition, and is not of the same character as or equal to the right of the individual to dispose of his labor at his own will.

A labor union, its officers or members, are not liable for procuring the discharge of a member by presenting to the employer the alternative of dispensing with his services or those of members of the union, since, by becoming a member, he must be deemed to have consented to the exercise of its discipline in furtherance of its lawful purposes. The ground assigned for this doctrine suggests its limitations, which are that the disciplinary proceedings must be in good faith, according to the by-laws of the union, and, it would seem, for some legitimate reason.

That one may, by becoming a member of a union, surrender his right to complain of interference with his employment, is inferable from the statement made in *Brennan v. United Hatters*, 73 N. J. L. 737, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698, as follows: "Assuming the defendant association to have been organized for lawful purposes only, plaintiff had lawful power to give his consent to its discipline to be exercised in furtherance of such purposes. And assuming that the method adopted by the defendant association of establishing an agreement with the manufacturing hatters in all the factories throughout an extensive 42 L.R.A. (N.S.)

district, to the effect that none but members of the association should be employed in their shops, was not unlawful, but plaintiff might assent that, upon his being in due course suspended from membership in the association after a proper conviction upon charges submitted and tried in accordance with its rules, he should lose his place of employment and his opportunity of gaining other employment within the district."

In *Blanchard v. Newark Joint Dist. Council*, 77 N. J. L. 389, 71 Atl. 1131, it was held that the refusal of a member of a union to pay a fine which was not imposed according to the laws of the order will not justify the union in inducing plaintiff's discharge, by notifying his employer that otherwise all the members of the order would cease to work for the firm.

Plaintiff was treasurer of a labor organization, and by provisions of the by-laws he was annually called upon to surrender to the trustees the books of the organization. Being required to surrender a book to a committee appointed by the president, he refused to do so, claiming that it was his own. It did not appear that, in refusing to surrender his books to the special committee, he violated any provision of the constitution or by-laws. In consequence of such refusal he was "knocked off" by the framing of a resolution adopted by the organization, and, when he presented himself at his place of employment, the walking delegate of the defendant told the other men employed on the work that they must not work with the plaintiff because of the resolution; and thereupon the plaintiff was discharged from employment by the foreman of the work, because the other men refused to work with him. It was held that he might maintain an action against the defendant as president of the organization, for the damages sustained by him, as there cannot be any doubt but that a right of action exists in favor of a discharged employee against a third party who has maliciously procured his discharge, and labor organizations have no more right to inflict injury to or upon others than have individuals.

fact. The first instance is where he finds that the plaintiff's personal attitude and conduct was not unduly severe or oppressive, "although some of the witnesses testified that they so considered it." The second instance is where the master finds "that the strike was instigated by a comparatively few men who were successful in inducing other members to adopt their suggestions and join them in their purpose to secure the complainant's removal as foreman, although they testified that their purpose was to secure better conditions." We interpret this to be a finding that the purpose of this strike was not to "secure better conditions" for the workmen, as distinguished from a purpose to get rid of a foreman who was disliked by some of the employees. To conclude the statement of the master's findings on the purpose of the strike, he found that the reasons "for their dislike or objection" to the plaintiff and Ardolino were "trivial," and would not have received any consideration had it not been for the existence of the present case; and that these reasons, "dislike and objection," were founded on a feeling of grievance because of the "enforcement of these rules . . . more strictly than the men had been accustomed to having them enforced."

Whether the purpose for which a strike is instituted is or is not a legal justification

for it is a question of law, to be decided by the court. To justify interference with the rights of others, the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference. To make a strike a legal strike, it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a legal purpose for a strike, but it is not necessary that they should have been in the right in instituting a strike for such a purpose. On the other hand, a strike is not a strike for a legal purpose because the strikers struck in good faith for a purpose which they thought was a sufficient justification for a strike. As we have said already, to make a strike a legal strike, the purpose of the strike must be one which the court as matter of law decides is a legal purpose of a strike, and the strikers must have acted in good faith in striking for such a purpose.

The purpose of the strike here in question has been found to have been to get rid of two foremen, because some of the workmen had personal objections to and a dislike for them. Or, to use the words of their own counsel, because these foremen were "distasteful to [some of] the employees." We are of opinion that that is not a legal purpose for a strike. The plaintiff had a right to work, and that right of

Connell v. Stalker, 21 Misc. 609, 48 N. Y. Supp. 77, affirming 20 Misc. 423, 45 N. Y. Supp. 1048.

The enforcing of the payment of arrears of defalcations by a former officer of the union is not such an object as will justify its officers in combining to prevent him from obtaining any employment in his trade or calling, to his injury. *Giblan v. National Amalgamated Laborers' Union* [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708.

Criminal aspects of combination to procure another's discharge.

In *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346, it was held that an association of workmen agreeing not to work for any person who shall employ any journeyman or other person not a member of such society, after notice given to him to discharge such workmen, is not a criminal conspiracy.

But in *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649, a combination of employees to compel their employer to discharge certain of their fellow workmen, the means adopted to enforce this concession being an announced intention to quit their employment in a body and by a simultaneous act, was held to be an indictable conspiracy at common law, on the ground that the aim of the combination was to in-

terfere with the business of the employer, and therefore unlawful, as is shown by the following excerpt: "It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. It is no answer to the above considerations to say that the employer is not compelled to submit to the demand of his employees; that the penalty of refusal is simply that they will leave his service. There is this coercion: the men agree to leave simultaneously, in large numbers, and by preconcerted action. We cannot close our eyes to the fact that the threat of workmen to quit the manufacturer under these circumstances is equivalent to a threat that, unless he yield to their unjustifiable demand, they will derange his business, and thus cast a heavy loss upon him. The workmen who



his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what "is distasteful" to some of them, is not in our opinion a superior or an equal right.

It is doubtless true that in a certain sense the condition of workmen is better if they work under a foreman for whom they do not have a personal dislike; that is to say, one who is not distasteful to them. But that is not true in the sense in which those words are used when it is said that a strike to better the condition of the workmen is a strike for a legal purpose. One who betters his condition only by escaping from what he merely dislikes, and by securing what he likes, does not better his condition within the meaning of those words in the rule that employees can strike to better their condition.

The defense in the case at bar has not failed because a strike to get rid of a foreman never can be a strike for a legal purpose. We can conceive of such a case. If, for example, a foreman was in the habit of using epithets so insulting to the men that they could not maintain their self-respect and work under him, a strike to get rid of

him, in our opinion, would be a legal strike. It is not necessary in the case at bar to define such cases and lay down their limits. It is wiser, in our opinion, in matters such as we are now dealing with, to go no farther than to decide each case as it arises. What we have just said is said to prevent misapprehension as to what is now decided. What we now decide is that a strike to get rid of a foreman because some of the employees have a dislike for him is not a strike for a legal purpose. For these reasons a majority of the court are of opinion that the strike was not a legal one.

It appears that the work at Wells Brothers ceased on January 10, 1910. There is therefore no occasion for an injunction to issue in the case at bar.

The master found that the difference between the plaintiff's wages as foreman and as a journeyman, for the period in which he was employed by Wells Brothers, is \$110.62, and then made the following finding: "In addition to this, the complainant claims the right to recover damages for his loss of position as foreman, damage to his reputation, and the hindering of his prospects of advancement. I make no ruling on this contention of the complainant, or his right to recover for the difference between what he formerly earned and that which he now receives, and without inti-

make this threat understand it in this sense, and so does their employer. In such a condition of affairs, it is idle to suggest that the manufacturer is free to reject the terms which the confederates offer. In the natural position of things, each man acting as an individual, there would be no coercion; if a single employee should demand the discharge of a coemployee, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees, it would be but a waste of time to pause to prove that, in most cases, he must submit, under pain of often the most ruinous losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another. I am unwilling to hold that a right which cannot, in any event, be advantageous to the employee, and which must be always hurtful to the employer, exists in law. In my opinion, this indictment sufficiently shows that the force of the confederates was brought to bear upon their employer for the purpose of oppression and mischief, and that this amounts to a conspiracy."

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The same case holds that the combination above described is not a combination to injure trade within the meaning of a statute against conspiring for such purpose. Upon this point the court said: "An act, to fall within this provision, must be one which, with directness, inflicts an injury on trade, as, for example, a combination to depress any branch of trade by false rumors. But in the case before us, the act charged, if it could be said to injure trade at all, did so not proximately, but remotely. It is true that, at a far remove, an injury to an individual manufacturer may affect trade injuriously; but in the same sense so, it is true, will an injury inflicted on a consumer of manufactured articles. But it is not this undesigned and incidental damage which is embraced within the statutory denunciation."

Procuring the discharge of an obnoxious foreman by a threat to strike constitutes a violation of N. Y. Penal Code, § 168, declaring it to be an unlawful conspiracy to interfere with another's exercise of his trade or calling by force, threats, or intimidation, or to commit any acts injurious to trade or commerce. *People ex rel. Gill v. Smith*, 5 N. Y. Crim. Rep. 509, 10 N. Y. S. R. 730, which is affirmed in 15 N. Y. S. R. 17, which is affirmed without opinion in 110 N. Y. 633, 17 N. E. 871. E. S. O.

mating in any way that he is entitled to recover anything, but in order that the court may have all of the facts before it at the hearing on this report, I find that if the court shall rule that the strike was not justifiable, and that the complainant is entitled to damages, the sum of \$500 will amply compensate him for whatever damage he has suffered or may suffer, including loss of wages." We could not say that the plaintiff would not be entitled to recover for damage to his reputation, if he proved that damage to his reputation was in fact caused by the defendants' illegal action. Under the finding of the master we are of opinion that the plaintiff is entitled to the larger sum, with interest from January 10, 1910, when his work at Wells Brothers ceased, the bill having been filed in the preceding July.

Decree accordingly.

#### SOUTH CAROLINA SUPREME COURT.

W. R. OSBORNE

v.

A. P. FULLER, Appt.

(— S. C. —, 75 S. E. 557.)

#### Usury — difference between cash and credit price.

It is usurious to charge one to whom store orders are furnished to enable him to procure supplies 20 per cent advance on the

cash price of the purchases for the accommodation, although that is claimed to be the difference between the cash and credit price of the articles purchased.

(Watts, J., dissents.)

(August 26, 1912.)

**A**PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Laurens County in plaintiff's favor in an action brought to recover a certain amount collected by defendant from the plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. F. P. McGowan for appellant.

Messrs. Irby & Sullivan for respondent.

Woods, J., delivered the opinion of the court:

In this action to recover \$952.12, double the amount of alleged usurious interest collected from the plaintiff by the defendant, the jury found a verdict in favor of the plaintiff for \$231.50. The defendant appeals assigning error in refusing a non-suit, in giving certain instructions to the jury, and in refusing to order a new trial.

Osborne, the plaintiff, was a tenant of Fuller, the defendant, for the year 1910, cultivating a five-horse farm. Fuller paid the balances on mortgages due by Osborne, and agreed to make advances to him by giving written or verbal orders to merchants for goods. To secure himself, Fuller took a note and mortgage of personal property,

#### *Note.—Usury: in store orders.*

An extended search has disclosed but one case other than *OSBORNE v. FULLER* wherein the applicability of the usury laws to store orders have been considered. In that case (*White v. Anderson*, 164 Mo. App. 132, 147 S. W. 1122) coupon ticket books good at certain stores were issued to a person, who could not obtain credit at such stores, for which the purchaser of the book gave his thirty-day note bearing eight per cent interest after maturity, for the price of the book, plus 5 per cent of the amount thereof; the merchant charged the tickets to the seller of the book and the latter redeemed them by paying 10 per cent less than the sum total of the tickets; the price charged by the merchant for the goods paid for by such coupon tickets was the proper retail price; and the coupons could not be used as money or for any purpose other than the purchase of merchandise. In an action upon the notes given for the purchase price of the book the purchaser contended that the compensation of 5 per cent of the amount of the book received from him, and 10 per cent of the sale price of the goods received from the merchant, rendered the transaction usurious; and the court held 42 L.R.A.(N.S.)

that the case was not one of a mere sale of credit which would sustain a price which in a loan would be usury, but was in reality and effect a usurious loan to the purchaser of the book, saying: "A lack of credit in defendant induced the transaction, resulting in a loan of money at a forbidden hire. When defendant bought his book of credit coupons, he was enabled to use it in payment for the purchase price of goods. He did not owe for the goods, but plaintiff did. The transaction was no less than if plaintiff had gone to the store with defendant, and then and there paid the merchant for the coat, and taken defendant's note just as he did take it. That defendant gave his note to plaintiff, and received from him the coupon orders for goods (and that, in reality, is what they were) before going to the store, does not influence the fact that he bought and paid for the goods with plaintiff's money; and that plaintiff paid the money over to the merchant, instead of defendant, cannot relieve the transaction of its true character, since it would have been idle to hand the money to defendant and then see that the latter passed it over to the merchant. The one important feature which the transaction lacks of being a sale of credit, such as in the sale of a guaranty

including the crop, for \$1,400, which it was supposed would cover the entire indebtedness. Fuller paid the merchants for the goods purchased on his orders, and charged and collected from Osborne the amount due and 20 per cent additional. He testified that this charge was made in pursuance of his agreement with Osborne; but Osborne denied that he was to pay more than the cash price for the goods and 8 per cent interest thereon. All other questions as to usury having been eliminated by the evidence, and the only substantial question left for the jury was whether this charge of 20 per cent was usurious. The circuit judge refused to grant a nonsuit, and in effect instructed the jury that under the evidence the charge of 20 per cent was usurious. When the transaction is stripped to its substance, the correctness of the instruction is made manifest. It is true that there is no limit to the price an owner of property may place on it, or to the difference he may choose to make between cash and credit. But there never was a moment in the transaction when Fuller was the owner of the goods which Osborne got from the merchants. To say that there was first a sale by the merchants to Fuller and a resale by Fuller to Osborne would be to substitute fiction for fact. The merchants did not deliver the goods to Fuller, but to Osborne, for his own use, and to be consumed by him. Fuller did nothing for Osborne but pay out money for his benefit, and Osborne received nothing from Fuller but the use

or indorsement, is that in those instances there is no advance of money made by the guarantor or indorser to or for the party guaranteed or indorsed, and he still owes the debt; while in this case there is an advance of money for the defendant by the plaintiff in full discharge of his debt, and he does not owe anything to the merchant, but does owe the plaintiff. When he gave plaintiff his note, ostensibly for the coupons, it was, in reality, for the money which plaintiff used in paying for the goods." As above intimated, the court seems to have decided the question upon the ground that it was the exaction of the 5 per cent from the purchaser, together with 10 per cent of the sale price of the goods, which rendered the transaction usurious, and in fact they did expressly state that such was the question, but it is hard to see in what manner the fact that the seller of the book received a discount from the merchant can affect the transaction between the purchaser and the seller of the credit. There does, however, appear to be a valid ground upon which the transaction could be attacked as usurious, and that is that the seller of the book charged 5 per cent of the cost price thereof as a commission, and took a note for 42 L.R.A.(N.S.)

of his money from the date of the advancement.

The case is much stronger against the defendant than *Thompson v. Nesbit*, 2 Rich. L. 73. There the plaintiff was the owner of the slave sold by him to the defendant, while here Fuller was not a merchant and had no goods to sell. The facts in that case are thus stated by the reporter: "The plaintiff asked \$1,000 for the negro. The defendant was willing to purchase at that price, but could not pay the cash. The plaintiff was willing to give any time that the defendant wanted, if he could have the price increased by the addition to the \$1,000 of 10 per cent per annum until payment should be made. After consultation with several persons as to the best means of carrying out their bargain so as to steer clear of usury, it was agreed that the defendant should fix the time, and the plaintiff the price. The defendant said he must have three years; the plaintiff said he must then have \$300 more. Whereupon the bill of sale was drawn, expressing the consideration to be \$1,000 and the note was drawn in the following words: 'Three years after date I promise to pay H. Thompson, or bearer, \$1,300, to be paid at such times as I please, and to deduct 10 per cent per annum off of the amount paid at each payment. 11th November, 1839. Samuel Nesbet.' The intention was that 10 per cent per annum should be added to each payment from the time it was made, until the note became due, so that the defendant should have the right of paying as he pleased within the three years, and upon

such cost price plus such commission due in thirty days with 8 per cent interest after maturity. In connection with the latter point, however, it might be added that the court in its statement of facts said: "It was further admitted that the matter of time defendant's notes were to run was not taken into consideration as a basis of the amount of commission to be paid plaintiff; it being admitted 'that plaintiff's terms to every person to whom credit and accommodation of like character were and are extended are 5 per cent on the total amount or value furnished to any person, whether the time to elapse before settlement be for one day or for six months, or one year, or any other time as might be agreed upon.'"

As to increasing price upon sale on credit as usury, see note to *Davidson v. Davis*, 28 L.R.A.(N.S.) 102.

As to validity of a contract to resell at an advance property purchased, see note to *Rogers v. Blouenstein*, 3 L.R.A.(N.S.) 213.

The general question of the applicability of usury laws to loans other than of money is treated in the note to *Title Guarantee & Surety Co. v. Klein*, 29 L.R.A.(N.S.) 620.

G. J. C.

every payment should have interest calculated in the same manner as it had been done on the \$1,000."

The court, in holding that the transaction was usurious, says: "The effect of the agreement is precisely the same as if the note had been taken for \$1,000, the price of the negro, with usury at 10 per cent per annum. The artifice, by which the parties attempted to give to the transaction the character of a sale at an enhanced price for the credit allowed is too plain to escape observation. The price of the negro was not enhanced otherwise than by the exaction of usurious interest while it remained unpaid. The true principal of the note was the sum expressed in the bill of sale."

As in that case the true consideration of the note was the value of the negro, fixed at the time of the sale at \$1,000, so in this case the true and only consideration—the only thing of value—which passed from Fuller to Osborne was the payment of money to another for the goods obtained by Osborne. The law will not permit evasions of the usury law by excessive charge for the use of money under the disguise of an increased price for credit in the sale of property. *People's Bank v. Jackson*, 43 S. C. 86, 27 L.R.A. 569, 49 Am. St. Rep. 823, 20 S. E. 786; *Milford v. Milford*, 67 S. C. 553, 46 S. E. 479; *Pope v. Marshall*, 78 Ga. 635, 4 S. E. 116. In this case there was not even the disguise of a sale from the defendant to the plaintiff, for the defendant was not the owner of the goods, but merely advanced the money to pay for goods sold by others. Under facts almost exactly the same, involving the sale of a mule, the supreme court of Alabama held that the transaction was an advance of the purchase money of \$102.50, and not a purchase by the person paying the price and a resale at \$130, and that it was therefore usurious. *Meyer v. Cook*, 85 Ala. 417, 5 So. 147.

The point is made in the exceptions that the circuit judge allowed the action to be enlarged into an action for the adjudgment of all the questions, including interest, arising in the accounts between Fuller and Osborne. We think the point too technical, for it seems clear from the record that the issue of usury could not have been fairly tried without an examination and adjudgment of interest of the entire account.

Affirmed.

Gary, Ch. J., and Hydrick and Fraser, JJ., concur.

Watts, J., dissenting:

I think judgment should be reversed, and new trial granted, for the reason, in my opinion, there was no usury in the transaction. 42 L.R.A. (N.S.)

tion. Fuller only charged Osborne the credit price for goods and merchandise, and for this reason I dissent.

## KENTUCKY COURT OF APPEALS.

ALBERT SILVA, Appt.,

v.

CITY OF NEWPORT.

(150 Ky. 781, 150 S. W. 1024.)

**Municipal corporation — ordinance — stools for motormen — validity.**

1. An ordinance requiring street car companies to provide stools for motormen is within the police power, and not unreasonable.

**Note. — Validity of statutes and ordinances for protection or comfort of street car operatives.**

None of the cases found upon the subject here being considered deal with the requirement for stools or chairs for the comfort of motormen, as was the case in *SILVA v. NEWPORT*, but all of them have to do with the requirements for screens or vestibules for the comfort and protection of street car operatives, and in these cases it is the general rule that ordinances and statutes providing for such protection are held valid.

Thus an act providing a penalty for its violation, and forbidding the operation of an electric street car during the winter months without having the forward end of such car provided with a screen or vestibule to fully protect the motorman, or other person directing the motive power, from wind and storm, is clearly within the police power of a state, and is valid. *Beaumont Traction Co. v. State*, 46 Tex. Civ. App. 576, 103 S. W. 233.

So, an act requiring every electric street car, other than trail cars, to be provided during certain winter months with a screen at the forward end, which shall fully and completely protect the driver, motorman, or gripman from wind and storm, and providing a penalty for its violation, is not in conflict with a constitutional provision that all laws of a general nature shall have a uniform operation throughout the state, nor with § 1 of the 14th Amendment to the United States Constitution, and is clearly authorized as a police regulation to protect the health and promote the comfort of those engaged in operating electric cars. *State v. Nelson*, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22.

Nor is such an act unconstitutional as special legislation, on the ground that it applies only to electric cars, and was enacted for the protection of a particular class. It is a plain, just, and commendable police regulation; the state has an interest in the health of its citizens and in the preservation of their lives and manhood,

## Same — statutory authority.

2. Statutory authority to a municipal corporation to pass ordinances expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, includes power to require street car companies to provide stools for motormen.

(November 27, 1912.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Campbell County dismissing a petition filed to test the validity of an ordinance requiring street car companies to provide stools for motormen. Affirmed.

The facts are stated in the opinion.

and such is the obvious unmistakable purpose of the act; besides, the lives and limbs of the passengers may be imperiled if the motormen are allowed to become benumbed by exposure. *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068.

So, an act requiring street railway companies operating electric, cable, or steam cars, requiring the constant service of persons upon any part of the car except the rear platform, to provide each car with an inclosure constructed of wood, iron, and glass or similar suitable material, sufficient to protect such employee from exposure to the inclemency of the weather at all times between November 1st and April 1st of each year, is within the police power of the state as protecting the health and lives of the motormen, and tending to the safety of their passengers and of travelers on the street; and such an act is constitutional. *State v. Smith*, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545.

And under a city by-law of Toronto, providing for the equipment of every street car operated within the city during certain winter months with proper and sufficient vestibules to protect the motorman and person in charge of such car from exposure to cold, snow, rain, or sleet while engaged in operating the car, the conductor as well as the motorman comes within the protection of such by-law, and accordingly the street railway company is bound to provide a vestibule for each end of the car. The validity of the by-law seems to have been assumed. *Reg. v. Toronto R. Co.* 35 Can. L. J. 422.

And in *McGraw v. Toronto R. Co.* 18 Ont. L. Rep. 154, 12 Ont. Week. Rep. 587, s. c. subsequent appeal, 13 Ont. Week. Rep. 129, an action for damages for injuries received by one while attempting to board a street car, the case turning upon other points, it appears that in pursuance of a provision in the Ontario railroad act of 1906, requiring all street cars in use during the months from November to April inclusive of each year to have the platforms so inclosed as to protect the motormen from exposure to wind and weather, the Ontario

*Mr. L. J. Crawford*, with *Mr. L. J. Crawford, Jr.*, for appellant:

An ordinance passed under a general grant of power must be reasonable to be valid.

*Hershberg v. Barbourville*, 142 Ky. 60, 34 L.R.A.(N.S.) 141, 133 S. W. 985, Ann. Cas. 1912D, 189; *Wells v. Mt. Olivet*, 126 Ky. 131, 11 L.R.A.(N.S.) 1080, 102 S. W. 1182; *Com. use of Madisonville v. Price*, 123 Ky. 163, 94 S. W. 32, 13 Ann. Cas. 489; *O'Bryan v. Highland Apartment Co.* 128 Ky. 282, 15 L.R.A.(N.S.) 419, 108 S. W. 257; *Dill. Mun. Corp.* § 328.

*Mr. Otto Wolff*, for appellee:

An ordinance of a city of the second class requiring stools for motormen is within the power granted to the city.

railway and municipal board ordered that the front platforms of all cars used by the Toronto Railroad Company within the city should be inclosed by a door to be fastened by a spring lock on the inside so as to be capable of being opened by the motorman to permit of the exit of passengers; and although the validity of this act and order was not in question, it seems to have been assumed.

However, in *Yonkers v. Yonkers R. Co.* 51 App. Div. 271, 64 N. Y. Supp. 955, it was held that a municipal corporation had no power to pass an ordinance prohibiting the running of any street car within the city during the winter months, unless it had a vestibule built upon each end sufficient to afford protection from the weather to motormen, conductors, and others standing upon the platform, under the authority granted by the railroad law to the common council of any city in the state to make regulations and ordinances as to the mode of the use of tracks. And the court added that the ordinance could not be upheld as a valid exercise of the police power, saying: "However reasonable it may be in itself, it is to be condemned as an exercise of a power not inherent to municipal existence, an interference with the affairs of the defendant [railway company] which the legislature has failed and apparently refused to authorize, and the assertion of a right on the part of the plaintiff [the city] which it did not, so far as appears, reserve to itself as a condition of the consent to the use of its streets by the defendant."

And while it is proper, and well within the recognized police power of a state, to prohibit the operation of an electric street car during the winter months unless the forward end be provided with a screen or vestibule for the protection of the motorman from wind and storm, and act purporting so to do, but applying only to a corporation operating such cars, and not to natural persons, firms, or associations engaged in the same business, is unconstitutional and unenforceable. *Beaumont Traction Co. v. State*, 57 Tex. Civ. App. 605, 122 S. W. 615.

H. C. Sh.

South Covington & C. Street R. Co. v. Berry, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026; Cincinnati. N. O. & T. P. R. Co. v. Com. 126 Ky. 719, 17 L.R.A. (N.S.) 561, 104 S. W. 771; Louisville & N. R. Co. v. Louisville, 141 Ky. 131, 132 S. W. 184; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Ex parte Hayes, 98 Cal. 555, 20 L.R.A. 701, 33 Pac. 337; Fisher v. Harrisburg, 2 Grant, Cas. 291; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Com. v. Reinecke Coal Min. Co. 117 Ky. 885, 79 S. W. 287; Com. use of Madisonville v. Price, 123 Ky. 163, 94 S. W. 32, 13 Ann. Cas. 489; Wells v. Mt. Olivet, 126 Ky. 131, 11 L.R.A. (N.S.) 1080, 102 S. W. 1182; O'Bryan v. Highland Apartment Co. 128 Ky. 282, 15 L.R.A. (N.S.) 419, 108 S. W. 257; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Walker v. Pennsylvania, 127 U. S. 699, 32 L. ed. 261, 8 Sup. Ct. Rep. 997; Chesapeake & O. R. Co. v. Maysville, 24 Ky. L. Rep. 617, 69 S. W. 728.

The subject of the ordinance is within the police power. Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Com. v. Reinecke Coal Min. Co. 117 Ky. 885, 79 S. W. 287; Com. v. Hillside Coal Co. 109 Ky. 47, 58 S. W. 441; Godfrey v. Beattyville Coal Co. 101 Ky. 339, 41 S. W. 10; Andrius v. Pineville Coal Co. 121 Ky. 724, 90 S. W. 233; St. Louis, I. M. & S. R. Co. v. McWhirter, 145 Ky. 427, 140 S. W. 672; Ex parte Hayes, 98 Cal. 555, 20 L.R.A. 701, 33 Pac. 337; State v. Glasby, 50 Wash. 598, 21 L.R.A. (N.S.) 797, 97 Pac. 734; People v. Smith, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; Beaumont Traction Co. v. State, 46 Tex. Civ. App. 576, 103 S. W. 239, 57 Tex. Civ. App. 605, 122 S. W. 616; State v. Smith, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545; State v. Nelson, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22; Yonkers v. Yonkers R. Co. 51 App. Div. 271, 64 N. Y. Supp. 955; State v. Buchanan, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52, 42 L.R.A. (N.S.)

Settle, J., delivered the opinion of the court:

This action was instituted by the appellant, Albert Silva, a resident and taxpayer of the city of Newport, against that city and Wm. Buten, its police judge, to test the validity of the following ordinance adopted and made a law July 22, 1912, by the city's board of commissioners:

An ordinance requiring stools for motor-men, etc., to be provided upon all street railway cars.

Be it ordained by the board of commissioners of Newport, Kentucky.

That every street car owned and operated by any person, company, or corporation, maintaining or operating street railway within the limits of the city of Newport, Kentucky, shall be provided by such person, company, or corporation with a stool, upon the forward platform, as a seat for the driver or motorman or gripman or other person in control of said car.

That each and every person, company, or corporation now maintaining or operating any such street railway within the city of Newport, Kentucky, shall within thirty days from the passage of this ordinance, comply with the provisions, and for each day's failure so to do, each and every person, company, or corporation so failing, shall, upon conviction in the police court, be fined not exceeding \$100.

This ordinance shall be in force and effect from and after its passage.

Adopted by the board of commissioners July 22, 1912.

A demurrer was sustained to the petition as amended, and, appellant failing to plead further, the action was dismissed at his cost. To obtain a review of the judgment manifesting these rulings he prosecutes this appeal.

The ordinance is assailed by the petition upon the grounds, first, that it is unreasonable and an unwarranted and arbitrary interference in and with the "business of all persons, companies, or corporations, owning or operating street railways within the limits of the city of Newport;" second, that the board of commissioners of the city of Newport were without power to pass or adopt it. Newport is a city of the second class, and its power, if any it has, to pass such an ordinance as the one under consideration, is conferred by § 3058, subsecs. 1, 20, 25, Kentucky Statutes; but it mainly relies upon subsec. 25, which empowers it "to pass all such ordinances, not inconsistent with the provisions of this act or the laws of the state, as may be expedient in maintaining the

peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power."

In no aspect of its meaning or effect can it be said that the ordinance is not a reasonable regulation. In *South Covington & C. Street R. Co. v. Berry*, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1020, an ordinance which required the street railway company to have both a conductor and driver on each of its cars was held to be a reasonable police regulation under the provision of the then existing charter of the city of Newport, which authorized its city council to pass all ordinances "that may be necessary for the due and effectual administration of right and justice in said city and for the better government thereof," and "to cause the removal or abatement of any nuisance." Moreover, that it was no objection to such an ordinance that it contained a provision directing the police of the city to cause any car without a driver and conductor to be returned to the stables; such removal of the cars from the streets not being a taking of the company's property without due process of law, as the company was not thereby divested of its property. In the same case it was also held that the mere granting of a charter to operate a street railway did not deprive the city government of the power to make reasonable regulations for the enjoyment of the privilege in such a way as would be consistent with the safety of the public.

In *Chesapeake & O. R. Co. v. Maysville*, 24 Ky. L. Rep. 615, 69 S. W. 728, the validity of an ordinance of that city compelling the railway company to erect and maintain gates at certain crossings in the city was attacked upon the ground that it was unreasonable in its requirements, and that the city council was without power to pass it, but we rejected both these contentions, and held the ordinance valid. In *Louisville & N. R. Co. v. Louisville*, 141 Ky. 131, 132 S. W. 184, we sustained the validity of an ordinance of the city of Louisville which fixed the grade of Roberta avenue, and directed that it be extended across the railroad track to connect with Frankfort avenue, the grade of the latter street being 3 feet higher than the railroad track, upon the ground that it could not be assailed as invalid by the railroad company because it might be considered as unreasonable or as working a hardship to it in that case, and that it is only in extreme cases that the power to declare a

municipal ordinance passed pursuant to legislative authority invalid on the ground that it is unreasonable, arbitrary, or oppressive can be exercised by the courts. It is a well-recognized rule of law that, where the municipal legislature has the power to act, it must be governed not by the discretion of the courts, but by its own discretion; for which reason the courts should not be hasty in convicting them of being unreasonable in the exercise of it. Our meaning can be better expressed by the following excerpt from the opinion in *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471: "It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is to be found in the enactments of our legislature. To say that such a law is of immoral tendency is disrespectful to the legislature, who, no doubt, designed to promote . . . the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern" when the legislative will has been plainly expressed. *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Ex parte Hayes*, 98 Cal. 555, 20 L.R.A. 701, 33 Pac. 337; *Com. v. Reinecke Coal Min. Co.* 117 Ky. 885, 79 S. W. 287.

The attitude of the courts with respect to this question is thus expressed in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714: "Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry." We are also clearly of the opinion that the object of the ordinance is a proper subject for police regulation. In other words, it is within the police power of the state to protect any class of its citizens, which stands in need of such protection. And it is not wide of the mark to say that the motormen who operate street cars are in need of such protection, if, as argued by counsel for appellee, they "are required to stand so steadily and in the same position that they are subject to impaired circulation of blood vessels, swelling of the legs, varicose veins, ulcerated legs, and contract diseases of the kidneys, incapacitating them for any kind of work and causing premature death." It may also be observed that the effect of enforcing the ordinance will be to protect the traveling public, because if mo-

tormen can by the use of stools be relieved of the necessity of constantly standing upon their feet in one position, and as well perform their work while using the stools (of which there seems to be no doubt), it would prevent the congestion of the lower limbs, to which they seem to be peculiarly subject, and enable them in case of an emergency or accident, to be alert and competent, to prevent injury to passengers on the cars.

The right of railway employees, whether engaged in operating steam or electric railways, to such protection as the ordinance contemplates, has been recognized by Congress in the enactment of the humane law, and its several amendments, commonly known as the "employer's liability act," which, among other things, provides that no common carrier engaged in interstate commerce shall require or permit its employees to be or remain on duty for a longer period than sixteen consecutive hours. The application of this provision, in allowing the recovery of damages for the death of an employee engaged in interstate commerce, was approved by us in the case of *St. Louis, I. M. & S. R. Co. v. McWhirter*, 145 Ky. 427, 140 S. W. 672; and in concluding the opinion we said: "In conclusion we are moved to say that the salutary object designed by the enactment of the statute, *supra*, would in our opinion be defeated if we should hold its provisions inapplicable to a case like the one at bar. Its aim is the protection of the lives of employees of railroad companies, and also the lives and property intrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance, and that hours of rest and recreation, as well as the use of good machinery and appliances, are needful to the health and safety of men engaged in the hazardous work of railroading, and that the benefits it is intended to confer will better enable them to serve their employers and promote the ends of commerce. The application of the provisions of the statute may sometimes bear harshly upon an offending railroad company, but, on the whole, their just enforcement, in all proper cases, is bound to be promotive of the public welfare." *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; *Holten v. Hardy*, 169 U. S. 366, 42 L. ed. 42 L.R.A. (N.S.)

780, 18 Sup. Ct. Rep. 383; *Com. v. Hillside Coal Co.* 109 Ky. 47, 58 S. W. 441; *Godfrey v. Beatyville Coal Co.* 101 Ky. 339, 41 S. W. 10; *Andricus v. Pineville Coal Co.* 121 Ky. 724, 90 S. W. 233.

Having reached the conclusion that the ordinance is not an unreasonable or oppressive exercise of the police power, the only other question to be considered is that raised by appellant's second contention. Were the appellee city's board of commissioners without power to pass it? In our opinion this question must be answered in the negative. Subsection 25, § 3058. Kentucky Statutes, in unambiguous language authorizes the board of commissioners "to pass all such ordinances . . . as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures." The power here conferred is as broad as the police power of the state, as it authorizes the council or board of commissioners of cities of the second class to pass any ordinance which would be promotive of any of the ends mentioned in the statute. Therefore an ordinance like the one under consideration, which is intended to, and does, add to the comfort and safety of employees charged with the duty of operating the cars of the street railway using the city's streets, must necessarily be promotive of the comfort and safety of the citizens of the municipality, who become passengers on the cars. In this way the ordinance, it may well be said, will serve to promote "good government, the health and welfare of the city," and also its "trade and commerce." As said in *Com. v. Reinecke Coal Min. Co.* 117 Ky. 885, 79 S. W. 287: "The subjects for the exercise of the police power are, first, preservation of the public health; second, preservation of the public morals; third, regulation of business enterprises; fourth, regulation of civil rights of individuals; and, fifth, the general welfare and safety of the citizens. All business must be subject to reasonable regulations."

It cannot seriously be contended that the courts may declare a municipal ordinance invalid merely because in their opinion the legislature should not have conferred the power exercised by the municipality in passing it. In order to declare the ordinance void, it must clearly appear from the language of the legislative enactment that it does not confer the power exercised by the municipality, or that the power conferred is prohibited by the Constitution of the state.

If subsec. 25 of § 3058, Kentucky Statutes, were less explicit as to the subject and matters with respect to which cities



of the second class may exercise the powers it confers, the closing sentence thereof, "and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power," would justify us in saying that the power conferred upon the municipalities is not confined to the subjects or matters therein enumerated, but may be exercised by it as to others of a like character not mentioned, which may come within the general scope of the police power of the state.

Being of the opinion that the ordinance is not open to the objections made to it, the judgment is affirmed.

### MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN

v.

WILLIAM E. DUNSTON.

(— Mich. —, 138 N. W. 1047.)

**Parent and child — desertion — failure to pay allowance.**

Failure to pay the allowance for the support of the children which are committed to the custody of the mother upon the granting of a divorce, with an allowance for support to be paid by the father, does not render him liable for criminal prosecution under the statute for desertion and abandonment.

(December 17, 1912.)

**EXCEPTIONS** by defendant, before sentence, to rulings of the Circuit Court for Oakland County made during the trial of an action in which he was convicted of desertion and abandonment of his children. Sustained.

The facts are stated in the opinion.

Mr. Andrew L. Moore, for defendant:

Where one has been divorced and his

children taken from him by a decree of the court, he cannot be said to be guilty of desertion.

People v. Stickle, 156 Mich. 561, 121 N. W. 497; Warner v. Warner, 54 Mich. 492, 20 N. W. 557; Place v. Place, 139 Mich. 511, 102 N. W. 996; Johnson v. Johnson, 125 Mich. 671, 85 N. W. 94; Cox v. Cox, 35 Mich. 461; Rose v. Rose, 50 Mich. 92, 14 N. W. 711; People v. Malsch, 119 Mich. 112, 75 Am. St. Rep. 381, 77 N. W. 638; People v. Albright, 161 Mich. 400, 126 N. W. 432.

Messrs. Carl H. Pelton and Clinton McGee for the People:

Defendant was guilty of desertion and abandonment of his children.

Warner v. Warner, 54 Mich. 492, 20 N. W. 557; 14 Cyc. 812; Graham v. Graham, 38 Colo. 453, 8 L.R.A. (N.S.) 1270, 88 Pac. 852, 12 Ann. Cas. 137; Courtright v. Courtright, 40 Mich. 633; Shannon v. People, 5 Mich. 71; Pidge v. Pidge, 3 Met. 257; Bennefield v. State, 80 Ga. 107, 4 S. E. 869; Bull v. State, 80 Ga. 704, 6 S. E. 178; Gay v. State, 105 Ga. 599, 70 Am. St. Rep. 68, 31 S. E. 569; Brown v. State, 122 Ga. 568, 50 S. E. 378; Moore v. State, 1 Ga. App. 502, 57 S. E. 1016; Com. v. Simmons, 165 Mass. 356, 43 N. E. 110.

Steele, J., delivered the opinion of the court:

This case involves the question of whether or not respondent is liable to criminal prosecution for desertion and abandonment of his children, as defined in act No. 144 of the Public Acts of 1907; he having previously been divorced from his wife, to whom the court had granted possession and custody of their minor children, decreeing an allowance to be paid to her for said children's support, which allowance respondent has failed to fully pay. Respondent was arrested, prosecuted, and convicted under said act No. 144 in the circuit court of Oakland county, and has removed the pro-

**Note.** — *Failure to pay alimony or allowance for support granted by decree of divorce, as criminal offense.*

Aside from PEOPLE v. DUNSTON the one case in point seems to be People v. Schlott, 102 Cal. 347, 122 Pac. 846, holding that a father who wilfully, and without lawful excuse, fails to comply with the provisions of a decree of divorce which requires that he contribute to the support of a minor child, whose custody is awarded to the mother, may be convicted of unlawfully omitting to provide for his minor child, under the section of the Penal Code which provides that a parent who wilfully omits, without lawful excuse, to furnish food, clothing, shelter, or medical attendance for the child, is punishable by imprisonment 42 L.R.A. (N.S.)

in the state prison, or in the county jail, etc. It was contended by the defendant that the fact of the decree awarding the custody of the child exclusively to the mother relieved him of the obligation to provide for the child, but this contention was considered unsound inasmuch as the decree contained a valid provision requiring the father to continue to contribute to such child's support. This case is distinguishable from PEOPLE v. DUNSTON, as the conviction in that case was under a statute providing for the punishment of one who deserts, or abandons his children, which, as was stated in that case was evidently not the fact, as he had been deprived of their custody by the decree of the court.

J. H. B.

ceedings to this court for review, on exceptions and assignments of error after verdict and before sentence.

The complaint in this case was made by his former wife, Margaret Dunston, to whom he was married on February 8, 1904, and from whom he was divorced January 9, 1909, by a decree in her favor under a bill alleging cruelty, drunkenness, and nonsupport. By the terms of said decree she was given possession and custody of their minor children, Ruth Dunston and William Dunston, aged, respectively, four and two years; it also being provided in said decree that defendant must pay to his said wife the sum of \$1.50 per week for the support of each child until it should arrive at the age of fourteen years. The testimony discloses that until March 1, 1910, defendant was absent from the state and made no payments, but on his return he entered into an agreement with his divorced wife that the back payments would be waived by her, provided he then commenced paying according to the decree and continued to pay from that time on. Following this agreement, he paid to her the sum of \$144 in all; the last payment being made on April 6, 1911.

On July 31, 1911, his former wife made the complaint upon which warrant was issued in this case, as before stated. On preliminary examination he was held to the circuit court for trial, and on December 5, 1911, he was there found guilty of the offense charged, by the verdict of a jury rendered pursuant to a charge of the court concluding as follows: "So I say to you, gentlemen, while I am not directing a verdict, that you must retire to the room and consider the verdict yourselves; but I say to you, you ought to convict the respondent in this case upon these facts, because I believe the facts do render him liable under the statute." The information filed against respondent charged that he, "on or about the 1st day of May, 1911, . . . did desert and abandon his minor children under fifteen years of age, to wit, Ruth Dunston, six years of age, William Dunston, four years of age, without providing necessary and proper shelter, food, care, and clothing for them, contrary to the form of the statute," etc. When arraigned in the circuit court, respondent stood mute, and a plea of not guilty was entered in his behalf by order of the court. On the trial, by direction of his counsel, he introduced no testimony. Neither he nor his counsel took any active part in the trial, except that, under the express understanding that no rights should be waived in so doing his counsel briefly cross-examined the people's witnesses to bring out 42 L.R.A. (N.S.)

certain of the facts contained in the statement of this case, and by pertinent objections, exceptions, and motions saved the points desired for review.

It was the testimony of complaining witness, Margaret Dunston, that she had made no demand on defendant other than for the amount decreed on granting her divorce, that the last payment was April 6, 1911, since which he had contributed nothing towards the support of their children, and that she made the complaint because he had failed to make the payments provided for in the decree. It also appeared that the children were not destitute, or liable to become a public charge, or that complainant's people, with whom she lived, were unable or unwilling to assist her. At the conclusion of the people's case, respondent's counsel requested the court to direct a verdict in his favor, for the reason that the testimony introduced only showed a failure on his part to pay all of the money which he was ordered, by the court of chancery in the divorce proceedings, to pay; that the wife had a complete and adequate remedy by contempt proceedings in the chancery court; that the word "desertion," as used in the criminal statute under which respondent was prosecuted, meant the act of the husband leaving his wife and children wilfully, with the intention of causing perpetual separation, and inasmuch as his children were taken from him by a decree of the chancery court he could not be held guilty of deserting or abandoning them within the meaning of the statute. This request was denied, as was also a motion for a new trial based on substantially the same grounds.

The offense of desertion and abandonment, as defined in said act No. 144, is made a felony, punishable by sentence to state prison for from one to three years. That crime is charged in the information in this case to have been committed by respondent on or about May 1, 1911, at the village of Clarkston, Oakland county. He was then living in Detroit, Wayne county. The children were living at Clarkston with their mother, to whom they had been given by the court. Though the date of the offense is charged with a *videlicet*, which would not bind the prosecution to the exact time stated, no complaint was made of respondent's misconduct prior to his last payment on April 6, 1911, and all the testimony is launched against his default subsequent to the latter date. The complaining witness was not then his wife. He had no right to the custody or company of his children, no control over them, and could not even legally visit them without her permission. By the former decree, dissolv-

ing the marriage ties and awarding the children to the mother, the legal entity of the family life and relations, with him as the head of the household, were destroyed, rightfully and through his fault, we must assume, but on the initiative of his wife. His family rights ended as to her, and, for the time being at least, as to his children. She became a single woman, with the rights of a surviving parent, as fully as though the father had been taken by death. She became solely entitled to the custody, parental pleasure of association and companionship, control, services, and earnings of their minor children, which otherwise belonged to the father separately or the parents jointly. He was divested of all paternal rights. His paternal duties which survived, were defined by the decree of the court of chancery. They could be enforced in a civil action and by punitive proceedings for contempt in disobeying the order of the chancery court.

In the absence of a provision in the decree requiring contribution by the father, even his civil liability for the support of minor children, unconditionally awarded to the mother, has been a mooted question. In *Keizer on Marriage & Divorce*, § 329, it is said: "The party to whom the custody of children is awarded must support them. But where no award is made as to the custody of children, the liability of the father to support his minor children still continues." This court has held that, where the custody of a child is given to the mother, a third party, supporting the child at her request, cannot recover therefor in an action of assumpsit against the father, restricting the rule, however, to the particular facts in that case; the party bringing the action having married the divorced mother of the child. *Johnson v. Onsted*, 74 Mich. 437, 42 N. W. 62. In *Finch v. Finch*, 22 Conn. 411, it was held, by a divided court, that a divorced wife, awarded the custody and control of their minor children, could not, in the absence of a provision in the decree of divorce requiring contribution from him, recover from the father for the support and education of such children. In *Rodgers on Domestic Relations*, § 503, the general rule is stated as follows: "The sundering of the marriage tie between the father and mother does not relieve the parent of his legal duty to support his children. . . . and a wife who has been divorced from her husband by reason of his fault, and who has been awarded the custody of the children, may maintain an action against the divorced husband, in any court having competent jurisdiction, for necessities and support furnished such children by her. . . . That there are respectable authorities at 42 L.R.A. (N.S.)

variance with this contention must be admitted. But it is confidently believed that the better reasoning, as well as the pronounced weight of authority, is to the contrary.

This question is only pertinent here for the light it may throw on the legal status of respondent at the time he is charged with the felony defined in said act No. 144, and his criminal turpitude in failing to make the payments for support ordered by the chancery court in the divorce proceedings. Said act has been twice before this court for consideration. In *People v. Stickle*, 156 Mich. 580, 121 N. W. 498, the act was held constitutional; but the case was reversed on the ground that the trial court did not, in charging the jury, give to the words "deserts" and "abandons" the meaning which the statute imports. It was there said: "Desertion of one by the other means more than going away, more than separation. . . . 'Abandonment' is defined as 'the act of a husband or wife who leaves his or her consort wilfully and with an intention of causing perpetual separation.'" 1 *Bouvier, Law Dict.* p. 2. The same author . . . defines 'desertion' as 'the act by which a man abandons his wife and children, or either of them.' . . . Respondent was entitled to have the jury instructed that 'abandonment' or 'desertion,' under the statute, means to separate from, wrongfully, without intention of again resuming marital relations."

In the case at bar respondent had already been separated from his wife and children by the decree of a court. He was a thing apart from them. He had no right to, and could not if he wished, resume marital or family relations with them. There only existed the obligation to contribute to the wife for support of the children. In the case of *People v. Albright*, 161 Mich. 400, 126 N. W. 432, respondent was charged under this statute with deserting and abandoning his wife on May 20, 1909. The proof showed that the desertion took place February 7, 1905, prior to the enactment of the statute under which he was prosecuted. This court there held that the statute does not make subsequent refusal or neglect to provide necessary shelter, etc., standing alone, a felony; that to constitute the offense desertion, abandonment, and refusal or neglect must contemporaneously combine; that, the desertion and abandonment having occurred in 1905, the offense could not be considered as committed in 1909, by reason of the then refusal or neglect to provide necessary shelter, etc.

Applying the construction of the statute in those cases to the facts in this case, and conceding that at the time charged, and to

which the testimony was directed, respondent neglected or refused to provide necessary and proper shelter, food, care, and clothing for his children, there is no proof that he at that time separated himself from, deserted, or abandoned them, within the meaning of the statute; but, on the contrary, he was apart from them, and his legal status was such that it was impossible for him to do so. Whatever his culpability and legal liability under other laws may be, we are constrained to hold that the facts proven by the prosecution in this case do not constitute the offense charged under the statute in question.

The conviction must be set aside, and respondent discharged.

### NEBRASKA SUPREME COURT.

RE APPLICATION OF PARKER M. WICKSTRUM, for Writ of Habeas Corpus, Appt.

(— Neb. —, 138 N. W. 733.)

#### Municipal corporation — ordinance — motor cycle — tank riding.

A provision in a general ordinance of the city of Lincoln regulating the use of motor vehicles, that "it shall be unlawful for any person operating a motor cycle to carry another person on said machine, in front of the operator," held, to be general with respect to all members of the class affected, to be based upon a reasonable classification, and to be a valid exercise of the police power of the city, in protecting the safety of travelers on the city streets and persons carried on motor cycles.

(November 27, 1912.)

Headnote by LETTON, J.

#### Note. — Regulations affecting motor cycles.

RE WICKSTRUM seems to be a case of first impression, as to the validity of a statute or ordinance prohibiting any person operating a motor cycle from carrying other persons on said machine, in front of the operator, commonly known as "tank riding."

For motor cycle as a motor vehicle within the statute regulating the latter and other similar vehicles, see note appended to *People v. Smith*, 21 L.R.A. (N.S.) 41.

In *Dunkelbarger v. McFerren*, 149 Ill. App. 630, it was held that a motor cycle came within the meaning of the words, "of other conveyance of a similar type or kind," of the act which regulates the speed of, and imposes certain obligations upon drivers of, "any automobile or any other conveyance of a similar type or kind," etc. As was said: "A motor cycle is propelled by the same power as an automobile, the use of which power causes the same loud and

APPEAL by petitioner from a judgment of the District Court for Lancaster County denying a writ of habeas corpus for his release from jail to which he had been committed for violation of an ordinance regulating the use of motor cycles. Affirmed.

The facts are stated in the opinion.

Mr. Barton Green, for applicant:

A person restrained under an unconstitutional law will be discharged on a writ of habeas corpus.

Ex parte Fisher, 6 Neb. 310.

The writ of habeas corpus will lie to relieve the petitioner from arrest and detention for the violation of the provisions of a void municipal ordinance.

Re McMonies, 75 Neb. 702, 106 N. W. 456.

The legislature cannot, under the guise of protecting public interests, impose unusual and unnecessary restrictions upon individual liberty, lawful occupation, or the use of property.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98.

The legislative body cannot arbitrarily divide a class, and say that a certain restriction shall apply to certain types of that class and shall not apply to certain others.

Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

Messrs. F. C. Foster and D. H. McClenahan, for appellee:

The presumption is in favor of the validity of the ordinance.

McQuillin, Mun. Ord. § 794; Peterson

rapid explosion. It moves with kindred speed, and, when not propelled by human power, has many of the general features of an automobile; the main difference being that it runs on two wheels, instead of four. If two motor cycles should be fastened and operated together, side by side, for the purpose of carrying passengers, there would be no question that the vehicle so constructed would be of a type or kind similar to an automobile, and yet if defendant in error's contention be correct, such contrivance ceases to be of such kind or type when separated into two distinct conveyances."

In *Shawnee v. Landon*, 3 Okla. Crim. Rep. 440, 106 Pac. 652, it was held that while it cannot be disputed that a city may reasonably regulate the speed of motor cycles, yet a conviction for reckless driving of a motor cycle cannot be sustained under an ordinance clearly intended to regulate the riding and driving of horses, mules, and other beasts

J. H. B.

v. State, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306; Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; Enders v. Friday, 78 Neb. 510, 111 N. W. 140, 15 Ann. Cas. 685.

The ordinance is a valid regulation, and operates alike upon all persons operating motor cycles, and is not class legislation.

Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629; State v. Mayo, 106 Me. 62, 26 L.R.A.(N.S.) 502, 75 Atl. 295, 20 Ann. Cas. 512; Com. v. Hawkins, 14 Pa. Dist. R. 592; Com. v. Boyd, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; Christy v. Elliott, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724; Barrett v. Rickard, 85 Neb. 769, 124 N. W. 153.

Letton, J., delivered the opinion of the court:

Appellant was arrested and convicted of the violation of a city ordinance providing that "it shall be unlawful for any person operating a motor cycle to carry another person on said machine in front of the operator." This provision is embraced within a general ordinance regulating the use of motor vehicles in the city of Lincoln. Having failed to pay the fine and costs adjudged against him, he was committed to jail. He applied to the district court for release upon a writ of habeas corpus, on the ground that the ordinance was unreasonable and void, and from a denial of the writ he has appealed.

Summarily stated, his contention is that the ordinance arbitrarily invades personal rights; that a motor cycle is a type of motor vehicle, which is no more dangerous to operate with a passenger in front than an ordinary electric automobile, which is usually a glass-inclosed cab in which passengers may occupy a seat directly in front of the operator. From these facts he argues that where a restraining law or ordinance is against a class, or one type of a class, that type or class must be more dangerous than others, or legislation against it cannot be upheld. The testimony is that, when a person is carried in front of the operator upon a motor cycle, he sits between the handlebars of the machine, directly over the gasoline tank; that while, by leaning the body or moving the head to one side, the operator may see directly in front, the presence of the passenger obstructs the view to some extent. It is also shown that several instances have occurred of fuel tanks leaking and catching fire, and that in case of accident it is difficult

or almost impossible for the person carried to get out from between the handlebars. It is also shown that such vehicles may be operated at a speed of from 30 to 60 miles per hour, and that upon wet pavements they are more likely to slip than four-wheeled vehicles.

The principles controlling the question presented are so well settled in this state as scarcely to require repetition: "Courts will not ordinarily inquire into the motive of a city council in its exercise of a discretionary power conferred upon it by the legislature." Enders v. Friday, 78 Neb. 510, 111 N. W. 140, 15 Ann. Cas. 685. In Peterson v. State, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306, it is said: "It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the protection of life and property within the city is committed, in the first instance, to the municipal authorities thereof by the legislature. When they have acted, and passed an ordinance, it is presumptively valid; and, before a court will be justified in holding their action invalid, the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred, by acting in an arbitrary manner." See also Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421. We think there is such a distinct difference between the operation of a motor cycle and of ordinary motor vehicles as to justify the enactment of the ordinance. Even if it be true that regulation in respect to passengers obstructing the view of the driver would be proper as to other classes of motor vehicles, perhaps the authorities have only made a beginning. It may be presumed that, if the city authorities become convinced of the necessity of further safeguarding the lives of the inhabitants of the city, they will take steps to do so. It seems clear that the provision complained of was intended to protect not only ordinary travelers on the streets from the danger that might accrue from the obstruction to the vision of the operator of such a speedy vehicle, but it was also intended to avoid the danger of accident to the person carried.

The ordinance is general with respect to all persons who operate motor cycles, and since it treats all members of that class alike, and the classification is founded upon a reasonable basis, it was within the

power of the city council to adopt the same.

We find no error in the judgment of the District Court, and it is therefore affirmed.

—  
**WASHINGTON SUPREME COURT.**  
(Department No. 2.)

**MATT WODNIK**

v.

**LUNA PARK AMUSEMENT COMPANY**  
et al., Appts.

(69 Wash. 638, 125 Pac. 941.)

**Master and servant — amusement park — defect in attraction — liability of owner.**

1. The owner of an amusement park who

*Note. — Liability of one maintaining place of amusement to which public are invited for safety of patrons.*

This note is supplemental to notes to Williams v. Mineral City Park Asso. 1 L.R.A.(N.S.) 427; Higgins v. Franklin County Agri. Soc. 3 L.R.A.(N.S.) 1132; Blakeley v. White Star Line, 19 L.R.A.(N.S.) 772; Greene v. Seattle Athletic Club, 32 L.R.A.(N.S.) 713; and other notes referred to under the appropriate headings.

As to liability of municipality for permitting exhibitions in street, see notes to Wheeler v. Ft. Dodge, 9 L.R.A.(N.S.) 146; Van Cleef v. Chicago, 23 L.R.A.(N.S.) 636; and Goodwin v. Reidsville, ante, 862.

As to liability of municipality for injuries by exhibition conducted by its officers or employees, see note to Kerr v. Brookline, 34 L.R.A.(N.S.) 464.

**Merry-go-round.**

As to liability of operator of scenic railroad or similar device to passengers, see note to O'Callaghan v. Dellword Park Co. 26 L.R.A.(N.S.) 1054.

The rule is stated in Linthicum v. Truitt, — Del. —, 80 Atl. 245, where the owner and operator of a merry-go-round was held not liable for injuries to a child by attempting to board the machine while in motion, that it is the duty of a person owning or operating a merry-go-round to which he invited children and the public to come and ride for pay, to provide a safe and secure means of ingress to and upon such machine, and to this end the merry-go-round should be brought to a full stop and stand to permit patrons to enter the same and to take their seats; that the conduct of children in the matter of contributory negligence should not be governed by the same rule that governs adults. While a particular act committed by an infant of a discerning age might clearly constitute contributory negligence, yet if the same act should be committed by an infant of less 42 L.R.A.(N.S.)

receives a percentage of the receipts of a concessionaire, for permitting an attraction to be on exhibition, cannot avoid liability to a patron for injury due to a defect in the mechanism, on the theory that the concessionaire was an independent contractor.

**Evidence — res ipsa loquitur — amusement park — accident to patron.**

2. The doctrine *res ipsa loquitur* applies where the head of a mallet having no patent defect, which is used by patrons of an attraction in an amusement park, flies off to the injury of one using it for the purpose for which it was intended, so that the owner, to avoid liability for the resulting injury, has the burden of showing freedom from negligence.

**Amusement park — use of attraction — negligence of patron.**

3. A patron of an attraction in an amusement park is not negligent in grasping a mallet near the head, rather than at the

discernment it might not constitute contributory negligence. Nevertheless if such infant places himself in a position of peril, although he may be unable to comprehend and appreciate the danger to which he is exposed, and should suffer injuries in consequence thereof, the person injuring him under such circumstances would not be liable therefor if, by the exercise of due and reasonable care, he could not have observed the perilous position of the infant and threatened injury to him. Neither negligence nor contributory negligence will be presumed from an injury by an attempt to board a moving merry-go-round.

In Harris v. Crawley, — Mich. —, 136 N. W. 356, an action for injuries sustained by a child falling off a merry-go-round operated at a fair ground, judgment for defendant was affirmed, a charge in substance that, in determining the plaintiff's contributory negligence, her age, intelligence, and experience must be considered, being held a correct statement of the law.

**Grand stand.**

The owner of a grand stand was in Phillips v. Butte Jockey Club & Fair Asso. — Mont. —, 127 Pac. 1011, held not liable to a patron for injury received by catching her clothes in a protruding nail and falling on a broken board while she was descending the stairway; the defects not being in the original construction of the grand stand, and defendant having neither actual nor implied notice of them. The court said that while the authorities are all agreed that the owner of a grand stand at a race course is not an insurer of the safety of his patrons, beyond this there is an irreconcilable conflict; one class of cases holding the relationship between such an owner and his patron analogous to that existing between a carrier and passenger for hire, the other class holding that the duty of such owner to his patron is measured by the standard of ordinary care. The court adopts the latter view, and cites as a lead-

other end, when attempting to use it for the purpose for which it was intended, so as to prevent his holding the owner liable in case the head flies off to his injury.

**Proximate cause — loose head of mallet — method of use.**

4. The insecure fastening of the head to the handle of a mallet used in connection with an attraction at an amusement park, and not the manner in which it is grasped by a patron is the proximate cause of his injury by the flying off of the head.

**Negligence — anticipated injury.**

5. The proprietor of an attraction in an amusement park, in connection with which a mallet is used, cannot escape liability for injury to a patron by the end of the handle striking his knee when the head flies off, on the theory that such injury could not reasonably have been anticipated.

(August 21, 1912.)

ing case upholding this and rejecting the opposite theory. *Williams v. Mineral City Park Asso.* 1 L.R.A.(N.S.) 427, and note, where the cases are reviewed at length. And see also cases cited in notes in 1 L.R.A.(N.S.) 427; 19 L.R.A.(N.S.) 772; 32 L.R.A.(N.S.) 713; and 3 L.R.A.(N.S.) 1132, involving grand stands.

**Lights.**

So, in *Branch v. Klatt*, — Mich. —, 138 N. W. 263, affirming a circuit court judgment in favor of defendant and denying a new trial in an action against the proprietor of a theater for injury sustained by a patron through failure to light a stairway and provide railings, the court said that "the inference from her testimony is that if the place had been plainly lighted so that she was able to see clearly she would not have fallen. Against her testimony that the stairway was dark, the defense opposed the testimony of numerous witnesses that it was well lighted. If the jury believed defendant's testimony as to the lights, they could legally find that defendant had discharged his duty to plaintiff, regardless of the presence of hand rails."

And the proprietor of a moving-picture show is not negligent in maintaining a step at the exit of the darkened room where the pictures are shown, into the corridor, so as to render him liable to a patron who, in attempting to use the exit, falls down the step to his injury, although a light is maintained over it which tends to dazzle the eyes of persons who emerge from the darkness; nor is such a proprietor negligent in directing patrons to use exits with which they are not familiar, if they are reasonably safe, so as to render him liable to a patron who falls down a step to his injury in attempting to use the exit to which he is directed. *Hollenbaek v. Clemmer*, 66 Wash. 565, 37 L.R.A.(N.S.) 698, 119 Pac. 1114.

But where a person, instead of using a safe and well-lighted stairway provided for 42 L.R.A.(N.S.)

**A**PPEAL by defendants from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas Byron MacMahon and George McKay for appellants.

Mr. J. P. Ball for respondent.

Ellis, J., delivered the opinion of the court:

This is an appeal by the defendants Luna Park Amusement Company and William Loeff from a judgment rendered upon the verdict of a jury for damages for personal injuries to the plaintiff, which, it is charged, were caused by their negligence.

The complaint, so far as material to the

all who desire to enter an entertainment hall, although warned of the danger, chose to enter by a dark stairway, which the public had received no invitation to use, it was held in *Hendershott v. Modern Woodmen*, 66 Wash. 155, 119 Pac. 2, that she was guilty of negligence and assumed the hazards which beset her, precluding recovery for injury by falling upon the steps. See also cases cited in note in 32 L.R.A.(N.S.) 713, involving lights.

**Amusement parks or piers.**

See also *Williams v. Mineral City Park Asso.* 1 L.R.A.(N.S.) 427, and other cases cited in 32 L.R.A.(N.S.) 716; and note in 3 L.R.A.(N.S.) 1134, involving amusement parks.

A steamboat company owning an amusement park was held not liable in *Schwab v. Anderson S. B. Co.* 66 Wash. 236, 119 Pac. 614, for injury to a person because of a defective swing, where the swing was outside the ground controlled by the company. It appears from the dissenting opinion in this case that the injured person was an attendant at a picnic, and while there was injured by falling from a swing that was a short distance beyond the line of the park proper, although there were tables and other paraphernalia incident to the picnic grounds even beyond the swing, so that the swing was an invitation to anyone inclined to take that sort of exercise or recreation. Mr. Justice Chadwick, dissenting, said that there was no difference in principle between this case and that of *Neel v. King County*, 53 Wash. 493, 102 Pac. 396, where a judgment was sustained although the defect in the highway was beyond the limit of the county's property. "The court there said that the doctrine upon which a recovery was allowed was that of simple justice, and fair play, and estoppel to deny responsibility where the county had in effect issued an invitation to the public to use the property adjacent to the highway as a part of the road, there

questions presented, in substance alleged: That the defendants were the owners and managers of a place of public amusement at West Seattle, called "Luna Park," and had, by extensive and broadcast advertising, made the resort well known to the public, and that it was largely patronized by the public; that among the amusements there maintained was a mechanical device called a "striking machine," so arranged that a person, by striking with a long-handled, heavy mallet upon a movable scale or balance, was enabled to register thereon the force of the blow; that on April 30, 1911, the plaintiff visited Luna Park, and accepted an invitation of the defendants, through their agent or employee in charge of the striking machine, to use the same,

paid the money demanded therefor, and was given and used a mallet which was unsafe, in that the head was not securely fastened to the handle; that in using the mallet he swung it above his head with both hands, intending to strike the machine, when the head of the mallet flew off, and, the handle being released, he struck himself therewith a violent blow upon the knee, inflicting the injuries complained of. The negligence charged is that the defendants, their agents, or employees, furnished to the plaintiff a mallet which they knew, or in the exercise of proper care, inspection, and supervision could have known, was unsafe for the purpose intended.

The answer admitted the ownership, management, and extensive advertisement

being no definite boundary between the road and the place where the public was invited to go. In my judgment, respondent was warranted in the assumption that the swing was a part of the park playground, and to hold that he is bound by an arbitrary unmarked line is to put a premium upon the negligence of those whose duty it is to safeguard all who come to their place for amusement and recreation. Appellant knew its boundary lines and it was within its power to define them. The court's decision puts the injured party to the burden of knowing them at his peril."

So, a street railway company, lessee of an amusement park, was held not liable in *Sheets v. Sunbury & N. Electric R. Co.* 237 Pa. 163, 85 Atl. 92, for injury to passenger by fall of decayed limb of tree situated in the park, the decayed condition of the limb, although obvious after it had fallen, not being observable by an inspection from the ground made the day before the accident, and the care required of defendant not obliging a closer examination by climbing the tree. The court said that "defendant was not obliged to warrant or insure the absolute safety of the Island Park. It did, however, impliedly warrant that the park was safe for the purpose for which the resort was used, save as to those defects which were undiscoverable by the exercise of reasonable skill and diligence, or by ordinary and reasonable means by inquiry and examination. The defendant was also under the obligation of a continuing duty of inspection so that the park would be reasonably safe for the protection of those to whom the invitation to visit it was given."

And in affirming a judgment for plaintiff in an action to recover damages for injuries sustained while upon an amusement pier, by coming in contact with certain high tension electric wires, the court in *Owens v. Associated Realities Corp.* 81 N. J. L. 586, 80 Atl. 325, said that since the plaintiff was not a trespasser, but was there by defendant's invitation, the law imposed upon the defendant the duty of exercising care for the plaintiff's safety while going about upon the pier within the scope of the 42 L.R.A. (N.S.)

invitation, and that there was clear evidence of negligence on defendant's part in permitting highly charged electric wires to be in such a position that one going onto the pier as plaintiff did, might come into contact with the wires and receive a harmful electric shock.

#### Falling object.

Under the rule *res ipsa loquitur*, it is held, in *Goldstein v. Levy*, 74 Misc. 463, 132 N. Y. Supp. 373, that the proprietor of a music hall is liable for injury to a patron by the breaking and falling of a shade around an electric light in the chandelier; evidence of an inspection of the chandelier and shades by an electrician three days before and every week prior to the accident, and that for a period of six weeks prior to the accident no similar accident had occurred, and that the globes had never been discovered to be defective or in a dangerous condition, being insufficient to overcome the presumption of negligence arising from such an accident. See also *Williams v. Mineral City Park Asso.* 1 L.R.A. (N.S.) 427, and cases cited in notes in 19 L.R.A. (N.S.) 772, and 32 L.R.A. (N.S.) 713, involving falling objects.

#### Injury by animals.

As to liability of master to servant for personal injury by wild animal or animal kept for exhibition purposes, see note to *Gooding v. Chutes Co.* 23 L.R.A. (N.S.) 1071.

Where a patron of a horse show while watching a horse jump was injured by a heavy iron gate which fell from the impact of a horse which had become unmanageable, the court in *Redmond v. National Horse Show Asso. of America*, 78 Misc. 383, 138 N. Y. Supp. 364, reversing a judgment dismissing the complaint, held that the defendant's argument that inasmuch as no claim of negligence on the part of the owner or driver of the horse could be predicated upon the fact that the horse had become unmanageable, without proof that the owner or driver knew of the horse's vicious propen-



of the park as a place of amusement by the defendants, denied the allegations of negligence, denied that the defendants owned or operated the striking machine, and set up as an affirmative defense in general terms that the injury was the result of the plaintiff's own negligence. This was traversed by the reply.

The evidence showed that one Friedle was the sole owner of the striking machine, and personally operated it on April 30, 1911, under a lease or concession of space from the defendants for the amusement season, paying the defendants 35 per cent of the gross receipts for the concession; that he hired and discharged his own employees; and that the defendants never exercised, or attempted to exercise, any authority over

him. The appellants contend that under this evidence they cannot be held responsible for the injury. This position is not tenable. They were admittedly the owners, managers, and operators of Luna Park, and advertised its amusement features as a means of procuring the patronage of the public for their own pecuniary advantage. They received a part of the proceeds from the specific amusement feature, in patronizing which the respondent was injured. He was there by their invitation. There was an implied representation that the instrumentalities for amusement which they advertised were reasonably safe. The fact that the amusement was furnished by a third party under an independent contract with the appellants in no manner relieved

sities, no cause of action will lie against the proprietor or lessee of the place of amusement for injuries caused by an unmanageable horse, was fallacious, and stated that "a horse is not ordinarily a dangerous animal, and the owner of a horse is not negligent merely because he uses an animal which he has not reason to believe is dangerous. Therefore to predicate negligence upon the fact that a horse became unmanageable requires proof that the owner or driver had reason to believe that the horse might become unmanageable. Where, however, a person invites others to come upon his premises to view an exhibition conducted by him for hire, he warrants the reasonable safety of the place, and, by reason of that warranty, is not under a passive duty merely, but is under an active duty, to guard against all risks which might reasonably be anticipated. Although he would undoubtedly not be liable for negligence in permitting a horse to be exhibited which became unmanageable, still the exhibition of horses involves the necessary risk that some horse might become unmanageable, and it is the duty of the proprietor to guard against such risks if they could reasonably be foreseen. From the facts in evidence a reasonable inference might have been drawn that the defendant could reasonably have foreseen the risk of a horse becoming unmanageable, and could have taken precautions against such risk."

See also cases cited in notes in 1 L.R.A. (N.S.) 427, and 3 L.R.A. (N.S.) 1132, as to liability for injuries by horses or other animals at places of amusement

#### Bathing resorts.

For earlier cases as to the duty and liability of owner of bathing resort, see notes to *Larkin v. Saltair Beach Co.* 3 L.R.A. (N.S.) 982; *Higgins v. Franklin County Agri. Soc.* 3 L.R.A. (N.S.) 1132; *Greene v. Seattle Athletic Club*, 32 L.R.A. (N.S.) 713, and *Turlington v. Tampa Electric Co.* 38 L.R.A. (N.S.) 72.

The proprietor of a bathing establishment was, in *Flora v. Bimini Water Co.* 42 L.R.A. (N.S.)

161 Cal. 495, 119 Pac. 661, held not guilty of a failure to station life guards, so as to render him liable for the drowning of a boy in one of the swimming tanks; it appearing that an elaborate and complete system for the vigilant supervision of the pools had been established, and that there was nothing to compel the inference that the persons charged with the duty of watching the pools were not giving proper attention to this duty. "The mere fact," said the court, "that a drowning occurred, regrettable though it be, is not of course conclusive proof of negligence; nor can it be said that the defendant was, as matter of law, bound to have a guard stationed in immediate proximity to the deep-water end of the pool. It was possible that bathers at other points might get into positions of danger, and it was for the court below to determine under all the facts whether the arrangements made were reasonably adapted to the end of protecting the defendant's patrons, and were such as an ordinarily prudent person situated as defendant was would have made."

#### Liability of lessor; liability for negligence of concessionaire.

See also notes in 14 L.R.A. (N.S.) 284, and 32 L.R.A. (N.S.) 713.

Where a person while listening to a band concert provided free to the public by a street railway company for the purpose of stimulating traffic at an amusement park owned and maintained by it was injured by a miniature railway engine leaving the track at an unguarded curve, it was held in *Turgeon v. Connecticut Co.* 84 Conn. 538, 80 Atl. 714, that a nonsuit was improper, since the plaintiff's evidence uncontradicted would have supported a verdict; that the jury might reasonably have found that ordinary care towards its patrons required the defendant to have seen that the roadbed was in better condition and a guard rail placed at the curve, or that defendant should have warned its patrons of the liability of the engine leaving the track, and the subsequent risk to them. The court

them from the duty to see that the appliances were reasonably safe for the use intended. The duty of exercising reasonable care for the safety of their patrons, while engaged in the performance of the very purpose for which they were invited, cannot be avoided in any such way. *Thompson v. Lowell*, L. & H. Street R. Co. 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 37 L.R.A. 258, 27 S. E. 70. We think that, as between the respondent and the appellants, the owner and operator of the striking machine must logically be held the appellants' agent.

The appellants also contend that there was no evidence of negligence on their part. The respondent's testimony as to how the injury occurred was substantially as alleged in the complaint. We think that the fact that the head of the mallet flew off

while the mallet was being used by the respondent for the very purpose for which it was furnished to him was sufficient to cast the burden of explanation upon the appellants. No explanation being offered, the jury was warranted in inferring that the head of the mallet came off because it was negligently and insecurely fastened to the handle.

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." 1 Shearm. & Redf. Neg. 5th ed. § 59.

"The doctrine of *res ipsa loquitur* means that the jury, from their experience and

laid down the rule that a street railway company which owns and maintains a place of amusement is bound to use reasonable care to keep every part of the grounds, to which it has invited people, in a reasonably safe condition, and to accomplish this end it was its duty in this case to see that the railway was built, maintained, and operated so as not to risk doing any injury to any of its patrons while in the park. The fact that it had leased the miniature railway to an independent contractor did not relieve it of this duty. On later appeal this case was submitted to the jury on the issue of negligence. *Turgeon v. Connecticut Co.* 85 Conn. 706, 82 Atl. 635. (Generally as to liability of operator of scenic railroad or similar device to passengers, see note in 26 L.R.A.(N.S.) 1054.)

An amusement park company charging a general admission fee was, in *Babic v. Riverview Sharpshooters' Park Co.* 256 Ill. 24, 99 N. E. 680, held liable for injury to a patron caused by collapse of seats used by concessionaires in attraction, although that part of the premises where the accident occurred was leased directly to the concessionaires by the owner of the land; the consideration being a certain percentage of the gross receipts of the concessions, the company inclosing and assuming charge of the plot in the same manner as its other lands. "By its contract and its general custom," stated the court, "it assumed the supervision of the construction of the concession and any repairs that might be made thereon, and reserved the right to eject the concessionaires and their property from the park in case of noncompliance with any of its rules or requirements. Under these facts, plaintiff in error does not, as it contends, come within any rule which governs in cases where injuries have been sustained on premises which are in the exclusive possession of the lessee, and it was its duty to exercise ordinary care to prevent injury

to those who visited the attraction known as the Florida Zoo."

So, a railroad company was held liable in *Wichita Falls Traction Co. v. Adams*, — Tex. Civ. App. —, 146 S. W. 271, for injury to a patron by an iron gas tank or reservoir falling upon his hand, notwithstanding it had leased the premises to a person for the purpose of selling commodities thereon, where the company reserved rights in the premises where the injury occurred. In this case the court said that the company would not have been liable if the lessee had been given exclusive control and management of the premises.

A case not distinguishable from *Hollis v. Kansas City, Missouri, Retail Merchants' Asso.* 14 L.R.A.(N.S.) 284, is *Stickel v. Riverview Sharpshooters' Park Co.* 159 Ill. App. 110, where the owner of an amusement park was held liable for injury to patrons by being compelled to slide down a chute forming the only exit from a building conducted by concessionaires. On appeal this case was affirmed in 250 Ill. 452, 34 L.R.A.(N.S.) 659, 95 N. E. 445. The court laid down the rule that the owner of an amusement park who receives a percentage of the receipts of concessionaires as compensation for the concessions assumes the obligation that the devices and attractions operated by them are reasonably safe for the purposes for which the public is invited to use them, and held it a question for the jury whether the construction and maintenance of a chute 18 feet high and descending to within 1½ to 2½ feet of the ground, at an angle of about 40 degrees, as the only exit from a building of a concessionaire in an amusement park, is such negligence as to render the owner of the park, who receives a percentage of the receipts of the building as compensation for the concession, liable for an injury caused by its use.

But the owner of a pleasure resort was,

observation as men, are warranted in finding that an accident of this kind does not ordinarily happen, except in consequence of negligence. As was said in *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L.R.A. 698, 12 Am. St. Rep. 526, 19 N. E. 166: 'All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came, in whole or in part, from the defendant's negligence than from any other cause.' " *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 328, 109 Pac. 1016, 1017.

There was no duty of inspection resting upon the respondent. There was no evidence of any defect so patent that he ought to have observed it without inspection. He had the right to assume that the mallet was fit for the purpose for which it was furnished him. He cannot be held to have assumed the risk of injury from any de-

in *Reisman v. Public Service Corp.* 82 N. J. L. 464, 38 L.R.A.(N.S.) 922, 81 Atl. 838, held not liable where one attending an exhibition of fireworks pursuant to the owner's invitation was injured by the firing of a rocket by an independent contractor; the owner of the resort not being responsible for the negligence of the contractor in discharging the fireworks, nor negligent in the arrangements made for witnessing the exhibition.

#### Duty to keep clear aisles and passageways in theater.

In New York state statute provides a penalty for causing or permitting any person to stand or sit in the aisles or passageways of any theater during a performance. Under this statute the proprietor of a theater was held liable for allowing persons to stand during a performance in the space behind the seats through which people must pass from the entrance to the aisles between the seats. *Waldo v. Seelig*, 70 Misc. 254, 126 N. Y. Supp. 798, affirmed in 146 App. Div. 879, 130 N. Y. Supp. 1133. To the contention that such proprietor was not shown to be in the theater at the time, and as notice of the condition was not brought to his attention by the fireman, he cannot be held liable, the court in the above case, said: "He was shown to be the licensee and the responsible proprietor of this theater, and the law imposes upon him the duty of keeping the aisles and passageways of the theater clear of spectators during the performance. It is immaterial whether he had actual personal knowledge of the condition; the knowledge of his agents and servants is his knowledge. We do not think it necessary that the fireman shall give notice to the proprietor of the violation in order that the penalty may be incurred."

So, under this statute the manager of a theater was, in *Sturgis v. Hayman*, 84 N. 42 L.R.A.(N.S.)

fects not so patent as to have been apparent to the casual observer. This court is committed to the rule that the doctrine *res ipsa loquitur*, under conditions where there is no duty of inspection upon the servant, is applicable even as between master and servant. *La Bee v. Sultan Logging Co.* 47 Wash. 57, 20 L.R.A.(N.S.) 405, 91 Pac. 560; *La Bee v. Sultan Logging Co.* 51 Wash. 81, 20 L.R.A.(N.S.) 408, 97 Pac. 1104; *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016; *Cleary v. General Contracting Co.* 53 Wash. 254, 101 Pac. 888.

*A fortiori* is the doctrine applicable in a case of this kind, where a customer or patron is present by invitation, and is injured by an instrumentality under the exclusive control of the defendant or his agents. *Anderson v. McCarthy Dry Goods Co.* 49 Wash. 398, 16 L.R.A.(N.S.) 931, 126

Y. Supp. 126, held liable for allowing persons to stand in the rear of the orchestra chairs during a public performance after his attention had been called thereto, it being necessary for people to use such space in reaching the aisles from the side entrance.

It is held in *Sturgis v. Coleman*, 38 Misc. 303, 77 N. Y. Supp. 886, that within the meaning of this statute the side aisle of a theater is that as actually constructed according to the plans, and not that required by the Building Code to be only 2 feet wide at its point of beginning and increasing toward the exit in the ratio of 1½ inches to every 5 feet; consequently the manager of a theater who permits patrons to occupy stools and chairs in a side aisle as constructed, and refuses to remove them when notified to do so, is liable to the statutory penalty.

But a passageway, within the meaning of this statute, is defined in *Sturgis v. Grau*, 39 Misc. 330, 79 N. Y. Supp. 843, as that portion of the building through which persons going to or from their seats are accustomed to, or must of necessity, pass; and the space between the orchestra circle and the rear of the auditorium, from which the chairs had been removed, is not such a passageway as will render the manager of the theater liable for allowing patrons to stand therein during a public performance. Mr. Justice MacLean, citing *Sturgis v. Coleman*, supra, dissents, saying: "It appears from the plan itself that the space in question was offered to the public as a passageway, and it is shown by the testimony that it was used as such by the public. While the manager of the theater has the right, within the law, to utilize the capacity of his house, the law does not permit him to sell and utilize so much thereof as he has, of his own volition, offered as a passageway to the public."

J. D. C.

Am. St. Rep. 870, 95 Pac. 325. And for a still stronger reason should the doctrine be invoked where, as here, the instrumentality which caused the injury was handed to the patron for use in the very purpose for which he was invited. In the very nature of the case, the respondent could not be expected to prove the specific defect in the mallet which caused the head to separate from the handle. That could only have been determined by inspection. The duty of inspection was upon the appellants. They offered no evidence of such inspection. The jury was warranted in finding them negligent.

The appellants further contend that the respondent's own act in taking hold of the mallet handle near the upper end, as he testified he did, was the proximate cause of the injury, and that in so doing he was guilty of contributory negligence. The proximate cause was that cause without which the accident could not have happened. It is plain that, had the head of the mallet been securely fastened to the handle, the accident would not have happened, no matter where the respondent grasped the handle. It is equally plain that he was not guilty of contributory negligence. He had no reason to assume that the head of the mallet would fly off. In fact, as we have seen, he had the right to assume that it would not. There was no evidence that he was not using the mallet as it was intended to be used. We fail to find any evidence whatever of contributory negligence. Nor do we find any merit in the argument that the accident was one which could not reasonably have been anticipated. It was the natural and probable result of the insecure fastening of the head of the mallet to the handle. This or some similar accident would reasonably be expected from such a condition.

Many assignments of error are based upon the giving of certain instructions by the court, and upon the refusal to give certain others requested by appellants. These, however, are sufficiently covered by what we have said of the law as applied to the facts. The case was submitted to the jury upon instructions fairly presenting the law applicable to the evidence. We find in the record no error which would justify a reversal.

The judgment is affirmed.

Mount and Fullerton, JJ., concur.  
42 L.R.A. (N.S.)

## MONTANA SUPREME COURT.

MRS. G. PHILLIPS, Resp.,  
v.

BUTTE JOCKEY CLUB & FAIR ASSOCIATION, Appt.

( — Mont. —, 127 Pac. 1011.)

**Show — grand stand — duty as to safety.**

1. Ordinary care measures the duty of the owner of a place of amusement to patrons with respect to the safety of a stand containing seats which they are invited to occupy.

**Pleading — injury on grand stand — knowledge of defects.**

2. Liability of the owner of seats in a place of amusement for injury to a patron is not shown by an allegation that the patron was tripped by a projecting nail on a stairway, and fell to his injury upon a broken board on the landing, of which defects the owner had knowledge, without stating facts showing defendant's knowledge, actual or implied, of the defects.

(November 14, 1912.)

**A**PPEAL by defendant from a judgment of the District Court for Silver Bow County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Frank C. Walker and Lamb & Walker for appellant.

Messrs. McCaffery & Tyler, for respondent:

As owner of the place of amusement, defendant was charged with the positive affirmative duty to know that the premises were safe for the use of the public, and it will not be exonerated because it had no precise knowledge of the defective condition of the place to which it invited the public.

38 Cyc. 268; 28 Am. & Eng. Enc. Law, p. 125; 1 Thomp. Neg. § 995; Francis v. Cockrell, L. R. 5 Q. B. 184, 501, 10 Best & S. 850, 39 L. J. Q. B. N. S. 113, 291, 22 L. T. N. S. 203, 23 L. T. N. S. 466, 18 Week. Rep. 668, 1205; Currier v. Boston Music Hall Asso. 135 Mass. 414; Butcher v. Hyde, 10 Misc. 275, 30 N. Y. Supp. 1073; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788; Lusk v. Peck, 132 App. Div. 426, 116 N. Y. Supp. 1051,

**Note.** — As to liability of one maintaining place of amusement to which public are invited, for safety of patrons, see note to Wodnik v. Luna Park Amusement Co. ante, 1070, and other notes therein referred to.

affirmed in 199 N. Y. 546, 93 N. E. 377; *Williams v. Mineral City Park Asso.* 128 Iowa, 32, 1 L.R.A.(N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 Ann. Cas. 924.

**Holloway, J.**, delivered the opinion of the court:

This is an action for damages for personal injuries. The Butte Jockey Club & Fair Association is a private corporation which conducts a place of amusement at Butte, where, during a certain season of each year, horse racing for premiums or purses is carried on, and to which the public generally is invited and an admission fee charged. Within the inclosure of the race course, the association has an amphitheater or grand stand with raised seats for the accommodation of its patrons. In order to reach these seats certain stairways lead from the ground to the grand stand. On August 18, 1910, while the race meeting for that year was being conducted by the association, this plaintiff accepted the invitation extended to the public generally to attend on that day, paid her admission fee, and took a seat in the grand stand. In attempting to leave it, she started to descend the most westerly stairway, when she fell to the first landing and sustained certain injuries of which she complains. She alleges that the cause of her fall was a large nail protruding an inch or more upward through the step of the stairway, upon which her clothes caught, and that her injuries resulted from the fall, and from alighting upon a broken board in the floor on the first landing. She undertakes to charge negligence on the part of the defendant in permitting the nail to protrude from the step of the stairway, and the broken board to remain in the floor of the landing. It is alleged that the defendant negligently permitted these defects to remain "for a considerable period of time" before the day of the injury, "and at the time of said injury, and long prior thereto, defendant knew of the defective condition of the said stairs." The defendant challenged the sufficiency of the complaint by demurrer, and by an objection to the introduction of any evidence. Its answer is a denial of any negligence on its part. The trial resulted in a verdict and judgment in favor of plaintiff, and, from the judgment and an order denying it a new trial, the defendant has appealed. Only two questions are presented, and only one of these need be determined at this time. It is, Does the complaint state a cause of action? The facts of the case present a question, altogether new in this state, and one somewhat difficult of solution, since there is a decided conflict in the

decisions from other states where similar questions have arisen. In order to determine whether the complaint states a cause of action, it is necessary, first, to determine the principal question, What is the measure of duty which the owner of a place of amusement, such as a race course, owes to his patron, who comes thereto at his invitation and who pays for the privilege?

That the owner is not an insurer of the safety of his patrons the authorities are all agreed, but beyond this there is an irreconcilable conflict. Two classes of cases are to be found. In the first are those cases holding that the relationship between the owner of the grand stand and his patron is analogous to that existing between a carrier and passenger for hire, and in the second class are those cases holding that the duty of the owner of the grand stand to his patrons is measured by the standard of ordinary care. If the rule announced by the first class of cases above is to be adopted here, then this complaint is sufficient under all the authorities; if, however, the duty of the grand stand owner is to be measured by the standard of ordinary care, the complaint does not state a cause of action under the former decision of this court and the holding of other courts generally.

The courts which have attempted to draw an analogy between the relationship of the owner of a race course and his patron, who pays for the privilege of witnessing a race, and that existing between a common carrier and a passenger for hire, have experienced the greatest difficulty in formulating any reason for their position, and apparently equally as great difficulty in stating the rule to which they adhere. A case generally cited by the courts of the first class above, as the leading case of that class, is *Francis v. Cockrell*, L. R. 5 Q. B. 184, involving facts somewhat similar to those before us in the present instance. In the English case the grand stand was erected by an independent contractor, but so negligently built that a part of it fell, resulting in injury to the plaintiff, who had paid an admission fee to witness steeple chase races. It was found that the defendant himself was without fault, and the only question for decision was whether he was to be held for the negligence of the independent contractor. The court of Queen's bench held that he was liable. In the course of the opinion it is said: "The nearest analogy to this case seems to be afforded by that of carriers of passengers. The carrier is paid for providing the means of transporting the passenger from place to place. The defendant received payment for providing the means for

supporting the spectator at a particular place. This distinction does not appear to give rise to any difference in principle between the contract to be implied in the one case and the other, as to the safety of the means provided for carriage or support." And again: "We have already stated that we consider the same reasoning which is applicable to the case of a carrier of passengers is applicable to the case of a person who, like the plaintiff, provides places for spectators at races or other exhibitions." But a reading of the entire opinion, in the light of the single question before the court for determination, discloses that the English court was speaking of the liability of the grand stand owner for the negligence of an independent contractor, when it sought to draw the analogy to the relationship of a carrier to its passenger, and was not considering, and did not determine, that the same degree of care is required generally in caring for the safety of the patron as is demanded in favor of the passenger for hire. The rule at common law was the same as that declared by our Codes. Section 5300 reads as follows: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." *Taillon v. Mears*, 29 Mont. 169, 74 Pac. 423, 1 Ann. Cas. 613. That rule was applied in proper cases by the English courts; but in *Francis v. Cockrell*, above, the court determined that the duty of the grand stand owner to his patron for hire is to be measured by the standard of ordinary care, instead of the standard of the utmost care, as declared by our statute above and by the rule of the common law.

Referring to the case of *Francis v. Cockrell*, Thompson, in his work on Negligence, says: "A good expression of the rule of liability applicable in such cases is found in an English case, to the effect that the proprietor of such a structure is not a warrantor or insurer that it is absolutely safe, but that he impliedly warrants that it is safe for the purpose intended, save only as to those defects which are unseen, unknown, and undiscoverable,—not only unknown to himself, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination." But in the very same paragraph he announces the rule as follows: "The duty assumed by the owners of places to which the public thus resort in large numbers is manifestly analogous to that which the law imposes upon carriers of passengers. Nevertheless it has been measured by the standard of ordinary 42 L.R.A.(N.S.)

care. Doubtless the true theory is that such persons assume the obligation of exercising reasonable care, and that what will be reasonable care will be a degree of care proportioned to the danger incurred, and to the number of persons who will be subjected to that danger." 1 *Thomp. Neg.* § 996.

*Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, is another case frequently relied upon as sustaining the doctrine for which the respondent in the present case contends. In that case negligence was charged in the original construction of the grand stand, and Green, J., apparently voiced the sentiments of the court in declaring that the fall of the stand was prima facie evidence of negligence, but in the next sentence he says: "The defendant was under obligation to maintain the structure in a reasonably safe condition and fit for the purposes for which it was let, so far as the exercise of reasonable care and skill could make it so."

These confusing, conflicting, and contradictory statements fairly illustrate the difficulties confronting the courts and text writers in attempting to draw an analogy between the duty owed by the grand stand owner to his patrons and that of the common carrier to a passenger for hire. In fact, there is not anything whatever in the situation of the parties to warrant the conclusion that the same measure of duty is demanded. The passenger on board a car of a rapidly moving train, entirely under the management and control of the railway officials, finds himself utterly helpless. He cannot direct the action of the engineer, conductor, train despatcher, or other officials operating the train. He cannot with safety leave the train while it is in motion. He has no option except to choose between jumping from the train while in motion, and thus inviting injury on the one hand, or awaiting the result of impending accident on the other; and it is because of the unequal opportunities of the passenger and the carrier officials, as well as the inherent risk in the business, that the law exacts of the carrier the highest degree of care. But the position of the passenger does not bear any analogy to that of the race course patron ascending or descending the stairway of a grand stand. The patron's situation is not different from that of the pedestrian traversing the city sidewalks, or a business man entering a railway depot to obtain information. Indeed, we think there cannot be a single valid reason suggested for exacting from the grand stand owner any higher degree of care than is demanded from individuals generally in dealing with kindred

questions, and this view has the support of the decided weight of authority as well as reason.

A leading case holding to this view, and rejecting the theory that there is a close analogy between the relationship of the grand stand owner and his patron, and that existing between the carrier and passenger for hire, is *Williams v. Mineral City Park Asso.* 128 Iowa, 32, 1 L.R.A. (N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 Ann. Cas. 924, where the cases are reviewed at length. The conclusion reached is fully sustained by the decided weight of the authorities, and the other cases need not be considered. The Iowa court said: "As bearing upon the degree of care which the law imposes upon the owners and managers of exhibitions and places of amusement, the decided cases are not numerous, but, so far as the courts have expressed themselves, it appears to be settled that reasonable care in such cases is the measure of duty. We are therefore not prepared to accept counsel's contention that when 'plaintiff placed her person in defendant's hands for a consideration,' it created 'a sort of bailment, just as if she had placed herself in a railroad's hands as passenger.' It would require too much ingenuity to adjust the law of bailments to the implied contract which arises between the proprietor of a place of public amusement and the visitor who attends such place upon the proprietor's invitation; and the undertaking of such a proprietor is not so similar to that of a common carrier of passengers as to call for an application of the same rule of responsibility."

Our conclusion is that the duty which the defendant owed to plaintiff is to be measured by the standard of ordinary care (38 Cyc. 269); and, this being so, the complaint fails to state facts sufficient to constitute a cause of action, under the decision of this court in *McEnaney v. Butte*, 43 Mont. 526, 117 Pac. 893. It was necessary to state facts showing that the defendant had notice, actual or implied, of the defects. There is not any claim that the defects mentioned were defects in the original construction of the grand stand. However difficult it may be to draw a distinction between ordinary care and utmost care, or to apply the rule of law in each instance, the court cannot overlook the fact that such distinction is recognized by the law, for the different rules exist by virtue of statute, and the distinction is emphasized by direct reference to their application to the case (1) of a carrier and a gratuitous passenger (§ 5299), and (2) of a carrier and a passenger for hire (§ 5300, above).  
42 L.R.A. (N.S.)

The judgment and order are reversed, and the cause is remanded for further proceedings.

Brantly, Ch. J., concurs.

Smith, J., being absent, did not hear the argument, and takes no part in the foregoing decision.

#### PENNSYLVANIA SUPREME COURT.

CHARLES HUDSON MACHEN, Appt.,  
v.

MACHEN & MAYER ELECTRICAL MANUFACTURING COMPANY et al.

(237 Pa. 212, 85 Atl. 100.)

Corporation — right of directors to inspect books.

1. A director of a corporation cannot be refused access to the corporate books by other directors because he neglected his duties as an officer of the company, interfered with its management, and was promoting a competing concern.

Mandamus — to compel display of books.

2. Mandamus will lie to compel directors of a foreign corporation to permit inspection, by one of the directors, of corporate books kept within the state where its chief place of business is located, notwithstanding a contention that its issuance would be an interference with the management of the internal affairs of a foreign corporation.

(July 2, 1912.)

**A**PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County refusing a writ of mandamus to compel defendants to permit him to inspect the corporate books of the corporation of which he was a director. Reversed.

The facts are stated in the opinion.

Messrs. Garrett A. Brownback and Roberts, Montgomery, & McKeehan, for appellant:

The right of a director to inspect the books, documents, and records of his corporation is a right existing at common law, and it is absolute and unqualified. This right is not taken away by reason of the fact that he is also connected with a competing concern, nor is it taken away be-

**Note.** — As to right of stockholders to inspect books of the corporation, see notes to *Weihermayer v. Bitner*, 45 L.R.A. 446; *Kuhback v. Irving Cut Glass Co.* 20 L.R.A. (N.S.) 185; *State ex rel. Brumley v. Jessup & M. Paper Co.* 30 L.R.A. (N.S.) 290; and *White v. Manter*, ante, 332.

cause the remaining directors "believe" that his reason for desiring to inspect the books and papers of the company is to aid a competing concern.

4 *Thomp. Corp.* 2d ed. 993; *People ex rel. Muir v. Throop*, 12 *Wend.* 183; *People ex rel. Gunst v. Goldstein*, 37 *App. Div.* 550, 56 *N. Y. Supp.* 306; *People ex rel. McInnes v. Columbia Paper Bag Co.* 103 *App. Div.* 208, 92 *N. Y. Supp.* 1084; *People ex rel. Leach v. Central Fish Co.* 117 *App. Div.* 77, 101 *N. Y. Supp.* 1108; *Lawton v. Bedell*, — *N. J. Eq.* —, 71 *Atl.* 490; *Kuhbach v. Irving Cut Glass Co.* 220 *Pa.* 427, 20 *L.R.A. (N.S.)* 185, 69 *Atl.* 981.

A stockholder's suit to inspect the books and records of a foreign corporation is not within the rule as to internal affairs.

*State ex rel. Richardson v. Swift*, 7 *Houst. (Del.)* 137, 30 *Atl.* 781; *State ex rel. Templin v. Farmer*, 7 *Ohio C. C.* 429, 4 *Ohio C. D.* 664; *State ex rel. Watkins v. North American Land & Timber Co.* 106 *La.* 621, 87 *Am. St. Rep.* 309, 31 *So.* 172; *Merritt v. Copper Crown Co.* 36 *N. S.* 383; *Nettles v. McConnell*, 151 *Ala.* 538, 43 *So.* 838; *Sloan v. Clarkson*, 105 *Md.* 171, 66 *Atl.* 18; *State ex rel. English v. Lazarus*, 127 *Mo. App.* 401, 105 *S. W.* 780; *Schondelmeyer v. Columbia Fireproofing Co.* 219 *Pa.* 610, 69 *Atl.* 49; *Andrews v. Mines Corp.* 205 *Mass.* 121, 137 *Am. St. Rep.* 428, 91 *N. E.* 122; *McGrew v. Pittsburgh & Mt. S. Gold M. & M. Co.* 20 *Pa. Dist. R.* 820; 4 *Thomp. Corp.* 2d ed. § 4532.

*Mr. D. J. Callaghan*, for appellees:

The court has no jurisdiction of the complaint, because it was an attempt to control the internal management of a foreign corporation.

*McCloskey v. Snowden*, 212 *Pa.* 249, 108 *Am. St. Rep.* 867, 61 *Atl.* 796; *Madden v. Penn Electric Light Co.* 181 *Pa.* 617, 38 *L.R.A.* 638, 37 *Atl.* 817; 199 *Pa.* 454, 49 *Atl.* 296; *Kinney v. Mexican Plantation Co.* 233 *Pa.* 232, 82 *Atl.* 93; *American Grease Co. v. Vogellus*, 9 *Pa. Dist. R.* 217, 23 *Pa. Co. Ct.* 664; *Cheyney v. Equitable Life Assur. Soc.* 16 *Pa. Dist. R.* 765, 34 *Pa. Co. Ct.* 671; *Bank of Virginia v. Adams*, 1 *Pars. Sel. Eq. Cas.* 534; *Morris v. Stevens*, 6 *Phila.* 488.

*Mestrezat, J.*, delivered the opinion of the court:

This was a petition filed in the court below for a mandamus by one of the seven directors of a foreign corporation, doing business in this state, requiring the six other directors and the officers of the corporation to permit the petitioner to inspect the books, documents, and papers of the corporation to the end that he might be able to perform his duties as a director thereof.

The petition and amended petition for the 42 *L.R.A. (N.S.)*

writ set forth the facts in detail, but they may be summarized as follows: The Machen & Mayer Electrical Manufacturing Company was organized in 1907 under the laws of New Jersey for the purpose of manufacturing and selling electrical specialties and supplies in the city and county of Philadelphia, Pennsylvania, and was duly registered under the laws of Pennsylvania as a foreign corporation doing business within the state. The manufacturing plant, and substantially all of the property of the corporation, as well as its chief place of business and its books of account, minute books, the stock books, and all of its papers and documents, are and always have been in the county of Philadelphia. The plaintiff and the six individual defendants are directors of the corporation, and he owns 156 of the 633 outstanding shares of its capital stock. Charles Horn is the president, general manager, and assistant treasurer, Walter D. Bryson is the secretary, and Alfred Brannen is the treasurer, of the company. The plaintiff, the individual defendants, except J. Edward Fagen, and all of the stockholders, are and have been since the incorporation of the company citizens and residents of Pennsylvania. The individual defendants residing in Pennsylvania have the custody and possession of all the books of account, records, papers, and documents of the corporation. The plaintiff is the registered agent of the corporation in Pennsylvania. There is no statute or law of New Jersey or by-law of the corporation regulating the inspection of books, documents, papers, and records thereof by the directors. The by-laws provide that the business affairs of the company shall be managed and controlled by the board of directors, and that regular meetings of the board shall be held on the first Monday of each month. The only meetings of the directors held since March 13, 1911, at which there was a quorum, were the regular meetings held in the months of July and October. Defendants Herman, Horn, and James Brannen hold but one share each in the stock of the company, and Bryson owns ten shares. Fagen is a resident of New Jersey and was elected a director in order to comply with the laws of that state. One share of the stock stands in his name, but he is not the real owner of it, and it was transferred to him to qualify him as a director.

The business affairs of the company have not been managed by the board of directors, but by the executive committee in conjunction with Charles Horn, the president. On several occasions the plaintiff asked permission of the other directors and officers of the company to inspect the books, docu-



ments, and papers thereof in order to enable him to properly perform his duties as director. He also requested information as to the manner in which the affairs of the company had been conducted, and asked to see a financial statement of the company. All of his requests were refused. He then instituted this proceeding for a mandamus requiring the defendants, at such times as might be reasonable and convenient for the purpose, to permit him to inspect the books, documents, and papers of the corporation to the end that he might be able to perform his duties as director. An alternative writ was awarded and served on all the directors except Fagen. A motion was made to quash the writ on the ground that the court was without jurisdiction, but it was overruled.

The defendants then filed a return to the alternative writ. It does not deny the facts set forth in the petition except the averment that there is no statute or law in New Jersey regulating the inspection of the books, documents, and records of the company by the directors of the company. It alleges, as a justification for refusing the plaintiff's request for permission to inspect the books and documents, that, prior to his last election as director, the plaintiff neglected his duties as president and secretary of the company, interfered with the general management of its affairs, prevented the general manager from attending to his duties, canceled instructions given by the general manager as to selling goods, that he was promoting a competing concern, that he put in circulation a printed card stating that he had resigned from the defendant corporation, that he had not made any charges or allegations of wrongdoing or irregularities on the part of the officers of the company, and that in a report from Bradstreet it was set forth that the plaintiff was president of another company. The plaintiff demurred to the return, which was overruled, and the court entered judgment for the defendants. From that judgment, this appeal was taken.

The appellant states and discusses two propositions: (a) The sufficiency of the facts averred in the petition to warrant the court below in granting the relief prayed for; and (b) the jurisdiction of the court to grant the relief.

The appellees confine their argument to the second proposition, and thereby concede that, if the court had jurisdiction, the undisputed facts were sufficient to justify it in awarding a peremptory mandamus. We have stated the material facts set forth in the petition, and they are not denied in the return to the alternative writ. They show that six of the seven directors of the 42 L.R.A. (N.S.)

corporation, by the means disclosed in the petition, have deprived the plaintiff, the other director, of access to the books, documents, and papers of the corporation, and of the opportunity of exercising the legitimate functions of a director. We know of no authority, and have been referred to none, that sustains such conduct on the part of a majority of a board of directors of a corporation. It is the duty of directors to manage the affairs of the corporation and to keep in touch with the acts of its executive officers, and for that purpose they should secure all the information affecting the corporation obtainable from every available source. An important and essential part of this information must necessarily come from the books and documents of the corporation itself. They should disclose the true condition of the corporation, and thereby enable the directors to obtain correct information as to the management of its affairs by the officers whom they have selected for that purpose. It is therefore apparent that the directors should at all reasonable times be permitted to inspect the books of the corporation. Judge Thompson, in sustaining the right of a director to such inspection, says in his admirable work on Corporations, 2d ed. vol. 4, p. 993: "Of this right of the director it has been said: 'The duty of a director is to direct, and if he neglects this duty he is certainly guilty of a moral wrong, if not a legal one. To perform this duty intelligently it is essential that he should keep himself informed as to the business and affairs of the corporation and as to the acts of all its executive officers, and, in order to keep himself so informed, he has the unqualified right to inspect its books, records, and documents.'"

The duty to manage the corporation rests alike upon each and every one of the directors, and therefore it is the right of each director to inspect its books and documents. There doubtless may be differences of opinion among directors as to the management of the affairs of the corporation; but, while the majority will control, they have not the authority and cannot be permitted to deprive the minority, by refusing an inspection of the books and papers, of the right to obtain information as to the affairs of the company. As said by Chief Justice Savage in *People ex rel. Muir v. Throop*, 12 Wend. 183: "Surely such an outrage could not be defended, nor can we perceive any plausible apology for it." The appellees set up in the return to the alternative writ several reasons for refusing the appellant access to the books of the company; but, conceding the truth of the matters alleged in the return, it does not deprive him of the right of inspection. These reasons might be suf-

ficient grounds to justify the stockholders in refusing to elect the appellant a director to manage the company's affairs, but that is a question to be considered and determined by the owners of the assets of the company, the stockholders, and not for the majority of the board of directors. Certainly the right of a director to inspect is superior to that of a stockholder, and we have sustained the latter's right in the face of an averment in the return of a belief that the demand for inspection was not in good faith, but for the purpose of using the information as a director in a competing company. *Kuhbach v. Irving Cut Glass Co.* 220 Pa. 427, 20 L.R.A.(N.S.) 185, 69 Atl. 981. The other matters alleged, as reasons for denying the plaintiff the right of inspection, are likewise without merit. They are for the consideration of the stockholders, not for the plaintiff's codirectors. He is responsible to the stockholders, and not to his fellow directors, for the faithful discharge of his duties as a director. He has an unqualified right to inspect the books of the corporation, and all that he need show to entitle him to an inspection is that he is a director of the company, that he has demanded permission to examine, and that his demand has been refused. *People ex rel. Leach v. Central Fish Co.* 117 App. Div. 77, 101 N. Y. Supp. 1108.

The other and important question in this case is *res nova* in this jurisdiction. It is whether the courts of the state have jurisdiction by mandamus, under the facts disclosed by the record, to compel the directors and officers of a foreign corporation, registered to do business in this state, to permit a codirector to inspect the records, books, and documents of the corporation which are within the state and the jurisdiction of the court. The objection to the jurisdiction is that the corporation was chartered under the law of another state, and that the exercise of the power would be to interfere in the management of the internal affairs of a foreign corporation. This contention, we think, is without merit in view of the undisputed facts of the case. We have already stated the facts, and they need not be repeated here in detail. The plaintiff and the individual defendants, against whom relief is asked, are citizens and residents of the city of Philadelphia, and all the books desired for inspection are at the office of the company in the city; and the refusal to permit an examination of the books by the petitioner occurred at the company's office in the city. The company's manufacturing plant is likewise in the city, and the sales of its products are made in this and other states. Almost immediately after the company was incor-

porated, it registered in this state, as required by our act of assembly, and has since continued its business in the city of Philadelphia. Its chief place of business is in Philadelphia, with a nominal office in Camden, which is required by the statute of New Jersey. Fagen, a nominal stockholder, resides in New Jersey, as required by the statute of that state; but he has not been served, and no relief in this proceeding is asked against him. The share of stock standing in his name belongs to one of the other defendants, and all of the other stock of the company is therefore owned by citizens and residents of this state. Personal service of the alternative writ was made on all of the individual defendants except Fagen.

The facts clearly show that there is no attempt on the part of the plaintiff to interfere with the internal affairs of the corporation. There is no demand for relief against the corporation, but against its directors and officers, who are citizens and residents of the state and within the jurisdiction of the court. It is not an attempt to enforce a claim against the corporation, nor to test the right of any officer or director to his office, nor to enforce a local law of the domiciliary jurisdiction of the company. The relief sought does not require the court to construe or enforce any law of New Jersey, or to interfere in any way in determining the rights or duties of the directors or officers of the corporation under the laws of the foreign jurisdiction. There is no demand here that the corporation be compelled to do anything, nor does the proceeding seek to adjudicate the rights of the stockholders in any matter concerning them. The plaintiff does not ask the court to exercise any visitatorial power over the corporation or control its management. We are therefore at a loss to see how the granting of the relief sought in this proceeding will regulate or interfere in any way with the internal affairs of the corporation. It is simply a demand on the part of the plaintiff that he be permitted to see the books, records, and documents of the corporation that he may perform the duties of director which the stockholders and others interested in the corporation have the right to demand of him. To deny him this right is, in effect, to exclude him from the directorate of the corporation, as well as to announce the principle that a majority of the directors may, at their pleasure, exclude the minority from all participation in the management of the corporation. Unless the court assumes jurisdiction and grants the relief prayed for, the plaintiff is without any adequate remedy to enforce a manifest right. The books desired, and the officers

and directors having the custody of them, are within the jurisdiction of the court, and a foreign court could not grant the relief which the plaintiff seeks and to which he is entitled. It would be worse than idle to compel the plaintiff, a citizen of this state, to go to the domiciliary jurisdiction to seek the relief he asks here.

The New Jersey statute, which confers jurisdiction upon its courts to compel the books of the corporation to be returned to the state, cannot give the plaintiff proper and efficient relief. The decisions of the New Jersey court clearly disclose that fact. *Huyler v. Cragin Cattle Co.* 42 N. J. Eq. 139, 7 Atl. 521; *Fuller v. Alexander Hollander & Co.* 61 N. J. Eq. 648, 88 Am. St. Rep. 456, 47 Atl. 646. The courts of that state have no jurisdiction over the persons of the directors and officers except director Fagen, a resident of New Jersey, and it is admitted that the books of the corporation are within this jurisdiction. If, indeed, the courts of New Jersey could compel the return to that state of the books, as well as the directors and officers of the company who have charge of them in this state, the relief obtained, if any, would be attended with such delay and inconvenience as would practically be a denial of it in an efficient form. The plaintiff is attempting to enforce a common-law, and not a statutory, right in which the courts of this commonwealth, under the facts of the case, have undoubted jurisdiction. In such cases the remedy is properly enforceable in the forum where the records and their custodians are located. The writ goes against the officers who have possession of the books, and it necessarily must be issued in the forum where the books and their custodians may be found. They cannot be reached directly by process issued in any other jurisdiction. The enforcement of the writ, compelling the production of the books, will not result in the investigation of or interference with the internal affairs of the corporation, nor will it affect the management of the corporation in any way whatever. We are therefore clear that the court below had jurisdiction to grant the relief prayed for in the petition, and to compel the production of the books, documents, and papers of the corporation in the city of Philadelphia for inspection by the plaintiff.

The courts in other states have sustained the jurisdiction and granted such relief on the application of a stockholder of a private corporation. *State ex rel. Richardson v. Swift*, 7 Houst. (Del.) 137, 30 Atl. 781; *State ex rel. English v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780; *Andrews v. Mines Corp.* 205 Mass. 121, 137 Am. St. Rep. 428, 91 N. E. 122; 5 Thomp. Corp. 2d ed. § 6742. 42 L.R.A. (N.S.)

In the *Andrews Case*, Chief Justice Knowlton, delivering the opinion, said (205 Mass. 122): "The right which is sought to be enforced here is one of general, if not universal, recognition from early times. It is referred to in different cases as a right existing at common law. In order to enforce it, the court is not called upon to investigate the internal affairs of the corporation, or to make any order that affects it in the management of its business, or in the relations of stockholders to one another." In the *Lazarus Case*, *Goode, J.*, said (127 Mo. App. 407): "It [the proceeding] is simply intended to enforce a common-law right enjoyed by the relator as shareholder to examine the corporate records for proper purposes; and such remedy may be, and properly is, sought in the forum where the records are kept by their custodians; and it is our opinion that, by accepting the provisions of the Missouri statutes enabling foreign corporations to do business in the state, the respondent company so far became subject to the jurisdiction of the Missouri courts that they may afford relief of the kind sought, if the circumstances are appropriate."

The right of a director to inspect the books of the corporation, like that of a stockholder, exists at common law; but the right of the former is unqualified, while the latter, to a certain extent, is a qualified right. The reason is that the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern. The protection of the interests of the company, therefore, require that his right to an inspection of the books be absolute. The inspection by a stockholder is primarily for the purpose of protecting his individual interest, and is not with the view of enabling him to perform his duty as a manager of the corporation. It is therefore a qualified right and depends in each instance upon the facts of the particular case. It may, and frequently does, interfere with and affect the internal affairs of the corporations; and, when it does, the domestic court will withhold its aid, and not grant the relief.

We have carefully examined the cases cited by the learned counsel for the appellees, and are convinced that they do not rule the case at bar against the appellant. Their facts differentiate them clearly from the present case. They are cases of a stockholder, and not of a director; and, as pointed out above, relief will frequently not be granted in such cases to a stockholder where it would be granted to a director. We think in the present case the plaintiff has,

both by reason and precedent in other jurisdictions, established his right to the relief he seeks, and that the authorities cited by the appellees do not rule the case against him. We are all of the opinion that the court should have granted a peremptory writ.

The judgment of the court below is reversed, and it is now ordered, adjudged, and decreed that that court issue a peremptory writ of mandamus directed to the individual defendants served and each of them, requiring and commanding them and each of them, at such times as may be reasonable and convenient for the purpose, to give to Charles Hudson Machen, the plaintiff, with his clerk or clerks, access to all the books, documents, and papers of the defendant corporation in their possession, with the opportunity to make abstracts and copies therefrom. It is further ordered that the individual defendants, served in this case, pay the costs in this and the court below.

#### TEXAS SUPREME COURT.

MRS. ANTOINETTE W. DAVIS, Appt.,  
v.  
LEWIS VIDAL.

(— Tex. —, 151 S. W. 290.)

#### Landlord and tenant — transfer — right of re-entry — action of landlord.

1. The insertion in a transfer of a lease for the entire term, of a provision for re-entry for failure to pay rent as well as the right to pay the rent to the landlord, retains an estate in the transferrer, and pre-

#### *Note. — Reservation of right of re-entry as affecting the character of instrument as an assignment or sublease.*

There is a conflict of opinion in the courts on this subject, not only where the controversy concerns third parties, but also where it arises between the parties to the transfer or their successors. The question usually discussed is whether such an instrument leaves any reversion in the transferrer. But it has been held that a reversion is not necessary to support a right of re-entry (*Doe ex dem. Freeman v. Bateman*, *infra*). *Doe v. Bateman* is also cited as authority both for and against the theory that a transfer for the remainder of a term ends the estate of the transferrer. And it is generally difficult to estimate the exact weight given by the courts to the reservation of the right of re-entry, in view of various other circumstances which in nearly every case have more or less bearing on the result. The reader accordingly will recognize that the authority of each case is not to be extended beyond a similar state of facts.

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vents an action by the landlord against the transferee for rent.

#### Same — agreement to pay rent — construction of lease.

2. An agreement by a transferee of a lease to pay rent to the lessor which will sustain an action is not shown by a clause in the transfer, that the transferee does well and truly agree and promise to pay the rent in said lease agreed to be paid; to wit, the sum of \$100 per month.

(December 4, 1912.)

**A**PPEAL by plaintiff from a judgment of the Court of Civil Appeals, Fourth Supreme Judicial District, affirming a judgment of the District Court for El Paso County in defendant's favor in an action brought to recover an amount alleged to be due for rent of certain premises in the possession of defendant as assignee. Affirmed. The facts are stated in the opinion.

Messrs. A. H. Goldstein and John L. Dyer for appellant:

The agreement between the brewery and defendant was an assignment, and not a subletting.

2 Taylor, Land. & T. § 426, p. 1; 1 Taylor, Land. & T. § 109, p. 119; *Smiley v. Van Winkle*, 6 Cal. 605; *Ascarete v. Pfaff*, 34 Tex. Civ. App. 376, 78 S. W. 974; *Wood, Land. & T. § 327*, p. 727.

Lewis Vidal was an assignee of the lease, and as such he became responsible for the payment of any rent to plaintiff.

*Ascarete v. Pfaff*, 34 Tex. Civ. App. 376, 78 S. W. 974; *LeGierse & Co. v. Green*, 61 Tex. 131; *Wood, Land. & T. 1888*, §§ 90, 320, pp. 180, 711; *Harvey v. McGrew*, 44 Tex. 415.

As between the parties to the transfer and their successors.

While a few of the cases claim that there is a distinction between questions arising betwixt the parties to the transfer and their successors, and those concerning third parties, on the ground that in the first case the intention is the controlling feature (see the *Linden* and *Potts* Cases, *infra*), the courts in general, as has been suggested, do not base their decisions on any such distinction.

In *Linden v. Hepburn*, 3 Sandf. 668, where the question arose between the holder of the lease and one to whom he had demised for the balance of the term a part of the original premises, the court, in enjoining the transferees from violating their covenants, said: "Whatever the effect of this lease might be, as between West [the transferee] and the original lessor of the demised premises, we have no doubt that as between West and the plaintiffs, it is to be regarded as a sublease, and not as an assignment of the original term. The right to re-enter was reserved to the plaintiffs,

When one, for a valuable consideration, agrees with another to pay the debt of the other person to a third person, such agreement inures to the benefit of the third party, who may maintain an action thereon, and there is a privity of contract between them, and one may enforce a contract, though not specifically named, if sufficiently indicated.

*Mathonican v. Scott*, 87 Tex. 398, 28 S. W. 1063; 3 Page, Contr. § 1308, p. 2017; *Giddings v. Felker*, 70 Tex. 177, 7 S. W. 694; 2 Wood, Land. & T. § 547, p. 1334.

Messrs. Beall, Kemp, & Ward, for appellee:

The contract entered into by the Dallas Brewery and defendant was a subletting and created him a subtenant.

and this suffices to enable them to enter for breach of the conditions, although there be no reversion remaining in them (*Doe ex dem. Freeman v. Bateman*, 2 Barn. & Ald. 168, 20 Revised Rep. 399)." See also the remarks of the court in *Stewart v. Long Island R. Co.* and in *Sexton v. Chicago Storage Co.* infra.

So, in *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 451, 69 S. E. 734, where an instrument, in terms a sublease, provided for a considerable advance in rent over the first deed, reserved the right of re-entry, required permission to be given by the lessor named in it, from time to time, as to certain matters, and contained also a agreement by the lessor named in it that rent should cease if the premises became untenable on account of fire, it was held that the intention of the parties was that the relation of landlord and tenant was to be created, and to continue, and that as between the parties it was not an assignment of an original lease to the lessor either under the general law or under the Georgia statute.

—reversion considered unnecessary.

In *Doe ex dem. Freeman v. Bateman*, supra, a lessee demised premises for a term coextensive with his own, reserving rent and subject to certain conditions, one of which was that a public house should not be opened on the premises without his consent, and reserved a right of re-entry in case of a breach of any of the covenants or conditions. A public house was so opened, and the transferrer entered, and the action was in effect by the transferee for possession, and he argued that, as there was no reversion, the right of entry was gone; but the court held otherwise, and decided that a reversion was not necessary to support the right of entry, and illustrated the case of a feoffment in fee reserving rent and with a right of re-entry for failure to pay the rent; in case of such failure the feoffor might enter, although the premises would be held under the superior lord since the statute *quia emptores*; also that 42 L.R.A. (N.S.)

Wood, Land. & T. § 65; *Dunlap v. Bul-lard*, 131 Mass. 161; *Fulton v. Stuart*, 2 Ohio, 215, 15 Am. Dec. 542; *Crusoe v. Bug-by*, 3 Wils. 234, 2 W. Bl. 766; *Sexton v. Chicago Storage Co.* 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920; 19 Am. & Eng. Enc. of Law, 659.

There was no specific promise on the part of defendant to pay plaintiff, and she could not sue upon the contract entered into between the Dallas Brewery and defendant.

18 Am. & Eng. Enc. Law, 658; *Wheeler v. Hill*, 16 Me. 329.

Dibrell, J., delivered the opinion of the court:

This is a suit by Antoinette W. Davis brought in the district court of El Paso

if one seised in the right of his wife should make a fee upon condition and die, and after his death, the condition was broken, his heir might enter, although upon the entry the premises would vest in the wife. The relative size of rent in the first and second leases does not appear.

—transfer construed as sublease.

In *Shumer v. Hurwitz*, 49 Misc. 121, 96 N. Y. Supp. 1026, a summary proceeding by the tenant against undertenants, to whom he let at an increased rent, the court in holding that the transfer was not an assignment said: "Herein there were reservations not only of re-entry on breach of certain conditions, but of new rent; and, though there was a demise for the residue of the term, there was a reservation of delivery of possession at the end of the term, and so a fragment of the original term."

In *People ex rel. Elston v. Robertson*, 39 Barb. 9, a summary proceeding to recover possession for failure to pay rent, brought against the tenant's underlessees by the assignees of one to whom the tenant had assigned his original lease, the rent in the second lease exceeding that in the first lease, it is stated in the headnote that a covenant to re-enter, in an instrument conveying the premises for the remainder of a prior term, would make the instrument a sublease, and not an assignment. The case is not fully reported so that it can be seen whether the covenant to re-enter was in the instrument, and it was not in any case necessary to the decision, as the court considered that the sublease expired first.

—transfer construed as assignment.

In *Cameron Tobin Baking Co. v. Tobin*, 104 Minn. 333, 116 N. W. 838, where a lessee demised a part of the premises for the unexpired term at a less rent than in the lease to him, the court answered in the negative the following question: "Can a lessee who has, by means of an instrument in form of a sublease, parted with his whole term as to a portion of the premises leased by him, maintain an action of forcible entry

county against Lewis Vidal, to recover the sum of \$1,200 alleged to be due her by Vidal for the use of certain premises situated in the city of El Paso, of which Vidal was in possession as the assignee of the Dallas Brewery. The sole question of law involved in the case is whether a certain instrument of writing executed by the Dallas Brewery to the defendant, Vidal, on October 1, 1907, was an assignment of its lease from the plaintiff, Antoinette W. Davis, of date April 26, 1907, or a subletting of the premises in question. If the instrument referred to was an assignment of the lease, then plaintiff was authorized to recover of the defendant the rent due on her contract of lease with the Dallas Brewery, by virtue of the privity of estate and

contract that subsists between them; but if, on the other hand, the instrument was a subletting of the premises to Vidal by the original lessee, the plaintiff could not recover against defendant as a subtenant, since in such case there is neither privity of estate nor of contract between the original lessor and the undertenant. *Harvey v. McGrew*, 44 Tex. 415; *LeGierse & Co. v. Green*, 61 Tex. 131; *Taylor, Land. & T. § 16*.

The instrument in question was construed by the trial court and the court of civil appeals to be a subletting of the premises by the Dallas Brewery to the defendant, Vidal, and in accordance with that holding judgment was rendered for the defendant. Upon appeal of the case to the court of civil ap-

and unlawful detainer against the person with whom he has so contracted, by virtue of an attempted reservation of the right of re-entry for the breach of a covenant contained in that instrument?" (The covenant breached was not to sell liquors nor to run a disorderly house.) The court said: "*In Ohio Iron Co. v. Auburn Iron Co.* 64 Minn. 404, 67 N. W. 221, it was further held that 'the right of re-entry cannot exist as an independent condition, but only as an incident to an estate or interest for the protection of which it is reserved.'"

*In Ohio Iron Co. v. Auburn Iron Co.* supra, a case of a mining lease, where Humphreys, the lessee, had granted to B all of his term on the original conditions, etc., reserving a right of re-entry, and the controversy arose between B and a party to whom Humphreys later assumed to assign his lease to B, the court said: "Humphreys retained no estate or interest whatsoever in the lands demised, and not even the possibility of a reverter remained in him, for the right to re-enter cannot exist as an independent condition. It only exists as an incident to an estate or interest for the protection of which it is reserved. . . . In general the right of re-entry for a breach of a condition subsequent is not assignable. . . . The right of re-entry is not an estate or interest in land, nor does it imply the reservation of a reversion. It is a mere chose in action, and when enforced the grantor is in through the breach of the condition, and not by reverter."

*In Porter v. French*, 9 Ir. L. Rep. 514, a lessee who had made a lease covering his whole term, reserving a right of re-entry, brought ejectment thereunder for nonpayment of rent, and it was held that under the Irish ejectment acts as there was no reversion and no relation of landlord and tenant, the action of ejectment would not lie. Pennefather, B., said in his opinion that the right of re-entry reserved would have permitted ejectment at common law, but not under the statutes, as they only applied to the relation of landlord and tenant. Richards, B., in his opinion, said that the 42 L.R.A. (N.S.)

assignee could not escape a suit of the original landlord by reason of a right of re-entry reserved in the assignment; that is to say, that the reservation of the right of re-entry did not make the instrument less an assignment.

*In Weander v. Claussen Brewing Asso.* 42 Wash. 226, 114 Am. St. Rep. 110, 84 Pac. 735, 7 Ann. Cas. 536, where A leased to B, who leased to C, who leased to D, who sued C for damages in that he had been evicted by A on account of some default on the part of B, the court in affirming a judgment for C said: "Respondent parted with its entire interest. It is true, it reserved the right of re-entry at the close of the term; but that provision is without force for the reason that, at the end of the term, there would be nothing left of which it could take possession. It also reserved the right of re-entry in case of default in payment of rent or breach of any of the covenants. The rental terms and covenants being, however, precisely the same as its own in the lease with its lessor, the authorities maintain that the legal effect of the instrument is not changed from that of an assignment to that of a lease, even though the right of re-entry for condition broken be reserved. While there is some conflict upon this point, yet we think the weight of authority decidedly supports the rule as stated."

*In Taylor v. Marshall*, 255 Ill. 545, 99 N. E. 638, the *Sexton Case*, *infra*, was approved, but it does not appear whether the demise by the lessee contained a right of re-entry. It was held that where A, a lessee, demised the premises for the remainder (exceeding five years) of his term at a rent larger than the rent in the original lease, that A had no leasehold estate within the statute providing that a judgment should be a lien upon a leasehold estate when the unexpired term exceeds five years, and that therefore a judgment creditor of A who purchased on an execution sale (under his judgment) the interest of A in the premises took no interest or estate, and the sheriff's deed in execution was void, as the demise by A was in law an assignment of his lease, and, "after assignment,

peals the judgment of the lower court was affirmed.

That the question involved and decided may be fully understood we embody the instrument executed by the Dallas Brewery to Vidal: "Know all men by these presents, that, whereas, on the 26th day of April, 1907, Mrs. Antoinette W. Davis, acting by her agents, A. P. Coles & Brother, did lease to the Dallas Brewery the following parcel of land with the tenements thereon in the city of El Paso, county of El Paso, state of Texas, to wit, being the one-story and adobe composition roof building situated on lot 1 and south 24 feet of lot 2, block 135, Campbell's addition to the city of El Paso, Texas; known as Nos. 415-419 Utah street, same being leased from the 1st day of May,

1907, for three years, to be ended and completed on the 30th of April, 1910, and in consideration of same lease the said Dallas Brewery yielding and paying therefor during said term the sum of \$100 per month, payable in advance on the first day of each and every month; and, whereas, said lease provides that said premises or any part thereof may be sublet by said Dallas Brewery without the consent of said Mrs. Davis; and, whereas, it is desired to transfer, assign, and sublet all of said above premises so leased by the said Mrs. Davis to said Dallas Brewery to Lou Vidal: Now, therefore, in consideration of the premises and the sum of \$300 to it in hand paid, the receipt whereof is hereby acknowledged, said the Dallas Brewery does hereby sublet, as-

the lessee does not have a leasehold estate, for his interest is then one growing out of contract, and is not an interest in the premises demised;" and the judgment creditor had no cause of action against A's transferee to enjoin him from keeping a house of ill fame.

—transferee purchasing reversion.

In *Thorn v. Woolcombe*, 3 Barn. & Ad. 586, where there was a transfer for the entire term to A and rent reserved to the transferrer and a right of re-entry if the rent were unpaid or the covenants in the transfer or original lease not performed, it was held that this was equivalent to an assignment, and A having acquired the reversion in fee and sold it to a purchaser who retained a part of the purchase money as security for the rent to be paid by A, A's executors might recover the money so retained, as there had been a merger, and the rent reserved in the transfer to A was no longer a charge upon the land. It does not appear what the rate of rent in the original lease was.

As concerning third parties — as between original landlord and transferee.

In *Koppel v. Tilyou*, 70 N. Y. Supp. 910 (municipal court), a case of redemption under the statute by the transferee against the original landlord, the court considered that the transfer of a part of the premises for the unexpired term of the first lease was a sublease, as "the right of re-entry for breach of conditions exists, and also that the instrument contains a covenant to surrender the premises at the end of the term," and judgment was for the defendant, the statute applying only to lessees and assignees. It did not appear that the covenant to surrender stated to whom the surrender was to be made.

In *Lloyd v. Cozens*, 2 Ashm. (Pa.) 131, where the rent was the same in both leases, and the second lease contained a provision that the rent should be paid to the person who was the lessor in the second lease and that he should have a right of re-

entry, it was held that the second lease was an assignment, and not a sublease, and that the transferee was liable to the original landlord on the covenants in the original lease; but it is not entirely clear that this was essential to the decision though the court takes the view that it was essential.

—liability for rent.

In *Sexton v. Chicago Storage Co.* 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920 (reversing 30 Ill. App. 95), where B, a lessee, demised the premises to C for the remaining part of his term at a rent at first smaller, but afterwards larger, than the original rent, with covenants for the payment of rent and for re-entry, and for surrender to B, upon the determination of the term or whenever he should elect to declare the term ended, it was held that as to A, the original landlord, this was an assignment of the lease to B, and that C stood in the shoes of B as respects B's covenant to pay rent to A. The court said: "The more recent English decisions, and all of the text-books treating of the question which have been accessible to us, hold that where all of the lessee's estate is transferred, the instrument will operate as an assignment, notwithstanding that words of demise, instead of assignment, are used, and notwithstanding the reservation of a rent to the grantor, and a right of re-entry on the nonpayment of rent or the nonperformance of the other covenants contained in it."

In *Stewart v. Long Island R. Co.* 102 N. Y. 601, 55 Am. Rep. 844, 8 N. E. 200, where the original landlord sued the tenant's transferee for rent, the term of the transferee extending much beyond the term of the original lease, the court in reversing a judgment for the defendant distinguishes between questions arising betwixt the original landlord and the transferee, and those that have arisen between the original tenant and the transferee, and states it to be the law that in the latter case if the intent is to make a sublease it will be a sublease as between those parties "as to all but strict

sign, and transfer the said above premises, and does assign and transfer the above said lease, to the said Lou Vidal, and in consideration therefor the said Vidal does well and truly agree and promise to pay the rents in said lease agreed to be paid, to wit, the sum of one hundred (\$100) dollars per month, each and every month hereafter ensuing, beginning on the first day of November, 1907, in advance on the first day of each month so hereinafter ensuing. And the said Vidal does agree and bind himself and obligates himself to in all respects indemnify, save, and hold harmless said Dallas Brewery by reason of any of the terms or conditions in said lease contained, including the payment of rent therein provided to be paid, and should the said Dallas Brewery

elect to pay any rent therein provided, or be called upon to pay any rent therein provided, upon same being done the said Vidal agrees to pay the same with interest at the rate of 10 per cent per annum; or if the said Vidal neglects or fails to pay said rent promptly, as in said lease provided to be paid, then and in such event the Dallas Brewery can and may at its option declare this transfer null and void, and thereupon oust the said Vidal, and assume possession thereof, and this without notice of any character or kind to the said Vidal; and the failure to pay any rent as in said lease provided to be paid, at the election of the said Dallas Brewery, can and may authorize it without notice to re-enter and repossess said premises."

reversionary rights." The court said: "In the latter class of cases the rule is well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and the essence of the instrument as an assignment so far as the original lessor is concerned will not be destroyed by its reserving a new rent to the assignor with a power of re-entering for nonpayment, nor by its assuming, by the use of the word 'demise' or otherwise, the character of a sublease; and the assignee, so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the covenant to pay rent. . . . The fact that the lease to the defendant reserves a different rent from that reserved in the original lease, with a clause for re-entry, cannot affect the question as between the parties to the present controversy, of its operating in law as an assignment of the term." The court points out that in *Collins v. Hasbrouck*, *infra*, the reversal on another ground made the decision, as regards the maker of the sublease or assignment, not controlling, and said, further, as to that case: "The question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of that question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to re-entry for breach of condition are immaterial." (Finch, J., dissented.)

On the other hand, it will be seen that in *DAVIS v. VIDAL*, it is held that the original landlord could not recover rent of the transferee as the reservation of the right of re-entry in the transfer prevented the passing of the entire estate of the original tenant.

—liability upon covenant to pay taxes.

In *Dunlap v. Bullard*, 131 Mass. 161, where it was held that the possessor of 42 L.R.A. (N.S.)

land was not liable to the original landlord upon a covenant in the original lease to pay taxes, and it appeared that the interest of the original lessees passed to O., who demised to J. the premises for a term equal to the unexpired part of the original term at a larger rent, reserving a right of re-entry, etc., and J. demised to the defendant, the possessor, the court said: "The interest which came to the defendant was conveyed by a lease of the premises containing all the agreements and covenants usually found in such an instrument. There is no reference in it to the original demise, and no indication of an intention on the part of Ostrom, the sublessor, to part with his whole interest in the leasehold estate, or to lose control of it as lessor. His provides that Johnson, the tenant, shall hold under him and pay rent to him and no one else. The rent reserved was larger in amount than that reserved in the original lease, and was payable at different times, and the lessee covenants to deliver up the premises to Ostrom, the lessor, at the end of the term. But what is more in point, the right is reserved to the lessor to enter and expel the lessee for nonpayment of rent, or breach of any of the covenants in the lease. It is clear that the parties to this lease intended to create the relation of landlord and tenant between themselves. . . . If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture, are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term."

A similar result was reached in *Martin v. O'Conner*, 43 Barb. 514, an action in effect between the original landlord and the tenant's transferee for the balance of the term of the original lease with similar rent and covenants, where the court said: "Though the lease of the original lessees (the trustees, etc.) to Hagadorn was a lease of the whole unexpired term, yet, as it contained a covenant on the part of Hagadorn to surrender up the possession of the prem-



In construing the effect of the foregoing instrument it is not conclusive as to its form, since it may be in form an assignment and yet be in effect a sublease. The question is one of law, to be determined from the estate granted by the instrument. As a general proposition, if the instrument executed by the lessee conveys the entire term and thereby parts with all of the reversionary estate in the property, the instrument will be construed to be an assignment; but, if there remains a reversionary interest in the estate conveyed, the instrument is a sublease. The relation of landlord and tenant is created alone by the existence of a reversionary interest in the landlord. Out of this fact arises the distinction made between assignments and sub-

tenancies. To state the test slightly different from that already stated, if the instrument is of such character by its terms and conditions that a reversionary interest by construction remains in the grantor of the property, he becomes the landlord and the grantee the tenant. The tenant who parts with the entire term embraced in his lease becomes an assignor of the lease, and the instrument is an assignment; but where the tenant, by the terms, conditions, or limitations in the instrument, does not part with the entire term granted him by his landlord, so that there remains in him a reversionary interest, the transaction is a subletting, and not an assignment. *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *Gulf, C. & S. F. R. Co. v. Settegast*, 79 Tex. 263,

ises to his lessors at the expiration of the term, and also a covenant on his part to pay the rent to his lessors, and as it contained a provision giving his lessors a right of re-entry in case of nonpayment of the rent, or of a breach of any of the covenants on his part, I cannot see why the case of *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303, is not in point to show, conclusively, that Hagadorn was the undertenant, and not the assignee of the original lessees; and that therefore no action could be maintained either against him or his assignee on the covenant of the original lessees to pay the taxes and assessments."

(In *Post v. Kearney*, supra, it does not appear whether there was any reservation of the right of re-entry for condition broken.)

But a contrary result was reached in *Craig v. Summers*, 47 Minn. 189, 15 L.R.A. 236, 49 N. W. 742, where the second lease was of a part of the premises at one half the rent in the first lease, and contained the same covenants, including one for re-entry. It was held that the second lease was an assignment, and not a sublease, it ending on the day of the original lease, and that the successor of the original landlord could recover of the assignee of the tenant in the second lease upon a covenant to pay taxes.

#### —landlord's liability to transferee.

In *Palmer v. Edwards*, 1 Dougl. K. B. 187, note, A made a lease to B and B transferred the entire term to C, under whom the plaintiff claimed, and the plaintiff brought an action against the original landlord's successor on a covenant in the lease that the original landlord would supply timber for repairs. The transfer from B to C reserved the rent to B, and not to the original landlord, and contained a clause giving B the right of re-entry; and it was held that the action would lie, as the transfer from B was really an assignment as there was no reversion left. The relative sizes of the rent under the original lease and under the transfer do not appear.

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#### —landlord's liability to original tenant.

In *Ganson v. Tift*, 71 N. Y. 48, where the second lease was for the remainder of the original term at a greater rental, and contained provisions for re-entry for nonpayment of rent or breach of other conditions, and of surrender to the lessor in the second lease, the original tenant sued the original landlord for a breach of a covenant contained in the original lease on the part of the landlord, and it was held that there had been no assignment and thus no elimination of the original tenant. The court follows *Collins v. Hasbrouck*, infra, and points out that in *Woodhull v. Rosenthal*, infra, there was no right of re-entry for a condition broken, and that the *Collins Case* had not been reported when the *Woodhull case* was decided.

#### —purchase of transfer by original landlord.

Where S, by an instrument employing the usual words of a demise and containing a reservation of rent and covenant of re-entry for conditions broken, demised premises to B for the unexpired term of the lease thereof by A to S,—B assigned his lease to C, who assigned to A, the original lessor, and it was held that S could not recover rent from A's executors, as the lease had merged in the fee. *Smiley v. Van Winkle*, 6 Cal. 605, where the court said: "The conveyance by Smiley et al., although it employs words ordinarily used in a demise, and contains a reservation of rent and the right of re-entry upon covenants broken, is not an underletting or sublease, but is considered in law as an assignment of their whole interest, as there remains in them no reversion of the estate; for it is one of the essentials of a lease that it should contain a reversion in favor of the party from whom the grant or assurance proceeds." It does not appear whether the rent was the same in the two leases.

#### —landlord's claim that transfer breaches the lease.

In *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407, where the landlord sued to

15 S. W. 228; 24 Cyc. 974, 975; Wood, Land. & T. 2d ed. § 65. It will be observed that, in stating the general rule as to what constitutes an assignment of a lease as distinguished from a sublease, the requirement is that the instrument must convey the whole term, leaving no interest or reversionary interest in the grantor.

By the word "term," as used in the statement of this principle of law, is meant something more than the mere time for which the lease is given; and the instrument must convey not only the entire time for which the lease runs, but the entire estate or interest conveyed by the lease. Mr. Blackstone in his Commentaries, bk. 2, p. 144, in commenting on the significance of the word "term," when used in leases, says: "Thus the word 'term,' does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the term may expire, during the continuance of the time, as by surrender, forfeiture, and the like." The meaning of the word "term," as defined by

Blackstone above, was adopted by the supreme court of Massachusetts in the case of *Dunlap v. Bullard*, 131 Mass. 162, and by a number of text writers on the subject of assignments and subleases.

Mr. Blackstone in his Commentaries, bk. 2, p. 327, defines an assignment to be, and draws the distinction between an assignment and a lease of property, as follows: "An assignment is properly a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this,—that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor." If we may accept this definition from so eminent authority upon the common law, which definition and distinction, so concisely stated and drawn, seems to have met the approval of this court in other cases, and apply it to the facts of the case at bar, the conclusion

eject the tenant's transferee on the ground that the transfer was a breach of a condition not to sublet contained in the original lease, the transfer was in the form of a lease; it reserved to the transferors rent at a new rate and at a new time of payment, stipulated for a right of re-entry on nonpayment of rent and on the breach of certain conditions contained in it, and provided for a surrender of the premises to them on the expiration of the term. It was held that the transferors did not part with their whole interest, and that the instrument was a sublease, and not an assignment. The court said: "If there be a right reserved to the lessor to re-enter on breach of conditions, this makes a sublease. *Doe ex dem. Freeman v. Bateman*, 2 Barn. & Ald. 168, 20 Revised Rep. 399." But the judgment for the landlord was reversed on questions of waiver.

In *Murdock v. Fishel*, 67 Misc. 122, 121 N. Y. Supp. 624, where the original landlord attempted to oust the transferee on the ground that he was in by assignment, which was against the covenant of the original lease, the court, holding the transfer not an assignment, said: "If in other respects the sublease and agreement could be regarded as possessing the legal features of an assignment, the fact that the tenant was to receive a surrender of the premises on the last day of his original term would preclude its being so regarded. *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303. We are satisfied, however, that, even if we ignore this feature of the case, there has been no assignment of the original term. That the tenant retained a reversionary interest, notwithstanding the sublease and the agreement, appears from the fact that he reserved rent at a different rate and time of payment from the original lease, 42 L.R.A. (N.S.)

and a right of re-entry on nonpayment and on breach of other conditions, and provided for a surrender of the premises to him on the expiration of the term. *Collins v. Hasbrouck*," supra.

But the transfer was held to be an assignment in *Herzig v. Blumenkron*, 122 App. Div. 756, 107 N. Y. Supp. 570, where the plaintiff, the original lessor, sued for a forfeiture on a provision in the lease not to assign it. The instrument executed by the tenant was, with the exception of its date, an exact copy of the original lease, and contained the customary clause reserving the right of re-entry for conditions broken. Its provision to surrender at the end of the term was not to any particular person, but in good order and condition, etc. The court reviews the cases on the subject, and states that *Collins v. Hasbrouck*, supra, is not an authority for the proposition that a clause reserving a right of re-entry will alone make a sublease, as there were other features in that case, and points out also that in the *Ganson and Collins Cases*, supra, there was a provision to surrender to the person making the transfer. The court also said: "The right of re-entry is not an estate or interest in the land, nor does it imply a reservation of a reversion; it is a mere chose in action. When enforced the grantor is in by the condition, and not by the reverter."

#### Miscellaneous.

In *Woodhull v. Rosenthal*, 61 N. Y. 382, where it does not appear whether there was reserved a right of re-entry, *Dwight C.*, said: "If a lessee, by any instrument whatever, whether reserving conditions or not, parts with his entire interest, he has made a complete assignment; if he has

must be reached that the instrument executed by the Dallas Brewery to Vidal was a sublease, and not an assignment. The instrument speaks for itself. By its terms the whole estate granted to the Dallas Brewery by its lease from Mrs. Davis is not conveyed, for the reason there is reserved to the Dallas Brewery a contingent reversionary interest in the estate, to be resumed summarily upon the failure of Vidal to pay rent. More than this, and of equal significance, by the terms of the instrument the Dallas Brewery reserved the right to pay the rent to the original lessor, and thereby the right was reserved to forestall Mrs. Davis, upon the failure of Vidal to pay the rent, from exercising the right to re-enter and possess the premises. That right was reserved to the Dallas Brewery, and gave it the power to control the estate in the premises upon failure by Vidal to pay it the rent.

If the instrument was an assignment of the lease, the Dallas Brewery must of necessity have parted with all its estate and

interest in said premises, and could therefore exercise no right in or control over the premises. If the instrument was an assignment of the lease, the legal effect was to substitute Vidal in lieu of the Dallas Brewery. But this was not the case. By the terms of the instrument the Dallas Brewery retained the control of the possession of the leased premises, thereby denying the legal effect of an assignment, which would have given Mrs. Davis the right of re-entry and possession of the property upon Vidal's failure to pay the rent.

We are aware that there is great conflict of authority upon this subject, and that it would be futile to attempt to reconcile such conflict. Many of the authors of the text-books on the subject of the assignment of leases and subletting under leases, and the decisions of a great many of the states in this Union, hold that the fact that the right of re-entry is reserved in the assignment, to the assignor, upon failure of the assignee to pay rent, does not change the instrument of assignment from

transferred his entire interest in a part of the premises, he has made an assignment *pro tanto*," disapproving *Martin v. O'Conner*, 43 Barb. 514.

In *Townsend v. Read*, 15 Abb. N. C. 285, the tenant having transferred his lease for the balance of his term to B, with sureties on the part of B, then assigned to his landlord his right, title, and interest under the said transfer, and the original landlord then sued the sureties on the transfer. The court held it did not make any difference whether the transfer was considered as an assignment or as a sublease, that the plaintiff was entitled to recover, but said: "I am of the opinion, however, that the paper of August 25, 1882, was a sublease. It reserved a new and larger rent, and contained the usual clause of re-entry. This, in effect, created a new estate, instead of transferring the old one, and was an underletting, and not an assignment. *Ganson v. Tift*, 71 N. Y. 48; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407, overruling *Woodhull v. Rosenthal*, 61 N. Y. 383, relied upon by the defense."

In *Dey v. Greenebaum*, 82 Hun, 533, 31 N. Y. Supp. 610, affirmed in 152 N. Y. 641, 46 N. E. 1146, where the question is not in the case, the court said: "It has been held that where the lessee reserves to himself an interest in the premises, such as the right of re-entry for a breach of covenants, there is no such devolution of title as will create a privity of estate between the original lessor and sublessee. *Ganson v. Tift*, 71 N. Y. 55; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407."

In *Clark v. Greenfield*, 13 Misc. 124, 34 N. Y. Supp. 1, the court in holding that the original lessee could not recover from his transferee for rent, as the transfer was an assignment, mentioned the absence of a 42 L.R.A. (N.S.)

right of re-entry, but the point was not necessary to the case.

In *Hyde v. Warden*, L. R. 3 Exch. Div. 72, 47 L. J. Exch. N. S. 121, 37 L. T. N. S. 567, 26 Week. Rep. 201, the court approved *Doe ex dem. Freeman v. Bateman*, supra, and held that where a tenant, having made one lease for a part of his term, made a second lease to the same person for the balance of the term, this lease being made before the expiration of the first of his leases to said person, that this did not destroy the right of re-entry in the first lease, as it was an *interesse termini*; and, further, because before the second lease came into effect the lessor in it might have procured an extension of his own lease; and there was a further element in the case that the second lease was made subject to the former lease between the same parties.

In *McNeil v. Kendall*, 128 Mass. 245, 35 Am. Rep. 373, where B, a lessee, by an instrument reserving a right of re-entry, leased to C not his whole estate in a portion of the premises, but a portion of his entire estate in part of the premises, it was held that this instrument was not an assignment of the original lease, and that therefore a purchaser upon levy and sale of B's leasehold estate could recover rent from C.

It may be noted that in *Drake v. Lacoe*, 157 Pa. 17, 27 Atl. 538, the court said: "An assignment for an increased consideration, with wholly new stipulations, with right of re-entry for conditions broken, with an express assumption of continuing liability of the assignors to the owners under the original lease, and a manifest intention to sublet, not only is not evidence of intention to end the privity of estate, but is a positive reaffirmance of it." B. B. B.

such to a sublease. The holding of such authors and decisions is based upon the theory that the right of re-entry is not an estate or interest in land, nor the reservation of the reversion. They hold that the reservation of the right of re-entry, upon failure to pay rent, is neither an estate nor interest in land, but a mere chose in action, and when exercised the grantor comes into possession of the premises through the breach of the condition, and not by reverter.

Those authorities which hold the contrary doctrine base their ruling upon the idea that the reservation in the instrument of the right of re-entry is a contingent reversionary interest in the premises resulting from the conveyance of an estate upon a condition subsequent, where there has been an infraction of such condition. This view of the law is strongly presented in the opinion in the case of *Dunlap v. Bullard*, 131 Mass. 163, as follows: "Where an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest. It was said in *Austin v. Cambridgeport*, 21 Pick. 215, 223, that the grantor's contingent interest in such case was an estate which was transmissible by devise and passed under a residuary devise in the will of the grantor. It was declared to be a contingent possible estate, which, united with that of the tenants, composed only the entire fee-simple estate, as much so as in the ordinary case of an estate for life to A, remainder to B.' In *Church in Brattle Square v. Grant*, 3 Gray, 142, 147, 63 Am. Dec. 725, it was said that when such an estate is created 'the entire interest does not pass out of the grantor by the same instrument of conveyance. All that remains, after the gift or grant takes effect, continues in the grantor, and goes to his heirs. This is the right of entry, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition.' These considerations are equally applicable whether the estate subject to the condition subsequent is an estate in fee, or an estate for life or years. They apply where, by the terms of an instrument which purports to be an underlease, there is left in the lessor a contingent reversionary interest, to be availed of by an entry for breach of condition which restores the sublessor to his former interest in the premises. The sublessee under such an instrument takes an inferior and different estate from that which he would acquire by an assignment of the remainder of the original term; that is to say, an interest which may be terminated by forfeiture on new and in-

dependent grounds long before the expiration of the original term. If the smallest reversionary interest is retained, the tenant takes as sublessee, and not as assignee."

We are not able to discern why there may not be a contingent reversionary estate or interest in land, as well as any other contingent estate or interest. It certainly cannot be contended upon sound principle that, because the right of re-entry and resumption of possession of land is contingent, it is thereby any the less an estate or interest in land. The very definition of a contingent estate as distinguished from a vested estate is that "the right to its enjoyment is to accrue on an event which is dubious and uncertain." 1 Washb. Real Prop. 38.

That the right of re-entry is an estate or interest in land seems to have been recognized by Platt, in his work on Leases, vol. 2, p. 318: "A right of re-entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may now be disposed of by deed."

We think it deducible from respectable authority that where the tenant reserves in the instrument giving possession to his transferee the right of re-entry to the premises demised, upon failure to pay rent, he necessarily retains a part of or an interest in the demised estate which may come back to him upon the happening of a contingency.

The instrument under consideration does not convey the entire estate received by the Dallas Brewery by its lease from Mrs. Davis, but retains by the right of possible re-entry a contingent reversionary interest in the premises. That the interest retained is a contingent reversionary interest does not, it seems to us, change the rule by which an assignment may be distinguished from a sublease. If by any limitation or condition in the conveyance the entire term, which embraces the estate conveyed in the contract of lease as well as the length of time for which the tenancy is created, may by construction be said not to have passed from the original tenant, but that a contingent reversionary estate is retained in the premises the subject of the reversion, the instrument must be said to constitute a subletting, and not an assignment.

The following test may be applied to determine whether the instrument in question is an assignment of the original lease, or a subletting of the premises: If it is an assignment, its legal effect must be a transfer of the right of possession of the property conveyed to Vidal and the creation of a privity of estate and contract between

Mrs. Davis, the original lessor, and Vidal, to whom the possession was granted by the Dallas Brewery. This would be essential to constitute the instrument an assignment, and if it was an assignment Vidal obligated himself to pay the rent to Mrs. Davis, and the Dallas Brewery had no further connection with or interest in the transaction. But such a result can by no fair or reasonable construction of the language and provisions of the instrument be deduced therefrom. On the contrary, the Dallas Brewery reserved the privilege of paying the rent to its lessor, and upon nonpayment of rent by Vidal it reserved the right to declare the instrument forfeited and to repossess the premises without notice to or the consent of Vidal. There can be but one theory upon which the Dallas Brewery considered itself interested in seeing that the rent was promptly paid by Vidal, and that is that it desired to control the property in question, and therefore intended, and by the language and reservation in the instrument made, it a sublease.

We do not think the proposition tenable that by the express terms of the agreement between the Dallas Brewery and Vidal, or by implication, Vidal obligated himself to pay the rent to Mrs. Davis. The provision of the contract relied upon to establish the fact that Vidal obligated himself to pay the rent to the lessor in the original lease is the following: "And in consideration therefore the said Vidal does well and truly agree and promise to pay the rents in said lease agreed to be paid; to wit, the sum of \$100 per month." Under the uniform rule of construction the latter part of the above sentence explains and qualifies the preceding part. The obligation of Vidal was to pay the rents in said lease agreed to be paid, that is, the sum of \$100 per month, payable on the 1st day of each month in advance. There is nothing in the agreement from which it may be inferred that Vidal obligated himself to pay the rents directly to Mrs. Davis.

Having reached the conclusion that the instrument executed by the Dallas Brewery to Vidal, conveying the premises in question, was a sublease, and not an assignment, by reason of the provision reserving to the Dallas Brewery the right of re-entry, which had the effect to withhold a part of the term granted by the original lease, or which retained an interest in said estate, and because by the other terms of the instrument reserving to the Dallas Brewery the discretion to pay the rents upon its own responsibility, and, upon the failure of Vidal to pay the same to it, the right to declare the instrument forfeited and to re-enter and

take possession of the premises, indicate the intention and purpose of the parties to enter into a subletting of the premises, and not to assign the original lease, we conclude there exists no privity of estate or contract between the plaintiff, Mrs. Davis, and the defendant, Lewis Vidal, and that Mrs. Davis has no cause of action authorizing her to recover judgment against Vidal.

Other questions presented in briefs of counsel are not discussed, for the reason their disposition is not essential to the decision of the case, in consequence of the view we have taken of its merits.

The court is of opinion the judgments of the Court of Civil Appeals and of the trial court should be affirmed, and it is, accordingly, so ordered.

#### KANSAS SUPREME COURT.

D. R. INGE, Appt.,  
v.

E. Q. STILLWELL.

(— Kan. —, 127 Pac. 527.)

#### Bankruptcy — discharge — partnership obligation.

The plaintiff and defendant were equal partners in a private bank, of which the former was president and the latter cashier. The cashier was permitted to manage the bank and certain other business of the firm as he chose; the result being a considerable loss. The president sued the cashier for loss, alleging fraud and mismanagement while acting as partner in a fiduciary capacity or relation. The defendant pleaded a discharge in bankruptcy; the plaintiff, who had notice of the proceedings, having filed no claim therein. Held, that such discharge was a good defense; the relation between partners, under the circumstances indicated, not being the fiduciary relation referred to in § 17 of the bankruptcy act (act July 1, 1898, chap 541, 30 Stat. at L. 551 [U. S. Comp. Stat. Supp. 1911, p. 1496]).

(November 9, 1912.)

Headnote by WEST, J.

*Note. — Bankruptcy: what relations are fiduciary within provisions in relation to discharge.*

In general.

There has been considerable diversity of opinion under the various bankruptcy acts as to what relations are fiduciary under the provisions of the acts excepting debts created while acting in a "fiduciary capacity" from those discharged, but the principles applicable to a determination of that question are now well settled.

**A** PPEAL by plaintiff from a judgment of the District Court for Woodson County in defendant's favor, in an action brought to recover a loss suffered by a private bank, alleged to have been caused by the fraud and mismanagement of the partnership by defendant. Affirmed.

The facts are stated in the opinion.

Mr. Baxter D. McClain for appellant.

Messrs. G. H. Lamb and W. E. Hogue-land, for appellee:

The relations between defendant and plaintiff were not fiduciary.

Gee v. Gee, 84 Minn. 387, 87 N. W. 1116; Goodman v. Herman, 172 Mo. 344, 60 L.R.A. 885, 72 S. W. 546; Bracken v. Milner, 5 Am. Bankr. Rep. 23, Re Bank of Madison, 9 Nat. Bankr. Reg. 184; Karger v. Orth,

116 Minn. 124, 133 N. W. 471, 27 Am. Bankr. Rep. 212; 2 Remington, Bankr. § 2785.

West, J., delivered the opinion of the court:

The parties became partners in a private bank; the plaintiff being president and the defendant cashier. The latter had the full management of the bank, and after several years' business it was closed by the state bank commissioner, and a receiver appointed; and while the creditors were substantially all provided for, the firm suffered a loss of about \$17,000. The plaintiff sued for the entire loss, alleging that it was caused by the fraud, misconduct, and unlawful management and control of the part-

In the first place, it is the generally accepted rule under all of the acts that the term "fiduciary capacity" relates to special, technical, or express trusts, and not to those trusts which the law implies from the contract between the parties. See Chapman v. Forsyth, 2 How. 202, 11 L. ed. 236; Austill v. Crawford, 7 Ala. 335; Williamson v. Dickens, 27 N. C. (5 Ired. L.) 259, and Pankey v. Nolan, 6 Humph. 154, which construed the act of 1841; Noble v. Hammond, 129 U. S. 65, 32 L. ed. 621, 9 Sup. Ct. Rep. 235; Keime v. Graff, 17 Nat. Bankr. Reg. 319; Fed. Cas. No. 7,650; Dupont v. Beck, 81 Ind. 271; Maxwell v. Evans, 90 Ind. 596, 46 Am. Rep. 234; Goddin v. Neal, 99 Ind. 334; Woodward v. Towne, 127 Mass. 41, 34 Am. Rep. 337; Gibson v. Gorman, 44 N. J. L. 325; Palmer v. Hussey, 87 N. Y. 303, affirmed in 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406 and Mulock v. Byrnes, 129 N. Y. 23, 29 N. E. 244, which construed the act of 1867; and Bracken v. Milner, 104 Fed. 522, 5 Am. Bankr. Rep. 23, 3 N. B. N. Rep. 714, writ of error dismissed in 52 C. C. A. 685, 115 Fed. 1020; Re Wenham, 153 Fed. 910, 16 Am. Bankr. Rep. 690; Re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Re Camelo, 195 Fed. 632; Young v. Clark, 7 Cal. App. 194, 93 Pac. 1056; Boyd v. Agricultural Ins. Co. 20 Colo. App. 28, 76 Pac. 986; Ehrhart v. Rork, 114 Ill. App. 509; Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332, affirmed in 73 N. J. Eq. 729, 69 Atl. 247; and Stickney v. Parmenter, 74 Vt. 58, 52 Atl. 73, which construed the act of 1808. But see Haggerty v. Badkin, 72 N. J. Eq. 473, 66 Atl. 420, 18 Am. Bankr. Rep. 302, wherein, in construing subdivision 4 of § 17 of the act of 1898, the court seemed inclined to the view that more than technical trusts are within the meaning of "fiduciary capacity," as used in that section; or, more specifically, that only those debts arising in the ordinary course of mercantile business, wherein the relation is that of debtor and creditor, are discharged under the act.

And the language of the acts seems to 42 L.R.A.(N.S.)

apply only to debts created by a person who was already a fiduciary when the debt was created, or independently of the particular transaction out of which the debt arose. Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931, 11 Sup. Ct. Rep. 313; Re Camelo, 195 Fed. 632; Cronan v. Cotting, 104 Mass. 245, 6 Am. Rep. 232, 4 Nat. Bankr. Reg. 667; Goodman v. Herman, 172 Mo. 344, 60 L.R.A. 885, 72 S. W. 546; State ex rel. Mock v. Howell, 101 N. C. 443, 8 S. E. 167. But see Haggerty v. Badkin, 72 N. J. Eq. 473, 66 Atl. 420, 18 Am. Bankr. Rep. 302, wherein the court inclined to the view that where one's funds or property comes into another's possession for a specific purpose, the latter becomes a trustee within the meaning of the act of 1898, § 17, subdivision 4.

But the mere reposing of confidence in the punctuality and integrity of a person with whom one has a commercial transaction does not create the fiduciary relation that was meant to be covered by the excepting portions of the acts. Chapman v. Forsyth, 2 How. 202, 11 L. ed. 236; Barrett v. Prince, 74 C. C. A. 440, 143 Fed. 302 (set out in INGE v. STILLWELL); Re Camelo, 195 Fed. 632; and Goodman v. Herman, 172 Mo. 344, 60 L.R.A. 885, 72 S. W. 546.

And the fact that the instrument creating the relation calls the obligation a "trust," and the bankrupt a "trustee," does not make the relation a "fiduciary" one, where the instrument in legal effect does not create such a relation. Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931, 11 Sup. Ct. Rep. 313. And see Re Butts, 120 Fed. 966, 10 Am. Bankr. Rep. 16.

And it seems that even though the obligation is regarded as fiduciary in the first instance, any change in the nature thereof, as by giving a note therefor, removes the debt from the excepting clause and renders it dischargeable, even though the consideration may have been a pre-existing fiduciary liability. See Coleman v. Davies, 45 Ga. 489; Donald v. Kell, 111 Ind. 1, 11 N. E. 782; Desobry v. Tete, 31 La. Ann. 809, 33 Am. Rep. 232; Baines v. Adams, 33 La.

nership by the defendant while acting as partner in a fiduciary capacity or relation. The answer set up, among other things, that prior to the filing of the amended petition the defendant was duly and legally discharged in bankruptcy, of which proceedings the plaintiff had due notice. Without going into the various mutations and dealings of the bank and divers matters covered by the testimony, it is sufficient to say that a referee was appointed, who, after an extended trial, reported that during all the transactions the plaintiff and defendant were partners owning the bank; that certain other business was conducted by the firm outside of the banking business; that they were each entitled to one half of the profits and liable for one half of the losses, ei-

ther as the Neosho Falls Bank or as Inge & Stillwell. The referee recommended that the receiver, upon final settlement and payment of all the debts of the bank and firm, be ordered to pay to the plaintiff out of any remaining funds not exceeding the sum of \$17,610.34, and that the same, when paid, should be a credit against such sum, and after such credit the defendant would be indebted to the plaintiff for one half of such balance as upon a claim and debt theretofore discharged in bankruptcy; that subsequently to the beginning of the action a petition in bankruptcy was filed against the defendant; that the sum of \$8,805.17, owing by the defendant to plaintiff, was an existing liability provable against the estate of the defendant; that plaintiff had actual no-

Ann. 46; *Light v. Merriam*, 132 Mass. 283; *Wilkes County v. Staley*, 82 N. C. 395; and *Elliott v. Higgins*, 83 N. C. 459. But the depositing of funds held by a fiduciary, to his individual account, and the drawing of a check for the amount due, does not so alter the relation where payment is stopped upon the check before it can be cashed. *Brown v. Hannagan*, 210 Mass. 246, 96 N. E. 714. Nor does reducing a claim against a fiduciary to a judgment so change its character as to make the relation one of debtor and creditor only. *Ibid*; *Brooks v. Yocum*, 42 Mo. App. 516, wherein it was said that the fiduciary character of a debt does not depend upon its form, but rather upon the manner of its origin; *Simpson v. Simpson*, 80 N. C. 332.

It might also be added that it has been held that the burden of proof that the debt is one incurred while acting in a fiduciary capacity is upon the party seeking to say that the debt falls within the exception of the act; and this, although the bankrupt has pleaded that the debt was not of that character. *Sherwood v. Mitchell*, 4 Denio, 435.

Decisions construing the provisions of the acts of 1841 and 1867, which correspond with that of § 17, subdivision 4, of the act of 1898, have been included in this note for the reason that the terms of the act of 1898 are so nearly identical with those of the preceding acts that the courts have followed the rules as finally established thereunder. In fact, it has been expressly held that the provisions of the act of 1898 "must" be deemed to have been used in the same sense as those of the early acts (see *Re Basch*, 97 Fed. 761, 3 Am. Bankr. Rep. 235, 2 N. B. N. Rep. 122), and that the decisions of the United States Supreme Court, which construe the provisions of the earlier acts, "must" be followed (see *Knott v. Putnam*, 107 Fed. 907, 6 Am. Bankr. Rep. 80).

#### Act 1898.

The provision of the bankruptcy act of July 1, 1898 (30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1496), 42 L.R.A. (N.S.)

which is involved herein, is that part of § 17 which provides as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

There is no question but that trustees of express trusts (*Ruff v. Milner*, 92 Mo. App. 620), administrators (*Stickney v. Parmenter*, 74 Vt. 58, 52 Atl. 73), executors, etc., whose relation to their *cestui que trust* arises from an express or special trust,—are fiduciaries within the meaning of that provision of the act of 1898 which excepts certain debts from discharge. And it has been held that a receiver in insolvency is a fiduciary within the meaning of that provision. *Field v. Howry*, 132 Mich. 687, 94 N. W. 213.

The real contest, however, has been as to whether or not § 17, subdivision 4, excepts from the discharge debts created by the bankrupts while acting as agents, brokers, factors, and the like, where the obligation is one of trust implied from the contract. It is now, however, well settled, as before stated, that this relation is not the "fiduciary relation" contemplated by the bankruptcy act.

Among private trustees or trustees of implied trusts who have been held released from their debts created while so acting are: agents employed for the particular transaction out of which the debt in question arose (*Re Camelo*, 195 Fed. 632); general agents to collect money (*Ehrhart v. Rork*, 114 Ill. App. 509); agents to make loans (*Bracken v. Milner*, 104 Fed. 522, 5 Am. Bankr. Rep. 23, 3 N. B. N. Rep. 714, writ of error dismissed in 52 C. C. A. 685, 115 Fed. 1020); insurance agents (*Boyd v. Agricultural Ins. Co.* 20 Colo. App. 28, 76 Pac. 986); and railroad ticket agents (*Re Wenham*, 153 Fed. 910, 16 Am. Bankr. Rep. 690). But in *Shipley v. Platts*, 17 S. D. 357, 97 N. W. 1, following the decisions under the act of 1867, which held that implied trusts arising from relations such as agents, factors, etc., were within the meaning of "fidu-

tice and knowledge of the pendency of such proceedings long prior to the granting of the discharge in bankruptcy on November 14, 1907; and that such claim was not, by law, excepted from the operation of the discharge. These findings were, after some slight amendment, approved by the court, and plaintiff appeals.

The only question presented is the effect of the discharge in bankruptcy. The findings of the referee fail to show any fraud committed by defendant against the plaintiff; and the evidence being voluminous and the findings having been approved by the trial court, we must accept them as correct. What the record shows is, in substance, that the defendant was permitted to manage the bank according to his own

judgment for a number of years, and that after some apparent prosperity adversities came and a considerable loss followed. The plaintiff was the president, but, according to his own theory, paid practically no attention to the affairs of the bank, and, in the absence of a finding of fraud, that section of the bankruptcy act in question could not be applied; and even if the plaintiff's theory be taken that the loss was occasioned by the fraudulent conduct and mismanagement of the defendant, the fiduciary relationship required by the statutes does not, according to the authorities, appear to have existed.

Section 17 of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 551, U. S. Comp. Stat. Supp. 1911, p. 1496)

ciary relation," as used therein, it was held that an agent in charge of a branch office of a laundry was a fiduciary within the meaning of the act of 1898, § 17, subdivision 4; but this case cannot be considered good law. And in *J. L. Mott Iron Works v. Toumey*, 94 App. Div. 216, 87 N. Y. Supp. 1020, where the agreement was to collect an order and pay the specific proceeds over to a certain party, it was held that the collector acted in a fiduciary capacity.

And a conclusion in accord with the general rule has been reached as regards brokers (*Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, 12 Am. Bankr. Rep. 659 [see case as set out in *INGE v. STILLWELL*]; *Knott v. Putnam*, 107 Fed. 907, 6 Am. Bankr. Rep. 80; *Re Gaylord*, 113 Fed. 131, 7 Am. Bankr. Rep. 577; *Barrrett v. Prince*, 74 C. C. A. 440, 143 Fed. 302 [quoted in *INGE v. STILLWELL*]; *Clarke v. Milliken*, 70 Misc. 492, 127 N. Y. Supp. 339; *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328); factors and commission merchants (*Re Basch*, 97 Fed. 761, 3 Am. Bankr. Rep. 235, 2 N. B. N. Rep. 122; *Re Adler*, 81 C. C. A. 564, 152 Fed. 422, 18 Am. Bankr. Rep. 240; *Mathieu v. Goldberg*, 156 Fed. 541, 10 Am. Bankr. Rep. 191; *Re Ennis & Stoppani*, 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Young v. Clark*, 7 Cal. App. 194, 93 Pac. 1056; *Re Benedict*, 37 Misc. 230, 75 N. Y. Supp. 165, 8 Am. Bankr. Rep. 463); naked bailees of money (*Lewis v. Shaw*, 122 App. Div. 96, 106 N. Y. Supp. 1012, 19 Am. Bankr. Rep. 866); and warehousemen if the goods were not to be returned in kind (*Sumner v. Richie*, 54 Iowa, 554, 6 N. W. 752); but otherwise if the identical goods were to be returned (*ibid.*). On the other hand, it has been held (*Mathieu v. Goldberg*, *supra*) that where the factor holds the goods unsold, and unlawfully refuses upon demand to return them, his liability is as for a debt created while acting in a fiduciary capacity, and not dischargeable. And see *Bills v. Schliep*, 62 C. C. A. 103, 127 Fed. 103, 11 Am. Bankr. Rep. 611.

And a corporation which wrongfully refuses to issue a certificate of stock was held in *Re Clipper Mfg. Co.* 103 C. C. A. 12 L.R.A. (N.S.)

260, 179 Fed. 843, 24 Am. Bankr. Rep. 683, not to have thereby created a fiduciary debt within the meaning of the act.

So, it has been held that an officer of a private corporation does not act in the necessary fiduciary capacity. *Re Gulick*, 186 Fed. 350. And the general rule was applied in *Tatum v. Lehigh*, 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216, to an appropriation of the funds of a private corporation the nature of which does not appear in the report of the case. But it has been held that a bank official, by misappropriating bank funds, created a debt while acting in a fiduciary capacity from which he could not be discharged in bankruptcy. *Harper v. Rankin*, 72 C. C. A. 320, 141 Fed. 626, certiorari denied in 200 U. S. 621, 50 L. ed. 624, 26 Sup. Ct. Rep. 758. And the same conclusion was reached as regards a director of a corporation in *Warren v. Robinson*, 21 Utah, 429, 61 Pac. 28.

And the rule of *INGE v. STILLWELL*, that a partner does not act in a "fiduciary capacity," as that term is used in the act of 1898, finds support in *Gee v. Gee*, 84 Minn. 384, 87 N. W. 1116, 7 Am. Bankr. Rep. 500, and *Karger v. Orth*, 116 Minn. 124, 133 N. W. 471, 27 Am. Bankr. Rep. 212, both of which are set out in the *INGE CASE*. But see *Haggerty v. Badkin*, 72 N. J. Eq. 473, 66 Atl. 426, 18 Am. Bankr. Rep. 302, wherein the court, following the rule that the surviving partner holds the property of the partnership in trust (this rule has been refuted in many jurisdictions), held that a surviving partner occupied a fiduciary relation within § 17, subdivision 4, of the act, and that his discharge in bankruptcy did not release his liability as for partnership funds which he had appropriated.

So it has been held that pledgees (*Re Adler*, 75 C. C. A. 461, 144 Fed. 659, 16 Am. Bankr. Rep. 417; *Re Ennis & Stoppani*, 171 Fed. 755, 22 Am. Bankr. Rep. 679; *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328); vendees in conditional-sale contracts (*Bryant v. Kinyon*, 127 Mich. 152, 53 L.R.A. 801, 86 N. W. 531, 6 Am. Bankr. Rep. 237, 7 N. B. N. Rep. 797); and purchasers of goods which were to be resold



provides that a discharge shall release a bankrupt from all his provable debts, except those which ". . . were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." Collier on Bankruptcy, 9th ed., says: "On the other hand, partners and bankers, like agents, factors, and commission men, do not usually act in a fiduciary capacity." Page 404.

In *Pierce v. Shippee*, 90 Ill. 371, it was held that a person furnished with money by another to purchase corn for speculation, the one receiving the money to make the purchase and bear all expense, and upon a sale the amount received in excess of the sum advanced to be equally divided, the loss, if any, to be portioned equally, was a

partner, and did not act in a fiduciary relation. The court said: "We perceive no element in the transaction which would make it a fiduciary debt. . . . Here was a limited partnership created, where the parties to the contract were to share in the profits and losses of the enterprise. The defendants were not trustees of the plaintiff; nor does the transaction disclose any relation of trustee and *cestui que trust*. . . . So far as the evidence shows, the only default of the defendants arises from the fact that they failed to pay over to the plaintiff one half of the money he advanced, with which the parties engaged in the speculation. This default is not a breach of trust, it is a mere breach of contract; and should this undertaking be held to be a

(*Re Butts*, 120 Fed. 966, 10 Am. Bankr. Rep. 16),—are relieved from debts created while so acting by a discharge in bankruptcy.

So it has been held that one to whom title to land has been conveyed to hinder and delay creditors of the conveyor, and without any trust being expressly declared, does not hold as a "technical trustee," and therefore not in a fiduciary capacity within the meaning of the act. *Reeves v. McCracken*, 69 N. J. Eq. 203, 60 Atl. 332, affirmed in 73 N. J. Eq. 729, 69 Atl. 247.

And there seems to be no question but that the ordinary sale and delivery of goods does not create the relationship necessary to prevent a discharge of the debt created thereby. *Goodman v. Herman*, 172 Mo. 344, 60 L.R.A. 885, 72 S. W. 546; *Lippincott, J. & Co. v. Herman*, 179 Mo. 350, 76 S. W. 1132.

#### Act 1867.

Sec. 33 of the bankruptcy act of 1867 (14 Stat. at L. 533, chap. 176, U. S. Rev. Stat. § 5117) excepted from the discharge debts "created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity."

Under this act, as under the act of 1898, trustees of technical, special, or express trusts, such as executors and administrators (*Laramore v. McKinzie*, 60 Ga. 532; *Crisfield v. State*, 55 Md. 192; *Light v. Merriam*, 132 Mass. 283; *dictum*); guardians (*Re Maybin*, 15 Nat. Bankr. Reg. 468, Fed. Cas. No. 9,337; *Carlin v. Carlin*, 8 Bush, 142; *Halliburton v. Carter*, 55 Mo. 435, 10 Nat. Bankr. Reg. 359; *Simpson v. Simpson*, 80 N. C. 332; *Cromer v. Cromer*, 29 Gratt. 288), etc., are not relieved by a discharge from debts or obligations incurred by them while acting as such. But where an executor acting outside of his character as such creates a debt for which he becomes personally liable, it is not one created "while acting in any fiduciary capacity," within the meaning of the act of 1867. *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312. And in

*Flanagan v. Pearson*, 42 Tex. 1, 19 Am. Rep. 40, 14 Nat. Bankr. Reg. 37, it was held that an attorney, when acting in his official capacity for a client, occupies a fiduciary relation within the meaning of § 33 of the act.

But under this act, a decided diversity of opinion grew up as regards agents, factors, commission merchants, etc., one line of decisions treating the implied trust arising from such relationship as "fiduciary" within the meaning of the act, and the other decisions construing the phrase in a more limited way, or, in other words, following the construction adopted under the act of 1841 (see *infra*, subdivision "Act 1841"). This diversity of opinion was based upon the reasoning that the act of 1867 was conceived in terms so much broader and more general than the act of 1841 that there was no chance to make any difference between special and implied trusts. Among the decisions which adhere to the first view are *Fulton v. Hammon*, 11 Fed. 291 (agent); *Re Kimball*, 2 Ben. 554, Fed. Cas. No. 7,768, 2 Nat. Bankr. Reg. 204, affirmed in 6 Blatchf. 292, Fed. Cas. No. 7,769, 2 Nat. Bankr. Reg. 354 (commission merchant); *Re Seymour*, 1 Ben. 348, Fed. Cas. No. 12,684, 1 Nat. Bankr. Reg. 29 (commission merchant); *Treadwell v. Holloway*, 46 Cal. 547, 12 Nat. Bankr. Reg. 61 (commission merchant); *Mayberry v. Cook*, 121 Cal. 588, 54 Pac. 95 (commission merchant); *Jones v. Russell*, 44 Ga. 460, overruled in *Georgia R. Co. v. Cubbedge*, 75 Ga. 321 (auctioneer); *Meador v. Sharpe*, 54 Ga. 125, 14 Nat. Bankr. Reg. 492, overruled in *Georgia R. Co. v. Cubbedge*, *supra* (commission merchant); *Gilreath v. Holston Salt & Plaster Co.* 67 Ga. 702, overruled in *Georgia R. Co. v. Cubbedge*, *suprt* (commission merchant); *Herman v. Lynch*, 26 Kan. 435, 40 Am. Rep. 320, cited in *INGE v. STILLWELL* (agent received money to use for particular purpose); *Banning v. Bleakley*, 27 La. Ann. 257, 21 Am. Rep. 544 (factor and commission merchant); *Brown v. Garrard*, 28 La. Ann. 870 (factor and commission merchant); *Desobry v. Tete*, 31 La. Ann. 809, 33 Am. Rep. 232 (factor and

fiduciary obligation within the meaning of the act, upon the same principle almost every legal or equitable obligation of a debtor would have to be included within the same list."

*Barber v. Sterling*, 68 N. Y. 267, at page 273, involved a transaction by which the defendant entered into a contract to lease plaintiff a furnace and fixtures for a term long enough to make and manufacture 1,000 tons of iron; the defendant to act as plaintiff's agent in the work of repair and in manufacture. The product was to belong to the plaintiff, who was to sell the same, retaining all advances made by him, with interest, and with commission on the net sales, and to pay the balance to the defendant as compensation for services and use of

the property. The defendant, with the knowledge and consent of the plaintiff, sold the product, using a portion of the proceeds in the purchase of materials in payment for labor, and failed to pay over the portion due the plaintiff. He overpaid for labor and materials, and appropriated profits arising from other transactions in which the plaintiff was entitled to a share. In an action to recover the amount due plaintiff, the defendant pleaded his discharge in bankruptcy, and it was held a good plea. The court said: "The defendant had an interest in the profits, and occupied more the position of a partner than an agent, as his labors in respect to the sales and the receipt and disbursement of money were performed for the benefit of all the parties to

commission merchant; the decision in this case, however, seems to have been upon the ground that, under the law of Louisiana, a factor acts in a fiduciary capacity; the rule in Louisiana was qualified, however, by holding that the giving of notes or accepting a draft for the amount of the indebtedness changed the nature of the debt, making the relation that of debtor and creditor, and therefore dischargeable in bankruptcy); *Desobry v. Tete*, supra; *Baines v. Adams*, 33 La. Ann. 46; *Brunswick v. Taylor*, 2 Mo. App. 351 (broker); *Brooks v. Yokum*, 42 Mo. App. 516 (commission merchant); *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326, 5 Nat. Bankr. Reg. 351 (commission merchant); *Whitaker v. Chapman*, 3 Lans. 155 (factors); *Hardenbrook v. Collison*, 24 Hun, 475, 61 How. Pr. 426 (factor); *Gay v. Farran*, 13 Ohio Dec. Reprint, 989 (commission merchant). In *Fulton v. Hammond*, supra, the court, in stating the above rule, said: "The first thing to be noticed . . . is that the wording of the act of 1867 is different from the act of 1841 in relation to the debts to be discharged under the respective acts. The act of 1841 released all debts which had not been 'created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity.' The act of 1867 released all debts which were not 'created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character.' There is so wide a difference in the language of the two acts that it would seem that the reasoning in *Chapman v. Forsyth* [infra, subdivision 'Act 1841'] entirely fails when applied to the act of 1867. There is no chance under this act to make any difference between special and implied trusts. All trusts, special, express, or implied, must be included under the head of 'any fiduciary character,' or else no exception is made by the act of 1867 in regard to such trusts."

But the other view, namely, that the clause applies to specific or express, and not to implied, trusts, is now conceded to be expressive of the correct interpretation of 42 L.R.A. (N.S.)

the act, the following cases, which expressly discuss the question, being illustrative of those so holding: *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; *Zeperink v. Card*, 3 McCrary, 549, 11 Fed. 295; *Bracken v. Milner*, 104 Fed. 522, 5 Am. Bankr. Rep. 23, 3 N. B. N. Rep. 714, writ of error dismissed in 52 C. C. A. 685, 115 Fed. 1020; *Grover & B. Sewing Mach. Co. v. Clinton*, 5 Biss. 324, Fed. Cas. No. 5,845, 8 Nat. Bankr. Reg. 312; *Keime v. Graff*, 17 Nat. Bankr. Reg. 319, Fed. Cas. No. 7,650; *Re Smith*, 9 Ben. 494, Fed. Cas. No. 12,976, 18 Nat. Bankr. Reg. 24; *Woolsey v. Cade*, 54 Ala. 378, 25 Am. Rep. 711, 15 Nat. Bankr. Reg. 238; *Chipley v. Frierson*, 18 Fla. 639; *Georgia R. Co. v. Cubbedge*, 75 Ga. 321; *Pierce v. Shippee*, 90 Ill. 371; *DuPont v. Beck*, 81 Ind. 271; *Cronan v. Cotting*, 104 Mass. 245, 6 Am. Rep. 232, 4 Nat. Bankr. Reg. 667 (a leading and much cited case); *Green v. Chilton*, 57 Miss. 598, 34 Am. Rep. 348; *Gibson v. Gorman*, 44 N. J. L. 325; *Keeler v. Snodgrass*, 8 Ohio L. J. 219; *Curtis v. Waring*, 92 Pa. 104; *Scott v. Porter Bros.* 93 Pa. 38, 39 Am. Rep. 719; *Kaufman v. Alexander*, 53 Tex. 562; *Slayton v. Wells*, 66 Vt. 62, 28 Atl. 632 (a specific classification of the cases adhering to this rule follows).

Among the respective relationships which have been held not to be fiduciary within the meaning of § 33 of the act of 1867 are general agents to sell and collect (*Grover & B. Sewing Mach. Co. v. Clinton*, 5 Biss. 324, Fed. Cas. No. 5,845, 8 Nat. Bankr. Reg. 312; *Georgia R. Co. v. Cubbedge*, 75 Ga. 321; *Kaufman v. Alexander*, 53 Tex. 562); agents to collect and remit (*Green v. Chilton*, 57 Miss. 598, 34 Am. Rep. 483; *Guilfoyle v. Anderson*, 9 Daly, 64,—especially where the relation is such that the collector might mingle the moneys collected with his own; *Mulock v. Byrnes*, 129 N. Y. 23, 29 N. E. 244, affirming 36 N. Y. S. R. 551, 13 N. Y. Supp. 190); agents to collect negotiable paper and apply proceeds to payment of debts (*Cronan v. Cotting*, 104 Mass. 245, 6 Am. Rep. 232, 4 Nat. Bankr. Reg. 667); an agent to procure the discount of a note (*Lawrence v. Harrington*, 122 N. Y. 408,

the contract. . . . No account was either rendered by defendant, or called for by plaintiff, during the period of defendant's employment, and for nearly four years the whole business was conducted in the most loose and irregular manner, so that none of the parties profited by their unfortunate venture. Upon such a state of facts a fiduciary relationship cannot be predicated."

In *Gee v. Gee*, 84 Minn. 384, 87 N. W. 1116, it was decided that the exception does not apply to a misappropriation of money by a partner while engaged in the conduct of a partnership business, unless in violation of some express trust. The circuit court of appeals of the seventh circuit held, in *Barrett v. Prince*, 74 C. C. A. 440, 143 Fed. 302, "that mere confidence reposed in

the punctuality and integrity of a person with whom one has commercial transactions is not the fiduciary relation that was meant to be covered by the excepting portion of the bankruptcy acts."

In *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, the Supreme Court ruled that "a commission merchant and factor who sells for others is not indebted in a fiduciary capacity, within the bankruptcy acts, by withholding the money received for property sold by him; and this rule applies to a broker carrying stocks on margin, who sells the same and does not pay over the proceeds to his principal."

The case of *Karger v. Orth*, 27 Am. Bankr. Rep. 212, 116 Minn. 124, 133 N. W. 471, decided in 1911, lays down the doctrine

25 N. E. 406); an agent to purchase goods (*Rowe v. Guilleaume*, 18 Hun, 556); attorneys, where the relation created between the attorney and client is that of debtor and creditor (*Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931, 11 Sup. Ct. Rep. 313; *Woodward v. Towne*, 127 Mass. 41, 34 Am. Rep. 337; *McAdoo v. Lummis*, 43 Tex. 227; see *contra*, *Heffren v. Jayne*, 39 Ind. 463, 13 Am. Rep. 281); auctioneers (*Gibson v. Gorman*, 44 N. J. L. 325); bankers, where the relation is the ordinary one of banker and customer (*Re Bank of Madison*, 5 Biss. 517, Fed. Cas. No. 890, 9 Nat. Bankr. Reg. 184; *Maxwell v. Evans*, 90 Ind. 596, 46 Am. Rep. 234; *Shaw v. Vaughan*, 52 Mich. 405, 18 N. W. 126); holders of money deposited for safe-keeping (*Hervey v. Devereux*, 72 N. C. 463; *State ex rel. Mock v. Howell*, 101 N. C. 443, 8 S. E. 167); borrowers of securities (*Grannis v. Cubbage*, 71 Ga. 582); pledgees (*Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576, affirming 84 N. Y. 676, which followed 77 N. Y. 427, 33 Am. Rep. 641, which reversed 13 Jones & S. 108); brokers (*Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158, affirming 87 N. Y. 303); produce dealers requested to collect money as an accommodation, without compensation, and to keep it until called for (*Noble v. Hammond*, 129 U. S. 65, 32 L. ed. 621, 9 Sup. Ct. Rep. 235); factors and commission merchants (*Zeperink v. Card*, 3 McCrary, 549, 11 Fed. 295; *Keime v. Graff*, 17 Nat. Bankr. Reg. 319, Fed. Cas. No. 7,650; *Ousley v. Cobin*, 2 Hughes, 433, Fed. Cas. No. 10,630, 15 Nat. Bankr. Reg. 489; *Re Smith*, 9 Ben. 494, Fed. Cas. No. 12,976, 18 Nat. Bankr. Reg. 24; *Woolsey v. Cade*, 54 Ala. 378, 25 Am. Rep. 711, 15 Nat. Bankr. Reg. 238; *Chipley v. Frierson*, 18 Fla. 639; *DuPont v. Beck*, 81 Ind. 271; *Keeler v. Snodgrass*, 8 Ohio L. J. 219; *Curtis v. Waring*, 92 Pa. 104; *Scott v. Porter Bros.* 93 Pa. 38, 39 Am. Rep. 719; *Slayton v. Wells*, 66 Vt. 62, 28 Atl. 632); partners (*Hill v. Sheibley*, 68 Ga. 556; *Pierce v. Shippee*, 90 Ill. 371; see also *Barber v. Sterling*, 68 N. Y. 267, 17 Nat. Bankr. Reg. 218, as set out and quoted in *INGE v. STILLWELL*, 42 L.R.A. (N.S.)

WELL); subscribers to capital stock of a private corporation (*Morrison v. Savage*, 56 Md. 142) and judgment debtors in actions for money had and received (*Goddin v. Neal*, 99 Ind. 334, holding that express or technical trusts must be proved in order to bring the case within the exception).

So it has been held that sureties, as such, do not act in a fiduciary capacity, so as to prevent their being relieved from liability on their bond by a discharge in bankruptcy. *Ex parte Taylor*, 1 Hughes, 617, Fed. Cas. No. 13,773, 16 Nat. Bankr. Reg. 40 (surety on guardian's bond); *United States v. Throckmorton*, 8 Nat. Bankr. Reg. 309, Fed. Cas. No. 16,516 (surety on bond of collector of internal revenue); *Jones v. Knox*, 46 Ala. 53, 7 Am. Rep. 583, 8 Nat. Bankr. Reg. 559 (surety on guardian's bond); *Jones v. State*, 28 Ark. 119 (surety on bail bond); *Reitz v. People*, 72 Ill. 435, 16 Nat. Bankr. Reg. 96 (surety on guardian's bond); *McDonald v. State*, 77 Ind. 26 (surety on guardian's bond); *Miller v. Gillespie*, 59 Mo. 220 (surety on guardian's bond); *McMinn v. Allen*, 67 N. C. 131 (surety on constable's bond); *Simpson v. Simpson*, 80 N. C. 332 (surety on guardian's bond); *Eberhardt v. Wood*, 6 Lea, 467 (surety on administration bond); *Davis v. McCurdy*, 50 Wis. 569, 7 N. W. 665 (surety on guardian's bond). Nor does a guardian stand in a fiduciary relation to his surety who has made good a defalcation (*Cromer v. Cromer*, 29 Gratt. 280).

And in *Fleitas v. Richardson*, 147 U. S. 550, 57 L. ed. 276, 13 Sup. Ct. Rep. 495, it was held that the liability of the husband to the wife for her paraphernal property, which, under the law of the state, was a debt, and therefore provable under the bankruptcy act, had none of the elements of trust so as to make it a "fiduciary" debt, and that consequently it was barred by the discharge of the husband in bankruptcy. But in *Donovan v. Haynie*, 67 Ala. 51, where the husband was trustee of the wife's separate equitable estate under an antenuptial contract, and liable to her personal representative for trust moneys received and unaccounted for at her death, it was held

that "misappropriation by a partner of partnership funds is not a misappropriation by him while acting in a 'fiduciary capacity,' within the meaning of the provision excepting certain debts from the effect of a discharge in bankruptcy."

The appellant cites *Herman v. Lynch*, 26 Kan. 435, 40 Am. Rep. 320; but the facts in that case were quite different from those now under consideration, and in the opinion it was said: "But if it was the understanding of the parties that the defendant might use this money in his own business and obtain exchange on his own account, then the defendant would not be holding the money in a fiduciary capacity, whether the bank allowed him to overdraw his account or not; and in such case the claim of the plaintiff would have been wholly discharged by the proceedings in bankruptcy, without reference to his dealings with the bank."

Reference is also made to *Stewart v. Harris*, 69 Kan. 503, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas.

that the debt was a fiduciary one and not discharged.

But it has been held that an officer of a private corporation was a fiduciary within the meaning of the act, and that his discharge would not affect his liability for misappropriation. *Peterborough R. Co. v. Wood*, 61 N. H. 418. And the same conclusion has been reached as regards public officers. *Richmond v. Brown*, 66 Me. 373 (tax collector); *Grantham v. Clark*, 62 N. H. 426 (tax collector).

#### Act 1841.

The salient provision of the act of 1841 (5 Stat. at L. 440, chap. 9) is found in § 1, which excepts from the discharge: "Debts . . . created in consequence of a defalcation as a public officer or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity."

Of course, under this act, trustees of express trusts are not relieved from debts created while acting in their official capacity (*Pinkston v. Brewster*, S. & Co. 14 Ala. 315; *Kingsland v. Spalding*, 3 Barb. Ch. 341); and the same is necessarily true as regards executors, administrators, and guardians.

And in *Morse v. Lowell*, 7 Met. 152, a public officer was held to be a fiduciary within the meaning of the act, and therefore not relieved by his discharge in bankruptcy from liability for a defalcation.

So it was held in *Matteson v. Kellogg*, 15 Ill. 547, which attempted to distinguish *Chapman v. Forsyth*, *infra*, that placing money in an agent's hands for a particular purpose, as for the price of lands to be purchased, made the agent a fiduciary within the meaning of the act of 1841; but this case does not seem to have been correctly decided. 42 L.R.A. (N.S.)

873; but that involved the relations between the managing officers of a corporation and its shareholders, and was not the case of an ordinary partnership.

The appellant says in his brief that the debt is excepted "by reason of the violation (fraud, deceit, embezzlement, misappropriation, and defalcation) of an express trust, and while the appellee occupied the position of an officer acting in a fiduciary capacity." The fraud, however, must occur against the party towards whom the debtor holds a fiduciary relation. If the cashier so conducted the bank as to defraud its depositors, he did so, not as the trustee, but as the partner of the plaintiff; and hence the latter cannot assert such fraud as committed against him,—an equal sharer in the gain, and equally responsible for the loss of the enterprise.

Counsel say: "At any rate, the appellant's relations with the appellee (whatever they were in law) cost him \$18,000, the loss of his property, and several years of expensive litigation, without any fault, knowl-

But the majority of the cases which arose under this act held that debts of trustees of implied trusts are not within the exception of the act. Thus it has been so held as regards agents to collect (*Commercial Bank v. Buckner*, 2 La. Ann. 1023; *Williamson v. Dickens*, 27 N. C. [5 Ired. L.] 259; *Pankey v. Nolan*, 6 Humph. 154; see *contra*, *White v. Platt*, 5 Denio, 269, holding that a party to whom notes were intrusted for collection was a trustee of a special trust, and therefore not relieved from liability to account for the proceeds by a discharge in bankruptcy); agents appointed to pay a particular debt (*Phillips v. Russell*, 42 Me. 360; *Bissell v. Couchaine*, 15 Ohio, 58); agents to invest money (*Halpine v. May*, 100 Mass. 498; see *contra*, *Flagg v. Ely*, 1 Edm. Sel. Cas. 208, holding that one who received money to invest for another was a special trustee, and within the meaning of the act, and not relieved from liability therefor by a discharge in bankruptcy); attorneys at law, acting as collectors (*Wolcott v. Hodge*, 15 Gray, 547, 77 Am. Dec. 381); a bookkeeper in a bank (*Strader v. Baldwin*, 1 Ohio Dec. Reprint, 219); factors (*Chapman v. Forsyth*, 2 How. 202, 11 L. ed. 236; *Austill v. Crawford*, 7 Ala. 335; *Hayman v. Pond*, 7 Met. 328); and sureties (*Fowler v. Kendall*, 44 Me. 448, surety on bond of deputy sheriff; term "fiduciary capacity" has reference only to the defalcation of the bankrupt himself).

And in *Fowles v. Treadwell*, 24 Me. 377, where an officer attached certain property and allowed the debtor to receipt therefor and retain it in his possession, subject to delivery to the officer on demand, it was held that the goods were not retained in a fiduciary capacity, within the meaning of § 1 of the act of 1841.

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edge, or ratification on his part." But the plaintiff voluntarily entered into the partnership and permitted its affairs to be conducted by the defendant as he chose, and, had his peculiar methods resulted in a gain, one half thereof would inure to the benefit of the plaintiff; and by the same rule one half the loss falls on him by reason of the partnership relation, and not from any fiduciary consideration.

The judgment is affirmed.

All the Justices concur.

Petition for rehearing denied.

#### MARYLAND COURT OF APPEALS.

ALBERT J. LONG, Exr., etc., of Catherine A. Shupp, Deceased, Appt.,  
v.

SALLIE L. HAWKEN.

(114 Md. 234, 79 Atl. 190.)

Writ — exemption from service — pending suit.

1. A nonresident party defendant is entitled to exemption from service of process for the commencement of a civil action

*Note. — Exemption of nonresident party from service of civil process while in state in connection with case.*

I. Distinction between parties plaintiff and defendant, 1101.

II. Exemption from service of summons.  
a. Majority rule, 1102.  
b. Minority rule, 1104.

III. Privilege from arrest, 1105.

IV. Final process, 1105.

V. To what courts or proceedings exemption extends, 1105.

VI. Effect of state decisions in Federal courts, 1107.

VII. Where party transacts other business, 1107.

VIII. Waiver, 1107.

IX. Statutory provisions, 1108.

X. Remedy, 1109.

As to privilege of nonresident witness from suit, see note to Mullen v. Sanborn, 25 L.R.A. 721. The present note is confined to exemption of parties as such, and does not cover exemption of parties as witnesses.

As to exemption of a defendant brought into a state on extradition proceedings, see note to White v. Underwood, 46 L.R.A. 711.

As to privilege of suitor or witness from service of process as affected by route taken or time consumed, see note to Barber v. Knowles, 14 L.R.A.(N.S.) 603.

As to right of service of process in an action against a corporation, upon a nonresident officer who is within the state as a 42 L.R.A.(N.S.)

against him, while in the state defending a suit pending against him in its courts.

Appeal — motion to quash summons — absence of exceptions — effect.

2. An appeal from an order granting a motion to quash a summons brings up the record for review, and a bill of exceptions is not necessary if the record discloses the question decided.

(January 10, 1911.)

**A** PPEAL by plaintiff from an order of the Circuit Court for Washington County quashing a service of summons and the return thereon against a nonresident defendant while in the state defending a suit pending against him in its courts. Affirmed.

The facts are stated in the opinion.

Mr. Albert J. Long *in propria persona*: Messrs. Alexander Armstrong, Jr., and John Ridout for appellee.

Briscoe, J., delivered the opinion of the court:

The question presented on this appeal is a narrow one, and, concisely stated, is this: Is a nonresident party defendant who comes into this state for the purpose of defending a suit pending against him exempt from service of civil process for the commence-

party or witness, see note to Breon v. Miller Lumber Co. 24 L.R.A.(N.S.) 276.

As to right of nonresident to exemption from service of process while within a jurisdiction pursuant to condition of bail bond, see note to Netograph Mfg. Co. v. Scrugham, 27 L.R.A.(N.S.) 333.

#### I. Distinction between parties plaintiff and defendant.

In a few instances only, the courts have discussed the question whether a distinction should be made between parties plaintiff and defendant.

In Hale v. Wharton, 73 Fed. 739, the court, after admitting that in most of the cases supporting the rule of exemption, the party complaining of the service of process was a defendant suitor, says: "But on principle I am unable to perceive any distinction in the privilege, both of the suitor and the court, between a plaintiff and defendant,—especially so when applied to the facts of this case," where the plaintiff in the subsequent action, as well as the defendant, was a nonresident of the state.

It was said in Fisk v. Westover, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961, that a perusal of the cases in which the immunity of a suitor has been declared discloses the fact that no distinction has generally been made between a plaintiff and a defendant; that the reasoning of the courts is as applicable to one as to the other, and the rule of privilege has been applied indiscriminately.

ment of civil action against him in this state? In other words, whether a civil summons can be served upon a defendant a nonresident of the state for another (new) action, while he is attending on court in this state as a party defendant in an action pending against him. It seems to be clear that, whatever may be the rule in other jurisdictions, it is settled in this state that a nonresident witness is exempt from service of civil process, as well as arrest, while attending on the courts of the state. In the early case of *Brookes v. Chesley* (1799) 4 Harr. & M. H. 295, it was held, in keeping with the common-law rule, "that jurymen and witnesses, during their attendance on court, are privileged from arrest." 3 Bl. Com. 289; 1 Greenl. Ev.

§§ 316-320. In *Bolgiano v. Gilbert Lock* Co. 73 Md. 132, 25 Am. St. Rep. 582, 20 Atl. 788, it is said: "A witness is protected from arrest on any civil process while going to the place of trial, while attending there for the purpose of the cause, and while returning home. *Eundo, morando, et redeundo*. And it matters not whether he attends voluntarily or by compulsion. . . . [And this is the rule] whether the privilege be regarded as a personal one to the witness, or the privilege of the court." 2 Taylor, Ev. § 1139; Greenl. Ev. § 316; 1 Wharton, Ev. § 389. And in *Bolgiano's Case*, supra, it was further said that a resident of another state, who comes into this state as a witness to give evidence in a case pending here, is exempt from service of process for

In *Roberts v. Thompson*, 149 App. Div. 437, 134 N. Y. Supp. 363, the contention was made that a nonresident plaintiff was not entitled to the same exemption as a nonresident defendant; but the court rejected this view, and held that a nonresident coming into the state to attend litigation, whether as plaintiff or defendant, should be protected from being required to engage in other litigation against his will.

In Connecticut a distinction is made as to right of exemption, between nonresident parties plaintiff and defendant. In *Bishop v. Vose*, 27 Conn. 1, it was held that a nonresident plaintiff was not exempt from service of summons, and in the later case of *Wilson Sewing Mach. Co. v. Wilson*, 51 Conn. 595, 22 Fed. 803, that a nonresident defendant was exempt from such service. In the latter case the court said: "There is, perhaps, a reason why a plaintiff, who has voluntarily sought the aid and protection of our courts, should not shrink from being subjected to their control, which does not apply to the condition of a defendant, whose attendance is compulsory." "The inconvenience to which plaintiffs are subjected by being compelled to sue defendants in the state of which they are citizens is not so great as to justify the allowance of obstructions by means of legal proceedings which will preclude nonresident suitors from giving free and unrestricted attention to their cases when they are on trial."

## II. Exemption from service of summons.

### a. Majority rule.

While the decisions of the state courts as to the privilege of a nonresident party from service of civil process are conflicting, the Federal courts seem to hold uniformly to the doctrine that a nonresident party is privileged. It was said in *Hale v. Wharton*, 73 Fed. 739: "It is, perhaps, not too much to say that no rule of practice is more firmly rooted in the jurisprudence of the United States courts than that of the exemption of persons from the writ of ar-

rest and of summons while attending upon courts of justice, either as witnesses or suitors."

In *Parker v. Hotchkiss*, 1 Wall. Jr. 269, Fed. Cas. No. 10,739, the court held that a party living "without the circuit" while defending a suit therein was exempt from service of summons, saying that the privilege is "founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights."

A nonresident of the state coming into it without arrest, to give bail and plead to an indictment, under an arrangement that he may do so without arrest within a prescribed time, is exempt from service of process. *United States v. Bridgman*, 9 Biss. 221, Fed. Cas. No. 14,645. The court based the decision, however, on the ground that the appearance was in reality compulsory.

It was held in *Peet v. Fowler*, 170 Fed. 618, that a nonresident party plaintiff was privileged from service of civil process upon him in the same court by the defendant in the former suit, the court saying: "It is a well-established principle of law that parties to a suit, for the sake of public justice, are privileged from the service of process upon them in coming to, attending upon, and returning from the court."

The exemption, however, does not apply where the defendants, at the time of the service of process, are engaged in a suit as plaintiffs in furthering wrongful acts which are the cause of the subsequent action. *Iron Dyke Min. Co. v. Iron Dike R. Co.* 132 Fed. 208, a case in which it was alleged that the defendants were acquiring valuable franchises in violation of the rights of the plaintiff, and that they were so engaged when the service was made upon them.

It was held in *Skinner & M. Co. v. Waite*, 155 Fed. 828, that the exemption applies to a resident of another state, who, although not made a party to a suit, is the real party in interest, and comes into the state to defend it upon demand of those who were made parties.

another suit. Judge Miller, who prepared the opinion in that case, said: "The decided weight of authority has extended the privilege so far, at least, as to exempt a resident of another state, who comes into this state as a witness to give evidence in a cause here, from service of process for the commencement of a civil action against him in this state, and that the privilege protects him in staying and returning, provided he acts bona fide and without unreasonable delay." A large number of cases were cited in support of the doctrine here announced, but we find it unnecessary to cite them.

But it is insisted that a different rule applies to a nonresident party defendant; and inasmuch as the appellee in this case, a nonresident of the state, was present as a party

defendant she was not exempt from service of the summons which had been issued by a court in this state, and which was served on her while in the state. There is considerable conflict of authority in the cases upon the general question here involved, and the courts are far from being in accord or harmony in the decisions. In 32 Cyc. p. 492, the doctrine is thus stated: "Suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending court, whether under summons or subpoena or not, are usually held immune from service of civil process while engaged in such attendance and for a reasonable time in coming and going." The rule is by most courts held to apply equally well to suitors and witnesses attending court in the states. In

In earlier cases in New York, it was held that, while nonresident witnesses were exempt from both arrest and service of summons, a nonresident party was exempt only from arrest, and not from summons. *Jenkins v. Smith*, 57 How. Pr. 171; *Taft v. Hoppin*, Anthon, N. P. 187. But in *Matthews v. Tufts*, 87 N. Y. 568, it was held that a nonresident party was exempt from service of summons, the court saying that the privilege is not confined to witnesses, but extends to parties as well; and while the party in that case was also a witness, the decision is based upon the ground that, conceding that he attended only as a party and attorney of other parties, he was privileged.

And in *Tribune Asso. v. Sleeman*, 12 N. Y. Civ. Proc. Rep. 21, 8 N. Y. S. R. 343, on the authority of the *Matthews* Case, it was held that the immunity from service of process was not limited to witnesses, but extended to a nonresident of the state attending court therein as a party.

In *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 790, 55 N. W. 961, it was held that a nonresident party was exempt from service of summons, the court saying that in a few instances, immunity has been denied to a foreign suitor under such circumstances, but that the granting of immunity was in accord with the greatly prepondering weight of authority. The party was also a witness, but the decision is not based upon that ground.

In *Cooper v. Wyman*, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947, a nonresident party and witness was held exempt from service of civil process, the court saying: "In some few of the earlier cases, it was questioned whether the privilege was not restricted to witnesses, but all the later and better considered cases embrace parties as well as witnesses, more especially since the change which enables parties to be examined as witnesses."

Similarly, in *Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787, it was held that a nonresident suitor and witness was privileged from service of summons, the court saying: "That suitors, as well as witnesses,

should feel free at all times to attend judicial proceedings outside their own jurisdiction, which necessarily require their presence, without being held to answer in some other outside jurisdiction an adverse judicial proceeding against them, is a rule of public policy that has been almost universally recognized wherever the common law is administered."

In *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308, it was held that a nonresident party defendant was exempt from service of summons, the court saying that the principle upon which the exemption rests applies as well to parties as to witnesses, and that it was immaterial whether the defendant came solely to give testimony in the case or not; that he was entitled to protection as a party.

Also, the following cases hold that a nonresident defendant coming into a state to defend a suit is exempt from service of civil process. *Dungan v. Miller*, 37 N. J. L. 182; *Juneau Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582 (even though the former suit by the same plaintiff, on the same cause of action, was discontinued).

It was held in *Waterman v. Merritt*, 7 R. I. 345, that a nonresident coming into the state as a nominal party plaintiff, under a writ of protection from service of civil process, is exempt while returning from the trial, from service of summons in a new civil action. The court says that the defendant was made a party plaintiff to the former suit not by choice, but by the will of the party in interest, and that, having come into the state only under protection of the court, it would be a breach of faith not to grant exemption.

A nonresident party cannot be deprived of exemption from service of summons while attending merely an argument of counsel on a matter of law, on the theory that his attendance was unnecessary. *Tory v. Bast*, 3 W. N. C. 63.

The contention that the privilege of a nonresident party is only from arrest, and not from service of summons, has been expressly overruled. *Halsey v. State*, 4 N. J. L. 324. The granting of exemption was

the case of *Bolghiano v. Gilbert Lock Co.* supra; this court, in referring to this privilege or immunity, said: "But does it protect a witness or a party from service of a summons in order to secure his appearance to an ordinary civil suit? On this question there has been some conflict of decision. The tendency, however, of the courts in this country, is to enlarge the privilege and afford full protection to suitors and witnesses from all forms of process of a civil nature during their attendance before any judicial tribunal and for a reasonable time in going and returning." The reason for the exemption is placed by the New York court of appeals and by Judge Cooley in the Michigan case, on the ground of public policy and the due administration of justice. The general

rule as announced by this court in *Bolghiano Case*, that a nonresident party defendant was also exempt from the service of process, has been approved by a long line of well-considered cases in other jurisdictions, and is supported by the great weight of authority in the states and Federal courts. In *Matthews v. Tufts*, 87 N. Y. 568, the court said: "In *Van Lieuw v. Johnson*, decided March, 1871 [not reported], and referred to in *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35, a majority of this court were of opinion that a summons could not be served upon a defendant, a nonresident of the state, while attending a court in this state as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administra-

said to be in order to encourage nonresident parties to come freely into the state to prosecute and defend suits, without fear of the institution there of new suits against them.

Also, in *Larned v. Griffin*, 12 Fed. 590, it was held that the privilege is not limited to exemption from arrest on civil process, but extends to service of summons.

#### *b. Minority rule.*

In *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83, it was held that a nonresident of the state, who came into it as plaintiff in an action, was not exempt from service of summons for the commencement of a suit against him. The court, after stating the reason for the exemption in those states where it is granted, says: "While we concede the force of the reasons advanced for protecting nonresident witnesses from the service of a summons against them for the commencement of a suit, . . . we are not convinced of the sufficiency of the reasons assigned for the exemption of nonresident suitors from such process. We think it would rarely happen that the attention of a nonresident plaintiff or defendant would be so distracted by the mere service of a summons, from the immediate business in hand in prosecuting or defending a pending suit, that the interests of justice would suffer in consequence; or that the liability to such service would often deter them from prosecuting or defending their just claims or rights."

And in *Ellis v. Degarmo*, 17 R. I. 715, 19 L.R.A. 560, 24 Atl. 579, it was held that a nonresident defendant was not exempt from service of summons. The reason for the rule was said to be that service of a writ of summons, amounting simply to a notice, does not obstruct the administration of justice, nor interfere with the attendance or attention of a party to the suit then on trial.

In *Capwell v. Sipe*, 17 R. I. 475, 33 Am. St. Rep. 890, 23 Atl. 14, it was held that a nonresident of the state attending court therein as a defendant is not exempt from

service of summons if he is personally interested in the result of the suit, even though he may also testify as a witness, although exemption of witnesses who are not parties in interest is recognized.

In *Bishop v. Vose*, 27 Conn. 1, it was held that one who came into the state as plaintiff to a suit was not exempt from summons in a civil action. The court says: "Had he been an inhabitant of Connecticut, his attendance in court would have given him no such immunity. Why should it any more because he comes here from another state? This would seem to be an additional reason why our citizens should be allowed to sue him here, and bring him to trial within our own jurisdiction. . . . From the first it has been the law, both common law and statute law, that a foreign citizen, if found here, whether here on business or pleasure or hastening through the state with railroad speed, is liable to be sued like any other person, and is not entitled to any personal or peculiar immunity. And we are at a loss to discover why our citizens should be obliged to go into a foreign jurisdiction in pursuit of their debtors, when those debtors are here and can be sued here, and can receive here that consideration which is meted out to all indiscriminately." But, as above noted, the doctrine of this case is restricted, to nonresident parties plaintiff.

In *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 726, 21 S. W. 29, while the court bases its decision that a nonresident party plaintiff is not exempt from service of summons partly upon statute, yet the doctrine of the Connecticut cases is approved, the court saying that it thinks the rule in Connecticut the better, that where a nonresident party plaintiff voluntarily attends court in the state, he is amenable to ordinary civil process in another action, the same as if he were a resident of the state.

In *Greer v. Young*, 120 Ill. 184, 11 N. E. 167, it was held that nonresident parties taking testimony before a notary public for use in a case pending in their own state were not exempt from service of summons.



tion of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority." In *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176, Judge Cooley put the exemption of a nonresident party defendant upon the ground of public policy, the due administration of justice, and protection to parties and witnesses alike demand it. In *Person v. Grier*, supra, it was said, in approving the doctrine that a party was exempt, that "this immunity is one of the necessities of the administration of justice." The following cases hold that a nonresident party defendant is exempt from the service of process: *Dungan v. Miller*, 37 N. J. L. 182; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Miles v. McCullough*, 1

*Binn.* 77; *Wilson v. Donaldson*, 117 Ind. 356, 3 L.R.A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210; *Huddeson v. Prizer*, 9 Phila. 65; *Bolz v. Crone*, 64 Kan. 571, 67 Pac. 1108; *Halsey v. State*, 4 N. J. L. 324; *Andrews v. Lembeck*, 46 Ohio St. 40, 15 Am. St. Rep. 547, 18 N. E. 483; *Hayes v. Shields*, 2 Yeates, 222; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Gregg v. Sumner*, 21 Ill. App. 110; *Martin v. Bacon*, 76 Ark. 160, 113 Am. St. Rep. 81, 88 S. W. 863, 6 Ann. Cas. 336; *Rorer*, *Interstate Law*, p. 26; *Cooper v. Wyman*, 122 N. C. 785, 65 Am. St. Rep. 731, 29 S. E. 947; *Murray v. Wil-*

The court says the privilege is limited, except in several states, to arrest on civil process; that the service imposes no greater hardship upon a nonresident than to be served with process out of his own state while on any other kind of business.

In *Guynn v. McDanel*, 4 Idaho, 605, 95 Am. St. Rep. 158, 43 Pac. 74, the court, while acknowledging that the majority of the decisions were otherwise, held that a resident of another state suing in the Federal court in Idaho should not be granted exemption from service of civil process in the state court. As an illustration of possible injustice from the majority rule, it is said that a resident creditor might have a claim against the nonresident plaintiff which he could not set up in that action, and yet which he should not be compelled to lose if he could not incur the expense of suing in another state.

### III. Privilege from arrest.

In all jurisdictions it seems that a nonresident party while attending the trial of his case in a state, and for a reasonable time going and coming, is privileged from arrest on civil process. In *Ellis v. Degarmo*, 17 R. I. 715, 19 L.R.A. 560, 24 Atl. 579, it was held that a nonresident party was privileged from arrest on a writ issued in a civil action, even though the action begun by the service of the writ should not abate.

The right of exemption of a nonresident party from arrest under civil process was recognized in the case of *Re Greene*, — R. I. —, 85 Atl. 552. The court says: "It is well settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether residents or nonresidents of the state, whether they attend on summons or voluntarily. . . . The privilege exists without the granting of the writ. . . . The writ therefore amounts only to convenient and authentic notice to those about to do what 42 L.R.A. (N.S.)

would be a violation of the privilege." In this case, however, the writ of protection was denied, because application therefor was not made to the court trying the case of the nonresident.

In *Steinmetz v. Wade*, 3 W. N. C. 187, where it was contended that a nonresident plaintiff claiming privilege from arrest was not within the protection conferred upon witnesses, it was held that he was privileged as a party, the court saying that exemption from arrest applies equally to parties and witnesses.

Privilege from arrest has been granted to a nonresident party, even though he was in the state to hear an argument of counsel before the court on a mere matter of law. *Ex parte McNeil*, 6 Mass. 245.

In *Hanagar v. Spangler*, 29 Ga. 217, where two nonresidents met in the state and each sued out bail process against the other, and the defendant was arrested during vacation, it was contended that he should have the right to arrest the plaintiff upon the latter's coming into the state to prosecute his suit; but the court held that a nonresident party was privileged from arrest, and that, even under the special circumstances of that case, the court was not justified in departing from the general rule of law.

### IV. Final process.

It has been held that exemption of nonresident parties from service of process does not extend to final process. *Schroeder v. Reynolds*, 17 Lanc. L. Rev. 300, where it was held that a nonresident of the state who came into it as party to a suit was not exempt from service of an attachment execution.

But in *Ex parte McNeil*, 6 Mass. 245, it was held that a nonresident party was privileged from arrest on execution.

### V. To what courts or proceedings exemption extends.

"Originally the exemption from process by privilege could be invoked only for attendance upon courts, but it is now extended so as to embrace every proceeding of a

cox, 122 Iowa, 189, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; Cameron v. Roberts, 87 Wis. 291, 41 Am. St. Rep. 43, 58 N. W. 376. The decisions of the Federal courts are to the same effect: Skinner & M. Co. v. Waite (C. C.) 155 Fed. 828; Nichols v. Horton, 4 McCrary, 567, 14 Fed. 330; Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. No. 7,582; Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; Lyell v. Goodwin, 4 McLean, 29, Fed. Cas. No. 8,616; Small v. Montgomery, 23 Fed. 707; Atchison v. Morris, 11 Biss. 191, 11 Fed. 582. In Wilson Sewing Mach. Co. v. Wilson, 23 Blatchf. 51, 22 Fed. 803, it is said: "It is important to the administration of justice that each party to a suit should have a free and untrammelled opportunity

to present his case, and that nonresident defendants should not be deterred by the fear of being harassed or burdened with new suits in a foreign state, from presenting themselves in such state to testify in their own behalf or to defend their property. . . . There is, perhaps, a reason why a plaintiff, who has voluntarily sought the aid and protection of our courts, should not shrink from being subjected to their control, which does not apply to the condition of a defendant, whose attendance is compulsory."

The motion to quash the summons and the return of the sheriff in this case is based upon the allegation that the defendant is now, and had been, a resident of the District of Columbia, and was not a resident

judicial nature where appearance is under process." Yeakel v. Brands, 7 North Co. Rep. 31.

Accordingly, it has been held that hearings before a referee or register in bankruptcy are within the rule allowing a nonresident party to attend judicial proceedings without being subjected to the service of civil process. Morrow v. U. H. Dudley & Co. 144 Fed. 441; Matthews v. Tufts, 87 N. Y. 568.

Exemption from service of process also extends to the taking of testimony before a commissioner under oral agreement between the parties that the same may be so taken and used in a suit pending in another state. Plimpton v. Winslow, 20 Blatchf. 82, 9 Fed. 365. It is said that the privilege violated is that of the court trying the former case, and is one that should be liberally construed for the administration of justice.

A nonresident creditor attending a hearing before commissioners appointed by a probate judge to examine claims against an insolvent estate of a deceased person is privileged from arrest. Wood v. Neale, 5 Gray, 538. The court says that the protection extends to all legal tribunals of a judicial character, whether strictly courts of record or not, recognized by the laws of the state and having power to pass upon the rights of persons attending them.

Exemption from service of summons has been accorded a nonresident party attending before a commissioner under an order from a master in a suit in the Federal court (Bridges v. Sheldon, 18 Blatchf. 295, 507, 7 Fed. 17); or attending the taking of depositions before a commissioner under a commission issued by the court of another state (Larned v. Griffin, 12 Fed. 590).

A nonresident party is privileged from arrest while attending as plaintiff a hearing before an examiner in a divorce suit (Steinmetz v. Wade, 3 W. N. C. 187); or while appearing before an examiner in chancery of the United States circuit court (First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308).

In Greer v. Young, 120 Ill. 184, 11 N. E. 42 L.R.A. (N.S.)

167, it was held that proceedings before a notary public were not of such a judicial nature as to entitle a nonresident party to exemption from service of summons. The court said that a notary before whom depositions were taken for use in a suit pending in another state cannot in any sense be regarded as an instrument or agency of the court wherein the suit is pending; that he is not answerable to the court for anything said or done, the whole matter being outside of the court's jurisdiction.

On the other hand, it was held in Parker v. Marco, 136 N. Y. 585, 20 L.R.A. 45, 32 Am. St. Rep. 770, 32 N. E. 989, that a nonresident coming into the state at the instance of the plaintiff in a suit pending in the defendant's state, to attend an examination of plaintiff and his witnesses before a notary public, was exempt from service of summons by the plaintiff for the same cause of action, the notary, under the Federal statute, being regarded as the representative of the court in the pending suit. The court says: "The tendency has been not to restrict, but to enlarge, the right of privilege so as to afford full protection to parties and witnesses from all forms of civil process."

And in Roschynialski v. Hale, 201 Fed. 1017, it was held that a nonresident plaintiff whose deposition, pursuant to agreement between the parties, was being taken before a notary public in the state where the action was pending, was exempt from service of summons. The contention that the defendant was not privileged, because attendance before the notary was not attendance before a court or tribunal vested with the authority of a court, was expressly denied. The court says that the privilege has been extended not only to those who attend before the court upon the trial, but also to those who attend as parties, either as defendant or plaintiff, before masters in chancery, registers in bankruptcy, examiners, and commissioners to take depositions.

In Partridge v. Powell, 180 Pa. 22, 36 Atl. 419, where the parties in a suit agreed to take depositions in another state before a notary public, and the taking out of a

of the state of Maryland, when and where the summons had been issued and where the process had been served. It is further alleged that the appellee was present in the circuit court for Howard county on the 24th day of September, 1909, for the sole purpose of attending on that court as a party defendant, and testifying as a witness, at the trial of a case wherein the appellant was plaintiff and the appellee was defendant. By the fourth paragraph of the petition it is averred that at the time and in the place mentioned, while the circuit court for Howard county was actually engaged in the trial of the case, and while she (the appellee) was in the actual presence of the court as such party defendant and witness, and while she was sitting within a few feet

of her attorneys, who were engaged in the conduct on her behalf of the trial of the case, and waiting to be called and sworn to testify as a witness in the case, and within fifteen minutes of the time when she actually did take the stand and testified as a witness in the case, and while within the state of Maryland, and in attendance upon the court for this, and for no other, purpose, the summons in this case was illegally served upon her, in violation of her rights and privileges as a party defendant and a witness in the case. The plaintiff (the appellant), in his answer to the defendant's motion, admits the allegations set out therein, but denies that the defendant was present and attending the trial as a witness, or for the purpose of testifying as a wit-

commission for that purpose was waived, it was held that the plaintiff could not take advantage of the waiver to serve summons upon the nonresident party while so engaged, although it is said that, as against a third party, the defendant could not claim the exemption, because he came into the state voluntarily.

An executor appearing before a register of wills in another state, in answer to a citation obtained by a creditor, to file a copy of the will, is exempt from service of summons by the creditor, even though the appearance is not for a hearing, but to request the register to appoint a day for a hearing. *Yeakel v. Brands*, 7 North. Co. Rep. 31.

A proceeding for dispossession under the landlord and tenant act is of such a judicial nature as entitles a nonresident party therein to privilege from service of summons in a new action. *Richardson v. Smith*, 74 N. J. L. 111, 85 Atl. 162.

The rule of exemption applies also to proceedings before an auditor appointed by a court to state the account between partners. *Martin v. Whitney*, 74 N. H. 505, 69 Atl. 888.

#### ***VI. Effect of state decisions in Federal courts.***

In *Hale v. Wharton*, 73 Fed. 739, it was held that the decisions of the state in which the Federal court was sitting, to the effect that, under circumstances similar to those in that case, a nonresident party was not exempt, were not binding upon Federal court, but that the nonresident party was entitled to exemption notwithstanding such decisions.

And in *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. ed. 272, 30 Sup. Ct. Rep. 125, the Supreme Court of the United States held that in cases which concern the jurisdiction of the Federal courts, notwithstanding the so-called conformity act, neither the statutes of a state nor the decisions of its courts are conclusive on the Federal courts.  
42 L.R.A. (N.S.)

#### ***VII. Where party transacts other business.***

In these cases the decisions are based on the assumption that the party's sole business in the foreign jurisdiction was in connection with his case. If he is there on other business also, he is not exempt from service of civil process.

Whether or not a party comes into a jurisdiction to transact other business also is a question of fact, which, being decided against a defendant, will not be disturbed on appeal if there is evidence which can fairly support the finding. *Finucane v. Warner*, 194 N. Y. 160, 86 N. E. 1118. In this case the trial consumed three days, and service was made in a new civil action during that time. Thereafter the defendant, a nonresident, remained in the state seventeen days, and although he alleged he came solely as a witness in his own behalf, there was evidence tending to show that he transacted other business after the close of the trial. It was held that he was not exempt. A dissenting opinion is based on the ground that the service, being irregular and illegal when made, since defendant was then in court, could not be rendered valid by subsequent delay in leaving the state.

#### ***VIII. Waiver.***

The privilege being personal to the suitor, and the service not void, but voidable, a defendant may waive his exemption. But a mere delay of three weeks after service of process, to assert the privilege, does not of itself constitute a waiver, where the rule to set aside the service is taken before the return day. *Morrow v. U. H. Dudley & Co.* 144 Fed. 441. The court says that it is ordinarily sufficient if application to set aside the service is made on or before the return day, provided no other step has been taken, and the situation of the parties has not changed meanwhile.

Where a nonresident is served with summons of garnishment, and judgment is entered against him by default, he cannot,

ness in the case. There were other averments in the answer, but, as we do not think they reflect upon the decision of the case, they need not be set out here. There is nothing, we think, in the facts of this case, that could take it out of the general rule as established by the decisions cited by us, or would deny to the appellee the immunity and exemption from service of process which she claims and sets up, both as a witness and as a party defendant, while in attendance upon the circuit court for Howard county. The case of Mullen v. Sanborn, 79 Md. 364, 25 L.R.A. 721, 47 Am. St. Rep. 421, 22 Atl. 522, relied upon by the appellant, is entirely dissimilar to this case. In that case the court denied the nonresident plaintiff the immunity and privilege claimed by him, upon the peculiar circumstances and facts existing in that case. It was distinctly said that Mullen's Case, *supra*, was unlike *Bolgiano's Case*, *supra*, and the cases therein cited.

As to the motion to dismiss the appeal, we need only say that the appeal is from the order and determination of the court in

granting the defendant's motion to quash the summons and the return of the sheriff thereon, and in such cases the appeal brings up the record for review by this court. *Schaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434; *Coulbourn v. Fleming*, 78 Md. 210, 27 Atl. 1041. When the motion rests on questions of fact, the evidence ought to be certified and presented by bills of exceptions properly authenticated and filed in the case. *Dumay v. Sanchez*, 71 Md. 512, 18 Atl. 890; *Palmer v. Hughes*, 84 Md. 659, 36 Atl. 431; *New v. Taylor*, 82 Md. 40, 33 Atl. 435. In the present case there was no bill of exceptions, but the record itself discloses the questions passed upon and decided by the court below. The motion to dismiss will be overruled.

In conclusion, we hold that the appellee, under the facts of this case, was clearly entitled to the immunity and privilege claimed, both as a witness and a defendant suitor, while attending the sessions of the circuit court for Howard county, and for the reasons given the order of the court below will be affirmed.

nearly two years thereafter, have the judgment set aside on the ground that he was privileged from service of summons as a nonresident party to a suit then pending in the state, the privilege being waived by not raising the objection at the proper time. *Thornton v. American Writing Mach. Co.* 83 Ga. 288, 20 Am. St. Rep. 320, 9 S. E. 679.

#### IX. Statutory provisions.

A statute prohibiting the arrest in civil actions of parties attending court as witnesses or jurors does not, by implication, repeal the common-law exemption of nonresident parties from service of summons. *Cooper v. Wyman*, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947. The court says that, while the statutory exemption from arrest is for the purpose of preventing disturbance of resident and nonresident witnesses and jurors while in court, the common-law exemption is for an entirely different reason, in order that nonresident parties and witnesses may be encouraged to come into the state and thus further the administration of justice. To the same effect as the decision in the *Cooper Case* is that in *Hamerskold v. Rose*, 52 N. C. (7 Jones, L.) 629.

Also, in the case of *Re Healy*, 53 Vt. 694, 38 Am. Rep. 713, it was held that a statute providing that "any party or witness shall not be liable to be arrested" did not restrict the power of the court to exempt a nonresident party and witness from service of civil process.

A statute providing that certain persons, including suitors, shall be privileged from arrest, but that nothing therein shall be construed to

strued to privilege any of the persons named from being served at any time with summons or notice to appear, does not abrogate the common-law exemption of nonresident parties to civil proceedings from service of summons. *Bassett v. Gunsolus*, 6 Ohio Dec. Reprint, 1228; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 493.

It was held in *Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787, that a statute providing that, in cases of nonresidents, an action might be commenced and summons served in any county where they may be found, did not apply to the case of a resident of another state coming into the state as a party and witness.

But in *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 726, 21 S. W. 29, it was held that a statute providing that, when all the defendants are nonresidents of the state, suit may be brought in any county of the state, did not authorize the court to make an exception as to nonresident parties attending court within the state, and that they were therefore not exempt from service of summons.

In *Guynn v. McDaniel*, 4 Idaho, 605, 95 Am. St. Rep. 158, 43 Pac. 74, the decision that a nonresident of the state was not exempt from civil process while attending court therein as plaintiff seems to have been based partly upon statutes providing that, if none of the defendants reside in the state, civil actions may be tried in any county which the plaintiff may designate in his complaint, and summons may be served by the sheriff of the county where the defendant is found.

It was held in *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961, that a statute prohibiting service of summons

upon nonresident witnesses did not cover the entire field of exemption, so as to preclude exemption of nonresident parties, although other statutes provided that there was no common law in any case where the law was declared by the Code, and that in all cases provided for by the Code, all rules theretofore in force were repealed.

But in *Rogers v. Rogers*, 138 Ga. 803, 76 S. E. 48, although the Code granted privilege from arrest to witnesses attending trial, and exemption of witnesses from service of any writ or summons had been recognized, it was held that this privilege was limited to witnesses, and that a nonresident coming voluntarily into the state to defend a misdemeanor charge was not exempt from service of civil process or arrest thereunder. The decision seems to be based upon statutory provisions that "the jurisdiction of this state and its law extends to all persons while within its limits," even though there temporarily; that a citizen of another state might be sued in any county in which he happened to be when served; and that a defendant in a criminal case could not be a witness in his own behalf.

### X. Remedy.

The defendant has usually in cases of service of summons appeared specially and moved to quash or set aside the service, and in cases of arrest sought discharge by habeas corpus proceedings or by motion, and no point has generally been made as to the form of remedy. A distinction, however, has been made between remedy by motion and plea in abatement, some courts holding that a defect in the writ, service, or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion, but that where the objection is founded upon extrinsic facts, the matter must be pleaded in abatement. *Greer v. Young*, 120 Ill. 184, 11 N. E. 167; *Bishop v. Vose*, 27 Conn. 1.

It has been held that a privileged party may be discharged from arrest by motion, but that, to abate an action begun by the writ, a plea in abatement is the proper remedy. *Ellis v. Degarmo*, 17 R. I. 715, 19 L.R.A. 560, 24 Atl. 579.

In *Bridges v. Sheldon*, 18 Blatchf. 295, 507, 7 Fed. 17, where the plaintiff in a suit in the Federal court served process upon the nonresident defendant in the suit, the process being issued out of a state court, it was held that the Federal court would grant a stay of execution until the plaintiff had discontinued the second action.

It was held in *Kinsman v. Reinex*, 2 Miles (Pa.) 200, that the proper remedy for an illegal arrest on civil process was to apply for redress to the court upon whom the contempt was committed, it being in a better position to determine the right of the party to exemption; and that only under special circumstances would the court issuing the process discharge the party. R. E. H.  
42 L.R.A.(N.S.)

## RHODE ISLAND SUPREME COURT.

KATHERINE ANN HAYDEN

v.

GERTRUDE S. HASBROUCK.

(— R. I. —, 84 Atl. 1087.)

**Libel and slander — qualified privilege — larceny from club — conference for suppression.**

1. Statements by the president of a federation of women's clubs, at a conference solicited by officers of a local club to devise means to stop larcenies which had occurred at meetings of the local club, upon the subject of suspects, in answer to questions propounded, are qualifiedly privileged.

**Same — malice — effect of statement.**

2. Statements by the president of a federation of women's clubs, upon a privileged occasion of a consultation as to methods of suppressing theft at meetings of a local club, with respect to a particular person, that, although there was no positive proof, she was convinced; that the suspect's husband had "paid her out before," and, as a reason for the conduct, that she was "as poor as Job's turkey,"—are not *per se* evidence of malice.

**Same — repetition — effect.**

3. That one who has made alleged slanderous statements upon a privileged occasion repeats them subsequently when called upon for an explanation is not admissible to show malice in the first utterance, if the

**Note. — Repetition of privileged statement as evidence of malice.**

On the question of privilege as affected by the extent of publication, see note in 20 L.R.A.(N.S.) 361; and as to whether malice which will preclude qualified privilege may be inferred from the publication alone, see note in 12 L.R.A.(N.S.) 91.

It is the general rule that slanderous or libelous statements which are qualifiedly privileged depend, for their privileged character, on the good faith of the utterer of the statements complained of; hence proof of actual malice in making the statements defeats the defense of privilege. As tending to establish the existence of actual malice, it is competent to show that these statements have been repeated at some other time and place by the defendant asserting this defense.

Cal.—*Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290.

Conn.—*Austin v. Remington*, 46 Conn. 116.

Ill.—*Rausch v. Anderson*, 75 Ill. App. 526.

Ky.—*Campbell v. Bannister*, 79 Ky. 205; *Sharp v. Bowlar*, 103 Ky. 282, 45 S. W. 90.

Md.—*Garrett v. Dickerson*, 19 Md. 418.

statement would not of itself afford an action for slander.

(November 25, 1912.)

**E**XCEPTIONS by defendant to rulings of the Superior Court for Providence and Bristol Counties made during the trial of an action for an alleged slander, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Mr. Charles E. Tilley, with Messrs. Waterman & Greenlaw, for defendant:

The court erred in permitting the attorney for the plaintiff to make certain remarks in his opening about other publications of the alleged slander, and in admitting and rejecting evidence offered while the plaintiff was putting in her case, with regard to such other publications of the alleged slander.

25 Cyc. 467; 31 Cyc. 570; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9; *Morrisette v. Wood*, 128 Ala. 505, 30 So. 630; *Columbia County v. Branch*, 31 Fla. 62, 12 So. 650; *Waidner v. Pauly*, 141 Ill. 442, 30 N. E. 1025; *Com. v. Snelling*, 15 Pick. 321; *Thompson v. Powning*, 15 Nev. 195; *McLaughlin v. Charles*, 60 Hun, 239, 14 N. Y. Supp. 608; *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907; *Watson v. Moore*, 2 Cush. 133; *Thompson v. McCready*, 194 Pa. 32, 45 Atl. 78; *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887.

Mass.—*Clark v. Brown*, 116 Mass. 504.  
N. Y.—*Collier v. Postum Cereal Co.* 150 App. Div. 169, 134 N. Y. Supp. 847.  
N. C.—*Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449.

Tex.—*Behee v. Missouri P. R. Co.* 71 Tex. 424, 9 S. W. 449.

Eng.—*Hemmings v. Gasson*, El. Bl. & El. 346, 27 L. J. Q. B. N. S. 252, 4 Jur. N. S. 834, 6 Week. Rep. 601, 9 Eng. Rul. Cas. 67; *Riddell v. Glasgow* [1910] S. C. 693, 47 Scot. L. R. 630.

This rule is based on the theory that the effect of privilege on a slanderous or libelous statement is to rebut the legal inference or presumption of malice which would otherwise be raised by the use of the words complained of, and to this extent it constitutes a good defense in an action for them; but this may be defeated by showing express malice on the part of the utterer of the statements complained of, and, in determining the existence of express malice, evidence is admissible of the repetition by the defendant of other words or acts having reference to the subject-matter. *Garrett v. Dickerson*, 19 Md. 418.

In Michigan, however, it would seem that a different rule obtains. Thus, in *Schultz v. Guldenstein*, 144 Mich. 636, 108 N. W. 96, it is said that a mere petition of a slanderous charge is not sufficient to show 42 L.R.A. (N.S.)

The court erred in permitting the plaintiff to testify as to when the words were reported to her, and what their effect was.

*Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683; *Simmons v. Holster*, 13 Minn. 249, Gil. 232; *Austin v. Bacon*, 49 Hun, 386, 3 N. Y. Supp. 587; *Sun Life Assurance Co. v. Bailey*, 101 Va. 443, 44 S. E. 692; *Hereford v. Combs*, 126 Ala. 369, 28 So. 582; *Zurawski v. Reichmann*, 116 Iowa, 388, 90 N. W. 69; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1; *Ward v. Weeks*, 4 Moore & P. 796, 7 Bing. 211, 9 L. J. C. P. 6; *Tunnicliffe v. Moss*, 3 Car. & K. 93; *Dixon v. Smith*, 5 Hurlst. & N. 450, 29 L. J. Exch. N. S. 125; *Parkins v. Scott*, 1 Hurlst. & C. 153, 31 L. J. Exch. N. S. 331, 8 Jur. N. S. 593, 6 L. T. N. S. 394, 10 Week. Rep. 562.

The court erred in refusing to allow the defendant to introduce evidence showing that she acted in good faith in making the statements alleged.

25 Cyc. 500; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *Schulze v. Jalonick*, 18 Tex. Civ. App. 296, 44 S. W. 580; *Conner v. Standard Pub. Co.* 183 Mass. 474, 67 N. E. 596; *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215, 3 Ann. Cas. 546; *Miller v. Greene*, 32 N. S. 120; *Thacher v. Phinney*, 7 Allen, 149; *Henn v. Horn*, 56 Ohio St. 442, 47 N. E. 248; *Lally v. Emery*, 54 Hun,

actual malice, in order to remove the protection of privilege; that the plaintiff has the burden of proving any abuse of the privilege, and such abuse is not to be found in the words spoken; and that evidence of the repetition of the charge does not prove knowledge of the falsity of the original charge. This reasoning would seem to indicate that the court confused malice with the question of knowledge of the falsity of the statement. While it may be that the utterance of a known false statement, slanderous in character, is evidence of malice, yet, as seen in the foregoing cases, the unnecessary repetition of a statement otherwise privileged may also be evidence of malice.

While not based on the theory of republication or repetition, it is held that the protection of privilege is destroyed where the privileged statement is given out to the newspapers for publication. *Bingham v. Gaynor*, 203 N. Y. 27, 96 N. E. 84; *Lathrop v. Sundberg*, 55 Wash. 144, 25 L.R.A. (N.S.) 381, 104 Pac. 176.

But privileged communications are not admissible for the purpose of showing malice in the utterance of a previous statement of similar import, which is also privileged. *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887; *HAYDEN v. HASBROUCK*.

517, 8 N. Y. Supp. 135; *Arnott v. Standard Assn.* 57 Conn. 86, 3 L.R.A. 69, 17 Atl. 361; *Manning v. Clement*, 7 Bing. 362, 5 Moore & P. 211, 9 L. J. C. P. 60; *Huson v. Dale*, 19 Mich. 17, 2 Am. Rep. 66; *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431; *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S. W. 805; *Swan v. Thompson*, 124 Cal. 193, 56 Pac. 878; *Rice v. Cottrel*, 5 R. I. 340; *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. Rep. 583, 26 S. W. 1020; *Schultz v. Guldenstein*, 144 Mich. 636, 108 N. W. 96; *Cameron v. Corkran*, 2 Marv. (Del.) 166, 42 Atl. 454.

Mr. P. H. Quinn also for defendant.

Mr. William H. Camfield, with Messrs. Gardner, Pirce, & Thornley and Thomas F. Cooney, for plaintiff.

Sweetland, J., delivered the opinion of the court:

This is an action of trespass on the case for slander. The declaration alleges that "at divers meetings of the women's clubs to which the plaintiff and defendant belonged, and at other gatherings of women held at divers dates not long before the time of the publishing of said slander, at divers places in the city of Providence, various sums of money and articles of personal property had been taken from the garments and hand bags and pocketbooks of divers members and guests of said clubs, under circumstances which indicated that such money and articles had been stolen."

*Melcher v. Beeler*, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181, however, while holding that the fact that a party was actuated by malice in making a defamatory communication which is privileged cannot be established alone by introducing evidence of the utterances of other privileged communications of the same import, since such communications are not admissible for this purpose until there is some other testimony taken to prove malice, holds that, when there is such testimony, such other communications, although privileged in their nature, are competent for the purpose of corroborating the other evidence.

To be admissible upon the question of actual malice, the repetition relied upon is not required to conform to any exact standard of similitude in terms with the original words. It is sufficient if of similar import, relating to the same subject-matter, and of a character from which the malicious purpose may be inferred. *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958. And a repetition of a slanderous charge, although not in the language complained of, if in words of like import, is admissible to show actual malice. *Rausch v. Anderson*, 75 Ill. App. 526.

The time of the repetition, while it may be of weight in the minds of the jury in determining the existence of actual malice, 42 L.R.A. (N.S.)

The facts thus alleged clearly appear in the testimony given at the trial. The declaration further alleges that in the presence of other women who knew the plaintiff, the defendant was asked "if the plaintiff was suspected of having taken such money and articles," and the defendant spoke of and concerning the plaintiff, "It is only too true; as far as I am concerned, I am convinced;" and that later in the course of the same conversation, when one of the other women said to the defendant that it would be a shock to the plaintiff's husband to be told that his wife was a thief, the defendant replied, "that will be no surprise to him; he has paid her out before." To this declaration the defendant pleaded the general issue alone. The case was tried in the superior court before a jury, and verdict was rendered for the plaintiff in the sum of \$1,800. After the denial by the justice of the superior court of the defendant's motion for a new trial, the case was certified to this court upon the defendant's exceptions, eighty in number, taken to rulings of the superior court before and at the trial, and to the decision upon said motion for a new trial. At the conclusion of the testimony the defendant moved for the direction of a verdict in her favor, which motion was denied, and exception was taken. This exception is one of those now before us, and in this opinion we will particularly discuss that exception.

does not, however, affect the admissibility of evidence of the repetition. Thus, it has been held that, to defeat the claim of privilege by establishing actual malice, a letter containing a substantial repetition of the charge is admissible, although written by the defendant some two years after the libel complained of. *Austin v. Remington*, 46 Conn. 116. And it is immaterial whether the repetition was before or after the suit is brought. *Garrett v. Dickerson*, supra.

Generally, the existence of express malice, to defeat the defense of privilege, is to be determined by the jury as a question of fact, and it may be inferred from a repetition of the slanderous or libelous statement complained of. *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Behee v. Missouri P. R. Co.* 71 Tex. 424, 9 S. W. 449. So where there is evidence of the utterance of other words of similar import, which in some degree indicate personal hostility on the part of the defendant, a case is made for the jury as to the existence of express malice. *Garrett v. Dickerson*, supra. And whether the subsequent repetition of the privileged communication, offered to prove malice, was made under circumstances which rebut any presumption of malice in the repetition, is a proper question for the jury. *Brown v. Radebaugh*, 84 Minn. 347, 87 N. W. 937.

A. G. S.

What we consider to be the material facts in the case was not disputed at the trial. It appeared in testimony that at the time of the speaking by the defendant of the alleged slanderous words, on March 12, 1909, there existed in the state over thirty separate organizations of women known as "women's clubs;" that each of these clubs had a board of officers and directors; that the total membership of these clubs was over 3,000; that one of these organizations was known as the Providence Mothers' Club; that these various separate organizations were affiliated with each other in a central organization, known as the "Rhode Island State Federation of Women's Clubs;" and that at the head of this affiliated body was an officer known as the "President of the State Federation." On March 12, 1909, and for a year previous thereto, the defendant held the office of president of the State Federation. On said March 12, 1909, the plaintiff was the president of the Providence Mother's Club; and one Mrs. Grieve and one Mrs. Lake were, respectively, the chairman of the hospitality committee and the secretary of said Providence Mothers' Club. The defendant, besides being the president of the central body, was a member of the board of directors of said Providence Mothers' Club. The taking of money and personal property from the cloakrooms of the various clubs, as set out in the declaration, became a matter of great concern to the officers and members of the various clubs. It appears in the testimony of one witness that a report of these occurrences was published in a newspaper. The defendant, as head of the organization, was requested by her associates to take action in an endeavor to stop the repetition of these larcenies. The defendant commenced an investigation, and employed a lawyer to assist her. The defendant states that every rumor that was brought to her was connected with the plaintiff, and with no other person. On March 12, 1909, Mrs. Grieve and Mrs. Lake, aforesaid, requested and obtained from the defendant a private interview with her, for the purpose of discussing the plaintiff's connection with said larcenies. It is at this meeting that the alleged slanderous words were spoken by the defendant, if spoken at all by her.

These women sought the interview with the defendant because she was the president of the State Federation. In opening this interview Mrs. Grieve stated that on the day before she, as chairman of the hospitality committee of the Providence Mothers' Club, had been asked to watch the plaintiff, as the person who was accused "of taking things from the Churchill House." The circumstances of this meet-

ing made it an occasion of qualified or conditional privilege. It is a principle recognized by the courts of this country and England, that "a communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without this privilege, would be slanderous and actionable." The word "duty," as used, cannot be confined to legal duties, which may be enforced, "but must include moral and social duties of imperfect obligation." *Harri-son v. Bush*, 5 El. & Bl. 344, 25 L. J. Q. B. N. S. 99, 2 Jur. N. S. 9, 4 Week. Rep. 199. The courts have been liberal in their view of the nature of the duty or the interest which must exist under this rule, to render a communication privileged. The following are among many which have been held to be privileged occasions or privileged communications: The publication of charges containing defamatory matter, made in a meeting of Congressional ministers against one of its members (*Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698); a complaint made to a church of which the plaintiff was a member, charging him with perjury (*Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431); words spoken in good faith, within the scope of his defense, by a party on trial before a church meeting, although they disparage private character (*York v. Pease*, 2 Gray, 282); the publication of charges made before a lodge of Masons (*Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316); words in themselves slanderous, uttered in the presence of a conference on church discipline (*Jarvis v. Hatheway*, 3 Johns. 180, 3 Am. Dec. 473); charges preferred by one member of an Odd Fellows' lodge against another member (*Streety v. Wood*, 15 Barb. 105); the letter written by a clergyman to the curate of another clergyman, charging the latter with wrongdoing (*Whiteley v. Adams*, 15 C. B. N. S. 392, 33 L. J. C. P. N. S. 89, 10 Jur. N. S. 470, 9 L. T. N. S. 483, 12 Week. Rep. 153). In *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237, Brett, L. J., said: "I am of opinion that where the relation between two persons is so intimate socially and professionally as that between a rector or a vicar and his curate, and when it can be said that the vicar is consulting with his curate, either upon the conduct of the curate or of the vicar in ecclesiastical matters, that is an occasion which is privileged."

In the case at bar the interview in question was not an occasion of trifling gossip,



but was a serious consultation upon a matter in which they were all interested as members and officers of the associations named, and upon a matter as to which they all had duties. The exact nature of the duty of Mrs. Grieve as chairman of said committee on hospitality does not appear; but by her testimony her office required her to watch any person suspected of purloining property at club meetings. Mrs. Lake was the secretary and also a director of the Providence Mothers' Club. The defendant was a director of that club. These officers all had interests and duties with reference to the charge of moral delinquency made against the president of said club. They all had a common interest in the good reputation of the club to which they belonged; which has been held to render serious discussions, such as the one under consideration, occasions of qualified privilege. As subordinate officers, the other women came to the defendant as the head of the state organization, and she had good reason to believe that they asked the questions which brought out her replies from an honest desire for information by which to regulate their conduct, or to aid them in the performance of their duties. None of the statements of the defendant upon which the action is based were volunteered by her, but were in reply to questions asked by the others, who had an interest in the matter under discussion, which circumstance alone would render the occasion a privileged one.

The interview in question being a privileged one, the defendant cannot be held liable for the words alleged to have been spoken by her, although the same were untrue, and in ordinary circumstances would be actionable, unless in uttering them she was moved by malice toward the plaintiff. And the word "malice" in this connection does not mean malice in law, or the absence of legal excuse, but malice in the popular sense, the motive of personal spite or ill-will. This is sometimes called express or actual malice. Unauthorized communications, which are actionable, carry with them the inference of malice; and the plaintiff, without proof, can rely upon the presumption of malice which arises from the slanderous nature of the words. But in a privileged communication, the occasion repels the inference of malice, and there arises a presumption of good faith, which the plaintiff is required to satisfactorily rebut. The burden of proving express malice is thrown upon the plaintiff by reason of the privilege in the defendant.

Our attention is called to certain statements of the defendant made in the course 42 L.R.A. (N.S.)

of said interview, as furnishing intrinsic evidence of ill-will on her part towards the plaintiff, and also to two subsequent occasions at which, it is claimed, the defamatory charges and statements were repeated by the defendant. It is claimed that these were properly submitted to the jury as evidence of spite or ill-will, and that they are sufficient to support a finding of malicious motive actuating the defendant at said interview. It was testified at the trial that the defendant, at said interview, in speaking of the rumors and suspicions against the plaintiff, said that she had "no positive proof," and, further, that "as far as I am concerned, I am convinced." In our opinion these statements were clearly within the privilege of the occasion; they contain no intrinsic evidence of malice; they were pertinent to the matter under consideration; in the circumstances the defendant properly stated the standing of the case against the plaintiff as the result of her investigation, and she might properly inform her companions of her honest opinion as to the plaintiff's guilt based upon that investigation, which would naturally furnish much more of hearsay than of positive proof. It is also in the testimony that at said interview Mrs. Lake said, "What a terrible thing for Mr. Hayden!" and the defendant replied, "It is no surprise to him; he has paid her out before." If this language of the defendant is interpreted to mean, as the plaintiff claims, that the plaintiff had been guilty of larceny on former occasions, it still furnishes no evidence of malice, in view of the testimony. It was fairly related to the subject-matter of the interview. The previous conduct of the plaintiff, in the regard stated, would have a material bearing upon the weight to be given the suspicions and rumors then under consideration. There is no testimony which indicates that this statement was not honestly made by the defendant. Upon the witness stand the defendant gave the name of the informant upon whose information she based the statement in question; and said informant was in court at the trial. It is also strongly urged by the plaintiff as evidence of malice that at said interview Mrs. Lake inquired: "Why, what reason could she have for doing such a thing? She has absolutely no reason for taking them. She has plenty of everything. She has all she wants and plenty of money." And the defendant replied: "Why, they are as poor as Job's turkey." The plaintiff sees in this remark of the defendant such an irrelevant reflection upon the plaintiff, such exaggeration and violence of language, as to indicate an ill-will towards the plain-

tiff, moving the defendant to speak the words declared upon in the declaration. Merely by the use of adjectives or similes a communication otherwise privileged is not rendered malicious. People conferring as these women were, in a confidential and privileged way, are not rigidly bound in their talk to formal, responsive replies, or to absolutely legal relevancy. The law makes allowance for differences of mental temperament, and differences in forms of expression. While poverty in itself would furnish no evidence of fault or crime, Mrs. Lake regarded the financial condition of the plaintiff as material to the discussion; and the reply of the defendant to this question cannot, in the circumstances, be regarded as entirely immaterial.

If, upon a privileged occasion, one of the participants goes beyond the business in hand, and makes an entirely irrelevant attack upon the character of the plaintiff, or indulges in language regarding the plaintiff of an unreasonably violent or grossly exaggerated character, such circumstances furnish proper subjects for examination by the jury upon the question of malice. However, it is not the tendency of most courts to submit the language of privileged communications to too strict a scrutiny. *Odgers, Libel & Slander*, 5th ed. p. 355; *Spill v. Maule*, L. R. 4 Exch. 232, 38 L. J. Exch. N. S. 138, 20 L. T. N. S. 675, 17 Week. Rep. 805; *Somerville v. Hawkins*, 10 C. B. 590, 20 L. J. C. P. N. S. 131, 15 Jur. 450. In *Laughton v. The Bishop*, L. R. 4 P. C. 495, at 508, the court said, with reference to a claim that malice attached to certain statements made upon a privileged occasion: "Some expressions here used undoubtedly go beyond what was necessary for self-defense; but it does not therefore follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications." The expression used by the defendant which is now under consideration was not itself slanderous in the circumstances of this case. We also find it entirely insufficient to support a verdict that the defendant was actuated by malice toward the plaintiff in speaking the words complained of in the declaration.

In her attempt to fix malice upon the defendant, the plaintiff further relies upon two so-called repetitions of the language complained of. The first of these was at the home of the defendant's attorney, in 42 L.R.A.(N.S.)

the course of an interview, and during the time that the defendant, Mrs. Grieve, and Mrs. Lake alone were present. This meeting was also held at the request of Mrs. Grieve and Mrs. Lake, that they might obtain further information in regard to the matter discussed at the previous conference. The testimony as to what occurred at this meeting does not show any repetition of the statements previously made. The conversation related to the desire of the other women to obtain the names of the defendant's informants. This the defendant was unwilling to divulge, on the ground, as she says, that the information was given to her in confidence, because of her position as president of the State Federation, and she was not at liberty to furnish the information sought. The second of these so-called repetitions was made at a meeting of the Providence Mothers' Club held in the Mathewson Street church. This was a special meeting of the club, called by the plaintiff herself, by virtue of her office of president, for the purpose of discussing the statements of the defendant regarding the plaintiff, made at the first interview hereinbefore referred to. By direction of the plaintiff, a special invitation to be present at this meeting was sent to the defendant, and in response to that invitation the defendant attended the meeting. It does not appear from the testimony that any persons were present except members of the club. At this meeting the plaintiff made a statement in regard to her conduct, and called upon the defendant to reply. The defendant then read a statement in defense of her words spoken at the first interview with Mrs. Grieve and Mrs. Lake. As to neither the interview at the home of said attorney, nor the meeting in said church, does any intrinsic or extrinsic evidence of malice towards the plaintiff appear in the defendant's language or conduct. These are also clearly occasions of qualified privilege. Testimony as to what took place at these two meetings was admitted by the justice at the trial against the objections of the defendant. Exceptions to said rulings are included in the bill of exceptions.

The justice presiding at the trial permitted this testimony to go to the jury on the ground "that repetition of the original statement, as bearing on the question of the attitude of the person making it, bears on the question of malice," and later in his charge the said justice so instructed the jury. In these rulings and instructions the learned justice was in error. This ruling permits the presumption of good faith, which attaches to the original statement, to be destroyed by another state-

ment, to which the presumption of good faith also attaches. It might well happen that the necessities of her position and the prosecution of her proper investigation might force this defendant into three or four or a greater number of privileged conferences similar to that held with Mrs. Grieve and Mrs. Lake. Each would be privileged, the communications made at each would be presumed to be made in good faith, and as to each, without the other, there might be no suspicion of malice; yet, from a consideration of all the communications, each without malice in itself, a jury might be permitted to find malice in everyone. In support of this ruling of the superior court the plaintiff has cited but one authority. *Davis v. Starrett*, 97 Me. 574, 55 Atl. 516. We have been able to find no other. The case of *Davis v. Starrett* has been referred to in text-books and other cases as an authority for the principle that the repetition upon a privileged occasion of words spoken at a previous privileged occasion may be shown in evidence upon the question of express malice in the defendant in his utterances at the first privileged occasion. Certain language of the Maine court in the opinion seems to warrant that view, but other observations of the court in the development of its argument appear to modify the broader general statement. The court says: "It is easily apparent that slanderous words, otherwise privileged, may be uttered in such a spirit or under such circumstances as to indicate that they themselves are the product of a hostile or malevolent disposition. If so, they certainly would have a tendency to show that in uttering some other, but similar, slander, the speaker was moved by the same disposition." There will be no dissent from that proposition. If it appears that words are uttered upon a privileged occasion in a malicious spirit, the speaker forfeits the privilege, the presumption of good faith is rebutted, as to him the occasion ceases to be a privileged one, and his slanderous words may be used to show a malicious motive in his utterances upon a previous privileged occasion. That seems to be the true intent of *Davis v. Starrett*. We find the better reason and ample authority in favor of the rule that privileged communications, which cannot themselves form the basis for an action of slander, are not admissible for the purpose of showing malice in other communications. *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887. *Watson v. Moore*, 2 Cush. 133; *McLaughlin v. Charles*, 60 Hun, 239, 14 N. Y. Supp. 608; *Thompson v. McCready*, 194 Pa. 32, 42 L.R.A. (N.S.)

45 Atl. 78; *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907.

We are of the opinion that there was no evidence of malice which justified the submission of the case to the jury. The exception to the refusal of the justice presiding to direct a verdict for the defendant is sustained.

Opportunity will be given to the plaintiff on December 2, 1912, to show cause why the case should not be transmitted to the Superior Court, with direction to enter judgment for the defendant for costs.

## NEW YORK COURT OF APPEALS.

INTERNATIONAL TEXT-BOOK COMPANY, Appt.,  
v.

EDWARD CONNELLY, Respnt.

(206 N. Y. 188, 99 N. E. 722.)

**Infant — contract — necessities — instruction in engineering.**

1. A five-year course of instruction in "complete steam engineering" is not a necessary for which an infant can contract, in the absence of anything to show his circumstances in life or his resources for securing such instruction.

**Estoppel — infant — asserting majority.**

2. Asserting majority in a contract signed by him does not estop an infant from setting up his minority in defense of liability on the contract.

**Infant — ratification of contract — payment after maturity.**

3. The mere payment by an infant, after attaining majority, of an instalment of the contract price for a course of instruction, is not sufficient as matter of law to ratify the contract, if he receives no benefit after attaining majority and as soon as possible returns all he has received under the contract.

**Evidence — burden of proof — ratification of infant's contract.**

4. The burden of proving ratification rests on the one claiming under a voidable contract with an infant.

**Appeal — right to find fact.**

5. The New York court of appeals cannot find a fact which the trial court failed to find.

**Note. — Infants: education or instruction as necessary.**

As to estoppel by misrepresentation as to age to plead infancy, see note to *Putnal v. Walker*, 36 L.R.A. (N.S.) 33.

As to authority of child to bind parent by contracts other than those for necessities, see note to *Habegger v. King*, 39 L.R.A. (N.S.) 881.

As to lack of parent or guardian as enlarging infant's capacity to contract for

**Conflict of laws — contract made in other state — enforcement.**

6. Courts will not enforce a contract against an infant residing in the state, contrary to its laws, where the promise was made and the contract was to be performed substantially within the state, although it was completed by acceptance in another state where infancy might not be a defense.

**Evidence — presumption — law of sister state.**

7. A common-law state will presume that the law of a sister state colonized from England is the same upon the subject of validity of infants' contracts as its own.

(October 1, 1912.)

**APPEAL by plaintiff from a judgment of the Appellate Division of the Su-**

other than necessities, see note to *Wickham v. Torley*, 36 L.R.A. (N.S.) 57.

As to right of infant to avoid agency contract with stockbroker, see note to *Benson v. Tucker*, 41 L.R.A. (N.S.) 1219.

An infant may bind himself for necessities. And the reason anciently assigned was that without this power he might be exposed to perish of want. But although this was the alleged ground on which the infant's obligation was placed, yet the law has never limited its definition of the term "necessaries" to those things which are strictly essential to the support of life,—as food, clothing, and medicine in sickness. The practical meaning of the term has always been in some measure relative, having reference as well to what may be called the conventional necessities of others in the same walks of life with the infant, as to his own pecuniary condition and other circumstances. Hence, a good common-school education, at least, is now fully recognized as one of the necessities for which an infant may make a valid contract. *Stone v. Dennison*, 13 Pick. 1; *Glover v. Ott*, 1 M'Cord, L. 572; *Nielson v. International Textbook Co.* infra (instruction of trial judge characterized as sufficiently favorable to the defendant); *Grossman v. Lauber*, 29 Ind. 618 (*dictum*); *Kerr v. Bell*, 44 Mo. 120 (*dictum*); *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537, wherein it was said: "Without it he would lack an acquisition which would be common among his associates, he would suffer in his subsequent influence and usefulness in society, and would ever be liable to suffer in his transactions of business. Such an education is, moreover, essential to the intelligent discharge of civil, political, and religious duties."

And in *Raymond v. Loyl*, 10 Barb. 483, it was said: "It was said on the argument that 'schooling' is not a necessary. . . . A parent is almost the sole judge of what is necessary. But if a parent is liable to a third person I hope it will never be decided that sending to a common school at a suitable season and to a reasonable extent is not necessary in this country. However, 42 L.R.A. (N.S.)

preme Court, Fourth Department, affirming a judgment of the County Court which affirmed a judgment of the Municipal Court of the City of Rochester, in favor of defendant in an action brought to recover a balance alleged to be due under a contract for correspondence instruction. Affirmed.

**Statement by Vann, J.:**

The plaintiff is a stock corporation organized under the laws of the state of Pennsylvania, with its principal office at the city of Scranton, in that state. According to its charter, it was formed "to originate, write, compile, illustrate, edit, publish, and sell instruction papers, text-books, drawing plates, periodicals, magazines, pamphlets, articles, and letters for the dissemination of

this cause does not call for a decision on that point."

Since an infant's board bill while attending common school is included among the necessities for which he may be compelled to pay, it has been held that one who pays such a debt for the infant at the infant's request has a good cause of action for the reasonable value of such necessities. *Kilgore v. Rich*, 83 Me. 305, 12 L.R.A. 859, 23 Am. St. Rep. 780, 22 Atl. 176.

A father is not liable for services rendered in tutoring, during vacation time, his minor son, who lives with and is supported by him, where the father is not consulted about and does not consent to the employment, even though the tutoring may have been a necessary, since a minor is not presumed to be the agent of the father. *Peacock v. Linton*, 22 R. I. 328, 53 L.R.A. 192, 47 Atl. 887.

Since, however, a father is bound to educate and maintain his infant child, if another person performs this natural duty for him with his knowledge and consent, the father is liable to pay a reasonable sum to such person. *Thompson v. Dorsey*, 4 Md. Ch. 149.

But a collegiate education is not ranked among those necessities for which the infant can render himself absolutely liable by contract. *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537.

And a classical education is not a necessary for which an infant's estate is liable. *Gayle v. Hayes*, 79 Va. 542.

So, too, it has been held that a professional education is not a necessary. *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574, wherein an infant was held not to be liable on notes and receipts he had given for money used in procuring a medical education. To the same effect is *Bouchell v. Clary*, 3 Brev. 194.

Whether a commercial education furnished an infant is a necessary for which the father is liable, is, where there is evidence as to the father's means, a question for the jury. *Cory v. Cook*, 24 R. I. 421, 53 Atl. 315.

Instruction in music and painting fur-

literary, technical, educational, and other information," etc. It carries on international correspondence schools in many states, "giving instruction by correspondence through the mails and otherwise to such persons as may desire the same, in mathematics, physics, the arts and sciences, English and foreign languages, and in all subjects constituting a technical, scientific, classical, or academic education. . . ." It has agencies in this and other states to solicit persons to contract with it "for such correspondence instruction." For many years it has maintained in this state a system of organized canvassing, and now has five district and thirty division offices here. Each district office is in charge of a district superintendent who has under him a corps of plaintiff's

representatives whose duties are to seek out persons desiring instruction and to induce them to subscribe therefor. The subscription papers are addressed to the plaintiff at Scranton, and are delivered with the initial payments by the solicitor to his division superintendent, who forwards the same to the plaintiff at Scranton, and, if it is accepted, the plaintiff enrolls the subscriber as a student in the course selected by him, and sends him by mail from Scranton a counterpart of the subscription paper and a certificate of enrolment, but, "if it rejects the same, it returns to him the amount so paid." Instruction papers, with directions how to commence and pursue his studies, are sent to the student by mail from Scranton. Such bound volumes and outfit as his

nished an infant without the authority of her guardian does not come under the head of "necessaries," considering the rank in life of the infant and the value of her estate, which consisted of about \$6,000 in personality, so that recovery is not to be had from the estate of the infant. *De Moss v. Giltner*, 5 Ky. L. Rep. 891.

So, it has been held that religious instruction is not a necessity. *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17, wherein the action was assumpsit for the rent of a pew hired and occupied by the wife of the defendant and their daughter. The effect of an infant's contract was not considered.

Although in *Stanton v. Willson*, 3 Day, 37, 3 Am. Dec. 255, a father is held liable for classical books and tuition for his son, who cannot safely live with his father, the question whether the items are to be considered as necessary was not passed upon.

But in a later case, *Finch v. Finch*, 22 Conn. 411, where the husband and wife were divorced, and in the decree the custody and control of their children were awarded to the wife, it was held in an action of book debt brought against the father for the entire support and education of the children, which had been furnished by the wife after the granting of the decree of divorce, that the wife could not recover. The case contains no discussion as to whether the things furnished were necessities.

Education furnished to an infant may be necessary to him, but only when it is suitable to his wants and condition, so that the question whether education of a merely preliminary character received through a contract with a correspondence school for a course of instruction in electricity is a necessary to an infant who has spent two years at a high school is properly disposed of as a question of fact. *International Text Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255. To the same effect is *Nielson v. International Textbook Co.* 106 Me. 104, 75 Atl. 330, 20 Ann. Cas. 591, where the contract was for a course in electrical engineering.

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and if it become a question, how much schooling is necessary, then you must inquire what situation in life he is required to fill. A knowledge of the learned languages may be necessary for one, a mere knowledge of reading and writing may be sufficient for another." *Peters v. Fleming*, 6 Mees. & W. 42, 9 L. J. Exch. N. S. 81; *Manby v. Scott*, Sid. 112.

It was held in *Pardey v. American Ship Windlass Co.* 20 R. I. 147, 78 Am. St. Rep. 844, 37 Atl. 706, that a minor's contract of apprenticeship made with his father's consent, containing provisions for compensation and instructions as a pattern maker, is binding on the minor as a contract for necessities.

And in *Cooper v. Simmons*, 7 Hurlst. & N. 707, 31 L. J. Mag. Cas. N. S. 138, 8 Jur. N. S. 81, 5 L. T. N. S. 712, 10 Week. Rep. 270, an indenture of apprenticeship providing for the instruction of an infant in the art of a rim and mortise lock maker was held to be binding on the infant notwithstanding the master died prior to the expiration of the apprenticeship.

A minor leasing rooms for a year while attending college is bound, on the ground that the lodging is a necessary, only to pay for the time he continues to occupy them, and he may terminate the lease at any time. *Gregory v. Lee*, 64 Conn. 407, 25 L.R.A. 618, 30 Atl. 53.

Assuming for the purpose of the case that a contract for a course of correspondence instruction is a contract for necessities, it was held in *International Text Book Co. v. Alberton*, 30 Ohio C. C. 352, that a suit could not be maintained against an infant on his express contract for such necessities, without an averment and proof that the price to be paid for such necessities was reasonable.

In *Oliver v. McDuffie*, 28 Ga. 522, a bill in equity which was filed against a guardian of certain infants to recover tuition furnished them under their contract was dismissed upon the ground that the complainant had an ample remedy at law. In this case the court said that an action for or

contract calls for are lent him by the plaintiff, the delivery being made either direct from Scranton or through a division office in this state. The student sends his papers by mail to the plaintiff at Scranton, and, after they are corrected, they are returned to him through the mail. All initial payments are deposited by the division superintendent in his own name in some bank in the city where his office is located, and subsequent instalments are collected by him and deposited in the same way. All sums paid are ultimately turned over to the plaintiff by the checks of the division superintendent. The plaintiff owns no real property in this state, but pays rent and office expenses, including salaries, wages, commissions, and all other liabilities incurred by it within this state, by check direct from its Scranton office. The division offices are under the supervision of the district superintendent, and he "has the power to and does direct, regulate, and superintend the management and conduct thereof and employ and discharge the division superintendent in charge thereof. Each division superintendent employs and discharges all other representatives of plaintiff in his division, subject to the district superintendent's approval. . . . The plaintiff gives to its students in this state cash commissions and premiums in consideration of their procurement of new subscriptions to it." It sells text-books, drawing and other outfits, instruments, supplies, and various publications to purchasers in this state and elsewhere. Drawing and answer paper suitable for use by students in their respective courses is purchased by plaintiff's district and division superintendents in this state, and sold here. Every division superintend-

ent and every representative in this state is required by plaintiff to be qualified to give instruction in mathematics to its students, and assistance in mathematics is given by them in such division offices to such students as desire the same. "A tutor is employed by plaintiff, who gives such assistance in mathematics at the Rochester division office on Tuesday and Thursday evenings of each week from 7 to 9 o'clock. He is paid therefor direct from Scranton. Except as aforesaid the school of plaintiff is located at Scranton, Pennsylvania, and no branch is located in this state. Except as aforesaid the teachers and superintendents in such schools reside and perform their duties at Scranton, as aforesaid, and do not perform any such duties in this state. There are now more than three hundred students enrolled in the Rochester division," where the defendant subscribed. The plaintiff's division superintendent at Rochester has a stenographer to assist him, who is paid by him, but the amount is repaid by plaintiff as an item in his expense allowance. "On the glass door of the Rochester division office appears the words 'The International Correspondence Schools of Scranton, Pa. Enrolment Office.' There is a board sign above the entrance to such office which reads 'Local Office International Correspondence Schools of Scranton, Pa. International Text-book Co., Proprietors.'" Plaintiff does all its business at Scranton aforesaid, unless the foregoing facts establish that it is doing business in this state.

The defendant resides at the city of Rochester in this state, and on the 2d of August, 1906, at that place he subscribed for a scholarship in the plaintiff's course of correspondence instruction in "complete steam engi-

against infants should be prosecuted in their own name, and they should in all cases appear by guardian.

When an infant has contracted in writing for a course of instruction in a school, but has concluded not to take the course, and has offered to return what he received under the contract and to terminate the agreement, no ground of liability exists against him. This conclusion goes upon the well-recognized principle that an infant is not liable upon either an executory or an express contract, even for necessities. Whatever liability attaches therefor is one wholly created by law, and can only arise when necessities have actually been furnished to him. *International Text Book Co. v. McKone*, 133 Wis. 200, 113 N. W. 438. To the same effect is *Jones v. Valentines' School*, 122 Wis. 318, 99 N. W. 1043, where the infants entered into a contract for a course in telegraphy.

In *Wallin v. Highland Park Co.* 127 Iowa, 131, 102 N. W. 839, 4 Ann. Cas. 421, where an infant sued to recover the unearned por-  
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tion of money paid under a contract for a course in pharmacy, it was conceded that the course comes within the definition of necessities for which an infant may be bound by contract; the only question for the court's determination was whether such a contract is voidable before such necessities are actually supplied him, to which question answer was made in the affirmative.

In *Mauldin v. Southern Shorthand & Business University*, 3 Ga. App. 800, 60 S. E. 358, where an infant sued to recover the tuition she had paid for a course in shorthand, it was held after the supreme court had reversed a judgment in defendant's favor and sent the case back for evidence as to whether or not such instruction was necessary (126 Ga. 681, 55 S. E. 922, 8 Ann. Cas. 130), that since the contract was executory, the question whether the course in shorthand would have been such a necessary thing as to charge the plaintiff with liability therefor if she had taken it was not in the case. E. M. S.

neering." The subscription paper was forwarded by the division superintendent to the Scranton office, where it was accepted on the 6th of August, and a counterpart of the contract sent to the defendant by mail. He paid \$5 down to one White, the solicitor and representative, who gave him a receipt for that amount "on account of scholarship as per written contract." The receipt was on a printed form furnished by the plaintiff, and was signed "International Text-book Company, Proprietors of the International Correspondence Schools, Elmer H. La Wall, Treasurer, by J. A. White, Representative," all of which was printed except the signature of White. According to the contract embodied in the subscription paper, the defendant was to pay \$5 each month until the sum of \$75.20 in all was paid. On August 6, 1906, he paid \$5 more to the division superintendent to apply on the price of such scholarship. By the terms of the contract \$5 became due and payable on October 8, 1906, and that amount was paid to said superintendent on December 5, 1906. The further sum of \$5 became due and payable on November 8, 1906, but it was not paid, and, no further payment having been made by the defendant, the plaintiff elected to treat the entire balance as due and payable as permitted by the contract. The defendant became twenty-one years of age on the 20th of August, 1906, although in the subscription paper signed by him on the second day of that month his age is stated as twenty-one. After default in payment, upon demand of the plaintiff, the defendant returned the volumes loaned to him under the contract, but did not pay 15 cents for the cost of transportation as he had agreed therein. The plaintiff paid that sum, received the books, and now has them in its possession. It does not appear that the defendant received any instruction or derived any benefit from the contract after he became of age.

On the 4th of March, 1908, the plaintiff commenced this action against the defendant in the municipal court of the city of Rochester to recover a balance of \$60.35 alleged to be due under the contract. The defendant in his answer pleaded infancy, *ultra vires*, and noncompliance by plaintiff with §§ 15 and 16 of the general corporation law and § 181 of the tax law. Upon the trial no evidence was given, but the facts were stipulated substantially as stated, although in greater detail. Judgment was rendered by municipal court in favor of the defendant, dismissing the complaint, and upon appeal to the county court of Monroe county the judgment was affirmed. Upon further appeal the judgment of the county court was, in turn, affirmed by the appellate divi-

sion, one of the justices dissenting, and, leave having been duly given, the plaintiff appealed to this court.

Mr. David C. Harrington, with Messrs. Salisbury & Agate, for appellant:

Plaintiff's contract is governed by the laws of Pennsylvania.

Hyde v. Goodnow, 3 N. Y. 266; Meyer v. Supreme Lodge, K. P. 178 N. Y. 63, 64 L.R.A. 839, 70 N. E. 111; Zeltner v. Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337; New York Architectural Terra-Cotta Co. 102 App. Div. 1, 92 N. Y. Supp. 808, affirmed in 184 N. Y. 579, 77 N. E. 1192; Tallapoosa Lumber Co. v. Holbert, 5 App. Div. 559, 39 N. Y. Supp. 432; Shelby Steel Tube Co. v. Burgess Gun Co. 8 App. Div. 444, 40 N. Y. Supp. 871; Great Northern Moulding Co. v. Bonewur, 128 App. Div. 831, 113 N. Y. Supp. 60; E. T. Burrowes Co. v. Caplin, 127 App. Div. 317, 111 N. Y. Supp. 498; St. Albans Beef Co. v. Aldridge, 112 App. Div. 803, 99 N. Y. Supp. 398; Murphy Varnish Co. v. Connell, 10 Misc. 553, 32 N. Y. Supp. 492; American Broom & Brush Co. v. Adickes, 19 Misc. 36, 42 N. Y. Supp. 871; Aiken v. Haskins, 27 Misc. 629, 59 N. Y. Supp. 486; National Knitting Co. v. Bronner, 20 Misc. 125, 45 N. Y. Supp. 714.

The defense of infancy is no bar to plaintiff's recovery if a ratification of the contract by defendant after attaining his majority was shown, although supported by no new consideration.

Hodges v. Hunt, 22 Barb. 150; Taft v. Sergeant, 18 Barb. 320; Conklin v. Field, 37 How. Pr. 455; Henry v. Root, 33 N. Y. 526; Beardley v. Hotchkiss, 96 N. Y. 201; Merchants' F. Ins. Co. v. Grant, 2 Edw. Ch. 544; Parsons v. Teller, 111 App. Div. 637, 97 N. Y. Supp. 808, reversed in 188 N. Y. 318, 80 N. E. 930, 111 App. Div. 652, 97 N. Y. Supp. 808; Eagen v. Scully, 29 App. Div. 617, affirmed in 173 N. Y. 581, 65 N. E. 1116; Everson v. Carpenter, 17 Wend. 419; 22 Cyc. 603; Aldrich v. Funk, 48 Hun, 367, 1 N. Y. Supp. 541; Ihley v. Padgett, 27 S. C. 300, 3 S. E. 468; American Mortg. Co. v. Wright, 101 Ala. 658, 14 So. 399; Morse v. Wheeler, 4 Allen, 570; Anderson v. Soward, 40 Ohio St. 325, 48 Am. Rep. 687; Ring v. Jamison, 2 Mo. App. 584, affirmed in 66 Mo. 424; Bestor v. Hickey, 71 Conn. 181, 41 Atl. 555; Hatch v. Hatch, 60 Vt. 160, 13 Atl. 791; Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774; Foley v. Canada Permanent Loan & Sav. Co. 4 Ont. Rep. 38; Henry v. Root, 33 N. Y. 526; Chapin v. Shafter, 49 N. Y. 407; Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654; Darlington v. Hamilton Bank, 63 Misc. 289, 116 N. Y. Supp. 678; Harris v. Wall, 1 Exch. 122, 16 L. J. Exch. N. S. 270; Keteley's

Case, 1 Brownlow & G. 120; Keegan v. Cox, 116 Mass. 289; Little v. Duncan, 9 Rich. L. 55, 64 Am. Dec. 760; American Mortg. Co. v. Wright, 101 Ala. 658, 14 So. 399; Dewey v. Burbank, 77 N. C. 259; Hook v. Donaldson, 9 Lea, 56; Whittingham v. Murdy, 60 L. T. N. S. 956; VanOrden, v. VanOrden, 10 Johns. 30, 6 Am. Dec. 314; Kelsey v. Deyo, 3 Cow. 133; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Steven v. Lord, 84 Hun, 353, 32 N. Y. Supp. 309, affirmed in 146 N. Y. 398, 42 N. E. 543; Murdock v. Waterman, 145 N. Y. 55, 27 L.R.A. 418, 39 N. E. 829; Jefferson County Nat. Bank v. Dewey, 181 N. Y. 98, 73 N. E. 569, 197 N. Y. 14, 90 N. E. 113; Merritt v. Bissell, 84 Hun, 194, 32 N. Y. Supp. 559, reversed in 155 N. Y. 396, 50 N. E. 280; Lazarus v. Ludwig, 18 Misc. 481, 41 N. Y. Supp. 997; Graves v. Miami S. S. Co. 29 Misc. 646, 61 N. Y. Supp. 115; Brown v. Reiman, 48 App. Div. 295, 62 N. Y. Supp. 663; Kincaid v. Kincaid, 85 Hun, 141, 32 N. Y. Supp. 476, affirmed in 157 N. Y. 715, 33 N. E. 1126; O'Rourke v. Hall, 38 App. Div. 534, 56 N. Y. Supp. 471; Foley v. Mutual L. Ins. Co. 64 Hun, 63, 18 N. Y. Supp. 615; Beardsley v. Hotchkiss, 96 N. Y. 201; Ackley v. Dygert, 33 Barb. 176; Jones v. Phoenix Bank, 8 N. Y. 228; Jackson ex dem. Wallace v. Carpenter, 11 Johns. 539; Morgan v. Morgan, 1 Atk. 489; Franklin v. Thornebury, 1 Vern. 132; Higley v. Barron, 49 Mo. 103; Huth v. Carondelet Marine R. & Dock Co. 56 Mo. 202; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Keegan v. Cox, 116 Mass. 289; Bohart v. Atkinson, 14 Ohio, 228; O'Conner v. Carver, 12 Heisk. 436; Darraugh v. Blackford, 84 Va. 509, 5 S. E. 542; Philpot v. Sandwich Mfg. Co. 18 Neb. 54, 24 N. W. 428; Ihley v. Padgett, 27 S. C. 300, 3 S. E. 468; Belton v. Briggs, 4 Desauss. Eq. 465; Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654; Delano v. Blake, 11 Wend. 85, 25 Am. Dec. 617; Ottman v. Moak, 3 Sandf. Ch. 431; Rice v. Butler, 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275; Youmans v. Forsythe, 86 Hun, 370, 33 N. Y. Supp. 474; Englebert v. Pritchett, 26 L.R.A. 177, note; Fry v. Bennett, 28 N. Y. 324; Blackman v. Riley, 138 N. Y. 318, 34 N. E. 214.

The instruction for which defendant contracted will be presumed to have been suitable, and was therefore a necessary.

Gay v. Ballou, 4 Wend. 403, 21 Am. Dec. 158; Gray v. Sands, 66 App. Div. 572, 73 N. Y. Supp. 322; Murphy v. Holmes, 87 App. Div. 366, 84 N. Y. Supp. 806; Gladding v. Follett, 2 Dem. 58, affirmed in 30 Hun, 219, affirmed in 95 N. Y. 652; 22 Cyc. 593, 594, and note 58; Goodman v. Alexander, 165 N. Y. 289, 55 L.R.A. 781, 59 N. E. 145; 42 L.R.A.(N.S.).

Rice v. Butler, 25 App. Div. 388, 49 N. Y. Supp. 494, reversed in 160 N. Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 703, 55 N. E. 275; Ryan v. Boltz, 16 Jones & S. 152; Atchison v. Bruff, 50 Barb. 381.

Mr. Smith O'Brien, for respondent:

Plaintiff cannot recover, because defendant was an infant when the contract was made, and it was not ratified or made valid in any way by him after he became twenty-one years of age.

Parsons v. Teller, 188 N. Y. 326, 80 N. E. 930; Rapid Transit Land Co. v. Sanford, — Tex. Civ. App. — 24 S. W. 587; Eagan v. Scully, 29 App. Div. 617, 51 N. Y. Supp. 680; Green v. Green, 7 Hun, 494, 69 N. Y. 553, 25 Am. Rep. 233; O'Rourke v. Hall, 38 App. Div. 534, 56 N. Y. Supp. 471; Foley v. Mutual L. Ins. Co. 64 Hun, 69, 18 N. Y. Supp. 615; Walsh v. Powers, 43 N. Y. 27, 3 Am. Rep. 654.

The contract was made in the state of New York.

American Case & Register Co. v. Griswold, 143 App. Div. 807, 128 N. Y. Supp. 206.

The contract was to be performed in the state of New York, and the place of performance governs as to the law applicable to the contract.

2 Kent, Com. 460; Jewell v. Wright, 30 N. Y. 264, 86 Am. Dec. 372; Jacks v. Nichols, 5 N. Y. 178; Dickinson v. Edwards, 77 N. Y. 587, 33 Am. Rep. 671.

If the education contracted for is a necessary, it had to be pleaded and proved as such, and that the infant had no parents or guardian, or if he had that they were unable to discharge their obligation in that regard. Plaintiff failed to do this, and the point is not available to it at this time.

Gray v. Sands, 66 App. Div. 572, 73 N. Y. Supp. 322; Murphy v. Holmes, 87 App. Div. 366, 84 N. Y. Supp. 806.

Vann, J., delivered the opinion of the court:

At common law a male infant attains his majority when he becomes twenty-one years of age, and all unexecuted contracts made by him before that date, except for necessities, while not absolutely void are voidable at his election.

The contract in question was executory in form and unexecuted in fact; and, as the defendant was under age when it was made, his infancy is an absolute defense, unless an answer is found in some of the questions raised by the learned counsel for the plaintiff.

It is insisted that the contract was for necessities, and hence was binding on the defendant, although he was an infant. What are necessities depends on circumstances to



some extent, and frequently involves a question of fact. While the facts in this case were stipulated, the stipulation does not state that the contract was for necessities nor any circumstances from which that inference could be drawn as one of fact. The word "necessaries," as used in the law, is a relative term, except when applied to such things as are obviously requisite for the maintenance of existence, and depends on the social position and situation in life of the infant as well as upon his own fortune and that of his parents. What would be necessary in a legal sense for an infant with ample means of his own might not be so for one with no means at all. The question in this case depends on the circumstances and situation in life of the defendant, and they are not set forth in the stipulation, although it expressly states that it is "a full, complete, and true statement of all the facts upon which the determination of the controversy and questions in difference depends."

A proper education is a necessary, but what is a proper education depends on circumstances. A common-school education is doubtless necessary in this country, because it is essential to the transaction of business and the adequate discharge of civil and political duties. A classical or professional education, however, has been held not to come within the term. *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574. Still circumstances not found in the cases cited may exist where even such an education might properly be found a necessary as matter of fact.

Moreover, an infant living with his father or guardian, who is able and willing to furnish him with everything suitable and necessary to his position in life, cannot make a binding promise to pay even for necessities. As was said by Chancellor Walworth in a case frequently cited: "An infant is liable for necessities, suitable to his rank and condition, when he has no other means of obtaining them except by the pledge of his own personal credit. But if he is under the care of a parent or guardian, who has the means, and is willing to furnish him what is actually necessary, the infant can make no binding contract for any article whatever, without the consent of his legal protector and adviser." *Kline v. L'Amoureux*, 2 Paige, 419, 420, 22 Am. Dec. 652.

The burden was upon the plaintiff to show that what it agreed to provide for the defendant was a necessary, and it was "bound, at his peril, to inquire and ascertain the real circumstances of the" defendant, "and whether he is in a situation to

bind himself by a contract for necessities." Id. No proof on the subject was furnished. For aught that appears, the defendant resided with a parent or guardian able and anxious to give him any kind of an education that he desired, and that in defiance of parental authority he perversely took his own course to his injury and the overthrow of family discipline. In the absence of all facts relating to any of these subjects, we think that a course of instruction in "complete steam engineering," with five years within which to finish it, was not a necessary within the meaning of the law.

The plaintiff also claims that the defendant is estopped from pleading his infancy, because he represented in the subscription paper which constituted the contract that he was twenty-one years old when he signed it. This position cannot be sustained. The doctrine of estoppel is rarely if ever applied to infants. The action is on contract, not in tort. There is no suggestion of false representation or fraud in the complaint or stipulation, except that the latter sets forth that the defendant signed the subscription paper which stated his age as twenty-one years. No other representation was made. While an infant is liable for his torts, the action must rest solely on the wrong committed by him. The complaint in this action rests wholly on the written contract, which is set forth at length, and the fact that the contract contains the statement as to age, with neither allegation nor proof that it was made with intent to defraud, does not "fix the character of the action as one *ex delicto*." *Sparman v. Keim*, 83 N. Y. 245. It is well settled in this state that, in an action upon a contract made by an infant, he is not estopped from pleading his infancy by any representation as to his age made by him to induce another person to contract with him. *Studwell v. Shapter*, 54 N. Y. 249; *New York Bldg. Loan Bkg. Co. v. Fisher*, 23 App. Div. 363, 48 N. Y. Supp. 152; *Brown v. McCune*, 5 Sandf. 224. To hold otherwise would in many cases deprive infants of the protection extended to them at an age when the mind and judgment are conclusively presumed to be immature, and they need to be shielded from their own imprudence and folly. It would virtually overthrow the law upon the subject as it has existed for time out of mind.

The next claim of the plaintiff is that the defendant ratified the contract by acquiescence and by making a payment of \$5 on the contract about three and one-half months after he became of age.

We have held that "mere acquiescence for three years after arriving at age, without any affirmative act, was not a ratifica-

tion." *Green v. Green*, 69 N. Y. 553, 557, 25 Am. Rep. 233. "Mere acquiescence, however long, if short of the statutory period of limitations, is not sufficient, and that an act of confirmation, if not equally solemn with the deed, must be of such a solemn and undoubted nature, of such a clear and unequivocal character, as to establish a clear intention to confirm the deed after a full knowledge that it was voidable." *Irvine v. Irvine*, 9 Wall. 617, 627, 19 L. ed. 800, 803.

After the last payment was made, on the 5th of December, 1906, the defendant refused to pay anything more, although, as alleged in the complaint, the plaintiff demanded the monthly payments as they became due from time to time. Prior to the 22d of January, 1907, he returned the property lent him by the plaintiff under the contract, and it does not appear that he derived any benefit from the contract after he became of age, or that he retained any benefit previously derived therefrom which could be returned. The claim of ratification, therefore, rests substantially on the fact that the defendant made a payment on an unexecuted contract between three and four months after he became of age.

"The defense of infancy is established by the decision and findings of the judge, with no fact in avoidance of it." *Walsh v. Powers*, 43 N. Y. 23, 27, 3 Am. Rep. 654. There was no express finding of fact in this case, but the complaint was dismissed. No fact in avoidance is presumed to have been found, and the presumption is that the trial court found that there was no ratification. *Callanan v. Keeseville*, A. C. & L. C. R. Co. 199 N. Y. 268, 92 N. E. 747. Ratification depends on intention, and payment is merely evidence of intention. Assuming that the single payment of \$5 made a few months after the defendant became of age, when considered with such acquiescence as there was, would have supported a finding of fact that he thereby intended to ratify and did ratify the contract, there is no finding or stipulation to that effect. Payment was not ratification as matter of law. As was said by the chief judge in *Parsons v. Teller*, 188 N. Y. 318, 326, 80 N. E. 930, 933: "It is not the case of an executed contract, where failure of an infant to disaffirm within a reasonable time after becoming of age would of itself operate as a ratification. It required affirmative action by the deceased to impose the obligations of the contract upon her. The alleged ratification in this case is based on the fact that during Mrs. Smith's life she continued to make payments under the agreement. . . . The record is devoid of evidence, except the mere fact of the payments, tending to show that the deceased intended to recognize the 42 L.R.A. (N.S.)

legal obligations of the contract of 1890; and these payments, under the circumstances, we think, were insufficient for the purpose." Hence payment does not necessarily show intention to ratify. It is not like an act in the nature of a fraud, such as the acceptance of benefits after arriving at age, and then attempting to repudiate the contract. No benefit was accepted or retained by the defendant after he became twenty-one. He wrote nothing, said nothing, and did nothing which bore on the question of intention, except to make one payment, which may have been owing to his sense of honor or gratitude on account of the instruction received while under age. As was said by Chief Justice Nelson in *Millard v. Hewlett*, 19 Wend. 301, 302: "The contract urged upon him was never obligatory, or operative, as it has always been in his power to admit or reject it. It was not absolutely void, because he had the option to enforce it against the defendant; but it never was binding upon himself, as the defendant could at no time have enforced it against him. In confirmation of this view, we may refer to the doctrine that requires an express promise, after full age, to bind the infant in respect to a voidable contract to pay a debt entered into before; a full acknowledgment or promise to pay, or even actual payment of part, will not render him liable to pay the whole debt." After citing authorities the learned judge continued: "The reason is that no legal liability or ground of action, capable of being enforced in a court of law, existed previously to the promise."

So it is said in 2 Page on Contracts, 1372: "By the weight of authority the rule in ratification of an infant's contracts, different from that in waiving the statute of limitations, is that a mere acknowledgment that the obligation has been incurred, or even a part payment thereon, is not a ratification. Even payment of interest, part payment of principal, and a mere acknowledgment of the debt, or a statement, 'I owe a debt, and you will get your pay,' was held not to be a ratification." Mr. Greenleaf says: "An explicit acknowledgment of indebtedment, whether in terms or by a partial payment, is not alone sufficient, for he may refuse to pay a debt which he admits to be due." 2 Greenl. Ev. 16th ed. § 367. Many authorities are cited by the learned authors in support of this proposition.

The burden of proving ratification rests on the one claiming under a voidable contract of an infant. In this case some evidence was produced on the subject, but it was not conclusive.

The trial court did not expressly find that there was a ratification, and did im-

pliedly find that there was no ratification. This is conclusive upon us; for we cannot find a fact even if we think the trial court should have found it.

Finally, the plaintiff claims that the contract was not made in this state, but in the state of Pennsylvania, and that there is no evidence that infancy is a good defense in that state. We think that the facts stated show that the contract wherever made was to be performed by both parties substantially in this state, and that it should be governed by its laws. Our courts will not enforce the contract of an infant against him, even if technically it was completed by acceptance in another state, when his promise was not only made here, but entire performance by one party and substantial performance by the other was to be made here. Otherwise it would be easy to deprive an infant of the protection which our law affords him on grounds of public policy.

Moreover, even if it were a Pennsylvania contract and its laws were to govern as to capacity to contract (*Union Nat. Bank v. Chapman*, 169 N. Y. 538, 545, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672), the presumption is that the common law of that state is the same as our own. There is no such presumption as to the statutes of a sister state, for they must be proved under proper allegations before the courts can take cognizance of them. The laws of foreign nations, with the exception of England prior to our independence, are facts to be alleged and proved. The same is true of the statutory law of the various states of the Union other than our own. In the absence of proof on the subject, however, the common law is presumed to prevail in all the states in which it is the foundation of their jurisprudence, such as New York and Pennsylvania, but not including those states which inherited or adopted the civil law, such as Louisiana. Our courts will, therefore, presume that the common law of a sister state originally colonized from England or formed from territory ceded by England is the same as our own, in the absence of evidence to the contrary. While this rule may not obtain in all the states having the common law of England as the basis of its system, it prevails in the most of them, and is the well-settled law of this state. *Southworth v. Morgan*, 205 N. Y. 293, 296, — L.R.A. (N.S.) —, 98 N. E. 490; *Robb v. Washington & J. College*, 185 N. Y. 485, 496, 78 N. E. 359; *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459, 472, 42 L.R.A. 139, 51 N. E. 398; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 331, 33 Am. Rep. 618; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182, 191; *Savage v. O'Neil*, 44 N. Y. 298, 301; *Ruse v. Mutual Ben. L. Ins. Co.* 23 42 L.R.A. (N.S.)

N. Y. 516, 522; *Sherrill v. Hopkins*, 1 Cow. 103, 109; *Holmes v. Broughton*, 10 Wend. 75, 79, 25 Am. Dec. 536; *Abell v. Douglass*, 4 Denio, 305, 309; *Starr v. Peck*, 1 Hill, 270; *Stokes v. Macken*, 62 Barb. 145, 149; *White v. Knapp*, 47 Barb. 549, 554; *Throop v. Hatch*, 3 Abb. Pr. 23; *Holmes v. Mallett*, *Morris* (Iowa) 82; *Legg v. Legg*, 8 Mass. 99; 1 Elliott, Ev. § 46; *Lawson*, *Presumptive Ev.* 358; 1 Am. & Eng. Enc. Law, 2d ed. 282.

As no fact was found or conclusively proved to avoid the effect of infancy, which was pleaded by the defendant and admitted by the plaintiff, the complaint was properly dismissed, and it is unnecessary to consider the other defenses relied upon by the defendant.

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Haight, Werner, Willard Bartlett, and Chase, JJ., concur. Gray, J., absent.

#### UNITED STATES SUPREME COURT.

J. E. EUBANK, Plff. in Err.,  
v.

CITY OF RICHMOND.

(226 U. S. 137, 57 L. ed. —, 33 Sup. Ct. Rep. 76.)

#### Constitutional law — establishment of building line.

An unconstitutional infringement of the guaranties of U. S. Const. 14th Amend., which cannot be upheld as an exercise of the police power, results from a municipal ordinance passed under the authority of Va. Laws 1908, p. 623, which requires the com-

#### Note. — Power to establish building line.

The decision in *EUBANK v. RICHMOND* is sustained by the few cases in the state court in which the point has been passed upon. Thus, in *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861, a statute authorizing in certain cities a building line, between which and the street line the owner of the property might not build, and an ordinance attempting to make provision for such a building line, were held unconstitutional, because no provision was made for compensation to the owner of the property, and further because there was no provision for condemnation proceedings or for notice to the owners of the property. In arriving at a conclusion the court said: "The day before the ordinance went into operation, defendant had the unquestionable right to build at will on his lot; the day afterwards, he was as effectually prevented from building on the 40-foot strip, except under peril of punishment, as if the city had built a

mittee on streets, upon request of the owners of two thirds of the abutting property, to establish a building line on the side of the square on which such property abuts, not less than 5 nor more than 30 feet from the street line.

(December 2, 1912.)

**E**RROR to the Supreme Court of Appeals of Virginia to review a judgment which affirmed a judgment of the Hustings Court of the City of Richmond affirming a judgment of the Police Justice imposing a fine for an alleged violation of a municipal ordinance establishing a building line. Reversed.

The facts are stated in the opinion.

wall around it, and this too without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

So, a statute which provided that on certain streets the owners of the abutting property might not erect any building, with certain exceptions as to porches, statuary, etc., nearer to the street line than a certain number of feet, but which made no provision for compensation to the owners, was held unconstitutional in *People ex rel. Dilzer v. Calder*, 89 App. Div. 503, 85 N. Y. Supp. 1015, wherein a writ of mandamus was granted to compel the issuance of certain building permits.

And in *1 Lewis*, on Eminent Domain, 3d ed. § 227, in considering an attempt by a statute or ordinance to establish a building line on a street, by which property owners thereon would be prohibited from building nearer to the street than the line, it is said: "Such a law deprives the owner of the lawful use of his property, and amounts to a taking thereof within the meaning of the Constitution, and, consequently, can only be carried out by making provision for the compensation of the owner." Citing *St. Louis v. Hill*, supra. A similar view is set out in 2 *Dillon*, on Municipal Corporation, § 695, which, citing the same case, says: "Thus, the legislature cannot, for the purpose of promoting the beauty of park ways or boulevards, authorize a city to establish by ordinance a building line within the limits of private property, to which all buildings must conform, without complying with the constitutional requirements as to making compensation for property taken."

In *State ex rel. Berger v. Hurley*, 73 Conn. 536, 48 Atl. 215, an application for a writ of mandamus to require the issuance of a building permit, the court advised the lower court, where a building line had been established by the common council and the interested owners had acquiesced therein for a period of ten years or more, that the right

**Mr. S. S. P. Patteson**, for plaintiff in error:

The establishment of a building line on residential private property, without compensation to the owner, is unlawful.

*Lewis*, Em. Dom. 2d ed. p. 433, § 227; *Chicago v. Pittsburg*, C. C. & St. L. R. Co. 244 Ill. 220, 135 Am. St. Rep. 316, 91 N. E. 422; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101; *May v. Craig*, 13 Cal. App. 368, 109 Pac. 842; *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861; *People ex rel. Dilzer v. Calder*, 89 App. Div. 503, 85 N. Y. Supp. 1017; *Byrnes v. Riverton*, 64 N. J. L. 210, 44 Atl. 857; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A.(N.S.) 1004, 94 N. E. 920.

of one to build without the line was a subject of grave doubt, the lapse of time furnishing a presumption in favor of the validity of the proceedings; and that a writ of mandamus should not be granted since a clear legal right to the building permit, as requested, was not shown, and the validity of the proceedings could not be controlled by mandamus.

But in the later case of *Northrop v. Wat-erbury*, 81 Conn. 305, 70 Atl. 1024, the court advised that a record owner of property who had received no notice of proceedings by the city to establish a building line, or of the proceedings to assess compensation to the affected property owners, was not limited by the line, and might maintain a suit to remove the cloud of the records of the proceedings establishing the building line from the title to the property, many years thereafter, even though the building line had been respected by all other property owners.

The holding in *Byrnes v. Riverton*, 64 N. J. L. 210, 44 Atl. 857, was merely to the effect that an ordinance attempting to establish a building line was void where no notice, actual or constructive, was given to the landowners affected thereby, and voidable for certain informalities in its adoption. The court expressly passed the question whether it was competent for the legislature to restrict a lot owner within a building line, without providing for his compensation.

Cases like *Re Perry's Court*, 10 Phila. 27, in which the question is considered as to the right to require property owners to recede from the street line under some conditions, for the purpose of widening a street or court, for which compensation is rendered the owner relinquishing property, are not included in this note; neither are those cases relating to the right to regulate the line to which projections may extend upon the sidewalk space.

In general, for cases involving the exercise of police power for esthetic purposes, see note to *Haller Sign Works v. Physical Culture Training School*, 34 L.R.A.(N.S.) 998.

R. S. N.

Mr. H. R. Pollard, for defendant in error:

Under proper grant of power, ordinances may establish, on certain streets, building lines, and provide that a certain class or character of buildings shall be erected in such district.

McQuillin, Mun. Ord. § 32; 29 Cyc. 859.

The failure of the statute to make provision for compensation to the lot owner on account of depriving him of the right to occupy his entire lot with buildings does not invalidate the act.

Watertown v. Mayo, 109 Mass. 318, 12 Am. Rep. 694.

Mr. Justice McKenna delivered the opinion of the court:

In error to review a judgment of the hustings court of the city of Richmond, affirming a judgment of the police court of the city, imposing a fine of \$25 on plaintiff in error for alleged violation of an ordinance of the city fixing a building line. The judgment was affirmed by the supreme court of the state. 110 Va. 749, 67 S. E. 376, 19 Ann. Cas. 186.

Plaintiff in error attacks the validity of the ordinance and the statute under which it was enacted on the ground that they infringe the Constitution of the United States, in that they deprive plaintiff in error of his property without due process of law, and deny him the equal protection of the laws.

The statute authorized the councils of cities and towns, among other things, "to make regulations concerning the building of houses in the city or town, and in their discretion, . . . in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings and to regulate the height of buildings." Acts of 1908, p. 623, 4.

By virtue of this act the city council passed the following ordinance: "That whenever the owners of two thirds of property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than 5 feet nor more than 30 feet from the street line. . . . And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line." 42 L.R.A. (N.S.)

A fine of not less than \$25 nor more than \$500 is prescribed for a violation of the ordinance.

The facts are as follows: Plaintiff in error is the owner of a lot 33 feet wide on the south side of Grace street, between Twenty-eight and Twenty-ninth streets. He applied for and received a permit on the 19th of December, 1908, to build a detached brick building to be used for a dwelling, according to certain plans and specifications which had been approved by the building inspector, dimensions of the building to be 26x59x28 feet high.

On the 9th of January, 1909, the street committee being in session, two thirds of the property owners on the side of the square where plaintiff in error's lot is situated, petitioned for the establishment of a building line, and in accordance with the petition a resolution was passed establishing a building line on the line of a majority of the houses then erected, and the building inspector ordered to be notified. This was done, and plaintiff in error given notice that the line established was "about fourteen (14) feet from the true line of the street, and on a line with the majority of the houses." He was notified further that all portions of his house, "including Octagon bay, must be set back to conform to" that line. Plaintiff in error appealed to the board of public safety, which sustained the building inspector.

At the time the ordinance was passed, the material for the construction of the house had been assembled, but no actual construction work had been done. The building conformed to the line, with the exception of the octagon bay window referred to above, which projected about 3 feet over the line.

The supreme court of the state sustained the statute, saying that it was neither "unreasonable nor unusual," and that the court was "justified in concluding that it was passed by the legislature in good faith and in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or, at least, some, of these objects." The court further said that the validity of such legislation is generally recognized and upheld as an exercise of the police power.

Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of

circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." *District of Columbia v. Brooke*, 214 U. S. 138, 149, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560. But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitution. *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487. The point where particular interests or principles balance "cannot be determined by any general formula in advance." *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

But in all the cases there is the constant admonition, both in their rule and examples, that when a statute is assailed as offending against the higher guaranties of the Constitution, it must clearly do so to justify the courts in declaring it invalid. This condition is urged by defendant in error, and attentive to it we approach the consideration of the ordinance.

It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is

to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line, between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence,—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a *number* having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

The case requires no further comment. We need not consider the power of a city to establish a building line or regulate the structure or height of buildings. The cases which are cited are not apposite to the present case. The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain. Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

## ILLINOIS SUPREME COURT.

MARY E. BELL

v.

- ULYSSES C. NYE, Appt.

(255 Ill. 283, 99 N. E. 610.)

**Election — separate property and interest under will — interest equal to dower.**

1. A widow is not required to elect between her right to her separate property and the provisions of a will which give her certain property in lieu of dower, including property belonging to her individually, if the property given does not exceed her dower interest, so that her renunciation of the will will not create a fund to compensate those whose rights under the will would be defeated by the election.

**Estoppel — inventory of estate — misstating title.**

2. One who purchases an interest in an estate without examining the records cannot hold the owner's widow estopped to assert her title to a parcel of the property,

*Note. — Wills: necessity of electing between claiming own property which the will attempts to dispose of, and a legacy or devise in lieu of dower or other fixed right.*

The general rule is that "election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both," the principle, in will cases, "being that one shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the will" (40 Cyc. 1959).

This rule, however, does not seem applicable to the class of cases under discussion herein. In the first place, where the provision is in lieu of dower or other fixed right, and does not give an excessive amount, the beneficiary takes not as a beneficiary under the will of a bounty, but as a purchaser. In other words, a legacy in lieu of dower or other fixed rights differs materially from an ordinary legacy springing out of the bounty of the testator, which is classed as a voluntary gift, in that a legacy in lieu of dower or other fixed right is a payment by the estate of the testator to discharge a lien upon his property. Again, where the legacy or devise in lieu of a fixed right or estate of the legatee or devisee is not valued in excess of property belonging to the devisee or legatee, an attempt to convey which has been made by the testator, renunciation of the will would not create a fund for other legatees, the general rule of election being that if the legatee choose to enforce his proprietary rights 42 L.R.A. (N.S.)

by the fact that she attempted to inventory it as belonging to the estate, if she refers to the source of title which the records would show placed the title in her.

(October 26, 1912.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Ogle County sustaining exceptions to the report of a master in Chancery in defendant's favor, recommending dismissal of the bill filed to quiet title to certain land and to remove as a cloud thereon a deed from defendant's mother to him. Reversed.

The facts are stated in the opinion.

Mr. Frank E. Reed, for appellant:

The effect of the failure of the widow to make renunciation is merely to bar her dower and distributive share in her husband's estate as widow, and nothing more.

Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040; Carder v. Fayette County, 16 Ohio St. 366; Sutton v. Read, 176 Ill. 69, 51 N. E. 801.

against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the operation of his rights (see 1 Jarman, Wills, p. 450), since the former would be entitled to the amount of the legacy or devise as owner of property of that value. From these premises it follows that the doctrine of equitable election does not require an election between a devise or legacy made in lieu of a fixed right,—assuming, of course, that it is not materially in excess of that right,—and the right to property belonging to the devisee or legatee which the will attempts to dispose of, or, in other words, election between taking under the will and relinquishing the title to one's own property, since the elements essential to the application of the doctrine, namely, inconsistent or alternative rights and detriment to other legatees by allowing the first legatee to enjoy dual rights, are not found in the question under discussion.

Very few cases, however, have directly involved the question stated in the title, but those that do in the main support the above contention.

Thus, in Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040, where testator bequeathed certain property, including lands owned by his wife in her own right, to her in lieu of dower, and by the devise she took nothing in excess of her dower, it was held that she took as a purchaser, and not as a beneficiary under the will, within the rule of the doctrine of election (quoted in BELL v. NYE), and therefore that she was not put to an election, so that failure to renounce the benefits conferred upon her by the will within the statutory period did not prevent the heirs of her devisee setting up title to her individual property, which the will had attempted to convey to her in lieu of dower.

The doctrine of election is equitable in its nature. No election is required unless the testator confers a benefit upon the devisee, and by the terms of the will assumes to dispose of some right of the latter.

Moore v. Baker, 4 Ind. App. 115, 51 Am. St. Rep. 102, 30 N. E. 629; Sorenson v. Carey, 96 Minn. 202, 104 N. W. 958; Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040; Kidder v. Douglas, 194 Ill. 388, 62 N. E. 911.

Where a provision made by the will of a testator for his widow is not in excess of what she would be entitled to under the law without a will, such provision is presumed to be made in lieu of dower, and such widow is not a beneficiary under the will, within the meaning of the rule.

Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040.

Plaintiff is in no position to claim an estoppel, because when she purchased of her sister, she made no examination of the record to ascertain the condition of the title, and was not influenced in making such purchase by anything said or done by her mother.

And see *Landers v. Landers*, 151 Ky. 206, 151 S. W. 386, wherein it was held that a widow, in asserting her interest in property which her deceased husband had attempted to dispose of by will, but in which he had no devisable estate, was not claiming in opposition to the will, so as to require her to elect between such interest and a devise from her husband.

And see *Haack v. Weicken*, 118 N. Y. 67, 23 N. E. 133, reversing 42 Hun, 486, wherein it was held that acceptance by a widow of a provision in her husband's will made "in lieu of dower" does not estop her, as against residuary legatees to whom he had devised "all the rest, residue, and remainder of my estate," from asserting title to her undivided half of property which he held in his name, the ground of the decision being that the residue of "my estate" did not dispose of the widow's "half interest" held by the testator. In the lower court the decision was upon the ground that the acceptance of the provision in the will constituted an election which estopped the widow from setting up title to her individual property, which the court held to have passed by the residuary clause. In this connection the court of appeals said: "If the conclusion of the trial court is correct, a very different result will be reached, for, under that view, the plaintiff, his widow, will be left without any substantial provisions made for her support and maintenance out of his estate. The real estate devised to her was encumbered by a mortgage for \$5,000. . . . If the real estate in question was worth \$25,000 at the time of his death, as claimed by the respondents, her half, which was taken from her by her husband, was worth \$12,500. The provisions of the will, therefore, but barely pay her for that which was 42 L.R.A. (N.S.)

*Campbell v. Jacobson*, 145 Ill. 389, 34 N. E. 39; *Vail v. Northwestern Mut. L. Ins. Co.* 192 Ill. 567, 61 N. E. 651; *Dickerson v. Evans*, 84 Ill. 455; *Moore v. Hunter*, 6 Ill. 317; *Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031; *Boone v. Graham*, 215 Ill. 514, 74 N. E. 559; *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305.

Mr. J. C. Seyster, for appellee: .

If, after qualifying under an appointment as executrix in her husband's will, the widow acts as such, and does acts inconsistent with her claim of dower, she is regarded as having elected to take under the will.

2 Am. & Eng. Enc. Law, 103; *Mendenhall v. Mendenhall*, 53 N. C. (8 Jones, L.) 287; *Syme v. Badger*, 92 N. C. 706; *Yorkly v. Stinson*, 97 N. C. 236, 1 S. E. 452.

Acting as executor under a will, and receiving the bequest or devise given by the will, show an election.

*Allen v. Boomer*, 82 Wis. 364, 52 N. W. 426; *Craig v. Conover*, 80 Iowa, 355, 45 N. W. 892; *Cox v. Rogers*, 77 Pa. 160; *Beem v. Kimberly*, 72 Wis. 365, 39 N. W. 542; *English v. English*, 3 N. J. Eq. 509, 29 Am.

her own, and at most, leave her but \$500, which she gets in lieu of dower, for her support and maintenance; and this out of an estate left by her husband of upwards of \$36,000, aside from her half of the real estate."

But see *Fytche v. Fytche*, L. R. 7 Eq. 494, 19 L. T. N. S. 343, wherein it was held that an election whether to take under or against the will should be made where the testator had bequeathed certain property, including certain navigation shares owned by his widow, and an annuity, in lieu of dower, and the widow died intestate leaving heirs, it being said that, should an heir elect to take against the will, he must account for the benefits received under the will by the widow during her lifetime.

In some jurisdictions statutes have been enacted which would seem to affect the question herein under discussion. For example, see *Lamar v. McLaren*, 107 Ga. 591, 34 S. E. 116, which construes Georgia Civil Code, § 4013, which provided that "when a testator has affected to give property not his own, and has given a benefit to a person to whom that property belongs, the devisee or legatee must elect either to take under or against the instrument. The rule does not apply if the . . . testator has an interest in such property upon which the will may operate," etc.

As to when a beneficiary will be deemed to have elected to take under a will assuming to dispose of his property, see note to *Hoggard v. Jordan*, 4 L.R.A. (N.S.) 1065.

As to devise or bequest of property in which testator had but a part interest as putting co-owner, who is a beneficiary, to his election, see note to *Waggoner v. Waggoner*, 30 L.R.A. (N.S.) 644. G. J. C.



Dec. 730; *Reaves v. Garrett*, 34 Ala. 558; *Churchill v. Bee*, 66 Ga. 621; *Scholl's Appeal*, 1 Monaghan (Pa.) 572, 17 Atl. 206; *Coe's Appeal*, 64 Conn. 352, 30 Atl. 140; *Kidder v. Douglas*, 194 Ill. 388, 62 N. E. 911; *Clark v. Hershy*, 52 Ark. 473, 12 S. W. 1077.

If one, by representation, or by maintaining silence under circumstances when he ought to speak, induces or allows another to deal with property of his own, or purchase the same, he is estopped from claiming it.

2 Pom. Eq. Jur. §§ 818, 821.

Cooke, J., delivered the opinion of the court:

Michael Stonebraker died testate in 1859, leaving his wife, Catherine Stonebraker, and his six children, surviving him. He died seised of 709.78 acres of land in Ogle county and a considerable amount of personal property. He resided upon one tract of this land, containing 160 acres, and occupied it as his homestead at the time of his death. Adjoining this tract, and constituting a part of what was known as the home farm, were 80 acres belonging to his wife, Catherine Stonebraker, which had been devised to her by her father. Under the law as it existed at that time, he held an estate by the curtesy in this 80-acre tract. The first clause of the will of Michael Stonebraker is as follows:

"First. I give and bequeath to my wife, Catherine Stonebraker, the home farm on which we now reside, during her natural life, described as follows: [Describing 240 acres, including the 80 acres owned by Catherine Stonebraker], and also \$3,000 in money, and personal property to be selected by her as she may wish, and paid to her by the executors of this will and to be accepted and received by her in lieu of dower, and after her death to be equally divided between my heirs, share and share alike, to my children, each to have an equal share of the whole amount."

The will appointed his wife and his brother as executors. They qualified, administered upon the estate, and were finally discharged. Appraisers fixed the amount of the widow's award at \$692, which she waived, and did not accept. She did not renounce the will, but she continued to live in the homestead and remained in possession of that tract, together with the 80 acres adjoining, until the time of her death in 1910. About a year after the death of Michael Stonebraker, the widow, Catherine, married John Nye, and appellant, Ulysses C. Nye, is a child of this union. The children of Michael Stonebraker always treated the whole of the 240 acres constituting the

home farm as a part of the lands which had been devised to them. As the result of various conveyances among them, the undivided one sixth of the 240 acres was conveyed to Mary E. Bell, the appellee, and one of the children, and the undivided two thirds thereof to her husband. In 1909, about one year before her death, Catherine Nye conveyed the 80 acres which had been devised to her by her father to her son, Ulysses C. Nye. Upon her death, in the following year, this bill was filed in the circuit court of Ogle county by Mary E. Bell and her husband to quiet the title to the 80-acre tract, and to remove as a cloud thereon the deed from Mrs. Nye to appellant. During the progress of the cause, Thomas J. Bell, the husband of appellee, died testate, devising all of his property to appellee. The suit thereafter proceeded in her name, as sole complainant. The master found the issues for appellant and reported, recommending that the bill be dismissed for want of equity. The court sustained exceptions to the master's report, and decreed that appellee is seised in fee simple of said land, and that appellant has no right, title, or interest in the same. From that decree this appeal has been perfected.

The first question presented for our consideration by this record is whether the widow of Michael Stonebraker was required to elect, in equity, between taking under the will of her husband and relinquishing the title to her own land. In the view we take, the determination of this question will dispose of the whole case.

Appellant urges, among other reasons, that the doctrine of equitable election does not apply, because it does not appear from the will that it was the clear and unmistakable intention of the testator to dispose of the lands belonging to his widow. There is some basis for this contention; but, as we are of the opinion that the doctrine of election does not apply in this case in any event, we will treat the will as though the intention of the testator to devise the widow's lands was clearly expressed.

In *Carper v. Crowl*, 149 Ill. 465, 36 N. E. 1040, was presented a question very similar to the one now before us. In that case, after a somewhat exhaustive discussion of the authorities on the question when the doctrine of election, as administered by courts of equity, will be applied, we deduced the following rule: "It would therefore seem indispensable to the application of the doctrine of election that there be, first, a plurality of gifts, or two inconsistent or alternative rights or claims in property devised, the choice of one by the devisee being intended to exclude him from the benefit of the other; and, second, in case the proper-

ty of the devisee is disposed of by the will, and he chooses to assert his right to such property against the will, that there be a fund for his benefit given by the will, which can be laid hold of to compensate the parties whose right to take under the will is defeated by the election." Applying this rule to this case, it must be apparent that no equitable election was required on the part of the widow. The devise to the widow was made upon the express condition that it be accepted in lieu of dower. From the evidence it appears that the testator devised to the widow approximately the actual value of her dower and other statutory rights in his estate. The master found that she took under the will slightly less than the would have received under the statute, had she renounced, and we perceive no error in his computation. The devise to her was not such a fund for her benefit as could be laid hold of to compensate the other devisees, as she was entitled to that proportion of the estate whether her husband died testate or intestate.

The question of equitable election involved in *Carper v. Crowl*, supra, is so nearly identical with the question here, that what was said in that case is clearly applicable here. We there said: "It is apparent from this record that under the will the widow was not a beneficiary of any fund out of which compensation could be made. By the will the support of the daughter, Maria A. Crowl, and a legacy of \$3,000 for her benefit, were made a charge upon the 'homestead' devised to the wife for life. By law the widow was entitled to dower in the whole of the 766½ acres of land of which her husband died seised. It is shown, as we think, that the land of the husband devised to her for life was not an average one third of the land owned by the testator, so that it is clear that by the devise of the land she took nothing in excess of her dower. Again, it seems clear from the evidence that, excluding the widow's award, as must be done, she received under the will less than one third of the personal estate after the payment of debts, which amount she would have been entitled to under the statute. Gross's Stat. 1869, chap. 34. The provision made by the will was therefore in lieu of, and not in excess of, her rights in her husband's estate as widow, and she took the same, not as a beneficiary under the will, but as a purchaser. In *Blatchford v. Newberry*, 99 Ill. 62, we said: 'A provision by will in lieu of dower is, in fact and legal effect, a mere offer by the testator to purchase out the dower interest for the benefit of his estate.' In *Isenhardt v. Brown*, 1 Edw. Ch. 413, the court, in speaking of a devise in lieu of dower said: 'It is the price put 42 L. R. A. (N.S.)

by the testator himself upon the right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower, which he proposes to extinguish, and if she agrees to the terms she relinquishes it and is entitled to the price. It is therefore a matter of contract of convention between them, and what she thus becomes entitled to receive is not by way of bounty, like other general bequests, but as purchase money for what she relinquishes.' See 2 *Scribner, Dower*, 469; *Fitts v. Cook*, 5 Cush. 596; *Carder v. Fayette County*, 16 Ohio St. 366."

Appellee insists that the acts and declarations of her mother, Mrs. Nye, or her silence when it was her duty to speak, will estop her and her assigns from claiming this land, and particularly the five sixths part thereof which, it is claimed, appellee acquired as an innocent purchaser for value. One of the grounds urged for such estoppel is that Mrs. Nye and her coexecutor attempted to inventory her land as the property of the testator. A certain 80 acres were inventoried by the executors as the property of the testator, and as having been willed to him by James Coffman, the father of Mrs. Nye. The land was misdescribed if it was meant to refer to this tract, and no one can tell with certainty whether it was intended to inventory this particular tract. An examination of the Coffman will would disclose the fact that the land here involved was devised to the daughter, and not to her husband; and this statement of the source of the title afforded notice which it would be the duty of anyone dealing with the land to follow up. Nothing is disclosed by the evidence which would estop Catherine Nye from claiming title to this land. She was in possession of it from the time of the death of Michael Stonebraker until she conveyed it to appellant. It is not shown that appellee or her husband were ever deceived by Mrs. Nye as to the condition of the title. It appears from the evidence that when appellee purchased the one-sixth interest in this land from her sister, she made no examination of the record to ascertain the condition of the title, and was not influenced by anything said or done by her mother. The husband of appellee also apparently purchased the interests acquired by him without making any examination of the records. Appellee does not occupy the position of an innocent purchaser, but is chargeable with all that an examination of

the records would have disclosed as to the condition of the title to this land.

The only election made by Mrs. Nye, and the only one required of her, was the election required by the statute. Her title to the 80 acres in question was not affected by her acceptance of the provisions made for her in the will. That title remained in her to the same extent as if she had formally renounced the provisions of the will for her benefit; and by her deed, it passed to appellant.

The decree of the Circuit Court is reversed and the cause remanded, with directions to dismiss the bill for want of equity.

#### NEW YORK COURT OF APPEALS.

GEORGE M. HARD, Resp't.,

v.

ROSA MINGLE, Exrx., etc., of Sampson Q. Mingle, Deceased, Appt.

(206 N. Y. 179, 99 N. E. 542.)

**Limitation of action — claim against surety — action by cosurety.**

1. The liability of a surety to contribute towards the amount paid by his cosurety is not barred by the running in his favor of the limitation period against the claim in the hands of the payee, if the cosurety subsequently pays the claim before it is barred in his favor.

**Principal and surety — failure to prosecute surety's estate — effect on claim against cosurety.**

2. The holder of a note does not impair its right to recover the amount from a surety by failure to prosecute it against the estate of a deceased cosurety until it is barred in favor of such estate by the limitation period.

(October 1, 1912.)

*Note. — When does statute of limitations commence to run to bar an action by a surety against a cosurety for contribution.*

The question has previously been treated in a note to *Mentzer v. Burlingame*, 18 L.R.A.(N.S.) 585.

In *Burrus v. Cook*, 215 Mo. 496, 114 S. W. 1065 (adopting the dissenting opinion of Ellison, J., of the Kansas City court of appeals, 117 Mo. App. 399, 93 S. W. 888), the court took the view that the statute commenced to run against a suit for contribution by a surety who had paid a judgment recovered by the creditor against himself and his cosurety, at the time of the payment of the judgment, and not at the time of its recovery. The question in this case, however, was whether the suit for contribution, which proceeded upon the theory that complainant was an equitable subrogee of the judgment, was governed by the five years' statute of limitations applicable to recovery of payment, or the twenty years' statute applicable to the enforcement of judgments; the decision being to the effect that the five years' statute governed, and that the suit, not having been brought within that time after the payment of the judgment, was barred.

**A** PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Trial Term, Part II., for New York County, in defendant's favor in an action brought to compel contribution towards an amount paid upon a guaranty of a note. Affirmed.

The facts are stated in the opinion.

Messrs. W. H. Van Benschoten and Charles H. Edwards, with Messrs. Bowlers & Sands, for appellant:

The fundamental and essential requisite to the right of contribution is that the party seeking contribution has discharged some debt or obligation which the one from whom he seeks contribution was equally bound with him to discharge, and that he has removed a common burden from both of them.

7 Am. & Eng. Enc. Law, 326; *Aspinwall v. Sacchi*, 57 N. Y. 335; *Lee v. Larkin*, 125 App. Div. 304, 109 N. Y. Supp. 480; *Wells v. Miller*, 66 N. Y. 258; 9 Cyc. 794; *Lowndes v. Pinckney*, 1 Rich. Eq. 155; *Blanchard v. Blanchard*, 201 N. Y. 134, 37 L.R.A.(N.S.) 783, 94 N. E. 630.

By the failure and neglect of the bank to commence an action against the estate of Mingle on the claim, within six months after the rejection of the claim, the bank not only lost its remedy, but the claim was extinguished, and that estate was absolutely discharged from all obligation and liability as to such claim.

*Flynn v. Diefendorf*, 51 Hun, 197, 4 N. Y. Supp. 934; *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643; *Re Kendrick*, 107 N. Y. 108, 13 N. E. 762; *Schutz v. Morette*, 146 N. Y. 143, 40 N. E. 780; *Thompson v. Hoxsie*, 25 R. I. 377, 55 Atl. 930.

The plaintiff when he paid the note on October 20, 1906, did not discharge a debt or obligation which the estate of Mingle or the defendant was either legally or morally

tributed, which proceeded upon the theory that complainant was an equitable subrogee of the judgment, was governed by the five years' statute of limitations applicable to recovery of payment, or the twenty years' statute applicable to the enforcement of judgments; the decision being to the effect that the five years' statute governed, and that the suit, not having been brought within that time after the payment of the judgment, was barred.

And in *Hinshaw v. Warren*, — Mo. App. —, 151 S. W. 497, under a law that actions for contributions of judgments should be brought within five years or be barred, in a case of a surety's demand against his deceased cosurety's estate the period was considered as having run from the day such surety had paid the judgment on the debt.

E. K. M.

bound to discharge, and did not in any way remove any burden resting upon defendant or her testator's estate, and hence there is no basis for a claim of contribution.

*Tobias v. Rogers*, 13 N. Y. 59; *Waggoner v. Walrath*, 24 Hun, 443, 92 N. Y. 630; *Staples v. Gokey*, 34 Hun, 289; *Screven v. Joyner*, 1 Hill, Eq. 252, 26 Am. Dec. 199; *Shelton v. Farmer*, 9 Bush, 314; *Cochran v. Walker*, 82 Ky. 220, 56 Am. Rep. 891; *Glasscock v. Hamilton*, 62 Tex. 143; *Horbach v. Elder*, 18 Pa. 33; *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123.

The plaintiff was not liable to the bank for the full amount of the debt.

*Story*, Eq. Jur. 13th ed. § 326, and note; *Waggoner v. Walrath*, 24 Hun, 443; *Benedict v. Rea*, 35 Hun, 34; *Morgan v. Smith*, 70 N. Y. 537; *Staples v. Gokey*, 34 Hun, 289.

Even if the plaintiff had been liable to the bank for the full amount of the debt when he paid it, the right of contribution would not exist.

*Staples v. Gokey*, 34 Hun, 289; *Tobias v. Rogers*, 13 N. Y. 59; *Waggoner v. Walrath*, 24 Hun, 447.

Messrs. Steele, Otis, & Hall, for respondent.

The plaintiff having been liable to the bank for the full amount of the debt, and having paid the bank the full amount thereof, thereupon acquired a right to contribution from the defendant, although the bank's remedy against the latter was at the time of payment barred by limitation.

*Blanchard v. Blanchard*, 201 N. Y. 134, 37 L.R.A.(N.S.) 783, 94 N. E. 630; *Benedict v. Rea*, 35 Hun, 34; *Wood v. Leland*, 1 Met. 387; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Reeves v. Pulliam*, 9 Baxt. 153; *Williams v. Ewing*, 31 Ark. 229; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791; *Crosby v. Wyatt*, 23 Me. 156; *Boardman v. Paige*, 11 N. H. 431; *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Cawthorne v. Weisinger*, 6 Ala. 714; *Sibley v. McAllaster*, 8 N. H. 389; *Norton v. Hall*, 41 Vt. 471; *Marshall v. Hudson*, 9 Yerg. 57; *Miller v. Woodward*, 8 Mo. 169; *Godfrey v. Rice*, 59 Me. 308; *Clapp v. Rice*, 15 Gray, 557, 77 Am. Dec. 387; *Koelsch v. Mixer*, 52 Ohio St. 207, 39 N. E. 417; *Evans v. Evans*, 16 Ala. 465.

The plaintiff continued to be liable to the bank for the full amount of the note after the bank's claim against the defendant was, as the plaintiff knew, barred by limitation.

*Payne v. Gardiner*, 29 N. Y. 146; *Cutler v. Wright*, 22 N. Y. 472; *Denny v. Smith*, 18 N. Y. 567; *Hixson v. Rodbourn*, 67 App. Div. 424, 73 N. Y. Supp. 779; *Davis v. Kinney*, 1 Abb. Pr. 440; *Winchell v. Hicks*, 18 N. Y. 558; *Staples v. Gokey*, 34 Hun, 289; 42 L.R.A.(N.S.)

*Blanchard v. Blanchard*, 201 N. Y. 134, 37 L.R.A.(N.S.) 783, 94 N. E. 630; *Fowler v. Wood*, 78 Hun, 304, 28 N. Y. Supp. 976, affirmed in 150 N. Y. 584, 44 N. E. 1124; *Simonsen v. Nafis*, 36 App. Div. 473, 55 N. Y. Supp. 449; *Villars v. Palmer*, 67 Ill. 204; *Moore v. Gray*, 26 Ohio St. 525; *Martin v. Frantz*, 127 Pa. 389, 14 Am. St. Rep. 859, 18 Atl. 20; *Vredenburg v. Snyder*, 6 Iowa, 39; *Banks v. State*, 62 Md. 88; *Minter v. Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842, 40 S. W. 395; *Ray v. Brenner*, 12 Kan. 105; *Ashby v. Johnston*, 23 Ark. 163, 79 Am. Dec. 102.

*Haight, J.*, delivered the opinion of the court:

On the 20th day of July, 1899, the plaintiff, George M. Hard, one Edward Thompson, and the defendant's testator, Sampson Q. Mingle, executed and delivered to the Chatham National Bank the following instrument: "For value received and for the purpose of giving the Realty Corporation of North America credit at the Chatham National Bank of New York, we hereby jointly and severally guarantee the payment at maturity of all checks, drafts, and promissory notes upon which said Realty Corporation of North America is now or hereafter shall be liable, to said bank, as maker, indorser, drawer, or acceptor, to an amount not exceeding \$15,000, hereby waiving demand and notice of nonpayment thereof, this to be a continuing guaranty." On the 13th day of July, 1903, the Realty Corporation executed and delivered its promissory note for \$15,000, payable in three months from date, to one Gilbert, who indorsed and delivered the same before maturity for value, to the Chatham National Bank. On September 15, 1903, and before said note became due, Mingle died, leaving a last will and testament which has been admitted to probate, whereby he appointed his widow, the defendant, sole executrix, to whom the Chatham National Bank, in due time, presented a claim against the estate of her testator for the principal and interest accrued upon the note, above referred to, which claim was rejected by the executrix, and, inasmuch as no action was brought by the bank within the time specified by § 1822 of the Code of Civil Procedure, the claim became barred by that provision of the statute. Thereafter and on or about the 14th day of February, 1906, the defendant caused a written notice to be served upon the plaintiff, advising him that the statute of limitations had run as against the claim presented by the bank; that the estate had thereby been relieved from liability upon the note, and that, if the plain-

tiff paid it, he did so at his own peril and on his own liability, without right of contribution by the estate. The plaintiff, however, did on the 20th day of October thereafter pay the bank the amount of the note, with interest accrued thereon, and then brought this action to recover the sum of \$5,603.89, one third of the amount so paid by the plaintiff. The Realty Corporation became insolvent upon the maturing of the note, and no part of the same had been paid to the bank until the payment made by the plaintiff. The learned special term found as conclusions of law that the claim of the bank against the estate of Mingle, deceased, was barred by the short statute of limitations, and that the statute operated to discharge the other guarantors from liability claimed by the bank, to the amount of one third thereof; and that therefore the plaintiff was only liable to the bank for the remaining two thirds of its claim, and, further, that the estate of Mingle having been discharged from liability, by reason of the statute of limitations, it is no longer liable for contributions to his co-guarantors.

We have had some doubts as to the disposition that should be made of this case, owing to an omission in both the allegations of the complaint and the findings of fact. In neither is the date given of the discount of the note by the Chatham National Bank. In each it is stated that the note was delivered before maturity, but the maturity of the note occurred nearly a month after the death of Mingle. If the note was discounted by the bank before the death of Mingle, his estate undoubtedly would be liable, under § 758 of the Code of Civil Procedure. But if the note was purchased after his death, especially if the bank had notice of such death, we do not understand that his estate would be liable. *National Eagle Bank v. Hunt*, 16 R. I. 148-153, 13 Atl. 115; *Jordan v. Dobbins*, 122 Mass. 168-170, 23 Am. Rep. 305; *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42-46, 49 L. J. Q. B. N. S. 204, 41 L. T. N. S. 798, 28 Week. Rep. 355, 21 Eng. Rul. Cas. 664; *Pratt v. Baptist Soc.* 93 Ill. 475, 34 Am. Rep. 187. This question, however, does not appear to have been raised upon the trial nor in the appellate division. The parties apparently assumed that the note was transferred to the bank before the death of Mingle, and we have therefore concluded to dispose of the case upon that assumption.

It is not our purpose to enter upon an extended digest of the cases bearing upon the question involved, for that has been done fully by Justice Clarke, who wrote the opinion adopted by the appellate division. We do not understand that a cosurety or

a coguarantor can step in and pay a claim upon which he has been discharged of liability, by reason of the running of the statute of limitations, and then compel contribution by his cosurety or coguarantor. But, so long as he is legally liable upon his guaranty, he may pay the claim, and may then seek contribution from his coguarantors. The statute, as to him, does not commence to run until he has paid the claim. Then, and not until such payment, has he the right to exact contributions. This right is founded upon the general principles of equity, that sureties *in æquali jure* must bear the common burden equally, under which the law implies a contract between them to contribute ratably toward discharging any liability which they may incur in behalf of their principal. So long, therefore, as one of their cosureties remains liable for the principal debt, their liability to contribute continues.

It must be borne in mind that, while the creditor has nothing to do with the right of the sureties for contribution among themselves, he must not affirmatively do any act tending to impair it. In other words, he must not by his action destroy or impair the rights of sureties as between themselves. If he does, to the extent that he impairs the rights of any one surety, to that extent he diminishes the amount of his recovery against him. But the mere delay to prosecute sureties, in the absence of any request to do so, does not discharge the surety who may subsequently find himself prejudiced by such delay.

It may be true that the plaintiff, as the president of the Chatham National Bank, gave directions to have the claim prosecuted against Mingle's estate, but the action was not brought until after the statute of limitations had run. We do not, however, understand that the bank by this neglect impaired its right to recover the full amount of the note that it held, with the accrued interest thereon. There were two other guarantors, the plaintiff and Thompson. It was not obliged to incur the expense of employing attorneys and prosecuting an action against the estate of the deceased guarantor, but it had the right to call upon the living guarantors to pay the whole amount of the note and then look to the decedent's estate for contribution. This was the procedure adopted by it, and our conclusion is that the appellate division has correctly determined the rights of the parties.

It may be true that there is a conflict in the authorities, and that the precise question here presented may not have been determined by the courts of this state. But the great weight of authorities, we

think, is in favor of the contention of the plaintiff. The leading case upon the subject is doubtless that of *Wood v. Leland*, 1 Met. 387, to which the appellate division has alluded. In that case the plaintiff and the defendants' father were both sureties on a bond given by one Harrington upon his appointment as a guardian of minor children. The defendants' father died, and his estate was distributed among them. Subsequently the plaintiff, by reason of the default of the guardian, was compelled to pay the amount due the children, and then brought this action to compel contribution by the defendants. The defendants in that case interposed the short statute of limitations of one year, provided by the statute of Massachusetts, as a defense. Chief Judge Shaw, in delivering the opinion of the court with reference thereto, says: "The plaintiff in fact was not compelled to pay, and did not pay, the amount of such balance, until November, 1838, which was more than one year after the breach of the condition of the bond. Now the defendants contend that as they could not be held responsible to the obligee for such breach of the bond, after one year, so they would not be held liable for a contribution to a surety, after that time. But the court is of opinion that the statute of limitations cannot be so applied. It may well be admitted that the statute of limitations would be a good bar to an action by the obligee against the heirs and legatees; but the right of action by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money, pursuant to that breach. The suit against him is not barred in one year. Besides, such suit may be brought within the year, but not come to judgment till long after the year; and he cannot be compelled to pay, until judgment is recovered, although he may pay sooner on demand, after a breach, if he chooses to do so. But his right of action for contribution arises when he does pay, and not before. Notwithstanding a breach, the debt may be paid by the principal, or relinquished or compromised, and the surety never compelled to pay. If so, he never has a cause of action against the cosurety or his representatives. The right of action grows out of the original implied agreement, arising out of there being cosureties, that if one shall be compelled to pay the whole or a disproportionate part of the debt, for which both thus collaterally and provisionally stipulate to be liable, the other will pay such a sum as will make the common burden equal; and, in case of the death of either, this 42 L.R.A. (N.S.)

obligation devolves upon his legal representatives." This was followed by *Crosby v. Wyatt*, 23 Me. 156; *Sibley v. McAllaster*, 8 N. H. 389; *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Boardman v. Paige*, 11 N. H. 431; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791; *Marshall v. Hudson*, 9 Yerg. 57; *Reeves v. Pulliam*, 9 Baxt. 154; *Cawthorne v. Weisinger*, 6 Ala. 714; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Koelsch v. Mixer*, 52 Ohio St. 207, 39 N. E. 417; *Seabury v. Sibley*, 183 Mass. 107, 66 N. E. 603; *Martin v. Frantz*, 127 Pa. 389, 14 Am. St. Rep. 859, 18 Atl. 20; and *Mentzer v. Burlingame*, 18 L.R.A. (N.S.) 585, with note (78 Kan. 219, 97 Pac. 371).

In the case of *Tobias v. Rogers*, 13 N. Y. 59, the plaintiff sought to hold Rogers, the defendant, as a cosurety upon a bond. Rogers, however, had been discharged in bankruptcy, and it was there held that the defendant was not liable to contribution, for, under his discharge in bankruptcy, he became discharged of all debts, contracts, and engagements provable under the act, and that all persons having uncertain or contingent claims against the bankrupt were forever extinguished, and that this included his liability to contribute to a cosurety. It is therefore apparent that this case is distinguishable from the one under consideration.

In the case of *Waggoner v. Walrath*, 24 Hun, 443, affirmed without opinion in 92 N. Y. 639, an action was brought against two sureties to a joint undertaking. Both of the sureties were served, but judgment was entered against one only. It was held that such entry of judgment released the other surety from all liability, and that he could not be called upon to contribute; that the judgment could not be enforced against the surety for more than one half of the amount of the undertaking. It is true that in the opinion delivered in that case an allusion was made to the case of *Tobias v. Rogers*, containing some statements the meaning of which had apparently been misunderstood. But even in the *Waggoner* Case the conclusion was reached that the amount which one of two sureties could recover of his cosurety is what he has paid in excess of his moiety. See also *Morgan v. Smith*, 70 N. Y. 537, and *Monroe County v. Otis*, 62 N. Y. 88.

The judgment should be affirmed with costs.

Cullen, Ch. J., and Vann, Werner, Willard Bartlett, and Chase, JJ., concur; Gray, J., absent.

## OREGON SUPREME COURT.

GEORGE J. WAGENER, Respt.,  
v.UNITED STATES NATIONAL BANK OF  
LA GRANDE, OREGON, Appt

(— Or. —, 127 Pac. 778.)

**Money received — overpayment of check — action by drawer.**

The drawer of a check for a specified number of cents may, in case it is cashed by mistake as calling for that number of dollars, maintain an action for money had and received against the payee to recover the difference between the amount called for and that collected by him.

(November 26, 1912.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Union County in plaintiff's favor in an action for money had and received to recover the difference between the amount called for by and that collected on a check. Affirmed.

The facts are stated in the opinion.

Mr. F. S. Ivanhoe, for appellant:

In the case of a deposit the bank becomes the borrower and the depositor the lender, entitled to repayment upon demand made by check, payable to himself or another.

5 Cyc. and notes; Commercial Bank v. Hughes, 17 Wend. 94; O'Neill v. Bradford, 1 Pinney (Wis.) 390, 42 Am. Dec. 574; First Nat. Bank v. Ocean Nat. Bank, 60

*Note. — Right of depositor to recover against one to whom bank has made excessive or unauthorized payment.*

The exact point involved in *WAGENER v. UNITED STATES NAT. BANK* seems to be discussed in but few cases. While the cases cited in the opinion lend some support to the principle upon which the decision is based, there is a conflict among the cases dealing with the specific point indicated in the title to the note.

Thus, in *Keene v. Collier*, 1 Met. (Ky.) 415, it was held that a depositor could not recover from the payee of a check an overpayment which the bank cashier had made to him by mistake. The court says that in cases of a general deposit the property becomes exclusively that of the bank, the transaction merely creating a debt from the bank to the depositor; that the latter has no interest in the subsequent management of the fund; that no privity exists between him and the customers of the bank among whom it is disbursed, and that therefore the overpayment was the money of the bank, which it only, and not the depositor, can recover.

In *National Bank v. Manufacturers' & T. Bank*, 122 N. Y. 367, 25 N. E. 355, it was held that the drawer of a draft which, after being raised, was deposited by the

N. Y. 278, 19 Am. Rep. 181; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24; *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368.

The theory that plaintiff was, at the time the money was received, the actual legal owner of it, is the only theory upon which an action can be maintained between the parties for money had and received.

27 Cyc. 868; *Buchanan v. Beck*, 15 Or. 563, 16 Pac. 422; *Thorsen v. Hooper*, 50 Or. 497, 93 Pac. 361; 2 Enc. Pl. & Pr. 1012, 1013, 1021; *Butterworth v. Gould*, 41 N. Y. 455; *Patrick v. Metcalf*, 37 N. Y. 332.

Mr. O. H. Finn, for respondent:

The count for money had and received is sustainable where money is paid by mistake.

2 Enc. Pl. & Pr. 1018; *Trecy v. Jeffs*, 149 Mass. 211, 21 N. E. 360; *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839; *Norton v. Bohart*, 105 Mo. 615, 16 S. W. 598; *Wilson v. Barker*, 50 Me. 447; *Noyes v. Parker*, 64 Vt. 379, 24 Atl. 12; *Keene v. Eldriedge*, 47 Or. 179, 82 Pac. 803.

**Burnett, J.**, delivered the opinion of the court:

On August 15, 1911, the plaintiff paid a note, held against him by the defendant, the principal of which was \$200, which he paid in cash. The interest due upon the same was 67 cents, in payment of which he gave his check on the LaGrande National Bank,

payee with defendant, the payee being credited with the full amount and the drawee paying to defendant the amount of the check as raised, could not, in an action for money had and received, recover the overpayment from the defendant. The court said that the sum paid in excess of the amount of the draft was the money of the drawee, and not of the drawer; that while the drawee could recover the amount of the overpayment from the defendant, it could not recover from the drawer, and therefore that it did not affect the legal status of the parties that the drawee had charged the drawer in its account with the full amount of the raised draft.

In *Davis v. Smith*, 29 Minn. 201, 12 N. W. 531, where a bank had paid the individual debt of a partner and charged to the firm the moneys so paid, it was held that neither the firm nor the other partner could recover the payment from the creditor, even assuming that it was paid without a proper order. The court said that the money of the firm as soon as deposited in the bank became the money of the bank, and the latter thereupon became debtor to the firm for the amount deposited; so that the bank paid to the debtor its own money, and not the money of the firm; that if the same was paid on a proper order it would be equivalent to a payment to the firm of so much

where he had a checking account with funds on deposit to his credit. The check reads as follows:

La Grande, Oregon. Aug. 15, 1911.

La Grande National Bank,

Pay to the order of U. S. National Bank  
\$67, sixty-seven and no/100 dollars.

Geo. J. Wagener.

It will be noticed that the figures on the face of the check consist of a dollar mark (\$), and a decimal point (.), and the digits six, seven (67), indicating 67 cents, while the written part is "sixty-seven and no/00 dollars," indicating the latter amount. There is no question raised in the testimony but what 67 cents was the exact amount of interest due on the note, and that the principal of \$200 was paid in coin; the check being given to cover the interest. It appears in the evidence that at that time there existed between the La Grande National Bank and the defendant, the United States National Bank of La Grande, a custom of making daily clearance of checks drawn against each other which had come into the possession of each bank. The clearance was accomplished in this manner: About 1 o'clock of each business day, the La Grande National Bank, by its representative, would attend at the banking house of the defendant and present the checks drawn against the latter which had come into the possession of the former, together with a list of the same; at the same time the defendant would present checks in its possession drawn against the La Grande Na-

tional Bank, with a list of the same. These lists were compared, and if they were found to be correct a balance was struck which was settled by the bank against whom it appeared, generally by New York Exchange, in favor of the other, or in cash if the balance was small. Ordinarily this method was observed for a week, when, for the succeeding week, the settlement would be made at the La Grande National Bank. In the ordinary course of business the check in question was put through the clearance process, as the defendant contends, at 67 cents, and as plaintiff contends at \$67. Some time in October, 1911, the La Grande National Bank rendered to the plaintiff a statement of account charging him with this check at \$67. Contending that the defendant had received on account thereof \$67, instead of 67 cents, he demanded from it the difference, \$66.33, payment of which having been refused, this action was instituted, with the result above noted.

On this appeal the defendant presents the single question which may be thus stated: In respect to the money which the plaintiff has deposited in the La Grande National Bank, that bank was the debtor to the plaintiff only, and if it paid to the defendant \$67 on the check in question, the money paid was not that of the plaintiff, but the money of the La Grande National Bank, and hence the bank, and not the plaintiff, is the party to sue the defendant for the money had and received. This question was urged in the circuit court on a motion for nonsuit, on a motion for a directed verdict, and by various requests to instruct the

of the bank's indebtedness, but if paid without such order it would have no such effect and could not be so charged; and that in neither case did the party to whom it was paid receive any money of the firm; so that an action by the firm against such party based on the title to the money would not lie.

In *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172, where a deposit was paid by the bank to the wrong party, it was held that the depositor had an election of remedies, to sue the bank as debtor, or bring an action for money had and received against the party to whom the deposit was paid, but that he was not entitled to both remedies, and, having elected the latter, he could not thereafter sue the bank. While this case is not directly in point as to the right in such cases to maintain an action against a third party to whom money has been wrongfully paid, yet such right is recognized, and an action thereon held a bar in a subsequent action against the bank on the ground that the remedies are inconsistent.

The case of *Dechen v. Dechen*, cited in the *WAGENER CASE*, was an action against one to whom a building, loan, and savings

association had paid a sum of money belonging to the plaintiff. While there is nothing in the reported opinion indicating that the association did a banking business, yet the principle of the case supports the conclusion reached in *WAGENER v. UNITED STATES NAT. BANK*, as it is stated that the relation between the association and the plaintiff was that of debtor and creditor, and that the deposit made for plaintiff's benefit vested in him a right to demand and receive the same.

In *Earle v. Whiting*, 196 Mass. 371, 82 N. E. 32, also cited in the *WAGENER CASE*, a daughter, by means of an order payable to her, but never delivered, obtained a transfer on the books of the bank to her own account of money belonging to her father; and it was held that the father, after the daughter's death, could recover the money from her estate. It is not clear whether or not the decision was upon the assumption that, as against the bank, the father would be bound by the payment.

As to remedy of payee of check against one who has taken it on indorsement of unauthorized agent, see note to *A. Blum, Jr.'s Sons v. Whipple*, 13 L.R.A. (N.S.) 211.

R. E. H.



jury, all of which were denied. We think, however, it is not necessary for the plaintiff to show that the money to which he had title, like he had to his horse or his cow, was received by the defendant, to sustain this cause of action. It is sufficient if he show that by any process, which was treated by the parties as a money transaction, the defendant has received money or its equivalent which, in equity and good conscience, belongs to and should be paid to the plaintiff, and this is true although the plaintiff may never have had actual manual custody of the specie in question. We quote from the case of *Mathewson v. Eureka Powder Works*, 44 N. H. 289: "The rule that the action for money had and received lies only where one party has received and has in his hands money which he has no right to retain has been long since relaxed; and it is sufficient to sustain the action that something has been received by the defendant which, under the circumstances of the case, ought, as between the parties, to be regarded as money. *Willie v. Green*, 2 N. H. 335; *Wheat v. Norris*, 13 N. H. 178. Thus the bills of a private bank, deposited and received as money, are deemed money (*Pickard v. Bankes*, 13 East, 20; *Mason v. Waite*, 17 Mass. 560); and so are negotiable notes, if received as money (*Clarke v. Shee*, Cowp. pt. 1, p. 200). In a loan of money a gold toothpick, estimated at a certain price, and forming part of a sum loaned, is to be deemed money. *Barbe v. Parker*, 1 H. Bl. 288. A check was held to be money, being treated as such. *Spratt v. Hobhouse*, 4 Bing. 179, 12 J. B. Moore, 395, 5 L. J. C. P. 147. Anything, it is said (13 N. H. 179), received as payment, and which amounts to payment in respect to the party receiving it, is deemed money. Thus an attorney who receives land, or other things, in his own right, and discharges his client's debt, will be chargeable for money. *Beardsley v. Root*, 11 Johns. 464, 6 Am. Dec. 386; *Floyd v. Day*, 3 Mass. 403, 3 Am. Dec. 171; *Ward v. Evans*, 2 Ld. Raym. 928; *Arms v. Ashley*, 4 Pick. 71; *Ainslie v. Wilson*, 7 Cow. 668, 17 Am. Dec. 532; *Hemmenway v. Bradford*, 14 Mass. 122; 2 Greenl. Ev. § 118."

In the case of *Tinslar v. May*, 8 Wend. 561, the defendant by mistake received credit for more than he paid in settling and paying a note and mortgage which were discharged. The court sustained an action for the excess as for money had and received. In the case of *Dechen v. Dechen*, 59 App. Div. 166, 68 N. Y. Supp. 1043, a bank paid a deposit to the wrong party, and the person in whose favor the deposit 42 L.R.A. (N.S.)

had been made maintained this action against the one receiving the money. The plaintiff had never had the actual custody of the money; the deposit having been made to his credit by a stranger to the suit. In *Earle v. Whiting*, 196 Mass. 371, 82 N. E. 32, a daughter, by means of an order drawn in her favor, but never delivered to her, obtained a transfer of her father's bank account to that of her own. The father maintained an action against her estate to recover for money had and received by the decedent to his use. In *Newburyport v. Spear*, 204 Mass. 146, 134 Am. St. Rep. 652, 90 N. E. 522, a city treasurer gave checks on the city bank account in payment of his own debt. The defendant, in whose favor they were drawn, deposited them to his credit in the bank in the usual course of business, but the city was successful in this form of action against that defendant. In the case of *Rudisill v. Handley*, 9 Ga. App. 789, 72 S. E. 189, a cashier of a bank by mistake credited a customer with \$200 too much, and the bank on that state of the account delivered to the customer two shares of its stock for which that amount was supposed to have been paid. The cashier, being charged with the shortage, replaced the money, contending all the while that it was a mistake in the entry, and was allowed to recover of the customer for money had and received, although no coin had ever passed between them. In *Whitton v. Barringer*, 67 Ill. 551, a principal debtor on a promissory note paid it in full to his deceased surety's administrator on the pretense of the latter that the estate was liable for the debt and had allowed a claim against it for the amount due on the note. The court sustained the payee of the note in this form of action against the administrator personally. In the case at bar the check in question was confessedly given to and received by the defendant in payment of some amount of money, and if by error the check was drawn and collected at a larger amount than was justly due to the defendant, it ought in equity and good conscience to repay the surplus and, failing to do so, this form of action will lie against it. We do not decide that the defendant collected 67 cents or \$67. That was purely a question for the jury to determine. What we do decide is that, if the defendant collected \$67, instead of 67 cents, in the manner described, this form of action will lie against it for the difference.

The judgment of the court below is affirmed.

## TENNESSEE SUPREME COURT.

WALTER HINES, Plff. in Err.,  
v.  
STATE OF TENNESSEE.

(— Tenn. —, 149 S. W. 1058.)

**Cemetery — devotion of property to burial purposes — trust.**

1. Land devoted to burial purposes passes into the hands of assignees charged with a trust for that purpose, although no express reservation is made, and descendants of the one who established the trust may exercise the right of burial there when necessity arises, and of protecting the graves and beautifying the grounds.

**Adverse possession — burial ground.**

2. The right to use property devoted to burial purposes is not barred by the statute of limitations so long as the lot is kept inclosed, or the monuments remain and the grounds are cared for.

**Cemetery — desecration — private burial ground.**

3. The statutes providing for punishment of those desecrating burial grounds apply to ground set apart for private burial and maintained as such.

(December 7, 1911.)

**ERROR** to the Circuit Court for Lincoln County to review a judgment convicting defendant of a misdemeanor. Affirmed.

The facts are stated in the opinion.

Messrs. Floyd Estill and G. H. Newmann for plaintiff in error.

Mr. Walter W. Faw, Assistant Attorney General, for the State:

The reservation of land for use as a family graveyard or burial ground merely reserves the easement for burial purposes, with the necessary right of ingress and egress.

Hagerty v. Lee, 54 N. J. L. 580, 20 L.R.A. 635, 25 Atl. 319.

The easement of burial reserved in the will of William Crawford passed to his lineal descendants.

Waldron's Petition, 26 R. I. 84, 67 L.R.A. 118, 106 Am. St. Rep. 688, 58 Atl. 453; Robertson v. Mt. Olivet Cemetery Co. 116

Tenn. 225, 93 S. W. 574; Gardner v. Swan Point Cemetery, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871.

Adverse possession of a burial lot is held by its use for a burial place, with or without inclosure, as long as gravestones stand, marking the place as a burial ground.

Hook v. Joyce, 94 Ky. 450, 21 L.R.A. 96, 22 S. W. 651.

Shields, Ch. J., delivered the opinion of the court:

Wm. Crawford, more than sixty years ago, set apart about 1 acre of his farm, in one of the cultivated fields, as a family burial ground or cemetery, and it was so used by him during his life, several of his family being then and there buried, and when he died he was there buried. His descendants, since his death, have used it as a family burying ground, and many of them are there buried. Monuments and gravestones have been erected and maintained over several of the graves, and from time to time have been repaired, and the cemetery put in order and otherwise cared for.

The portion of the farm surrounding the cemetery was devised by Wm. Crawford to certain of his children, and by various conveyances the same has come to and is now the property of the plaintiff in error. In none of these conveyances is there any express reservation of the cemetery.

The question presented in the record is whether the prosecutor and other descendants of Wm. Crawford have a right or easement of burial in the cemetery, and of ingress and egress for the purposes of burial, visiting, repairing, and keeping in proper condition the graves and grounds around the same.

We are of the opinion that they have these rights, and may exercise them in a reasonable manner and at seasonable times, so as not to unnecessarily injure the owner of the farm in its cultivation and use.

When land has been definitely appropriated to burial purposes, it cannot be conveyed or devised as other property, so as to interfere with the use and purposes to which it has been devoted. When once dedicated

**Note. — When right of burial in private burial ground is barred by adverse possession.**

As to character of estate or property of owner in burial lot, see note to Waldron's Petition, 67 L.R.A. 118.

As to prescriptive right to maintain a public nuisance, see note to Leahan v. Cochran, 53 L.R.A. 891.

And as to whether title may be acquired in a grave or burial lot by prescription or adverse possession, which is the exact converse of the question considered in the in- 42 L.R.A. (N.S.)

stant note, see note to Wooldridge v. Smith, 40 L.R.A. (N.S.) 752.

No case other than HINES v. STATE has been found on the question here annotated.

In Hook v. Joyce, 94 Ky. 450, 21 L.R.A. 96, 22 S. W. 651, however, there are *dicta* to the effect that there cannot be an actual ouster of the possession of a burial lot by an intruder, or running of the statute of limitation in his favor, while such gravestones stand there indicating by the inscription the previous burial of others.

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to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust. The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.

They also have the right to visit the cemetery for the purpose of repairing, beautifying, and protecting the graves and grounds around the same, and for these purposes they have the right of ingress and egress from the public road nearest the cemetery, to be exercised at seasonable times and in a reasonable manner.

Those who purchase the property after it has been appropriated to burial purposes take it subject to the rights we have stated, without any express reservation in the will or deed under which they take. Such reservation is implied. The graves are there to be seen, and the purchaser is charged with notice of the fact that the particular lot has been dedicated to burial purposes, and of the rights of descendants and relatives of those there buried. Burial lots, whether public or private, are not the subject of trade and commerce, and it is always presumed that they are not included in the sale of property which surrounds them. *Robertson v. Mt. Olivet Cemetery Co.* 116 Tenn. 221, 93 S. W. 574; *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871; *Waldron's Petition*, 26 R. I. 84, 67 L.R.A. 118, 106 Am. St. Rep. 688, 58 Atl. 453; *Thompson v. Hickey*, 59 How. Pr. 434; *Stewart v. Garrett*, 119 Ga. 386, 64 L.R.A. 99, 100 Am. St. Rep. 179, 46 S. E. 427.

Nor is the right barred by the statute of limitations, so long as the lot is kept inclosed, or, if uninclosed, so long as the monuments and gravestones marking the graves are to be found there, or other attention is given to the graves, so as to show and perpetuate the sacred object and purpose to which the land has been devoted. No possession of the living is required in such cases, and there can be no actual ouster or adverse possession, to put in operation the statute of limitations, so long as the dead are there buried, their graves are marked, and any acts are done tending to preserve their memory and mark their last resting place. *Hook v. Joyce*, 94 Ky. 450, 21 L.R.A. 96, 22 S. W. 651.

We therefore hold that the desecration of such a burial ground, and the graves therein, and the wrongful obstruction of the easement of a right of way from the public road thereto, are misdemeanors, sub-42 L.R.A. (N.S.)

ject to punishment under the statutes applicable to offenses of this character.

## NEW YORK COURT OF APPEALS.

WILLIAM HAUSER, Resp't.,

v.

NORTH BRITISH & MERCANTILE INSURANCE COMPANY, Appt.

(206 N. Y. 455, 100 N. E. 52.)

### Insurance — broker — limitation of right.

Restricting the right to engage in an insurance brokerage business to those who make that their principal business, or those engaged in the real estate business, deprives other citizens wishing to engage in that business of the constitutional liberty and the equal protection of the laws.

(November 19, 1912.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, in plaintiff's favor, in an action brought to recover commissions for services performed as a fire insurance broker. Affirmed.

The facts are stated in the opinion.

**Note.** — Constitutionality of statute restricting right to engage in particular profession, business, or occupation to those who intend to make it their principal calling.

The court of appeals in the foregoing case affirms the holding of an appellate division of the supreme court in the same cause, in 152 App. Div. 91, 136 N. Y. Supp. 1015, but a search of the authorities, compassing many branches, has failed to bring to light a case precisely like it or within the scope of this note.

However, the cases of *Wyeth v. Board of Health* (*Wyeth v. Thomas*), 200 Mass. 474, 23 L.R.A. (N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925, and *People v. Ringe*, 197 N. Y. 143, 27 L.R.A. (N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474, are somewhat similar in principle to *HAUSER v. NORTH BRITISH & M. INS. CO.* It was held in these cases that a statute requiring one who would engage in the business of an undertaker to procure a license (which meant to qualify) as an embalmer was unconstitutional, as offering an undue restriction to the liberty of one who desired to engage in that business; thus, in effect, saying that one might be an undertaker only in connection with the business of embalming.

A somewhat analogous question is raised in *Wyeth v. Thomas*, 23 L.R.A. (N.S.) 147; *People v. Ringe*, 27 L.R.A. (N.S.) 528; and *State v. Rice*, 36 L.R.A. (N.S.) 344, with regard to statutes which attempt to restrict the business of undertakers to those who qualify as embalmers.

Mr. W. H. Van Benschoten, with Messrs. Bowers & Sands, for appellant:

The statute is a valid exercise of the police power.

*Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127; *Buffalo East Side R. Co. v. Buffalo Street R. Co.* 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; *People ex rel. Armstrong v. Warden*, 183 N. Y. 223, 2 L.R.A.(N.S.) 859, 76 N. E. 11, 5 Ann. Cas. 325; *People ex rel. Schwab v. Grant*, 126 N. Y. 473, 27 N. E. 964; *People v. Ringe*, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; *Wright v. Hart*, 182 N. Y. 341, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156; *People ex rel. Moskowitz v. Jenkins*, 202 N. Y. 59, 35 L.R.A.(N.S.) 1079, 94 N. E. 1065.

Mr. Alfred J. Talley for superintendent of insurance of the state of New York.

Messrs. Almet Reed Latson and Ward W. Pickard for Insurance Brokers Association:

So much of the statute as requires a person to have a license from the state superintendent of insurance in order lawfully to engage in the insurance brokerage business is valid as an exercise of the police power of the state.

*Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; 1 *Tiedeman, State & Federal Control of Persons & Property*, p. 264; *People v. Formosa*, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492; *Emert v. Missouri*, 156 U. S. 290, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *People v. Russell*, 49 Mich. 617, 43 Am. Rep. 478, 14 N. W. 568; *People ex rel. Moskowitz v. Jenkins*, 202 N. Y. 53, 35 L.R.A.(N.S.) 1079, 94 N. E. 1065.

If subdivision "d" of the statute is unconstitutional, it may be separated from the remainder of the statute without destroying its effectiveness.

*Duryee v. New York*, 96 N. Y. 477; *Lawton v. Steele*, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088; *Cooley, Const. Lim.* 178; *People ex rel. Cumisky v. Wurster*, 14 App. Div. 556, 43 N. Y. Supp. 1088; *Buffalo v. Hill*, 79 App. Div. 402, 79 N. Y. Supp. 449; *People ex rel. Lodes v. Health Dept.* 117 App. Div. 856, 103 N. Y. Supp. 275, reversed in 189 N. Y. 187, 13 L.R.A.(N.S.) 894, 82 N. E. 187; *People ex rel. Schwab v. Grant*, 126 N. Y. 473, 27 N. E. 964; 42 L.R.A.(N.S.)

*People ex rel. Dorr v. Thacher*, 42 Hun, 349.

Mr. William B. Ellison, *amicus curiæ*:

The determination of the question of constitutionality was not necessary to the determination of the case, and in consequence the constitutionality of the statute should not have been passed on.

*Demarest v. New York*, 147 N. Y. 203, 41 N. E. 405; *Parfitt v. Ferguson*, 3 App. Div. 176, 38 N. Y. Supp. 466; *People ex rel. Simpson v. Wells*, 99 App. Div. 364, 91 N. Y. Supp. 219; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75.

Mr. William Hauser, *in propria persona*:

The section of the statute is arbitrary and discriminatory in its character, since it does not affect all persons alike, and is therefore repugnant to the Federal and state Constitutions.

*Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 102, 115, 46 L. ed. 92, 106, 111, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 552, 565, 46 L. ed. 679, 686, 692, 22 Sup. Ct. Rep. 431; *Southern R. Co. v. Greene*, 216 U. S. 400, 417, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; *Re Pell*, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; *People ex rel. McPike v. Van De Carr*, 91 App. Div. 20, 86 N. Y. Supp. 644; *People v. Beattie*, 96 App. Div. 383, 89 N. Y. Supp. 193; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N. Y. Supp. 497; *People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626; *People ex rel. Nechamcus v. Warden*, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; *Schnaier v. Navarre Hotel & Importation Co.* 182 N. Y. 90, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561.

The enforcement of the statute cannot be justified as a proper exercise of the police power of the state.

*Schnaier v. Navarre Hotel & Importation Co.* 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 108 Am. St. Rep. 809, 75 N. E. 404, 3 Ann.

Cas. 263; *People ex rel. Armstrong v. Warden*, 183 N. Y. 223, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; *People v. Ringe*, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912 B, 156; *People ex rel. Wineburgh Advertising Co. v. Murphy*, 129 App. Div. 260, 113 N. Y. Supp. 855, affirmed in 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; *Boswell v. Security Mut. L. Ins. Co.* 193 N. Y. 465, 19 L.R.A.(N.S.) 946, 86 N. E. 532.

Gray, J., delivered the opinion of the court:

From the facts, which were agreed upon by the parties, in the submission of their controversy, it appears that the plaintiff was a lawyer and, in connection with the practice of the law, had, for some years, carried on the business of an insurance broker. He held what is termed a "first-class broker's certificate," which had been issued to him by the New York Fire Insurance Exchange, an organization formed by certain fire insurance underwriters. This certificate entitled him to receive commissions, or brokerage, as a fire insurance broker, to be paid by the members of the exchange, of which the defendant was one, upon his placing insurance with them. Upon the application of the plaintiff, the defendant issued, in the months of February and March, 1912, two policies of fire insurance, covering, the one, certain personal property, and, the other, certain real property, and delivered them to him for the owners. The amounts of the premiums, or charges, due upon these policies, were tendered by the plaintiff to, and were accepted by, the defendant, and were duly indorsed upon the policies. At the time of making the payments of the premiums, the plaintiff demanded of the defendant "the usual broker's commissions . . . upon the premium paid, . . . agreed upon, and fixed by the members of the New York Fire Insurance Exchange." Payment, however, was refused by the defendant, "for the reason that the plaintiff had not, prior to the application for, and the issuance of, the said policies, and the payment of the premiums of insurance, or charges, thereon, obtained a broker's certificate of authority, as provided in § 142 of the insurance law, and by reason of the provision contained in said § 142 for a forfeit to the people of the 42 L.R.A.(N.S.)

state of the sum of \$500 for a violation of any of the provisions of the section."

Section 142 of the insurance law, first inserted in 1911 by chapter 748 of the Laws of the year, as amended by chapter 1 of the Laws of 1912, went into effect, by its terms, prior to the time of the transactions between the plaintiff and the defendant. The section, so far as now material, provided that "no person, partnership, association, or corporation shall act as broker in the solicitation or procurement of applications for insurance, or receive for services in obtaining or placing such insurance any commission or other compensation from any underwriter authorized or permitted to do an insurance business in this state, or agent thereof, without first procuring a certificate of authority so to act from the superintendent of insurance, which must be renewed annually on the 1st day of January, or within six months thereafter." Provision was made for the payment of a fee of \$10 annually to the superintendent of insurance, and for authority to him to revoke a certificate in cases of violation of the statute. The section then reads: "Before any broker's certificate of authority shall be issued by the superintendent of insurance, there must be filed in his office a written application for such certificate, which must set forth: . . . (d) That the applicant is engaged or intends to engage, in good faith, principally in the insurance business, or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business," etc. Subdivisions "a," "b," and "c" need not be quoted. They require a description of the applicant, whether an individual, a partnership, or a corporation, a statement whether any certificate as agent or broker had been theretofore issued, and a statement of the business in which the applicant had been engaged. The section requires the application to be verified, defines the insurance contracts to which it is applicable, and provides that for a violation of its provisions there should be a forfeiture to the people of the state of \$500. After the act had gone into effect, the plaintiff made his application to the superintendent of insurance for a "broker's certificate of authority," which was refused upon the ground that "said application does not set forth that you are engaged, or intend to engage, in good faith, principally in the insurance business, or that you conduct, or intend to conduct, such a business in connection with a real estate agency, or real estate brokerage business." He had stated in his application, in answer to questions embodying these requirements of the statute, that he

was engaged "in the practice of the law, and as an insurance broker in connection therewith," and he refused to pledge himself otherwise as to the conduct of his future business.

The case of the plaintiff seems quite clear. Within the existing agreement and in accordance with the rules of the Fire Insurance Exchange, he had entitled himself, by the performance of services as a fire insurance broker, to receive from the defendant the usual brokerage commissions, agreed to be paid in such cases. Their payment was refused solely because he held no certificate of authority from the superintendent of insurance, as required by § 142 of the insurance law. That official was prohibited by the statute from issuing such a certificate, unless the application contained the statement above quoted from clause "d" of the section, and he based his refusal of the application solely upon that ground. If the enactment of § 142 was a valid piece of legislation, the plaintiff was remediless without a certificate. If, however, the legislative act overstepped the limits within which the legislature may regulate and restrict the business pursuits of the citizen, then it was violative of the plaintiff's constitutional rights, and was inoperative to deprive him of the right to his brokerage.

The appellate division, in the first department, has held the statute to be unconstitutional legislation, and I think that we should affirm its determination.

It is evident, from a reading of the provisions of this added section of the insurance law, that it was the purpose of the legislature to confine the business of the insurance agent or broker, mentioned, to those who should make that their principal business, or who should be real estate agents or brokers. That was made a condition of the right to pursue the business. We may readily concede that, as a measure regulative of a business pursuit which, from the extent to which it is carried on, is, presumably, affected with a public interest, the requirement by the legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents and fitness of character, and be a reasonable enough precaution in the public interest. But the legislature has prescribed in this statute a condition for the issuance of the license which is a purely arbitrary restriction. There is no good reason, and no public interest can, conceivably, be subserved, in prohibiting persons from conducting the business of an insurance agent or broker, in connection with any other lawful business or occupation in which they may be engaged. As it was intimated below, follow-

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ing the suggestion in *People v. Ringe*, 197 N. Y. 143, 27 L.R.A. (N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474, the legislation now in question must have been promoted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare. And see *People v. Gillson*, 109 N. Y. 389, at page 399, 4 Am. St. Rep. 465, 17 N. E. 343. Why should those who wish to engage in the business of soliciting and placing insurance not be permitted to conduct it as incidental to, or in connection with, any other innocent occupation, except that of real estate brokers? Where the legislature may prohibit a business or an occupation, it may prescribe conditions upon which it may be conducted; but if the business or occupation be useful to the citizen, and it be lawful, the Constitution, both of the state or of the nation, guarantees to him the right to pursue it freely, and any arbitrary restriction upon its pursuit should be condemned as an invasion of the guaranty. In varying language, but with the same thought, in very many cases, this court has pointed out that the constitutionality of an act is to be tested by its effect upon the citizen's right freely to pursue lawful occupations; that a statute under the guise of an exercise of the police power cannot arbitrarily interfere with that liberty of pursuit; that the equal protection of the laws means equality of opportunity to all in like circumstances; and that classification to be valid must not be arbitrary and discriminate against persons without a basis in reason. These principles have become familiar from frequent statement in the decisions and need no citation nor discussion of the cases here. They have become constituent elements in our popular form of government. The very nature of our free government forbids that a man should be compelled to refrain from acts which the laws permit.

The statute before us goes far beyond what is proper regulation, and is prohibitory, in preventing a person from pursuing the occupation of an insurance broker, except as his principal business, or as an adjunct to a real estate business. To use the language in the case of *Wynehamer v. People*, 13 N. Y., at page 399, this statute "passes the utmost limit of regulation, and does not even wear a disguise." The restriction is not in the public interests; it is obviously in the interests of the class, either of insurance, or of real estate, brokers. The insurance underwriters are not forbidden to transact their business through brokers; they are required to limit it to the class of brokers authorized by the stat-

ute. The plaintiff is a lawyer, and presumably the nature of that occupation should well qualify him to make insurance contracts, and there are many mercantile occupations which certainly cannot be deemed to affect the person's fitness to solicit, or to place, insurance. But this statute would prevent them from adding to their earnings by pursuing that occupation. To concede the validity of this statute would be to concede a power to the legislature, in the guise of a regulation, to destroy a lawful business. This plaintiff had built up a brokerage business in connection with his other occupation; as many, presumably, others have done, holding, similarly, fire exchange brokers' certificates. But, under this statute, he is compelled to refrain from it, unless pursued under conditions which involve the sacrifice of that other occupation. Arbitrarily, the statute interferes with a citizen's business pursuits, and, by an unreasonable discrimination, deprives him of that equal opportunity which the Constitution guarantees to him. What is there in the calling of an insurance agent or broker, which demands any especial training or knowledge, not readily to be acquired by any business man? That he should be qualified by antecedents and in character for engaging in an occupation calling for some degree of trustworthiness may be true; as it is, also, true that the nature of this occupation, differing from other mercantile pursuits, calls for an acquaintance with certain rules by which it is governed. But trustworthiness is the common property of men, and success in placing insurance will depend upon the industry, honesty, and competency which the broker displays.

The statute invests the superintendent with no discretion, and he has not pretended to exercise any. He gave his reason for refusing a certificate in an inability of the department to grant it, for the failure of the plaintiff to subscribe to the condition prescribed by the statute. That was of the essence of the legislation, read the section how you will. The legislature was dealing with "agents' and brokers' certificates of authority." It commences by defining the terms of "agent and broker." It then requires an agent of an insurance underwriter to procure a certificate of authority from the superintendent of insurance, annually, and forbids the employment of an agent unless possessing such a certificate. It continues by forbidding an underwriter to pay commissions, or compensation, to such agent, unless holding such a certificate of authority, and, in the clause heretofore quoted, forbids any person from acting as a broker without that certificate. Then fol-

lows the provision, which has also been quoted from, that, before any broker's certificate of authority shall be issued by the superintendent of insurance, a written application must be filed, in which the applicant sets forth that he is, or intends to be, engaged principally in the insurance business, or that he will conduct it in connection with a real estate business. Thus, the sole purpose was to deal with the occupation of an insurance agent, or broker, and to restrict it to a certain class of persons. If there was the purpose, as suggested, of preventing a person from obtaining a certificate with the object of indirectly securing a rebate on the insurance of his own property, in the guise of commissions, the suggestion is too far fetched to save the act, as the appellate division said. Such a purpose could be appropriately accomplished by the "more direct and simple method" of prohibiting a broker from receiving commissions on the insurance of his own property, or that of any partnership, association, or corporation of which he was a member or employee.

If the statute is valid, it was effectual to prevent the plaintiff from enforcing a recovery from the defendant of the commissions he had earned; inasmuch as the procuring of a certificate was made a condition precedent to his right to receive any commissions or compensation for his services. See *Johnston v. Dahlgren*, 166 N. Y. 354, 59 N. E. 987; *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21. If the statute is unconstitutional, then the plaintiff is remitted to his status under the underwriters' agreement and certificate, which, concededly, entitled him to receive from its members certain fixed commissions.

The argument that the invalid provision may be rejected and the rest of the section preserved has been sufficiently answered by the appellate division. The opinion of that court holds, in substance, that the requirement as to the statement in the application in question was a restriction "imposed upon the issuance of a certificate," and was "a necessary part of the scheme requiring a certificate at all. For how are we able to say whether the legislature would have required a license without imposing that condition upon its issuance? . . . Subdivision 'd' is the only condition imposed; the other statements required in the application being merely descriptive of the applicant." They say, further, in answer to the suggestion that the superintendent might ignore the invalid provision, that "the argument loses sight of the fact that the legislature authorized him to issue a certificate only upon an application containing the said statement."

I reach the conclusion that the case was correctly decided below, and that the statute, being invalid, was inoperative to defeat the plaintiff's claim. This was the sole question presented by the appeal, and I advise that the judgment should be affirmed; but, under the terms of the stipulation, without costs to either party, as against the other.

Cullen, Ch. J., and Haight, Vann, Werner, Châse, and Collin, JJ., concur.

# **RHODE ISLAND SUPREME COURT.**

JULIANO C. BASABO

v.

SALVATION ARMY.

(— R. I. —, 85 Atl. 120.)

**Charity — Liability for negligence of servant.**

A charitable corporation like the Salva-

**Note.**— *Liability of charitable institutions for personal injuries.*

As to duty and liability as to ambulance generally, see note to Kellogg v. Church Charity Foundation, 38 L.R.A.(N.S.) 481.

As to liability of fire insurance patrol for injuries, see note to Coleman v. Fire Ins. Patrol, 21 L.R.A.(N.S.) 810, wherein it appears that the liability is dependent upon whether the patrol is considered a public charity or a private corporation.

As to liability of proprietor of private sanatorium or hospital for negligence of nurses, see note to Stanley v. Schumpert, 6 L.R.A.(N.S.) 306.

The present note is supplementary to Hordern v. Salvation Army, 32 L.R.A.(N.S.) 62, and earlier notes there referred to.

It must now be regarded as settled that a charitable corporation is not exempt from liability for a tort against a stranger because of the fact that it holds its property in trust to be applied to purposes of charity. Kellogg v. Church Charity Foundation, 203 N. Y. 191, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, reversing 135 App. Div. 839, 120 N. Y. Supp. 406, on a point not within the scope of the instant note.

So, a religious corporation organized to operate a hospital is not exempted from liability for injury sustained by an employee through negligence chargeable to it, though money received in payment for services was expended in maintaining the institution for the benefit of the poor, paying off a mortgage on its property, and to support its mother institution, located in another state. Armendarez v. Hotel Dieu, — Tex. Civ. App. —, 145 S. W. 1030, wherein it was said: "The defendant is a creature of the state, which has permitted it to incorporate for the purpose desired by it under a statute which vested it with capacity to sue and be sued. 42 L.R.A.(N.S.)

tion Army is liable for injury to a pedestrian through the negligence of its servant in handling a team engaged in its charitable work, even though it is not lacking in care in the selection or retention of the servant.

(December 16, 1912.)

**C**ERTIFICATION by the Superior Court for Providence and Bristol Counties, for the determination by the Supreme Court, of a question arising upon demurrer to the declaration in an action brought to recover damages for the death of plaintiff's minor daughter, alleged to have been caused by the negligence of defendant's servant. Affirmative answer returned.

The facts are stated in the opinion.

Mr. A. B. Crafts, for plaintiff:

The fact that defendant is a charitable corporation does not exempt it from liability.

Glavin v. Rhode Island Hospital, 12 R. I. 423, 34 Am. Rep. 676; Hordern v. Salva-

An object of the incorporation was to carry on a business, in order that the institution might obtain funds, to enable it at the same time to accomplish its charitable work. In order to conduct its business, it naturally was proper and necessary for it to have employees, and to thus assume the relation of master and servant, which it did by employing this plaintiff. The law of master and servant, involving the duties it imposes on the master and his liability for injuries resulting from the nonobservance of such duties, permeates and reaches every situation in the affairs of men in which that relation is assumed. This defendant, it appears from the evidence, conducted its affairs for the combined purposes of revenue and charity; the former being, in the religious aims of the members, subordinated to the latter as the ultimate object. But, independently of this, had this corporation derived no revenues from its operations, and the funds which enabled it to carry on its beneficent actions were derived not from its beneficiaries, but from endowments or contributions, it would not, in our opinion, make a particle of difference in its attitude to the law with reference to its legal duties and liabilities to persons in its service as employees. It was an incorporated body, chartered by its own volition, endowed with power to employ servants, and with the capacity to sue and to be sued. It was not in any sense an agency of the state, nor has the legislature seen fit to extend to such corporations exemption from the well-known duties and liabilities imposed by the general law governing master and servant. This being so, defendant would be liable for injury sustained by its employee, due to the negligence, if any, of itself, its managing officers or agents or vice principals, which is the case presented here."

In the preceding case it was also said that it was a matter of no importance that



tion Army, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; Duncan v. Findlater, 6 Clark & F. 894, Maclean & R. 911; Powers v. Massachusetts Homœopathic Hospital, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Eighth v. Union P. R. Co. 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 33 L.R.A.(N.S.) 141, 78 Atl. 898; Bruce v. Central M. E. Church, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; Mulchey v. Methodist Religious Soc. 125 Mass. 487; Davis v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 368; Smethurst v. Independent Cong. Church, 148 Mass. 261, 2

L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 367.

Mr. Henry W. Gardner, with Messrs. Gardner, Pirce & Thornley, for defendant:

A charitable or eleemosynary corporation is not liable for the torts of its servants or agents, where said corporation has been guilty of no negligence in the selection or retention of said servants or agents, and where there is no duty undertaken requiring the exercise of special art or skill.

1 Clark & M. Priv. Corp. p. 264, § 244; State v. Thompson, 47 Or. 492, 4 L.R.A.(N.S.) 481, 84 Pac. 476, 8 Ann. Cas. 646; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; Currier v. Dartmouth College, 54 C. C. A. 430, 117 Fed. 44; Thornton v. Franklin Square House, 200 Mass. 465, 22 L.R.A.(N.S.) 486, 86 N. E. 909; Whittaker v. St. Luke's Hospital, 137

the property of the defendant was exempt from execution by reason of its character, and that therefore recovery against it would be of no effect.

But it is a well-established doctrine that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes, is not liable to the inmates for the negligence of nurses. Some courts say that one accepting the benefits of such a charity exempts his benefactor from liability for the negligent acts of servants. Others assert that nonliability is based on the ground that trust funds created for benevolent purposes should not be diverted therefrom to pay damages arising from the torts of servants. Exemption from liability is frequently sanctioned on the ground that public policy encourages the support and maintenance of charitable institutions, and protects their funds from the maw of litigation. While there is a diversity of opinion as to the reasons for the rule, the doctrine itself is firmly established. Duncan v. Nebraska Sanitarium Benev. Asso. — Neb. —, 41 L.R.A.(N.S.) 973, 137 N. W. 1120, wherein it was held that a charitable institution conducting a hospital for benevolent purposes alone does not necessarily incur liability in damages for the death of an insane patient, who committed suicide when alone in a room, though pay for the patient's room was accepted under an oral agreement to keep a nurse in constant attendance.

A public charitable hospital, organized as such and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital, resulting from the negligence of a nurse employed by it. Taylor v. Protestant Hospital Asso. 85 Ohio St. 90, 39 L.R.A.(N.S.) 427, 96 N. E. 1089.

A statute incorporating an institution of learning for the instruction of persons of both sexes in science and literature, and pro- 42 L.R.A.(N.S.)

viding that the income or proceeds of the stock shall be appropriated to no other use than for the benefit of the institution as contemplated by the act, creates a charitable institution, and it is not liable for the negligent acts of its officers or employees in preserving its grounds. Hill v. Tualatin Academy, 61 Or. 190, 121 Pac. 901, wherein it was also held that though an action may be maintained against an officer, servant, or employee of a charitable institution to recover damages for injury caused by the act or omission of such person, the action must be against him in his individual, and not in his corporate, capacity, so that if a recovery is awarded, it will not be discharged from trust funds.

Nor does the fact that a public charitable hospital receives pay from a patient for lodging and care affect its character as a "charitable institution," or its right or liabilities as such in relation to such a patient. Taylor v. Protestant Hospital Asso. and Duncan v. Nebraska Sanitarium Benev. Asso. supra.

In Holder v. Massachusetts Horticultural Soc. 211 Mass. 370, 97 N. E. 630, where a charitable corporation owning a building let a part of the building to a tenant for purposes entirely disconnected from those for which it was chartered, it was held that it was not exempted from liability for an injury to a man in its employ, caused by the negligence of its superintendent, when the superintendent and the employee were engaged in doing work for the benefit of the tenant, in accordance with the contract of the corporation with the tenant. In this case the court said: "At the time of the accident, the work in progress was in no way connected with charity, even in its more liberal sense, and the rule of exemption invoked by the defendant is not applicable."

E. M. S.

Mo. App. 116, 117 S. W. 1189; *Cunningham v. Sheltering Arms*, 61 Misc. 501, 115 N. Y. Supp. 576; *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 33 L.R.A.(N.S.) 141, 78 Atl. 898; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Noble v. Hahnemann Hospital*, 112 App. Div. 663, 98 N. Y. Supp. 605; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Fordyce v. Woman's Christian Nat. Library Asso.* 79 Ark. 550, 7 L.R.A.(N.S.) 485, 96 S. W. 155; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278; *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Van Tassell v. Manhattan Eye & Ear Hospital*, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620; *Eighmy v. Union P. R. Co.* 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997; *Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Plant System Relief & Hospital Dept. v. Dickerson*, 118 Ga. 647, 45 S. E. 483; *Parks v. Northwestern University*, 218 Ill. 381, 2 L.R.A.(N.S.) 556, 75 N. E. 991, 4 Ann. Cas. 103; *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L.R.A.(N.S.) 1179, 102 S. W. 351; *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453; *Gitzhoffer v. Sisters of Holy Cross Hospital Asso.* 32 Utah, 46, 8 L.R.A.(N.S.) 1161, 88 Pac. 691; *University of Louisville v. Hammock*, 127 Ky. 564, 14 L.R.A.(N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219; *Illinois C. R. Co. v. Buchanan*, 126 Ky. 288, 11 L.R.A.(N.S.) 711, 103 S. W. 272; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087.

**Parkhurst, J.**, delivered the opinion of the court:

This is an action at law by the plaintiff for the death of his minor daughter, alleged to have been due to the negligence of a servant of the defendant. To this declaration the defendant demurred on the ground that the defendant corporation was described in said declaration as a charitable and eleemosynary corporation, and that it was, as such, not liable for the torts of its servants and agents. After arguments upon the demurrer had been heard in the superior court, the case was certified to the supreme court for the determination 42 L.R.A.(N.S.)

of the question raised by said demurrer, as being a question of such doubt and importance, so affecting the merits of the controversy, that it ought to be determined by the supreme court before further proceedings, under the provisions of chapter 298, § 5, of the General Laws of 1909. The question certified was framed on the language descriptive of said defendant corporation, used by the plaintiff in his amended declaration, and is as follows: "Is a corporation, which is lawfully under its charter and in accordance with the purposes therein prescribed and authorized, doing business in the city of Providence for the purposes of distributing charity and assistance, and supplies of food and clothing and medicine to persons needy or sick or suffering in said Providence, and for the purposes of giving religious entertainments and instructions in said Providence, and improving the morality of the people living in said city, and for all said purposes employing divers horses and teams and servants and agents in and about the streets and highways of said Providence in collecting clothing, food, supplies, medicines, and charities, and in distributing the same, and for its other purposes,—liable for injuries to persons caused by the negligence of such servants and agents in the care and management of said horses and teams while employed for such purposes, where it is not shown or alleged that there has been any lack of care or diligence on the part of such corporation in the selection or retention of such servants or agents?"

The defendant's counsel contends that, under the facts stated in the question above quoted, the defendant is a charitable corporation, as to which no dispute is made by the plaintiff's counsel; and we are of the opinion that the defendant is a charitable corporation in accordance with definitions so often repeated in the cases that no citation of authority is necessary. The defendant's counsel further contends that, as such charitable corporation, it is not liable for the torts or negligence of its servants or agents, where, as is shown by the question, it has not been guilty of negligence in the selection or retention of its servants or agents, and where there is no duty undertaken requiring the exercise of special care or skill such as that of a physician or surgeon. And the defendant's counsel cites numerous cases in support of its contention; but it will be found upon examination of the cases cited, where it has been held that a charitable corporation or institution is not liable, that the great majority of them are cases where suit was brought by a patient or inmate of the hospital or institution, who was receiving the benefit of

the charity at the time of the alleged injury. Some of the cases cited absolutely deny the liability of a charitable corporation in any event to pay damages for injuries arising from the negligence of its servants or agents, either to a patient or inmate or to a third party, on the ground of public policy, saying (as in *Fire Ins. Patrol v. Boyd*, *infra*) that "it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants" of the charity, and arguing that, if such damages were to be allowed to be paid out of the trust funds, it would tend to destroy the charity, and to discourage the giving of money or other property for the establishment of charities. *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 647, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087; *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189; *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 33 L.R.A.(N.S.) 141, 78 Atl. 898; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278 (no negligence shown, but approves *Downes Case*); *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Parks v. Northwestern University*, 218 Ill. 381, 2 L.R.A.(N.S.) 556, 75 N. E. 991, 4 Ann. Cas. 103; *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L.R.A.(N.S.) 1179, 102 S. W. 351; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453. Other cases cited, while arguing along the same general lines of public policy, limit the exemption of charitable corporations from liability for injuries occasioned by the negligence of physicians, surgeons, nurses, servants, and agents to cases where there has been no negligence on the part of the defendants in the selection or retention of such persons. *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Van Tassel v. Manhattan Eye & Ear Hospital*, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620; *Eighmy v. Union P. R. Co.* 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; *Plant System Relief & Hospital Dept. v. Dickerson*, 118 Ga. 647, 45 S. E. 483; *Illinois C. R. Co. v. Buchanan*, 126 Ky. 288, 11 L.R.A.(N.S.) 711, 103 S. W. 272; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 42 L.R.A.(N.S.)

8 Ann. Cas. 1109; *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L.R.A.(N.S.) 486, 86 N. E. 909.

We think these latter cases must be regarded as entirely inconsistent with the general proposition of the exemption of charitable corporations on grounds of public policy, set forth in the previous cases, as was said in reference to many of these cases by Gaynor, J., in *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, at page 217, 112 N. Y. Supp. 566, at page 569: "In many, if not most, of the cases, a ground for the nonliability for the torts of agents or servants of charitable institutions is that to pay damages for such torts would be a diversion of their funds from the trust purposes for which they are donated by the charitable, and thus a contravention of the trust; and that as such institutions have no other funds, it would be futile to allow judgments to be taken against them in such cases. But the opinions of the judges in these same cases almost invariably except cases where the agent or servant was incompetent and there was negligence in his selection; failing to take note that it would be as much a diversion of the trust funds to pay damages for the tort of negligence in selection as for any other tort. If the rule exist, it must necessarily apply to all torts and in all cases. The only support for the argument that it does exist is found in the remarks of judges in certain rather old English cases, which were repudiated in later cases, and never had a direct application to actions of tort against charitable corporations such as are now common. It is true that an action does not lie against a trustee under a will, or the like, as such, for his torts or those of his servants in the affairs or administration of the trust. He has to be sued individually; but the reason is purely technical, and the courts allow the judgment against him individually for damages to be paid out of the trust funds, if he was free from wilful misconduct in the tort. No rule, therefore, that trust funds may not be used to pay damages for torts in the administration of the trust, exists even in the case of ordinary express trusts, let alone in the general trusts of charitable corporations. *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190. The position of such a corporation in respect of its torts would seem to be the same as that of an individual carrying on similar charitable work with donated funds or with

his own funds. I do not understand that, if my servant, sent out by me on an errand of mercy or charity, negligently runs over one in the street, I am not liable for his act." These views were approved by the court of appeals of New York (although the decision was reversed on other grounds) in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 194, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883.

We are of the opinion that the doctrine of the absolute exemption of charitable corporations is very much weakened by the position taken by the courts in these later citations, and is practically repudiated by them, whatever general remarks the courts may have made in regard thereto, when the same are submitted to a careful and logical consideration. And this is all the more apparent when we consider the doctrine laid down in *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 132, 109 Fed. 294, 303, where, after a very careful review of the authorities up to the date of decision (1901), the United States circuit court of appeals repudiated the doctrine of general exemption on the ground of public policy, and placed the exemption of the defendant in the case at bar, where it was sued for negligence of a nurse by a patient injured, upon the ground that "one who accepts the benefit either of a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and

the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected." The same doctrine was hinted at, though not fully developed, in the case of *Hearns v. Waterbury Hospital* (1895) *supra*, 66 Conn. 98, on page 125, where it says: "Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party,—a stranger to the transaction,—he is rather a participant." So in *Downes v. Harper Hospital* (1894) *supra*, 101 Mich. 555, on pages 559, 560, the court seems to recognize the same principle where it says: "It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition." Certain other cases have been cited on behalf of the defendant which relate solely to the denial of the right of recovery for injuries arising from negligence of agents and servants of public institutions, some of which are hospitals, some penal or reformatory institutions, where the functions performed are those of a state or of a municipal corporation, and where the ground of exemption is that the defendant is performing a public function of the state, or of a municipal corporation, and shares the immunity of the state or of such municipal corporation from suit. *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836, (in one aspect); *Noble v. Hahnemann Hospital*, 112 App. Div. 663, 98 N. Y. Supp. 605; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997. The case of *Fordyce v. Woman's Christian Nat. Library Assn.* 79 Ark. 550, 7 L.R.A.(N.S.) 485, 96 S. W. 155, cited by defendant, is to the effect that the real estate of a charitable corporation dedicated to charitable uses cannot be sold under execution on a judgment against the corporation. These latter cases are not in point in this inquiry.

We have referred at some length to the above cases, which are cited on behalf of the defendant, in order to classify them, and in the endeavor to show that the doctrine of the general immunity of charitable corporations from liability for damages occasioned by the negligence of servants and agents on grounds of public policy is not so widely

held as was contended in argument, but, in its broadest sense, is confined to seven states, from which the cases first referred to are taken; and that the doctrine of qualified immunity, in cases where no negligence appears in the selection or retention of agents or servants, does not logically rest upon grounds of public policy, as somewhat loosely argued in the second list of cases, above referred to, but could properly and logically be rested in most cases upon the doctrine that the physicians and surgeons in attendance upon patients in hospitals, or the nurses who are under the direction of such physicians or surgeons, are not in general the servants of the defendant charity in the true sense of the relation of master and servant, because, as to the nature and manner of their services, they are not under the direction of the defendant, but that they become and remain the servants of the patient so long as they are in attendance upon such patient; and that the full duty of the defendant charity has been performed if it has exercised due care in the selection of competent persons for such service.

It has been suggested on behalf of the defendant that the principles set forth by this court in *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, are not applicable in the decision of the case at bar and should not be applied; and that in view of the numerous decisions of other courts, rendered since that case was decided, this court should not adhere to that decision. That case has been carefully re-examined in the light of all the cases cited by the parties hereto, and of some other cases which are cited by neither party, and this court sees no reason to modify the conclusions reached in said decision, or in any respect to recede from them or to doubt their correctness, upon the facts of that case as reported. It is true that, in many of the cases decided by other courts since 1879, the *Glavin Case* has been referred to; in some it has been criticized, but in none of them has it been fully and correctly stated, nor do we find any case which is quite on all fours with it.

As we have already indicated above, in speaking of the relation between a charitable hospital corporation and its physicians and surgeons, that such relation is in general not that of master and servants, we find in the *Glavin Case*, 12 R. I. page 423, the following discussion: "It is quite conceivable that a corporation might not agree to do more than furnish hospital accommodations, leaving the patient to find his own physician or surgeon. In such a case the corporation would plainly not be liable for the torts of the physicians or surgeons, 42 L.R.A. (N.S.)

for in such a case they would not be its servants, and it would not have assumed any responsibility in their selection. But that is not this case. Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A, out of charity, employs a physician to attend B, his sick neighbor, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. The relation of master and servant is not established between A and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them; but it has this power, not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognize the right of the corporation, while retaining them, to direct them in their treatment of patients. But, though the relation of master and servant cannot be said to exist between the hospital and the physicians and surgeons attendant on it, the hospital does nevertheless assume a responsibility, in that it uses its own judgment, or that of its trustees, in selecting them, and impliedly, therefore, undertakes to exercise reasonable care to get such as are skilful and trustworthy in their professions. A patient has a right to rely on the exercise of such care, and consequently if, through the neglect of the hospital to exercise it, he receives an injury, he is entitled to look to the hospital for indemnity, unless the hospital enjoys some extraordinary exemption from liability. In the case at bar, however, the injury was not received from a physician or surgeon, but from a surgical interne, and it may be that a surgical interne stands on a different footing. There are some cases of minor importance in which the internes are allowed to act as physicians and surgeons, and in such cases I think that their relation to the corporation does not differ from that of a visiting physician or surgeon. But the internes act in still another capacity. The corporation undertakes to furnish physicians and surgeons for all kinds of cases, including the most critical. It has a regular staff of physicians and surgeons. But inasmuch as these are not, like the internes, constantly in attendance at the hospital, they must frequently be sent for. The corporation undertakes to send for them, and of course it must do it through

an agent. The internes are the persons appointed to perform this duty for it. A rule of the hospital prescribes that in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring an immediate operation, the interne shall send for the surgeon of the day, and, if he cannot be found, for one of the other surgeons. Here, then, we have the relation of principal and agent, or master and servant. If the interne neglects to call the surgeon in the class of cases designated, his neglect is the neglect of the corporation. Now the plaintiff contends that his injury was such that, under the rule, a surgeon should have been immediately sent for, and that the interne's neglect to do it cost him his arm. He also contends that the corporation did not use proper care in selecting the interne, who was incompetent for his position, and thereby he suffered the injury complained of. He contends that he was entitled to recover on both these grounds, and, if the evidence was sufficient to establish them, we think that he was entitled to recover on both grounds, unless the hospital enjoys some peculiar immunity. This brings us to the important question whether the hospital does enjoy any peculiar exemption from liability. The claim that it enjoys such an exemption rests upon two grounds; to wit, on the ground of public policy, and on the ground that the hospital had no funds except such as are exclusively dedicated to the charitable uses for which it was established, and which therefore cannot be applied to indemnify a patient who has been injured by the negligence or malpractice of a physician or surgeon, or of a medical or surgical interne. The first ground is the ground on which the plaintiff was nonsuited. The argument is that hospitals, like the Rhode Island Hospital, are a public benefit; but if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they shall be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great public charity such as the Rhode Island Hospital is, but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully; and to that extent, therefore, it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacri-

ficed to it. Whether it shall be or not is not a question for the court, but for the legislature." The court then proceeds to a critical examination of the earlier authorities in England upon which it was supposed that the doctrine of the absolute immunity of trust funds was founded, and shows satisfactorily, to this court at least, that such doctrine of absolute immunity has no logical foundation.

The Galvin Case is peculiar in this: That while by the rules of the defendant corporation it was provided that "in all cases requiring immediate and important action, in all doubtful cases, and in all cases requiring an immediate operation, the interne shall send for the surgeon of the day, and, if he cannot be found, for one of the other surgeons" (12 R. I. page 425), the case shows that this was not done; but that after the abortive attempts of an incompetent interne to stop the hemorrhage by ligating certain arteries, and after the placing of a tourniquet upon the arm to stop the hemorrhage so tightly as to stop the circulation, the patient was left in this condition for nearly seventeen hours before the arrival of a surgeon who was skilful enough to ligate the arteries, whereby the injury complained of, resulting in gangrene and loss of the arm, was caused. We find no such case among all the numerous cases cited, nor do we find that any court, in referring to the Galvin Case, has adequately set forth the peculiar features of the negligence complained of as the cause of the injury. The Galvin Case thus stands for four things: First, it sets forth the true relation of a charitable corporation to the skilled attendants, such as physicians, surgeons, and nurses, whose services are furnished to its patients, showing that such skilled attendants are not, in general, the servants of the corporation, in that they are not under the control of the corporation as to their treatment of patients, and that, if they are selected with due care, their negligence is not the negligence of the corporation, and we are of the opinion that upon this principle, in most of the cases cited relating to such corporations, their immunity from responsibility for damages might have been more logically and properly founded; second, that there are certain duties to patients which are corporate duties, such as the exercise of due care in the selection of skilled and competent attendants and the exercise of due care in the summoning of such attendants in a case where the condition of the patient requires such service, and that the agent of the corporation, whose duty it is to summon such attendants, is in such case the agent and representative of the corporation, whose negligence is deemed to be that of the cor-

poration itself; third, that the doctrine of the general immunity of a charitable corporation from liability for damages, on the ground of public policy, as involving the diversion of trust funds from the purposes of the trust, has no logical foundation; fourth, that, where such a corporation has funds available for the general purposes of the corporation, it may apply such funds to pay damages for which it is held liable "notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them" (12 R. I. page 428), even though certain property, such as its real estate, may be "subject to so strict a dedication that it cannot be diverted to the payment of damages." 12 R. I. page 429. So much for the general principles of liability as they are to be and have been applied as between a charitable corporation and its beneficiaries.

When we come to the question of liabilities of such corporations for their negligence or the negligence of their servants or agents, resulting in injuries to third parties who are not in relation of inmates, patients, or beneficiaries, we find comparatively little clear authority. Among all the cases heretofore referred to, where charitable corporations have been held to be immune from liability, we find only one clear case which declares such immunity in relation to injury suffered by a third party by reason of the negligence of its servants. This case is *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, where it appeared that plaintiff's intestate, while walking on the street, was killed by the negligent act of a servant of the patrol in throwing a bundle of tarpaulins, which had been used to cover goods at a fire, from a window in the building where the fire had occurred upon Boyd, the plaintiff's intestate. The court held that the Fire Insurance Patrol was a charity, and not liable under the doctrine of general immunity heretofore discussed (and which this court has repudiated). This case is to some extent offset by the case of *Newcomb v. Boston Protective Dept.* 24 N. E. 39, 151 Mass. 215, 6 L.R.A. 778, where a similar corporation was sued in tort for personal injuries occasioned to the plaintiff, a cab driver, by a collision between his cab and a wagon of the defendant, through the alleged negligence of the driver of the wagon, a servant of the defendant. The Massachusetts court held that the defendant was a private corporation, not a charity, and attempted to distinguish the defendant from the Fire Insurance Patrol in the previous case, but we think the distinction is not well made out. In the *Newcomb Case* 42 L.R.A. (N.S.)

the plaintiff was held entitled to recover. We are of the opinion that the *Newcomb Case*, in holding that the defendant was not a charity, is a better reasoned case than that of *Fire Ins. Patrol v. Boyd*, supra. Certain other cases which hold that such charitable corporations are not liable for injuries to employees due to negligence in having machines out of order, or in not giving proper warning or instruction, are *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189, where the doctrine of general immunity is held; *Cunningham v. Sheltering Arms*, 61 Misc. 501, 115 N. Y. Supp. 576, and *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A. (N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109, in which two latter cases the plaintiffs appear to have been inmates and beneficiaries of the charity. In the case of *Noble v. Hahnemann Hospital*, 112 App. Div. 663, 98 N. Y. Supp. 605, where the plaintiff sued for injuries suffered by reason of the negligence of the driver of defendant's ambulance in colliding with a wagon in which the plaintiff was sitting, the defendant was a charity and was representing the city in the performance of a municipal function, and was held not liable on both grounds. And see *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566, Id., 203 N. Y. 191, 194, 38 L.R.A. (N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, supra, where, under similar circumstances, the liability of a charitable corporation was sustained. With these exceptions, which we do not find to be of even persuasive authority in the case at bar, we find that the adjudicated cases, which have dealt with the question of the liability of a charitable corporation to its servants or to third parties for injuries arising from negligence, have held in favor of the plaintiffs.

In the case of *Hewett v. Woman's Hospital Aid Asso.* (1906) 73 N. H. 556, 7 L.R.A. (N.S.) 496, 64 Atl. 190, 193, a nurse in the employ of the defendant, a charitable corporation, who was receiving wages and instruction in consideration of her services as such nurse, was placed by the superintendent in charge of a patient suffering from diphtheria, of which the superintendent had notice, but neglected to give notice to the nurse. The nurse, not knowing the nature of the case, took the disease, and, for the injury to her, caused thereby, brought suit. She was held entitled to recover. Exemption from liability was claimed by the defendant on the same grounds of exemption as set forth in many of the cases above cited. After examining the statutes of New Hampshire under which the defendant was incorporated, and finding

therein no express exemption from liability, the court proceeds to a careful examination of the cases holding such corporations exempt from liability on general grounds of public policy, and the court finds from the evidence that the plaintiff was a servant or employee of the defendant corporation. In stating its conclusions upon this branch of the case, the court says as follows: "If she had been employed by an individual to attend a member of his family afflicted with smallpox, of which he had knowledge, but of which he did not inform her, and she took the disease without fault on her part, and suffered damage therefrom, it would not be seriously denied that he was guilty of actionable negligence in not informing her of the danger to which he exposed her. It was his duty, arising from his employment of her, or from the contractual relation of master and servant existing between them, to warn her of the danger incident to the service which he knew, or under the circumstances ought to have known, and of which he knew she was ignorant, though in the exercise of ordinary care. And this duty is a non-delegable one. *Hamel v. Newmarket Mfg. Co.* 73 N. H. 386, 62 Atl. 592; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548; *Wallace v. Boston & M. R. Co.* 72 N. H. 504, 514, 57 Atl. 913. To say that a similar duty was not imposed upon the defendant for the benefit and protection of the plaintiff, because it is a charitable corporation, is to relieve such corporations from the reasonable obligation of exercising the care ordinarily required of, or contractually assumed by, men in general in the prosecution of their legitimate business. The necessity for such an exceptional holding is not apparent. Since the property of the defendant is held for the general purpose of maintaining a hospital, without other specific limitation, it is no more exempt from being appropriated to the payment of damages occasioned by the negligence of the hospital than is the property of an individual, which he holds for commercial or charitable purposes, for the consequences of his negligence. In conducting the affairs of a hospital, its officers and agents are as liable to commit acts of negligence as are the officers and agents of a railroad or other business corporation. Men in general are not uniformly careful. Experience shows that negligence—the failure to exercise ordinary care—is to be expected when men engage in industrial pursuits. It may not inappropriately be said to be necessarily incidental in the accomplishment of most practical results through the agency of men. The donors of the defendant's property for hospital purposes were not ignorant of this fact, and are presumed to have given the trust

property, knowing that it might be required for the liquidation of claims in tort, as well as for claims in contract, incurred in carrying out the purposes of the corporation. Indeed, its conceded authority to contract for the employment of nurses and other necessary agents would seem to include power to respond in damages for all breaches of such contracts, one essential or incidental element of which is its duty to exercise care as well as its duty to pay the stipulated compensation. No conditions were imposed upon the defendant, either by its charter or by the donors of its property, by which the contracts of employment it was obliged to make with its servants should have a different effect from that usually given to such contracts, or that the relations between it and its employees should be legally different from those usually subsisting between master and servant. There is therefore no substantial reason for holding that it did not owe the duty to the plaintiff of warning her of the dangers of her employment under the law as applied to the ordinary relation of master and servant. In this respect the legislature has not invested it, either expressly or inferentially, with peculiar powers." This case was not cited by either party in the case at bar, but it is evidently referred to in the defendant's supplemental brief, where it is said: "In New Hampshire a charitable corporation is now liable for the acts of its servants and agents to the same extent as a business corporation, and there are decisions to this effect, but they are based solely upon the New Hampshire statute, which declares in plain terms that such corporation shall be so liable. These decisions in New Hampshire are therefore not in point upon this question, although they have been cited by the Michigan and New York courts in the decisions above referred to." There is no ground for such a statement. The New Hampshire supreme court refers to the statutes only to show that the defendant was incorporated as a charitable corporation, and that there was no express statutory exemption from liability. The decision of the case is based entirely upon general considerations as above set forth.

In *Bruce v. Central M. E. Church* (1907) 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150, two members of the court found that the defendant was not a charitable corporation, and therefore not exempt. But six members of the court agreed that the defendant was a charitable corporation, and proceeded to examine the doctrine of the exemption of such charitable corporation from liability for negligence. In this case plaintiff was an employee of a contractor engaged in decorating the church



building, and sued for injuries sustained by reason of the breaking of defective scaffolding furnished by the agents of the defendant. The majority opinion, after setting forth the reasons for holding the defendant to be a charitable corporation, proceeds to the examination of the case of *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42, *supra*, where some of the language used was consistent with the doctrine of general exemption on grounds of public policy, and says as follows: "I conclude, therefore, that we cannot hold the principle of the decision in *Downes v. Harper Hospital*, *supra*, inapplicable, upon the ground that the funds of the church are not charitable trust funds. This leads us to the inquiry, Is there any other ground upon which we should hold *Downes v. Harper Hospital* inapplicable? There is this distinction between *Downes v. Harper Hospital* and this case, *viz.*, in the *Downes Case* plaintiff was a patient in defendant's hospital, and therefore a beneficiary of the charitable trust administered by the hospital corporation, while in this case he was an employee of defendant's contractor, and not a beneficiary of the trust administered by defendant. If we hold that the principle of the *Downes Case* applies to the case at bar, we must declare that that principle exempts a corporation administering a charitable trust from all liability for the torts of its agents, and, as a corporation can act only by and through its agents, that it is exempt from all liability whatsoever for torts. What is the principle underlying the *Downes Case*? Does it exempt a corporation administering a charitable trust from all liability for torts? Those who answer this question in the affirmative cannot support their position by appealing to the reasoning of the opinion in that case. While that opinion says, 'The law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution,' the pith of its reasoning, in my judgment, is contained in the following words: 'It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damages to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.'" And after referring to a large number of the cases heretofore cited, the opinion goes on (page 252 of 147 Mich.): "In the latest of these cases (*Powers v. Homœopathic Hospital*), the opinion is exhaustive and elaborate, and discusses nearly all the authorities. It is held that the ground upon which lia-

bility is denied is that of assumed risk; the court saying: 'One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants.' If this is correct, it is scarcely necessary to say that that principle has no application to the case at bar. Is it correct? The ground upon which liability is denied in nearly all the foregoing cases is that stated in the *Downes Case*; *viz.*, that it would thwart the purpose of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts. It is entirely logical to say that this will must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries, they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound,—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual,—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity." The opinion then further very carefully examines the underlying authorities in the English cases of *Duncan v. Findlater*, 6 Clark & F. 894, *Maclean & R.* 911; and *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, L. R. 1 H. L. 93, 12

Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, with the subsequent cases, and shows that the doctrine stated in many of the cases, that those administering a trust fund are not responsible for the torts of their agents, because damages for such torts cannot be paid from the trust fund, is not well founded, as this court has already held in the Glavin Case, supra. And finally, in disposing of this question, the opinion says (page 255 of 147 Mich.): "I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot therefore claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such a tort, and that *Downes v. Harper Hospital* and other similar cases are consistent with this rule. They rest upon the principle, correctly stated in *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 132, 109 Fed. 294, 303, viz., that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers v. Massachusetts Homeopathic Hospital*. The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation."

In *Hordern v. Salvation Army* (1910) 199 N. Y. 233, 237, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626, 627, the action was brought to recover for personal injuries sustained by the plaintiff, a journeyman mechanic, who was engaged in making repairs upon a boiler upon defendant's premises, through the defective condition of a runway or staging leading from a door in the boiler room. The defendant claimed exemption from liability as being a religious or charitable corporation. The court cites many of the cases above referred to where such corporations have been held to be totally immune from liability, as well as those where they have been held immune on the ground that they were performing governmental functions, and also those where the immunity is made dependent upon the relation the plaintiff bears to the defendant, and says: "In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state" (citing cases). And after discussing certain other cases in New York, where defendant charitable corporations have been held liable to third persons 42 L.R.A.(N.S.)

for negligence, repudiates the doctrine of the nonliability of trust funds for payment of damages arising from negligence, citing with approval from *Hewett v. Woman's Hospital Aid Asso.* (1906) 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 193; *Bruce v. Central M. E. Church* (1907) 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Powers v. Massachusetts Homeopathic Hospital*, supra, and concludes: "We can add nothing to the force of this reasoning, but simply express our concurrence therein, as well as in the argument of Judge Lowell." This case was subsequently approved by the New York court of appeals in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 194, 38 L.R.A. (N.S.) 481, 96 N. E. 406, 407 Ann. Cas. 1913A, 883, where the court says: "It must now be regarded as settled that a charitable corporation is not exempt from liability for a tort against a stranger because of the fact that it holds its property in trust to be applied to the purposes of charity."

In *Kellogg v. Church Charity Foundation* (1908) 128 App. Div. 214, 112 N. Y. Supp. 566, we find circumstances somewhat analogous to those in the case at bar. There a driver of an ambulance belonging to the defendant, a charitable hospital, negligently ran down a person who was traveling on a highway, and who was in the exercise of due care. Judge Gaynor made a careful review of the authorities, classifying them as to the reasons assigned for the immunity of charitable corporations from liability, and we have already quoted from this opinion, where the doctrine of the immunity of trust funds from liability for damages is repudiated. It is sufficient to say that the conclusion of the court is that a charitable institution is liable for the negligence of its servants resulting in injury to persons who are not patients or beneficiaries.

These doctrines were approved by the New York court of appeals in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 194, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, supra, although in that court the judgment of the appellate division was reversed on the ground that the evidence showed that the ambulance driver was not the servant of the defendant, but was the servant of the livery stable keeper, who furnished the horse and driver for the use of the defendant. See also *Gartland v. New York Zoological Soc.* 135 App. Div. 163, 120 N. Y. Supp. 24; *Donaldson v. General Public Hospital*, 30 N. B. 279. It is to be noted, also, that, while it was held by the supreme judicial court of Massachusetts in *McDonald v. Massachusetts General Hospital* (1876) 120 Mass. 432, 21 Am. Rep. 529, that a

public charitable hospital was not liable for an injury to a patient caused by negligence of its agents, and this doctrine was approved in *Benton v. City Hospital* (1885) 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836, and in *Farrigan v. Pevear* (1906) 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109, yet the same court, in suits against religious and other charitable corporations, has, in several instances in contemporaneous cases, held the defendants liable for injuries to third parties arising from the negligence of agents and servants of the defendants. *Mulchey v. Methodist Religious Soc.* (1878) 125 Mass. 487; *Davis v. Central Cong. Soc.* (1880) 129 Mass. 387, 37 Am. Rep. 368; *Smethurst v. Independent Cong. Church* (1889) 148 Mass. 261, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387; *Stewart v. Harvard College* (1866) 12 Allen, 58. And while the court says in *Farrigan v. Pevear*, 193 Mass. 147, 149, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109, supra, that the question of the liability of a public charity for the negligence of its servants or agents does not appear to have been raised or decided in either the *Davis Case* or the *Smethurst Case*, it is remarkable that such ground of exemption was not suggested either by counsel or court, if the doctrine of exemption could by any possibility have been thought to apply in cases where the parties injured were third parties, standing in no beneficiary relation to the defendants. We cannot believe that counsel in those cases would have failed to raise the question so recently decided in favor of defendants in the hospital cases if they had not seen the distinction which we believe to exist between the two classes of cases.

In view of the principles above set forth, this court is of the opinion that both upon reason and upon authority, so far as the cases directly apply to the case at bar, the defendant corporation, although it is a charitable corporation, is liable, as any other corporation, for injuries to third persons caused by the negligence of its servants and agents in the care and management of its horses and teams while employed for its purposes, even though it is not shown or alleged that there has been any lack of care or diligence on the part of the defendant in the selection or retention of such servants or agents. We believe that public policy does not require any such exemption from liability as is claimed by the defendant in this case, but, on the contrary, that such exemption would be contrary to true public policy. We are clearly of the opinion that the true legal relation of master and servant existed between the defendant and the 42 L.R.A.(N.S.)

drivers in its employ at the time of the alleged injury, and that, just as such a servant has a lawful right to recover his stipulated wages for his services and to recover damages for breach of his contract of service on the part of his master, so, also, would he be entitled to recover for injuries due to the negligence of his master as in other cases of master and servant; and so, also, would his master be liable for his torts and negligence while in the service of the master, as in any other case. It would, in our opinion, be manifestly unjust and contrary to public policy to hold that a person run over and injured on a public highway by a horse and wagon belonging to the defendant, and driven by the defendant's servant, through the negligent acts of such servant, would not be entitled to recover against the master, but could only recover against the negligent servant, while a person injured under similar circumstances by the servant of an expressman, or the driver of a cab belonging to a liveryman, would be allowed to recover against the master. There is no reason or logic in the attempted distinction between the servant of the defendant and the servant of any other person or corporation. We answer the question submitted to this court in the affirmative.

The papers in the case will be sent back to the Superior Court sitting within and for the counties of Providence and Bristol, with our decision certified thereon, for further proceedings.

#### KENTUCKY COURT OF APPEALS.

AGNES B. SAMUEL, Appt.,  
v.

H. E. SAMUEL'S ADMINISTRATOR.

(151 Ky. 235, 151 S. W. 676.)

Limitation of action — note — applying open account.

One holding another's note cannot, without the consent or direction of the maker,

*Note. — Limitation of actions: right to apply indebtedness owed by creditor to debtor, for purpose of tolling statute.*

As to revival of barred debt by application of general payment, see notes to *Sanborn v. Cole*, 14 L.R.A. 208, and *Anderson v. Nystrom*, 13 L.R.A.(N.S.) 1141.

As to effect of payment on security held as collateral, to stay running of statute against principal obligation, see note to *Bosler v. McShane*, 12 L.R.A.(N.S.) 1032.

As to effect of application of proceeds of sale under deed of trust or mortgage, upon the running of the statute of limitations against the indebtedness secured, see note

apply an indebtedness which he owes the maker on open account in reduction of the note, so as to toll the statute of limitations.

(December 17, 1912.)

**A** PPEAL by claimant from a judgment of the Circuit Court for Mercer County disallowing claims against the estate of H. E. Samuel, deceased. Affirmed.

The facts are stated in the opinion.

Mr. E. H. Gaither, for appellant:

Appellant had the right to place her indebtedness to deceased upon the notes in controversy, and thus take them out of the statute of limitation.

25 Cyc. 1380; Brown v. Osborne, 136 Ky.

to Holmquist v. Gilbert, 14 L.R.A. (N.S.) 479.

The correct rule as to the right of a creditor to apply an indebtedness owed by him to the debtor, as a credit on his demand against the latter, and one of the reasons therefor, are well stated in *SAMUEL v. SAMUEL*. In *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* — Kan. —, 70 Pac. 933, where the defendant, when demand was made for payment of the amount for which the suit was subsequently brought, denied its liability therefor, and presented a claim against the plaintiff based on other transactions, and the plaintiff, without the defendant's assent, allowed and credited a part only of that claim upon its own claim against the defendant, which the latter had denied and repudiated, the court said: "Does the mere fact that the grain company allowed and credited \$200 upon a claim denied and repudiated by the railway company take the case out of the statute? We think not. . . . It is not within the power of a creditor to prevent the statute of limitations from running on his claim by the arbitrary indorsement of a credit of which the defendant has no knowledge, or at least to which he has not in some manner given his assent. Before a payment or a credit will arrest the running of the statute, it must be an acknowledgment of the existence of the debt, and it cannot be such unless it is made with the request or understanding by the debtor that it shall be credited on the amount which he is owing."

So, a mortgagee who has taken and retained possession of the mortgaged premises after their abandonment by the mortgagor has no right to apply, toward the payment of the mortgage debt, for the purpose of arresting the running of the statute of limitations against it, the value of the use and occupation of the premises each year, although the mortgagor has the right to compel him to account for such use and occupation, and to apply the value thereof toward the payment of the debt. *Anderson v. Baxter*, 4 Or. 105.

And the mere fact that the payee of a note is owing the maker an undetermined 42 L.R.A. (N.S.)

456, 124 S. W. 405; *Clapp v. Ingersol*, 11 Me. 83; *Rowell v. Lewis*, 72 Vt. 163, 47 Atl. 783; *Ramsay v. Warner*, 97 Mass. 8; *Walker v. Butler*, 6 El. & Bl. 506, 25 L. J. Q. B. N. S. 377, 2 Jur. N. S. 687; *Taylor v. Foster*, 132 Mass. 30; *Jackson v. Burke*, 1 Dill. 311, Fed. Cas. No. 7,133; *Bowe v. Gano*, 9 Hun, 6; *Robinson v. Allison*, 36 Ala. 525; *Mills v. Fowkes*, 5 Bing. N. C. 455, 7 Scott, 444, 2 Arnold, 62, 8 L. J. C. P. N. S. 276, 3 Jur. 406; *Nash v. Hodgson*, 6 De G. M. & G. 474, 3 Eq. Rep. 1025, 25 L. J. Ch. N. S. 186, 1 Jur. N. S. 946; *Pond v. Williams*, 1 Gray, 630; *Blake v. Sawyer*, 83 Me. 129, 12 L.R.A. 712, 23 Am. St. Rep. 762, 21 Atl. 834; *Ayer v. Hawkins*, 19 Vt. 26; *Robie v. Briggs*, 59 Vt. 448, 59 Am. Rep. 737, 9 Atl. 593; *Beck v. Haas*, 31 Mo.

balance on certain transactions in no way connected with the note, which balance might have been applied on the note, is not sufficient to prevent the maker's availing himself of the bar of the statute of limitations as against the note, where no settlement or adjustment of the matters in connection with which the balance is due was ever had between the parties, and the maker has never ordered such balance to be indorsed as a payment on the note. *Sears v. Hicklin*, 3 Colo. App. 331, 33 Pac. 137.

Nor can a balance due at the end of a year, from the maker of a note to the holder, on an open account between them, be construed as a payment on the note which will arrest the operation of the statute of limitations against it. *Nash v. Woodward*, 62 S. C. 418, 40 S. E. 895.

Where the maker of a promissory note, having an open account against the payee, directs the latter to credit the note with the amount of the balance claimed on the account, but the payee disputes the amount due on the account, he has no right, for the purpose of tolling the statute of limitations, to concede as a credit on the note a part only of the amount claimed by the maker. *Reinhard v. Fluckiger*, 119 Mo. App. 465, 94 S. W. 994.

And the application by a creditor, without the privity of his debtor, of an indebtedness owing from himself to the debtor upon an independent transaction, as a credit upon his claim against the debtor, does not prevent the running of the statute of limitations against the claim (*Loeffel v. Hoss*, 11 Mo. App. 133; *Chapman v. Hogg*, 135 Mo. App. 654, 116 S. W. 492), or take the claim out of the statute after it has become barred (*Freeze v. Lockhard*, 87 Mo. App. 102).

Thus, in each of the following cases, it has been held that the facts stated do not constitute a payment which will prevent the running of the statute of limitations against the debt in question:

—where the payee of a note went with another person to the house of the maker and obtained lodgings for the night, and in the morning produced the note and demand-

App. 180; *United States v. January*, 7 Cranch, 572, 3 L. ed. 443; *Alexandria v. Patten*, 4 Cranch, 317, 2 L. ed. 633; *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. ed. 176.

Mr. J. F. Vanarsdall, for appellee:

If the payments are denied, although indorsed on the notes, it is incumbent on the holder of the note to show that they were not only actually made, but also to show the date when they purport to have been made.

*Tabor v. Hardin*, 9 Ky. L. Rep. 493; *Frazer v. Frazer*, 13 Bush, 399; *Pitchford v. Gatewood*, 10 Ky. L. Rep. 112; *Bourne v. Bourne*, 13 Ky. L. Rep. 207; *Brown v. Osborne*, 136 Ky. 456, 124 S. W. 405.

ed payment, and, upon the maker's answering that he had not the money to pay it, said that he would credit on the note the amount due him for the lodgings, to which the maker did not consent; and where, in fact, no indorsement of the payment was then, or ever, made upon the note. *Kyger v. Ryley*, 2 Neb. 20.

—where the maker of a promissory note, having an open account with the payee, directed the latter to credit the note with the amount of the balance claimed on the account, but the payee disputed the amount due on the account and entered no credit on the note, and there has never been any agreement between the parties as to the exact amount due on the note. *Reinhard v. Fluckiger*, supra.

But credits given on an account for the amount of certain work performed by the debtor for the creditor, in accordance with an agreement under which the debtor performed the work, that the amount thereof should be credited upon the account, constitute payments which will arrest the operation of the statute. *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406.

And rent payable by a creditor to his debtor, and applied by agreement, as it becomes due, on the principal debt owed by the debtor to the creditor, constitute payments which prevent the statute of limitations from running against the debt until the date when the last rent is due. *McKeon v. Byington*, 70 Conn. 429, 39 Atl. 853.

Likewise, the crediting, by consent of the parties, on interest due on a promissory note, of an indebtedness of the holder thereof to the maker and his partner, of which credit entries are made on the books of the partnership and of the holder of the note, operates as a payment in removing the bar of the statute of limitations. *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276.

And an agreement between the payee and the maker of a bond, that an indebtedness due from the former to the latter shall be applied and entered as a credit upon the bond, constitutes a payment thereon which will arrest the operation of the statute of limitations, although the credit is not actu-

*Carroll, J.*, delivered the opinion of the court:

In July, 1911, H. E. Samuel died, and the following November a suit was filed in the Mercer circuit court for a settlement of his estate. In this suit the appellant filed six claims against his estate, amounting in the aggregate to \$3,700. One of these claims was an open account for services rendered to him as clerk. The others were five notes, one for \$1,419.68, dated February 6, 1894, and due one day after date; one for \$200, dated May 3, 1895, due one day after date; one for \$400, dated June 19, 1897, due one day after date; one for \$200, dated March 30, 1897, due one day after date; and one for \$892.21, dated February 1, 1905, due one day after date. The notes for \$1,419.68 and

ally entered upon the bond, as agreed. *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459.

Where the guardian of an insane woman sold real estate belonging to her, with the agreement that the purchaser should take charge of her and should be paid for his charges and disbursements, and that the sum which should become due to him therefor should go toward the price to be paid by him for the property; and the purchaser has cared for the ward until her death, and her administrator has recognized the guardian's agreement and has given the purchaser credit for the ward's board until her death, such credit is sufficient to avoid the defense of the statute of limitations to the administrator's claim against the purchaser for the balance of the purchase price of the land. *Peabody v. North*, 161 Mass. 525, 37 N. E. 744.

And an indorsement upon a promissory note, of a balance due from the payee to the joint makers upon a joint contract of theirs independent of the note, which indorsement is made with the consent of one of the joint makers and contractors, who alone, of the two, is present at a settlement upon the contract, constitutes a payment by the other, which arrests the operation of the statute of limitations in his favor, as against the note, where, previous to the settlement on the contract, he consented to the payee of the note, that what was due on the contract should be indorsed on the note, and after the indorsement was made, said it was all right. *Hawley v. Griswold*, 42 Barb. 18.

And under the "well-settled principle that where a depositor in a bank is indebted to the bank by bill, note, or other indebtedness, the bank has the right to apply so much of the funds of the depositor to the payment of his matured indebtedness as may be necessary to satisfy the same," the application by a bank, of a customer's deposit on his notes due to it, constitutes, *pro tanto*, payment thereof, and is sufficient to arrest the running of the statute of limitations as against the notes. *Park Bank v. Schneidermeyer*, 62 Mo. App. 179. A. C. W.

\$200 were contested by the administrator, upon the ground that they were barred by the fifteen-year statute of limitation. From the judgment of the lower court, sustaining this defense, this appeal is prosecuted.

As more than fifteen years had elapsed between the maturity of the notes and the death of H. E. Samuel, the statute presented a complete bar, unless, as contended by counsel for appellant, the life of these two notes was extended by payments, which, it is claimed, appellant had the right to credit them by, before the expiration of fifteen years from their maturity. No credit is indorsed on either of the notes; but it is insisted, on behalf of appellant, that the amount of a store account and a board bill due by appellant to H. E. Samuel should have been credited on these notes, and that it was agreed this should be done.

The evidence in the case consists of checks and other written exhibits, an agreed statement of fact, and the deposition of Miss Mary Bright. The appellant also gave her deposition; but objection was properly sustained to so much of it as related to conversations or transactions had with the deceased, and the remainder of it throws no light on the controversy.

It appears that in 1898 the deceased began business in Harrodsburg as a druggist, at which time the appellant, who was his daughter-in-law, came to live with him, and so continued until his death. During this time, and beginning in January, 1898, the appellant opened an account at the drug store of H. E. Samuel, and this account continued to February 1, 1905, when it amounted, including \$50 for Miss Bright's board, to \$496.52. On this date it appears that the account of \$496.52 was deducted from a note for \$1,388.70, due to Mrs. Samuel, and a new note executed for \$892.21; this new note being one of the five heretofore mentioned. On March 4, 1905, a new account was opened, and this account, which was made up of various articles of merchandise and included a charge of \$100 for Miss Bright's board from March 20, 1905, to January 28, 1906, continued until June 27, 1911, when it amounted to \$314.91.

Passing, for the present, the evidence of Miss Bright, it appears from the exhibits and agreed state of facts that appellant opened an account at the store of H. E. Samuel in January, 1898, and that this account continued to run until February 1, 1905, at which time it was settled in the manner before stated, and in March, 1905, a new account was opened by appellant, which continued to run until June 27, 1911, at which time it amounted to \$314.91. From this statement it will be seen that

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virtually all the time from January, 1898, to June, 1911, appellant owed H. E. Samuel a store account, which included the board of Miss Bright, and that H. E. Samuel owed appellant during all this time the two notes in controversy in this case, dated 1894 and 1895, as well as the two notes dated in 1897, and, for about six years of this time, the note dated in 1905. No credit is indorsed on either of these notes, but it is the contention of appellant in her pleadings that it was agreed that the store account due by her and the board of Miss Bright should be credited on these notes at stated intervals; for example, in July and January of each year.

If this was done, of course, the barred notes would be taken out of the statute. There is, however, no evidence tending to support this averment of the pleading, except the testimony of Miss Bright, whose board from November, 1904, to January, 1906, was due to H. E. Samuel; and Miss Bright's testimony, so far as pertinent, is as follows:

Q. When you came to live with her, were there any arrangements made about your board?

A. Yes, sir.

Q. Who paid that board?

A. Mr. Henry Bright, of Danville.

Q. To whom was it paid?

A. It was to go on Mrs. Samuel's notes.

Q. What amount was paid?

A. Ten dollars a month for fourteen months, \$140.

Q. When these arrangements were made for board, how did you know anything about it?

A. My uncle told me so.

Q. Were you present when the arrangements were made?

A. Yes, sir; I was in the store.

Q. When the checks would come in, would they be payable to Mrs. Samuel?

A. Yes; and she would take them to the store and show them to him every month.

Q. You heard Mr. Samuel tell her to let the board money go on the notes?

A. Yes, sir.

Q. And that is all you know about that?

A. Yes, sir.

Q. Did you know anything about these notes, except what she said?

A. I knew he owed her money.

Q. She told you that?

A. Yes.

It appears from this evidence that the board Miss Bright paid was to go as a credit on the notes appellant held against H. E. Samuel, but she does not say on which of the five notes appellant at that time held it was to go as a credit. She

only knew that she heard H. E. Samuel tell appellant to "let the board money go on the notes." She did not know anything about the notes, except what appellant told her; and it does not appear that appellant told her what notes she held, or anything about them, except that H. E. Samuel owed her money.

That the parties did not understand that Miss Bright's board was to be put as a credit on the notes executed in 1894 and 1895, or on any particular note, is shown by the fact that a part of her board was included in the settlement made on February 1, 1905, and went to reduce a note for \$1,388.70 to \$892.21. But treating this circumstance as of no importance in adjudging the case, the evidence of Miss Bright is not sufficient to save the notes in controversy from the statutory bar.

At the time Miss Bright's board was paid, no one of the notes was barred by limitation; and it may be conceded that under the general direction given by H. E. Samuel as to the manner in which he wanted Miss Bright's board applied, the appellant had the right at the time, or in a reasonable time thereafter, to apply the amount of the board as a credit on any of the notes, or to distribute it as a credit on all of them, and that if she had then made this application, it would have cut off the antecedent time on all of the notes to which the payment was applied as a credit. *Brown v. Osborne*, 136 Ky. 456, 124 S. W. 405.

But appellant did not at the time the board was paid, or at any time during the five years that H. E. Samuel lived thereafter, apply the board money as a credit on any of the notes; nor is there any evidence to show why she did not do this, or to excuse or explain her failure to make the application when the board was paid, or within a reasonable time. This being true, the case must be considered as if no special direction was given by H. E. Samuel as to the application of the board money, and so we will treat the board money merely as a part of the account that appellant owed H. E. Samuel, and deal with it as a part of that account.

Indeed, appellant, in her pleading, does not rely on any special direction as to the application of the board money, but treats it as part of her general account. Looking at the matter from this standpoint, the question for decision is: Did appellant, after the two notes in controversy were barred by limitation, or before that time, or at any time, have the right, without the consent or direction of H. E. Samuel, to apply the amount she owed him on account as a credit on these notes as of the date when the account became due,—say at the end of each

six months, beginning in 1905,—and by applying the store account as a credit on the notes in 1905, 1906, 1907, 1908, 1909, and 1910, save them from their being barred by the statute? We think not.

When the creditor owes a claim or demand to the debtor, he cannot, without the consent or direction of the debtor, apply what he owes as a credit on the note or demand he holds against the debtor; and if he makes the application without the direction or consent of the debtor, it will not interrupt the running of the statute of limitation. The reason for this rule is that the debtor, who is, to the extent of his demand, a creditor, has the right to direct and control the disposition that shall be made of his debt, and to apply, or not apply, as he pleases, to the payment of demands that he owes; and this privilege cannot be taken out of his hands by the mere act of another person.

As said in *Brown v. Osborne*, supra: "The mere putting of a credit on an open account or note, unless there is evidence showing that the amount represented by the credit was paid by the debtor on the note or account, will not be sufficient, in itself, to stop the statute from running. *Hopkins v. Stout*, 6 Bush, 375; *Frazer v. Frazer*, 13 Bush, 397. If the mere entry of a payment as a credit upon an open account or note would, of itself, have this effect, it would be an easy matter for the creditor, if he felt so disposed, to evade the plea of limitation and stop the statute from running against any note or account that was barred." To the same effect are *Anderson v. Baxter*, 4 Or. 105; *Nash v. Woodward*, 62 S. C. 418, 40 S. E. 895; *Phillips v. Mahan*, 52 Mo. 197; *Kyger v. Ryley*, 2 Neb. 20. As appellant could not do this before the notes were barred, of course, she could not, after some of the notes were barred, apply, as a credit on these notes, the account she owed H. E. Samuel, and thereby restore them to life.

If H. E. Samuel during his life, and after some of the notes had been barred, had directed her in a general way to credit his notes by the amount of her account, she could not have applied any part of the account on the barred notes, either in part payment of them, or as a payment that would arrest the running of the statute as to the balance of the notes. As she could not have done this if he were living, neither can she do it after his death.

There is some conflict in the cases as to the right of a creditor to apply undirected payments to barred notes; but we think the sound and correct rule is that where a debtor owes a creditor several notes, and he makes a payment without directing its ap-

plication to either of the notes, the creditor may apply it to whichever one he pleases, except that he may not apply it in part payment of or as a credit on a note that is barred by limitation, and thereby restore life to the note. It will not be presumed that a debtor, in making a payment to a creditor who holds several notes against him, intended, in making the payment, that it should be applied to a nonenforceable note, or to impart life into notes that were then dead; nor will the creditor be permitted to so apply the payment, unless with the consent of the debtor. The presumption will be, if no direction is given by the debtor, that he intended the payment to be applied as a credit on subsisting, enforceable debts against him, and so if the creditor holds several subsisting, enforceable notes, none of which are barred by limitation, he will be at liberty to credit each of them by a part of the payment, unless directed otherwise to do by the debtor, and may thus prolong the life of all the notes; but the debtor has the exclusive right, in making a payment, to direct the particular debt he desires it applied to, and this direction the creditor must observe. *Anderson v. Nystrom*, 103 Minn. 168, 13 L.R.A.(N.S.) 1141, 128 Am. St. Rep. 320, 114 N. W. 742, 14 Ann. Cas. 54; *Wilden v. McAllister*, 91 Mo. App. 446; *Id.*, 178 Mo. 732, 77 S. W. 730; *Blake v. Sawyer*, 83 Me. 129, 12 L.R.A. 712, 23 Am. St. Rep. 762, 21 Atl. 834; *Armour Packing Co. v. Vinegar Bend Lumber Co.* 149 Ala. 205, 42 So. 866, 13 Ann. Cas. 951.

The judgment is affirmed.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

SAM ZWICKER

v.

EDWIN S. GARDNER, Exr., etc., of Harris Goodman, Deceased.

(213 Mass. 95, 99 N. E. 949.)

**Statute of frauds — sale of mortgaged property — promise to pay over surplus.**

A parol promise by a mortgagee that if the mortgagor will not bid at the foreclosure, he will bid in the property, sell it, and account for the surplus over and above the amount due and expenses, is separable, and not within the statute of frauds as to the promise to pay over the surplus, so that, in case a sale has produced a surplus, the mortgagor may recover it.

(November 25, 1912.)

**EXCEPTIONS** by defendant to rulings of the Superior Court for Hampden 42 L.R.A.(N.S.)

County made during the trial of an action brought to recover a surplus from the sale of mortgaged premises over and above the amount due and expenses, which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Charles G. Gardner and Ralph W. Stoddard, for defendant:

The statute of frauds is a bar to plaintiff's recovery.

*Note. — Parol agreement to take title to real property, sell the same, and divide the proceeds, as affected by the statute of frauds.*

This note is supplemental to a note in 8 L.R.A.(N.S.) 1137, on the question of agreement of vendee of real property to divide the proceeds of resale with vendor, as affected by the statute of frauds, and the note in 20 L.R.A.(N.S.) 298, as to parol agreements to take title to real property, sell the same, and account for the proceeds, as affected by the statute of frauds.

A case somewhat similar to *ZWICKER v. GARDNER*, in which a conclusion directly to the contrary is reached, is *Mitchell v. Bilderback*, 159 Mich. 483, 124 N. W. 557, holding that an oral agreement by a mortgagee with a subsequent mortgagee of the same property, to resell the land mortgaged after obtaining the same upon a foreclosure sale in foreclosure of his mortgages, and give to the subsequent mortgagee a share of the proceeds, was within the statute of frauds and void, although the subsequent mortgagee, in reliance upon the agreement, was induced to refrain from redeeming from the mortgage sale.

And much to the same effect is *Bryan v. Douds*, 213 Pa. 221, 110 Am. St. Rep. 544, 62 Atl. 828, 5 Ann. Cas. 171, holding to be within the statute of frauds and void an agreement with the owner of lands to purchase the same at sheriff's sale, pay off certain judgments and mortgages thereon, resell the land, and pay the proceeds to the owner after retaining sufficient therefrom to cover the money advanced, although the promisor actually purchased the land and afterwards resold the same at a profit over and above all the moneys advanced by him.

**Agreement between vendor and vendee.**

In line with the North Carolina cases referred to in the note in 8 L.R.A.(N.S.), *Bourne v. Sherrill*, 143 N. C. 381, 118 Am. St. Rep. 809, 55 S. E. 799, holds that where, as an inducement to a sale of land, the purchaser orally agrees with his vendor that if he resells it, he will give the vendor the profits from the resale, the agreement is not within the statute of frauds. This case is followed in *Brown v. Hobbs*, 147 N. C. 73, 60 S. E. 716, holding not to be within the statute of frauds an oral agreement by the purchaser of land, to divide with the vendor all he received from the resale over and above a stipulated sum.

A. G. S.



Kennerson v. Nash, 208 Mass. 393, — L.R.A.(N.S.) —, 94 N. E. 475; McDonough v. O'Neil, 113 Mass. 92; Bourke v. Callanan, 160 Mass. 195, 35 N. E. 460; Kendall v. Mann, 11 Allen, 15; Davis v. Wetherell, 11 Allen, 19, note; Potter v. Jacobs, 111 Mass. 32; Graves v. Goldthwait, 153 Mass. 268, 10 L.R.A. 763, 26 N. E. 860; Page v. Monks, 5 Gray, 492; Irvine v. Stone, 6 Cush. 508; Trowbridge v. Wetherbee, 11 Allen, 361; Collins v. Sullivan, 135 Mass. 461; Tourtillotte v. Tourtillotte, 205 Mass. 547, 91 N. E. 909; Hurley v. Donovan, 182 Mass. 64, 64 N. E. 685; Walker v. Locke, 5 Cush. 90; Emerson v. Galloupe, 158 Mass. 146, 32 N. E. 1118; Fickett v. Durham, 109 Mass. 419; Rose v. Fall River Five Cents Sav. Bank, 165 Mass. 273, 43 N. E. 93.

Messrs. George A. Bacon and Thomas H. Kirkland, for plaintiff:

The contract is valid and not within the statute of frauds.

Page v. Monks, 5 Gray 492; Brackett v. Evans, 1 Cush. 79; Preble v. Baldwin, 6 Cush. 549; Wetherbee v. Potter, 99 Mass. 362; Pomeroy v. Winship, 12 Mass. 514, 7 Am. Dec. 91; Davenport v. Mason, 15 Mass. 85; Wilkinson v. Scott, 17 Mass. 249; Basford v. Pearson, 9 Allen, 387, 85 Am. Dec. 784; Parker v. Coburn, 10 Allen, 82; Trowbridge v. Wetherbee, 11 Allen, 361; Eastham v. Anderson, 119 Mass. 531.

Morton, J., delivered the opinion of the court:

The plaintiff mortgaged certain premises to the defendant's testator. The defendant's testator instituted foreclosure proceedings, and the plaintiff alleges that the defendant's testator agreed that if he, the plaintiff, would not bid at the foreclosure sale or procure other persons to bid, he, the defendant's testator would bid the premises in and sell them at private sale, and pay over to the plaintiff any balance that remained after deducting the mortgage, interest, and expenses. The plaintiff alleges that he refrained from bidding or procuring others to bid at the foreclosure sale, and that the defendant's testator bid the premises in, and afterwards sold them at private sale for a sum in excess of the mortgage, interest, and expenses. This is an action to recover such excess. The case was sent to an auditor, who found the facts to be as alleged by the plaintiff, and was heard by a judge of the superior court without a jury upon the auditor's report. The judge ruled and found in favor of the plaintiff. The case is here on exceptions by the defendant to the refusal of the judge to rule as requested by the defendant, that the contract was within the statute of frauds, and that the plaintiff could not recover. It 42 L.R.A.(N.S.)

was agreed that the contract, if there was one, was not in writing, and that there was no note or memorandum thereof in writing signed by the defendant's testator, or by anyone by him thereunto lawfully authorized.

We think that the ruling and finding of the judge were right. This is not an action to enforce an oral contract for the sale of land, or an interest in or concerning the same. The land has been sold, and nothing remains to be done except for the defendant to account for and pay over the excess. That part of the contract is separable from the rest of the contract, and the rest of the contract having been performed, there is no reason why this part of it should not be enforced. And to that effect see the cases which we cite. Page v. Monks, 5 Gray, 492; Trowbridge v. Wetherbee, 11 Allen, 361; Graffam v. Pierce, 143 Mass. 386, 9 N. E. 819. The case of Kennerson v. Nash, 208 Mass. 393, — L.R.A.(N.S.) —, 94 N. E. 475, cited by the defendant, is entirely different from the case before us. It is not necessary to consider whether, if the contract did come within the statute of frauds, it would have been taken out of the statute by part performance.

Exceptions overruled.

#### IOWA SUPREME COURT.

JAMES H. BRINSMAID et al., Appts.,

v.  
IOWA STATE TRAVELING MEN'S ASSOCIATION et al.

ALICE M. STEELE, Intervener.

(152 Iowa, 134, 132 N. W. 34.)

**Insurance — designation of beneficiary by will.**

A beneficiary in a mutual benefit certificate may be designated by will where, by statute, the benefit may be made payable to a legatee, and there is no provision of statute or articles of incorporation or by-laws of the association which prevents it, and the beneficiary designated in the application according to the provisions of the by-laws is dead.

(July 5, 1911.)

**Note. — Insurance: right to designate by will the beneficiary of benefit insurance.**

This note does not purport to deal with any question as to the persons or claims of persons that may be designated as beneficiaries, or as to whether the beneficiary originally named has such a vested interest in the certificate as will preclude a change of beneficiaries in any form, and does not include cases that are disposed of upon

**A**PPEAL by plaintiffs from a judgment of the District Court for Polk County, dismissing the petition in an action brought to recover the amount alleged to be due on a certificate of insurance. Affirmed.

Statement by Ladd, J:

Action by plaintiffs, as heirs of Thomas F. Brinsmaid, deceased, to recover on a certificate of insurance. Alice M. Steele filed a petition of intervention, claiming the indemnity stipulated. The defendant denied all liability. On trial judgment was entered dismissing plaintiffs' petition, and on the issues between intervener and defendant the jury disagreed. The plaintiffs appeal.

either of these grounds, although the particular designation was by will.

Generally as to power of insured to destroy rights of beneficiaries, see note to Union Cent. L. Ins. Co. v. Buxer, 49 L.R.A. 737.

Many of the earlier decisions upon the question of the right to change by will the beneficiaries of benefit certificates are gathered in the note to *Re Harton*, 4 L.R.A. (N.S.) 939, and such cases are not set out further in the present note.

Where designation by will is expressly granted by statute or reserved by contract.

See also cases cited *infra*, under heading, "Sufficiency of particular designation."

The holding in *BRINSMAID v. IOWA STATE TRAVELING MEN'S ASSO.*, that a beneficiary may be designated by will where it is provided by statute that the benefit may be made payable to a legatee, and there is no provision of the statute or of the articles of incorporation which prevents it, and the beneficiary designated according to the provisions of the by-law is dead, is in accord with other cases in which by the contract the right to designate a beneficiary by will is expressly or impliedly given by the terms of the contract.

It may be stated as a general rule that where the right to dispose by will of the fund in a benefit association is given by the terms of the contract, such designation made in this manner will be given effect.

Thus, in *Nuckols v. Kentucky Mut. Ben. Soc.* 16 Ky. L. Rep. 270, it appears that the charter authorized members to change their beneficiaries by will, and it was there held that an attempted change in another manner was ineffectual. See also *Roberts v. Roberts*, 64 N. C. 695, where power to dispose of the benefit by will was expressly given by a by-law.

And in *Hoffmeyer v. Muench*, 59 Mo. App. 20, where the charter of a foreign benefit association provided that the fund should be paid to the member's family or to others, 42 L.R.A. (N.S.)

*Mr. Clinton L. Nourse*, for appellants:

The beneficiary under a membership in a mutual benefit association cannot be designated or changed by the will of the insured member unless the association, the insurer, assent thereto or be notified thereof during the life of the insured.

*Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Hainer v. Iowa*, L. H. 78 Iowa, 245, 43 N. W. 185; *Wendt v. Iowa*, L. H. 72 Iowa, 682, 34 N. W. 470; *Bowman v. Moore*, 87 Cal. 306, 25 Pac. 410; *De Silva v. Supreme Council*, 109 Cal. 373, 42 Pac. 32; *Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. 275; *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 867; *Pilcher v. Puckett* (Modern Woodmen v. Puckett) 77 Kan. 284, 17

in accordance with his directions, and a certificate was made payable "to his will," a direction by will was held a sufficient direction.

And in *Stice v. Carter*, 23 Ky. L. Rep. 915, 63 S. W. 770, where a section of the act governing mutual benefit associations provided that if a member shall leave a will, the benefit should be appropriated in accordance therewith, the will of a member of such an association was construed to bequeath the benefit to the member's wife, to be used as she saw proper.

And where the charter and constitution provide that the fund is to be payable to certain persons, "or to be disposed of as he may direct," and the certificate provided that the benefit was to be paid to such person as "he may by will or entry in record book of this lodge, or on the face of this certificate, direct," it was held that the residuary clause of a member's will, disposing of "the balance of all my property of every kind," passed the fund. *Weil v. Trafford*, 3 Tenn. Ch. 108.

And where the constitution of a benefit society provides that the benefit shall inure to a certain class of persons, but another section gives the member the right to dispose of the benefit by will, and provides that the restriction as to classes of persons eligible for beneficiaries shall not apply in such case, a member has the right to make a bequest of the benefit to persons not within the restricted classes, and the fund will pass to such persons notwithstanding the fact that they were also illegally named as beneficiaries by inserting their names in the certificate. *Middelstadt v. Grand Lodge*, S. H. 107 Minn. 228, 120 N. W. 37.

And in *House v. Northwestern Life Assur. Co.* 200 Pa. 173, 49 Atl. 937, where the application made the fund payable "to the devisees under my will or in case of their death to my heirs at law," and the benefit association agreed to pay the member's devisees, adding the words, "or if no will specifically bequeathing the benefits which shall be payable on account of this certificate shall appear and be brought to the knowledge of this association within sixty

L.R.A.(N.S.) 1083, 94 Pac. 132; Fink v. Fink, 171 N. Y. 616, 64 N. E. 508; Re Smith, 42 Misc. 639, 87 N. Y. Supp. 728; Kunkel v. Workmen's Sick & Death Ben. Fund, 68 App. Div. 385, 75 N. Y. Supp. 188; Boice v. Shepard, 78 Kan. 308, 96 Pac. 486; Northwestern Masonic Aid Asso. v. Jones, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253; Harton's Estate, 213 Pa. 499, 4 L.R.A.(N.S.) 939, 62 Atl. 1059.

Such a beneficiary cannot in any manner be designated or changed without the consent of or notice to the association during the lifetime of the member.

Modern Woodmen v. Little, 114 Iowa, 115, 86 N. W. 216; Parker v. Des Moines Life Asso. 108 Iowa, 123, 78 N. W. 826; Paterson v. Natural Premium Mut. L. Ins.

days after the death of the said insured, then to the heirs at law of said insured," it was held, where the insured devised all of his property to his wife, that she was entitled to the benefit.

So, where the benefit certificate of a mutual benefit company provided that the proceeds should be paid "as a benefit to his devisees, as provided in his last will," and the member bequeathed the amount to a named person "in trust for my legal heirs," it was held that the person named took the proceeds as trustee, although he was also named by the testator as executor and qualified as such. People use of Brooks v. Petrie, 191 Ill. 497, 85 Am. St. Rep. 268, 61 N. E. 499.

In Jacob v. Jacob, 28 Ky. L. Rep. 327, 89 S. W. 246, the question involved was whether the member of a benefit association whose certificate provided that it was payable "as directed by the will" had changed the designation of the policy otherwise than by will to make it payable to other beneficiaries; but the benefit was held payable to the beneficiary designated by the member in the first instance in his will.

In Shamrock Benev. Soc. v. Drum, 1 Mo. App. 320, where the constitution of a benefit association provided that the fund should be paid to the widow of the insured or to any person named in his will, but that the claims should be considered only in the order in which they were named, it was held that the widow's right was superior to that of a legatee named by the insured in his will.

In Ontario the right to change beneficiaries in benefit certificates by will appears to be given by statute.

Thus, in Videan v. Westover, 29 Ont. Rep. 1, it was held that § 160 of 60 Vict. chap. 36, applied to a benefit certificate, and under this section, which authorized the assured to make or alter the apportionment of the insurance money by his will, and declared that an apportionment made or altered by his will should prevail over any other made before the date of the will, except so far as such other apportionment has been acted on before notice of the apportionment by the will, a reapportionment 42 L.R.A.(N.S.)

Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 167; Hellenberg v. District No. 1, I. O. B. B. 94 N. Y. 585; Fink v. Fink, 171 N. Y. 616, 64 N. E. 508; Olmstead v. Masonic Mut. Ben. Soc. 37 Kan. 93, 14 Pac. 449; Pilcher v. Puckett (Modern Woodmen v. Puckett) 77 Kan. 284, 17 L.R.A.(N.S.) 1083, 94 Pac. 132; Knights of Maccabees v. Sackett, 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423.

If the beneficiary named by the member dies before the member, and no change or designation of beneficiary is thereafter properly made by the member during his lifetime, upon the member's death the mortuary benefit is payable either to the heirs

made by a member in his will was held valid.

And following Videan v. Westover, supra, it was held in Racher v. Pew, 30 Ont. Rep. 483, that a change of beneficiaries, made by a member of a benefit society, by a codicil to his will, was valid.

And a like result was reached in Re Carbery, 30 Ont. Rep. 40.

And in Re Cheesborough, 30 Ont. Rep. 639, under § 160, Ont. Rev. Stat. chap. 203, it was held that a member of a benefit association had power by his will to direct to whom the funds due upon policies in which no beneficiary had previously been named should be paid, and a devise without specifically identifying the policies by number, name, date, or amount was held sufficient under the act to transfer the benefit to the preferred beneficiaries named.

And under § 160 of the act under consideration it has been held that one who held a certificate in a benefit society in which his wife was named as the beneficiary might, by his will, transfer the benefit to one of his sons, notwithstanding the wife of the insured was a beneficiary for value, having paid a part of the premium, this fact not being expressly stated in the certificate, and it appearing that a subsection of § 160 merely restricted the right of the insured to change beneficiaries by will to cases where the policy expressly stated that the beneficiary was a beneficiary "for value." Book v. Book, 32 Ont. Rep. 206.

And in McIntyre v. Silcox, 30 Ont. Rep. 488, where the insured made his six children beneficiaries in equal shares, and after three had died without issue, he executed a will altering the shares of the surviving children, and gave another child and four grandchildren portions, and subsequently had the policies canceled, and took others payable to "his executors in trust," it was held that under Rev. Stat. 1887, chap. 136, the apportionments were valid as legacies.

Where benefit payable to insured or insured's estate.

Where the fund in a benefit certificate is made payable to the insured or his estate,

of the deceased beneficiary or to the heirs of the member.

*Expressman's Mut. Ben. Asso. v. Hurlock*, 91 Md. 585, 80 Am. St. Rep. 470, 46 Atl. 957; *Thomas v. Cochran*, 89 Md. 390, 46 L.R.A. 160, 43 Atl. 792; *Simms v. Randall*, 117 Tenn. 543, 96 S. W. 971.

*Messrs. Sullivan & Sullivan* for appellees.

Mr. Thomas A. Cheshire, for intervener appellee:

A beneficiary of a certificate of the character of that in suit has no vested right in it before the death of the member on whose account it was issued, and the member may change the beneficiary without the consent, and against the will, of the one first named,

he has been held to have the right to designate a beneficiary by will.

Thus, in *Catholic Knights v. Kuhn*, 91 Tenn. 214, 18 S. W. 385, where a benefit certificate was payable on its face to the insured, it was held to be a part of his property, and subject to disposition by will.

And in *Stoelker v. Thornton*, 88 Ala. 241, 6 L.R.A. 140, 6 So. 680, the disposal by will of benefit certificates payable to insured's estate was held valid. The contention here, however, was that such designation was invalid because of the insured's previous attempt to transfer them to the legatee by a sale which was void as against public policy.

Where other mode is expressly provided for.

Where special modes for changing beneficiaries are provided for by the charter, constitution, or by-laws of benefit societies or associations, these provisions are exclusive and must be followed, and an attempted change by will is invalid where this mode is not mentioned by the provisions. *Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. 275; *Order of Mutual Companions v. Griest*, 76 Cal. 494, 18 Pac. 652; *Bennett v. Slater* [1899] 1 Q. B. 45, 68 L. T. N. S. 45, 47 Week. Rep. 82, 79 L. T. N. S. 324, 15 Times L. R. 25.

The rule thus laid down was applied in the following cases, the attempted change of beneficiaries by will being held invalid:

—where it was provided that a member desiring to change his beneficiary should fill out a blank form on his benefit certificate, authorizing the change, and have his signature thereto attested, and deliver the certificate to an officer of the lodge. *Hainer v. Iowa*, L. H. 78 Iowa, 245, 43 N. W. 185; *Pilcher v. Puckett* (*Modern Woodmen v. Puckett*) 77 Kan. 284, 17 L.R.A. (N.S.) 1083, 94 Pac. 132; *Grand Lodge, A. O. U. W. v. Fisk*, 126 Mich. 356, 85 N. W. 875;

—where the certificate provided that all changes of beneficiaries must be made upon a blank furnished by the association for the purpose. *Masonic Mutual Asso. v. Jones*, 154 Pa. 107, 26 Atl. 255; 42 L.R.A. (N.S.)

and the change may be effected without the assent of the association.

*Brown v. Grand Council, N. W. L. H.* 81 Iowa, 400, 46 N. W. 1086; *Hirschl v. Clark*, 81 Iowa, 200, 9 L.R.A. 841, 47 N. W. 78; *Schmidt v. Iowa K. P. Ins. Asso.* 82 Iowa, 304, 11 L.R.A. 205, 47 N. W. 1032; *Simcoke v. Grand Lodge, A. O. U. W.* 84 Iowa, 383, 15 L.R.A. 114, 51 N. W. 8; *Carpenter v. Knapp*, 101 Iowa, 712, 38 L.R.A. 128, 70 N. W. 764; *Shuman v. Ancient Order U. W.* 110 Iowa, 642, 82 N. W. 331; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Belknap v. Johnson*, 114 Iowa, 265, 86 N. W. 267; *Masonic Benev. Asso. v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Wandell v. Mystic Toolers*, 130 Iowa, 639, 105

—where a member was authorized to make a new direction by writing on the back of his certificate in the form prescribed. *Vollman's Appeal*, 92 Pa. 50; *Hunter v. Firemen's Relief & Benev. Asso.* 20 Pa. Super. Ct. 605.

And where the by-laws provide that upon a failure of a certain class of beneficiaries, the fund shall go to "such person or persons as he may have formally designated to his lodge prior to his decease," the will of a member will not operate as a new designation, where it is not brought to the notice of the lodge prior to his death. *Hellenberg v. District No. 1, I. O. B. B.* 94 N. Y. 580.

And in *Re Smith*, 42 Misc. 639, 87 N. Y. Supp. 725, where certain methods for changing beneficiaries were provided for, but neither the statute, constitution, nor by-laws of the order, in force at the time the member became such, or at the time of his death, authorized a designation of beneficiary or disposition of the proceeds by will, such a designation was held invalid.

And where the by-laws of a mutual benefit society gave a member a right to change the beneficiary with the assent of the association, the designation and change being required to be made in writing upon the certificate of membership, the member's bequest after the death of his wife, who was originally named as beneficiary, giving the residue of his estate, including the insurance, to his surviving children, was held not to constitute a valid change of the beneficiary. *Thomas v. Cochran*, 89 Md. 402, 46 L.R.A. 160, 43 Atl. 792.

And where a member of a mutual benefit society at the time of joining was allowed to designate his beneficiary by signing a paper adopted and called a "testamentary disposition," but a subsequent amendment of the by-laws provided that the benefits should be paid to a certain class, and upon failure of members of this class, the member was empowered to direct that the benefit should be paid to any other person, it was held in an action in which it was stated that there were no persons of the class named, that a member's will is not a testamentary

N. W. 448; *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151; *Niblack*, Ben. Soc. 2d ed. §§ 212, 214.

In the absence of a provision as to the method of changing the name of the beneficiary, the holder of the certificate could change the beneficiary by will.

Supreme Council, C. M. B. A. v. Priest, 46 Mich. 429, 9 N. W. 481; *Masonic Benev. Asso. v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Stoelker v. Thornton*, 88 Ala. 241, 6 L.R.A. 140, 6 So. 680; *Carruth v. Clawson*, 97 Ark. 50, 133 S. W. 178; *Kaiser v. Kaiser*, 13 Daly, 522; *Hannigan v. Ingraham*, 55 Hun, 257, 8 N. Y. Supp. 232; *Videan v. Westover*, 29 Ont. Rep. 1; *Racher v. Pew*, 30 Ont. Rep. 483; *Niblack*, Ben. Soc. p.

disposition" within the meaning of the by-laws. *Kunkel v. Workmen's Sick & Death Ben. Fund*, 68 App. Div. 385, 75 N. Y. Supp. 188.

So, where the rules of an association provide that the funds shall be paid to a certain designated class "unless otherwise ordered in writing by the deceased member, such order to be signed by two witnesses and acknowledged before a justice of the peace," a will executed in the usual form, which is not acknowledged before a justice of the peace, is not such an order, and will not operate to transfer the benefit to the person named. *Mellows v. Mellows*, 61 N. H. 137.

But see *Dennett v. Kirk*, set out by the court in *BRINSMAID v. IOWA TRAVELING MEN'S ASSO.*, where a writing executed as a will and signed by sufficient witnesses was given effect.

And in *Grand Lodge v. Ohnstein*, 85 Ill. App. 353, where a by-law required the name of the beneficiary to be written in full upon a blank form, a designation on the form, "payable to such parties as provided for in my will," was held sufficient, and the benefit was held to pass under the provisions of the insured's will.

And in *Hannigan v. Ingraham*, 55 Hun, 257, 8 N. Y. Supp. 232, it was held that a provision in a certificate that "all payments or benefits that may accrue or become due to the heirs of the person insured by virtue of this policy will be payable to . . . or . . . lawful heirs" was merely a form to be filled up and signed by the insured in case he should desire to designate a beneficiary in that manner, and it was held that where he made no use of such form, but by his will disposed of the fund to the class of persons within the contemplation of the organization, such designation was valid.

And in *Armstrong v. Blanchard*, 150 Wis. 31, 136 N. W. 145, it was held that the by-laws of a benefit association designating who might be named as beneficiaries, and providing that no payment should be made to any person who did not bear a specified relationship with the member, and provid-

411, § 214; 1 Bacon, Ben. Soc. § 308a; 29 Cyc. 119, 134; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Wendt v. Iowa L. H.* 72 Iowa, 682, 34 N. W. 470; *Hainer v. Iowa, L. H.* 78 Iowa, 245, 43 N. W. 185.

Where the original beneficiary dies before the member and holder of the certificate, such member may designate a new beneficiary by will.

*High Court, C. O. F. v. Malloy*, 169 Ill. 58, 48 N. E. 392.

*Ladd, J.*, delivered the opinion of the court:

While bathing in the surf at Long Beach, California, November 27, 1907, Thomas F. Brinsmaid lost consciousness, and was taken from the water to the emergency room of

ing further for a change of beneficiaries by the insured in his lifetime, and stipulating that such change should be for the benefit of the class named, and that no change of beneficiaries should become operative unless made in compliance with said rules, and still further providing for a disposition of the fund in a certain way in case no beneficiary was named,—did not deprive the member of his right to dispose of the proceeds by will; and where the one originally named as beneficiary died before the insured, it was held that the benefit passed under the insured's will to devisees named therein, who came within the class entitled to take.

A change of beneficiaries by will has also been sustained notwithstanding provisions specifying the form to be followed, where the assured has been prevented from complying therewith, and has done all in his power to effect a change in accordance with the prescribed form.

Thus, where the rules of a benefit association provided that a member might change his beneficiary by filling out a blank form on the back of his benefit certificate and having his signature attested, and after a member was divorced he applied for a change of beneficiaries, setting out that he had been divorced and that the certificate was in the possession of his divorced wife, who refused to surrender it, and his application was disapproved at a meeting of the lodge, it was held that a disposition of the benefit made by him in a will executed after the refusal of the society to act upon his request constituted a valid change of beneficiaries. *Grand Lodge, A. O. U. W. v. Kohler*, 106 Mich. 121, 63 N. W. 897.

And where an attempted testamentary change has been treated as valid by the insurer, it has been given effect although not in strict compliance with the rules governing the designation of beneficiaries.

Thus, where one of the by-laws of a membership insurance company provided that no change of beneficiaries should be made unless the member so designating should return his certificate to the secretary, accompanied with his written request, desig-

the bathhouse. Though skilfully treated, he did not recover, and whether death resulted from drowning or rupture aneurism of the aorta was in issue. He became a member of the defendant, a mutual assessment association, in 1883, with his mother named as beneficiary. She died in 1889, and no one was substituted by him in her stead unless this was effected by will executed in December, 1906, in which he gave all property of which he died seised or possessed to Alice M. Steele, enumerating as such property insurance policies in the Iowa State Traveling Men's Association and other companies. The plaintiffs are the brothers of deceased and his sole heirs, as well as the sole heirs of the beneficiary first named, and as such claim in this action the indemnity promised in the defendant's by-laws in event of the accidental death of a member. Alice M. Steele filed a petition of intervention, claiming said indemnity by virtue of being designated beneficiary in the will. After all the evidence had been introduced, the court directed the jury to return a verdict against the plaintiffs, which was done and judgment entered thereon, and submitted

the issues as between the intervener and defendant to the jury, which disagreed. The plaintiffs have appealed, and there are several assignments of error.

I. No requirement of proofs of loss is to be found in the articles of incorporation or by-laws, and appellants insist that none were essential as a condition precedent to the maintenance of the action. Section 3 of chapter 211 of the eighteenth general assembly was construed to be applicable to mutual benefit associations, and defendant relies on authorities construing that section as exacting proofs of loss. See *Christie v. Life Indemnity & Invest. Co.* 82 Iowa, 360, 48 N. W. 94; *Parsons v. Grand Lodge, A. O. U. W.* 108 Iowa, 6, 78 N. W. 676. Without quoting the entire section, it is enough to say the sentence declaring the provisions of the section applicable to "all contracts and policies of insurance" contemplated in the chapter was not retained in the enactment of § 1742 of the Code.

There seems to be no statutory requirement of proof of loss as a condition precedent to the maintenance of an action for benefit or indemnity against a mutual as-

suming the alteration desired, which alteration should be recorded, and another section provided that the benefit shall be paid "to the person or persons whose name or names shall be recorded on the books," it was held that the return of the certificate by the member after the death of the beneficiary named therein, and a written request that the funds should be paid "as provided in my will," which request was recorded on the books, would pass the benefit as directed in a residuary devise, especially where the association, for a considerable time after the request to change, received the member's assessments and dues. *Brooklyn Trust Co. v. Seventh Regiment V. & A. League*, 113 App. Div. 717, 99 N. Y. Supp. 248.

And in *Katz v. Witt*, 74 Misc. 582, 134 N. Y. Supp. 675, where the by-laws of a benefit society required members to designate a beneficiary on a form prescribed, and a member designated a person by name as "trustee," which designation was accepted as sufficient, it was held that the member might direct the distribution of the funds by his will.

And where the by-laws of a mutual benefit association provide that "any member may, however, designate to whom such payment shall be made by a will or writing signed and acknowledged by such member and filed with the treasurer of the association," a paper signed by the insured and executed in the presence of two subscribing witnesses, but not acknowledged before an officer authorized to take acknowledgments, which changes the beneficiary, will be given effect where the treasurer of the association received it and filed it. *Allison v. Stevenson*, 51 App. Div. 626, 64 N. Y. Supp. 481.

42 L.R.A. (N.S.)

Where no other mode provided.

In *Kaiser v. Kaiser*, 13 Daly, 522, where the constitution and by-laws of a benefit association merely required that beneficiaries should be designated, without prescribing any form of designation, or requiring that the designation should be made in any particular way or at any particular time, it was held that the benefit due at the death of a member who, at the time of applying, designated his legal heirs as beneficiaries, but by his will bequeathed the fund to his wife, passed to the latter.

Where designation by will prohibited.

It has been held that a condition of membership in a benefit society that the benefit shall go as directed by the laws of the order, and shall not be controlled by will, is not against public policy, and that where such a provision is made, a benefit cannot be disposed of by will. *Thomas v. Covert* (*Thomas v. Supreme Lodge, K. H.*) 126 Wis. 593, 3 L.R.A. (N.S.) 904, 105 N. W. 922, 5 Ann. Cas. 456.

And it was held in *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065, that a member of a benefit society could not, after the death of the original beneficiary, bequeath the benefit to a person not within the class for whose benefit the society was formed, this being expressly prohibited by the laws of the association.

Sufficiency of particular designation.

It has been held that the insured's right to name a beneficiary by will is a mere

assessment association; and, as the defendant concedes that the proofs of loss by the intervenor were sufficient, we have no occasion to determine whether these were essential, and whether they might be deemed sufficient in behalf of the plaintiffs.

2. By the terms of his will made in 1906, deceased gave all the property of which he died "seised or possessed of every nature and description and wherever situated" to Alice M. Steele, and described his property as an interest in a deceased's sister's estate and "insurance policies in the Connecticut Mutual Insurance Company and accident insurance in the United Commercial Travelers of America, and the Iowa State Traveling Men's Association of Des Moines, Iowa." The will was admitted to probate in California, the estate settled, and the membership certificate in the defendant association turned over to the intervenor in pursuance of an order of court. Though not definite, the intent to name intervenor as beneficiary to whom the indemnity under several insurance contracts should be paid is manifest. In the second clause he gave everything absolutely to the

intervenor, and in the third asserted that he had no children or other descendants, and was unmarried, and then, to make certain that there should be no misunderstanding, he enumerated as a part of the property left the insurance in controversy. Plainly enough the intention to designate the intervenor as beneficiary is to be inferred, and nothing else. The more serious question, however, is whether this might be done by will. No membership certificate was issued by the association prior to 1892. Admission as member was on application, and § 2 of the fifth by-law provided that "in any case of death from accident to any member within ten weeks from the date of injury, an assessment of \$2 per member shall be made, to be paid to the party or parties named in his application for membership." As said, the mother of deceased was so named, but she died in 1889. Neither the articles of incorporation nor by-laws then provided for the substitution of another beneficiary, but the assured, in the absence of any statute to the contrary, had that right to make such change during life. *Carpenter v. Knapp*, 101 Iowa, 712, 38

power of appointment, and that his intention to exercise it must be clearly shown.

Thus, in *Duvall v. Goodson*, 79 Ky. 224, where the charter of a mutual benefit association provided that if a member should leave no widow or child, then the fund should be appropriated according to his will, it was held that the member had a mere power of appointment in case he had neither wife nor child, and that, having no personal interest in the fund, it did not pass under a will disposing of all of his estate, but in which no mention was made of the fund in question.

To the same effect is *Greeno v. Greeno*, 23 Hun, 478.

So, in *Arthur v. Odd Fellows' Beneficial Asso.* 29 Ohio St. 557, where the by-laws and regulations of a benefit association provided that the funds should be payable to certain persons "if not otherwise directed by him previous to his death," it was held that the insured was clothed with the power to change the order in which the relatives should take by a proper appointment, but it was held that a clause in the insured's will, devising to his children "my estate and property, real, personal and mixed," was not a sufficient execution of the power.

And in *Maryland Mut. Benev. Soc. I. O. R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52, where the constitution of the society provided for payment of the benefit to the widow, children, or such person or persons to whom the deceased might have disposed of the same by will or assignment, and, if no widow or children, or the deceased should not have made a disposition by will or assignment of the benefit, then the board should dispose of it in a certain

manner, it was held that the *jus disponendi* given by the charter was a mere power, and that a will which did not express the intention to exercise the power, and which merely made a residuary bequest, was not a valid exercise of the power, it not appearing that there was not other property upon which it might operate.

In *Ledebuhr v. Wisconsin Trust Co.* 112 Wis. 657, 88 N. W. 607, where a benefit certificate contained a power of appointment by will as to who the beneficiaries should be, and that power was executed by the member naming a beneficiary in his will, it was held that the beneficiary named was entitled to the fund under the certificate, and not under the will, the establishment of the will being of no significance to him except as showing a valid exercise of the power, and it was held that, although the charter of the benefit society contained a provision that the beneficiary should be named in the certificate, this would not defeat a recovery by a beneficiary appointed in the manner provided for in the certificate, where the naming of such person violated no statute or rule of public policy.

In *Aveling v. Northwestern Masonic Aid Asso.* 72 Mich. 7, 1 L.R.A. 528, 40 N. W. 28, it was held that a certificate of a mutual benefit association would pass to the sole and general devisee under the words "all other property of which I shall die seised," where it appeared that the testator intended it to pass, and the certificate was made payable on the death of the insured "to his devisees or, if no will, to the heirs at law." See also *Weil v. Trafford*, 3 Tenn. Ch. 108, J. T. W.

L.R.A. 128, 70 N. W. 764. And in 1894 the association amended its by-laws by adding that "whenever a member of this association, in good standing, through external, violent, and accidental means, receives bodily injuries which shall, independently of all other causes, result in death within twenty-six (26) weeks from said accident, the beneficiary named in his application for membership, or his heirs, if no beneficiary is named therein, shall be paid the proceeds of one assessment of two dollars (\$2) upon each member in good standing, but in no case shall such payment exceed the sum of five thousand (\$5,000) dollars." This, as will be observed, materially altered the by-laws quoted above, and, as neither the articles nor by-laws in force when deceased became a member provided for amendment, this, in so far as it adversely affected his rights, was not binding on him. *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 282, 68 Am. St. Rep. 306, 76 N. W. 683. Prior to this, in 1886, a change of beneficiary had been expressly authorized by the legislature "with the consent of such corporation." Section 7, chap. 65, Acts 21st Gen. Assem. The words quoted were eliminated in Code 1897, § 1789, which reads: "No association organized or operating under this chapter shall issue a certificate of membership to any person under fifteen nor over sixty-five years of age, nor unless the beneficiary named in the certificate is the husband, wife, relative, legal representative, heir, creditor, or legatee of the insured member, nor shall any such certificate be assigned. Any certificate issued or assignment made in violation of this section shall be void. The beneficiary named in the certificate may be changed at any time at the pleasure of the assured, as may be provided for in the articles or by-laws, but no certificate issued for the benefit of a wife or children shall be thus changed so as to become payable to the creditors." This leaves it optional with the association whether consent to such change by or notice thereof to it shall be exacted as a condition precedent to the substitution of one beneficiary for another. Possibly, as suggested by appellants, such notice might be conducive to the orderly transaction of business. On the other hand, it would be a limitation on the freedom of the member in disposing of the benefit to be derived from his contract, and we know of no reason for insisting on the association exacting such notice when, by failing to require it in its by-laws, a contrary wish has been evidenced. Neither notice to the association nor consent by it thereto was essential to the change of beneficiaries. This point was decided in *Hirschl v. Clark*, 81 Iowa, 200, 9 L.R.A. 42 L.R.A. (N.S.)

841, 47 N. W. 78, where the court, speaking through Rothrock, Ch. J., said: "If the association receives notice of the change in the beneficiary before it has been in any way prejudiced, it would seem that it would be bound to obey the direction. . . . In our opinion, the fact that Burrows died before the association received the instrument is not a material question. Under this contract, Burrows could have changed the beneficiary by an assignment on the certificate, or by a separate paper, and it was complete, at least, so far as Mary Burrows was concerned, when it was delivered to Clark, the trustee. Notice to the insurer of the assignment was not necessary, unless required by the contract of insurance. *Bliss, Life Ins.* § 333; *May, Ins.* §§ 388, 396, and authorities cited. Where a policy is assignable, or where a benefit certificate authorizes a change of beneficiaries, which is the same thing in effect as an assignment, notice of the assignment is not necessary to its validity, unless required by the contract of insurance." And, as no mode of changing beneficiaries was prescribed, this might be done in any informal manner which indicated the intention of the insured so to do. *Shuman v. Ancient Order*, U. W. 110 Iowa, 645, 82 N. W. 331.

It is also to be noted that the section quoted expressly recognizes the right of the insured to designate as beneficiary a "legatee." Moreover, the 1st section of chapter 7 of title 9, in conformity with which the association is organized, denies the associations contemplated as those "organized for the purpose of insuring the lives of individuals, or furnishing benefits to the widows, heirs, orphans, or legatees of deceased members, or accident indemnity." These statutes clearly recognize the authority of the association to insure for the benefit of a legatee, and, as no limitation is prescribed in its articles or by-laws, it is to be presumed persons of any class enumerated in the statute may be beneficiaries. Had deceased, in procuring membership originally, or in an appropriate paper filed with the defendant, designated as beneficiary a legatee named or to be named as entitled thereto in his will, no one could well deny, in view of these statutes, that such legatee would have been entitled to the indemnity. Can it make any difference that he designated a legatee in his will as beneficiary without advising the association? As seen, he was under no obligation to notify it of any change he might make, and, though the will may not become effective in disposing of his property until his death, it might prove effective in designating a beneficiary. The naming of a beneficiary of life insurance is in its nature



testamentary. Like a will, it is revocable, and is not effective in passing the benefits stipulated during life. In *Den-nett v. Kirk*, 59 N. H. 10, the designation of a beneficiary by will was upheld; the court saying: "Is the will inoperative as a bequest of a fund which was not the property of the testator, an order for the payment of the fund to Oliver's mother within the meaning of the rules of the association? It is a writing signed by the member and a sufficient number of witnesses. It distinctly refers to the fund as the subject-matter of his power of appointment. . . . The will is not addressed to the association, and the part relating to this subject is not a formal order for the payment of the relief either by anybody or to anybody. But it clearly expresses Oliver's desire and direction that it should be paid to his mother. It plainly manifests his intention to so comply with the rules of the association as to exercise his power of selection in her favor. By the formal bequest he expressly informed all to whom knowledge of it should come that the relief was to be paid to her. He named her as the person entitled to a certain fund that was in fact payable to his appointee (with or without certain limitations) at his death. He described the fund as being in the hands of a certain accurately described association. He effectually declared in a writing signed by himself and more than two witnesses that his mother should be the payee of that fund, of which nobody but the association could be the payer. A written statement that a certain thing will be done at a certain time, when made known to the only person who can do it, may be an imperative order that he shall do it. . . . In this case the testamentary language, literally signifying a bequest to the testator's mother of certain money in the hands of a certain association, means that the association is ordered to pay the money to her. That meaning could have been expressed in the more common phraseology of command, but the formal bequest is, in legal construction and effect, an order within the meaning of the rules of the association." See also *Thomeuf v. Knights of Birmingham*, 12 Pa. Super. Ct. 195. *Masonic Benev. Asso. v. Bunch*, 109 Mo. 560, 19 S. W. 25, is squarely in point. The association was organized under statutes of Illinois similar to those of this state quoted, though using the word "devisees," instead of "legatee." The charter contained no provision for the designation or change of beneficiaries. After directing attention to the well-settled doctrine that the right of members of such association is simply that of appointing the beneficiary, that the

beneficiary does not acquire a vested interest in the certificate of insurance, but merely an expectancy subject to being divested at any time by the insured, and that possession of the certificate is not essential to effect a change, the court said: "This right of change has generally been held analogous to a testamentary disposition of the benefit. It, like a will, is revocable at any time during the life of the testator. *Union Mut. Asso. v. Montgomery*, 70 Mich. 587, 14 Am. St. Rep. 519, 38 N. W. 588; *Chartrand v. Brace*, 16 Colo. 19, 12 L.R.A. 209, 25 Am. St. Rep. 235, 28 Pac. 152; *Duvall v. Goodson*, 79 Ky. 224; *Thomas v. Leake*, 67 Tex. 469, 3 S. W. 703; *National Asso. v. Kirgin*, 28 Mo. App. 80. It was only by holding that Lewis could have made David his devisee that we could sustain the legality of the original designation of David as a beneficiary. The same reasoning will sustain the right of Lewis to change his will and name a different devisee or legatee at any time before his death. And, according to the authorities above cited, neither was this right affected by the fact that Mrs. Katherine Bunch and Frank Bunch refused to permit him to have the certificate upon his demand. If they, with the possession of the certificate, had no such right therein as would defeat the right of Lewis Bunch to change the beneficiary, after he demanded it, their possession was wrongful, and they will not be allowed to profit by their own wrong. As we have already seen, neither the constitution nor by-laws of plaintiff prescribed any formalities whatever for a change of beneficiary. In the absence of such, any clear, definite designation of a different beneficiary will suffice. So we think that the designation of a trustee by his last will, formally executed and duly probated, wrought an effectual change, particularly as he was authorized by the charter to give it to his devisees."

To the same effect, see *Raub v. Masonic Mut. Relief Asso.* 3 Mackey, 68; *Supreme Council, C. M. B. A. v. Priest*, 46 Mich. 429, 9 N. W. 481. *Niblack, Ben. Soc.* § 214, where it is said: "If there is no provision of the charter, by-laws, or certificate of membership governing the manner and mode in which such change shall be made, a designation of a new beneficiary may be made by the last will and testament of the member." *High court, C. O. F. v. Malloy*, 169 Ill. 58, 48 N. E. 392; *Bacon, Ben. Soc.* § 308a, where the author says: "If no formalities are required by the laws of the society for change of beneficiary, it may be made in any manner indicating the intention of the member as by will." See *Hannigan v. Ingraham*, 55 Hun, 257, 8 N. Y.

Supp. 232; *Stoelker v. Thornton*, 88 Ala. 241, 6 L.R.A. 140, 6 So. 680; *Bloomington Mut. Ben. Asso. v. Blue*, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Carruth v. Clawson*, 97 Ark. 50, 133 S. W. 178. The indemnity can be enjoyed only after the insured's death. The naming of a beneficiary by will, then, is timely, and interferes with the rights of no one. Thereby the insured does not dispose of a fund of his own, but merely indicates to whom another, the insurer, shall pay under the terms of its contract. Of course such designation of beneficiary does not become effective until the insured's death, but this is quite as soon as though made in any other way. Any designation is revocable any time before the death of the assured. The manner of designating a beneficiary, where this is in no wise controlled by article of incorporation or by-law of the association or by statute, would seem to be solely a matter of choice with the insured. As no notice is required, it is immaterial to the association how this is done. The interest of the existing beneficiary is merely that of expectancy, subject to change without his knowledge. In other words, the designation of a beneficiary by the insured, whether by will or in some other instrument, is made during life, but becomes effective only upon his death. Of course, where the association has prescribed a method by which beneficiaries shall be named or changed, this cannot be accomplished by will, unless so authorized, and this is the holding of most of the decisions relied upon by appellants. See *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449; *Pilcher v. Puckett* (Modern Woodmen v. Puckett) 77 Kan. 284, 17 L.R.A. (N.S.) 1083, 94 Pac. 132; *Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. 275; *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506. Such is the law in this state. *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Hainer v. Iowa L. H.* 78 Iowa, 245, 43 N. W. 185; *Wendt v. Iowa L. H.* 72 Iowa, 682, 34 N. W. 470. In *De Silva v. Supreme Council*, 109 Cal. 373, 42 Pac. 32, it was conceded for the purpose of the case that a change of beneficiaries might be made by will. The discussion only lends support to appellants' contention. In *Heltenberg v. District No. 1, I. O. B. B.* 94 N. Y. 580, the indemnity was to be paid to "such person or persons as he (insured) may have formally designated to the lodge prior to his decease." *Re Smith*, 42 Misc. 639, 87 N. Y. Supp. 725, merely holds that neither the insured's estate nor a stranger are within the class of beneficiaries authorized by statute. All the authorities denying the validity of a designation of beneficiary

by will base the decision on conditions in the articles of incorporation, by-laws, or statute exacting another method.

In the absence of any such obstruction, there is no tenable ground for saying that the beneficiary may not be so named especially where the indemnity may be made payable to a legatee.

**Affirmed.**

Petition for rehearing denied.

#### MARYLAND COURT OF APPEALS.

MINEOLA TRIBE NO. 114, IMPROVED ORDER OF RED MEN,

v.

ALICE S. LIZER, now Alice S. Funk, et al.

(— Md. —, 83 Atl. 149.)

**Insurance — benefit — will — effect.**

1. The will of a member of a mutual benefit society will not operate on the benefit due on his certificate, if the by-laws of the order make it payable to his widow, orphans, parents, or attested order.

**Same — attested order — will.**

2. A will is not an attested order within the meaning of a provision in a mutual benefit certificate making the fund payable to certain designated persons, or attested order, where the statute provides that a benefit shall not be assignable except to the beneficiary's name, and then only by consent of the association, "attested by its seal and the signature of its supreme secretary and its supreme executive officer."

(January 9, 1912.)

**A**PPPEAL by Joseph W. Wolfinger, executor, etc., of Thomas J. Ridenour, deceased, from a decree of the Circuit Court for Washington County distributing the proceeds of a mutual benefit certificate to heirs at law of the deceased member in an interpleader proceeding to determine whether such heirs or a legatee of the member was entitled thereto. **Affirmed.**

The facts are stated in the opinion.

Mr. Joseph W. Wolfinger is *proprie persona*.

Messrs. Wagaman & Wagaman for appellee.

Briscoe, J., delivered the opinion of the court:

A bill of interpleader was filed by the appellant in the circuit court for Washington county, on the 25th of January, 1910, to es-

**Note.** — As to right to designate by will beneficiary of benefit insurance, see note to *Brinsmaid v. Iowa State Traveling Men's Asso.* ante, 1161.

establish the true owner or owners of the fund here in controversy, and alleging that the plaintiff was ready and desirous of paying the money into court, to avoid suits at law by the claimants thereof. The plaintiff disclaims any interest in the money, and is ready and willing to distribute the fund to the proper owner or owners entitled to it.

The facts upon which the decision of the case must turn, briefly stated, are these: The Mineola Tribe No. 114, Improved Order of Red Men, of Leitersburg, Washington county, Maryland, is a fraternal and beneficial society or association, duly incorporated, and holding its meetings and transacting its business in this state. It appears that one Thomas J. Ridenour, late of Washington county, deceased, was at the time of his death a member in good standing of this association, and by its by-laws (§ 4, art. 19), upon the death of a member, the sum of not less than \$20 shall be paid by the society to the widow or heirs of the member for funeral expenses. And by §§ 9 and 10 of article 14 of the order, it is provided "that upon the death of a beneficial member, should he leave a widow or orphans, parents, or attested order, a contribution of (\$180) fathoms shall be presented by the sachem and keeper of wampum, in the name of Mineola Tribe No. 114, Impd. O. R. M., to such widow, orphans, or parents or attested order, as the case may be, for their use and benefit, which shall be paid within one moon after the death of a brother. And in case the widow or orphans or parents are considered incompetent to take proper care of the wampum, there shall be a guardian or trustee, as the case may be, appointed, into whose hands shall be paid the amount as provided in § 9, in trust of said beneficiaries, who shall report regularly and exhibit his account every six moons to the tribe, who may be removed at the option of the tribe." The bill further avers that Thomas J. Ridenour late of Washington county, was, at the time of his death, a member of the society in good standing; that he departed this life on the 2d day of April, 1909, leaving a last will and testament in which he bequeathed to Alice S. Lizer, now Alice S. Funk, all the sick and death benefits which may be due him at the time of his death, from the order; and Joseph W. Wolfinger has qualified as executor of the will, which has been duly admitted to probate in the orphans' court of Washington county. The bill then avers that the fund is claimed and demanded by Wolfinger as executor, on behalf of Alice S. Funk, the legatee named in the will, and also by the children and heirs at law of Thomas J. Ridenour, deceased. Upon this bill and exhibits, the court, on the 31st day of January, 1910, passed a decree of inter-

pleader, directing the fund to be paid into court to the credit of the cause, that the parties interplead, and that Joseph W. Wolfinger, executor, be the plaintiff, and Frank J. Ridenour, Charles C. Ridenour, Sadie E. Wolcott, Gertrude E. Burkett, and Mollie Melott, children and heirs at law of Thomas J. Ridenour, and Alice S. Funk, the devisee, be the defendants. The case was heard upon the bill, petition, and answer of the respective parties claiming the fund, and from a decree of the court directing the fund to be paid to the children and heirs at law of Thomas J. Ridenour, this appeal has been taken.

The essential facts of the case are admitted and conceded by the pleadings, and the principal questions presented by the proceedings are: First, whether, under a proper construction of the by-laws of the Mineola Tribe, a member of the order can dispose of the benefits, or wampums, by will; and, secondly, whether a will is an "attested order," within the meaning and contemplation of the by-laws of the association.

In this case, we have the beneficiaries plainly named and designated in the by-laws (§ 9, art. 14) of the order, to whom the money shall be paid upon the death of the member, and they are "the widow, orphans, or parents or attested order, as the case may be, for their use and benefit, which shall be paid within one moon after the death of a brother."

The fund or fathoms of wampum were a contribution by the order to be presented by the sachem and keeper of wampum in the name of the tribe, upon the death of the member, to the widow, orphans, or parents, as the case may be, for their use and benefit, and were not payable to the deceased or for his benefit. There being no provision in the by-laws of the association authorizing a member to dispose of the fund by will, and the fund not being his property, the will could not in any way operate upon it, and it cannot pass under his will to the legatee named therein.

In *Maryland Mut. Benev. Soc. I. O. R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52, this court said, in considering the nature and extent of the interest of the member of a mutual benefit association in the proceeds of a policy of insurance, held, that the will did not operate upon it, because, as the insurance was not payable to the deceased or to his benefit, it was not his property, and did not go as assets to his administrator. And to the same effect are the cases of *Yoe v. Benjamin C. Howard Masonic Mut. Benev. Asso.* 63 Md. 91; *Cowman v. Rogers*, 73 Md. 403, 10 L.R.A. 550, 21 Atl. 64; *Thomas v. Cochrane*, 89 Md. 402, 46 L.R.A. 160, 43 Atl. 792; *Condon v. Mutual Reserve Fund Life*

Asso. 89 Md. 123, 44 L.R.A. 149, 73 Am. St. Rep. 169, 42 Atl. 944; Dale v. Brumbly, 96 Md. 678, 54 Atl. 655; Goodman v. Jedidjah Lodge, No. 7, 67 Md. 128, 9 Atl. 13. 13 Atl. 627.

The decisions of this court uniformly hold that these associations are of a beneficial character and have for their general object and purpose mutual aid and protection of the families and near relatives of the deceased members. While they differ as to the persons who may be named as beneficiaries, and in their various insurance features as to whom the money shall be paid to upon the death of the member, the contract of membership relates to the by-laws and rules of the association, and these are a part of the contract. We think it is clear that the member in this case had no property in the fund here in controversy that could pass under his will, and, as he left no widow surviving him, the money is properly payable to his children. Sections 9 and 10 of article 14 of by-laws of the tribe; article 23, §§ 210-223, of Code of Public General Laws of 1904.

Manifestly, a will cannot be held to be "an attested order," with the meaning of the by-laws of the Mineola Tribe, whereby the member can dispose of the fund, because § 10 provides that, in case the widow or orphans or parents are considered incompetent to take proper care of the wampum, there shall be appointed a guardian or trustee to hold the fund in trust for the beneficiaries, who shall report to the tribe, and who can be removed by the tribe.

Assuming, for the purposes of this case, that a beneficial member of the tribe can change and designate another as a beneficiary, by "an attested order," it is quite certain that this was not done in this case in the lifetime of the member and with the consent of the tribe.

Section 210 of article 23 of the Code of Public General Laws, subtitle "Fraternal Beneficiary Societies, Orders, or Associations," provides that a benefit shall not be assignable except to the beneficiaries named in the section, and then only by the consent of such association, attested by its seal and the signature of its supreme secretary and its supreme executive officer; but the member may surrender his benefit certificate and have a new one issued to any one or more of the beneficiaries named, in the manner provided by the constitution and laws of such association. Dale v. Brumbly, 96 Md. 678, 54 Atl. 655.

There is no power conferred upon a beneficial member in the by-laws of the order to dispose of the fund or wampums by will and, as we have held that a will is not "an attested order," as contemplated by the 42 L.R.A. (N.S.)

tribe, the decree of the Circuit Court for Washington County, dated the 5th day of May, 1911, directing the fund to be paid to the children and heirs at law of Thomas J. Ridenour, deceased, in equal portions, will be affirmed; the costs in this court and the court below to be paid by the plaintiff, under the decree of interpleader.

#### MISSISSIPPI SUPREME COURT.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appt.,

v.

G. W. KIRK.

(— Miss. —, 58 So. 710.)

**Judge — disqualification — relation to attorney with contingent fee.**

1. A judge is disqualified to sit in a case where his son is attorney under an employment calling for a contingent fee, where the Constitution provides that no judge shall preside on the trial of any case where the parties, or either of them, shall be connected with him by affinity or consanguinity.

**New trial — objection of interest of judge — time.**

2. An objection that the attorney in the case was related to the judge, and is employed under a contract calling for a contingent fee, is in time if made by motion for new trial before final judgment, where the facts were not known to the opposing attorney until after the close of the trial.

**On Suggestion of Error.**

**Pleading — limitation of action — general issue.**

3. The statute of limitations must be specially pleaded in an action to recover the statutory penalty and damages for failure to maintain cattle guards where a railroad passes through inclosed land, and evidence of such defense cannot be given under the general issue.

**Courts — rules — authority.**

4. The supreme court of Mississippi has

**Note. — Relationship to attorney in case as disqualifying judge.**

It is held in some cases that relationship to an attorney employed in a cause does not disqualify the judge, at least in the absence of a contingent fee. Sjoberg v. Nordin, 26 Minn. 501, 5 N. W. 677 (statute prohibiting a judge from hearing a cause in which he is interested, or would be excluded from sitting as a juror); State v. Ledbetter, 111 Minn. 110, 126 N. W. 477; People v. Whitney, 105 Mich. 622, 63 N. W. 765 (statute disqualifying for relationship to "party"); Patton v. Collier, 90 Tex. 115, 37 S. W. 413 (where the notes in suit provided for the payment of attorneys' fees by the maker, but no portion of the notes had

no power to prescribe rules for the government of the trial courts of the state.

(June 4, 1912.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Yazoo County in plaintiff's favor in an action brought to recover the statutory penalty and actual damages resulting from the alleged failure of defendant to construct and maintain necessary or proper cattle guards. Reversed.

The facts are stated in the opinion.

Messrs. Barnett & Perrin and Mayes & Longstreet for appellant.

Messrs. Barbour & Henry for appellee.

Cook, J., delivered the opinion of the court:

This case was twice tried in the circuit court of Yazoo county. At the first trial the defendant below, appellant here, succeeded in convincing the jury that it was not guilty. This verdict was set aside by the court and a new trial granted. A special bill of exceptions was presented to the trial judge and signed by him. When the case was tried a second time, the ver-

dict of the jury was for the plaintiff. A motion for a new trial was overruled. So it is the action of the court in sustaining the first motion and overruling the second that is before us for review. The same judge presided at both trials.

The suit was instituted to recover the statutory penalty and actual damages resulting from alleged failure of the railroad company to construct and maintain necessary or proper cattle guards where its track passed through plaintiff's inclosed lands. The one-year statute of limitations was invoked in both trials to defeat plaintiff's recovery of the statutory penalty. The statute was not specially pleaded, but evidence was given tending to establish the bar of the statute. In the special bill of exceptions it is stated by the judge that he had sustained the motion to set aside the verdict of the jury solely because the defendant had not claimed the bar in his pleadings. We think the reason given by the judge for his rulings was unsound, as the defense may be raised by the evidence and under the plea of the general issue.

been assigned to the attorneys); Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985 (sustaining a refusal of a petition for a change of venue, on account of which, coupled with other circumstances, it was advised that, in the event of a new trial, another judge should be called); Zambetti v. Garton, 113 N. Y. Supp. 804 (though a new trial was ordered as a matter of propriety, since, from the evidence, a suspicion might arise that the court had been unduly influenced); Casmento v. Barlow Bros. Co. 83 Conn. 180, 76 Atl. 361 (*dictum*—statute disqualifying for relationship to "party"); Bryant v. Livermore, 20 Minn. 313, Gil. 271 (*dictum*).

So it is no ground for a rehearing that a relationship existed between a judge of this court and an attorney who instigated the cause in the lower court, where the record discloses that other attorneys presented the case. Maclean v. Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209.

And in People v. Patrick, 183 N. Y. 53, 75 N. E. 963, it was held that there was no impropriety, so as to warrant a rehearing, where the judge who wrote the prevailing opinion was related to an assistant district attorney who appeared at one stage of the proceedings in the lower court.

But by virtue of a constitutional provision disqualifying a judge related within a certain degree to a "party," relationship within such degree to an attorney employed by one of the parties upon a contingent fee is held to disqualify the judge, in Johnson v. State, 87 Ark. 45, 18 L.R.A.(N.S.) 619, 112 S. W. 143, 15 Ann. Cas. 531.

So, it was held in Vine v. Jones, 13 S. D. 54, 82 N. W. 82, that, under a statute requiring a county judge, when he is a party to, or personally interested in, any proceed-

ing in any probate matter therein, or related to any person so interested within a specified degree, to certify to the circuit court such fact, that he must make such certificate when he is related within the degree provided by statute, to an attorney who is prosecuting a cause on a contingent fee.

And in Re Taber, 13 S. D. 62, 82 N. W. 398 (*dictum*), citing Vine v. Jones, supra, it was said that a judge was disqualified from hearing a cause in which an attorney related in a certain degree was employed upon a contingent fee. But it was held that the most of the acts of a county judge who was disqualified by reason of a relative's contingent interest in the cause as an attorney were not void, but voidable, and hence not subject to collateral attack.

Where, under a Code provision, a judge is prohibited from hearing a cause in which he was related to a party within a certain degree, without the consent of all the parties in interest, it was held in Roberts v. Roberts, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616, that a judge was disqualified from hearing an application for alimony and counsel fees, since he was related to attorneys for the applicant within the specified degree, although certain attorneys' fees had been determined regardless of the outcome of the application. And the court said: "It is the pecuniary interest of the attorney in the result of the case which disqualifies the judge. If the applicant did not ask any allowance of counsel fees, of course, the fact that her counsel was related to the judge, no matter how closely, would not have the effect to disqualify the judge from presiding. The moment the applicant asks for counsel fees, her counsel becomes pecuniarily interested in the result of the suit, and, so far as these fees are concerned, the

The rule is analogous to the rule in criminal cases where the suit involves a penalty. 13 Enc. Pl. & Pr. p. 282, and cases there cited. However, the ruling may have been correct, though the reason upon which it was based may be fallacious; it being doubtful whether there was any evidence to support the bar.

At the second trial the court peremptorily directed the jury to find for the plaintiff the statutory penalty, and also all damages which the evidence showed resulted from the failure of defendant to perform its statutory duties. Of course, the verdict of the jury was responsive to the directions of the court. As to whether or not the court erred at either or both trials is a close question, and the court may be affirmed or reversed without doing serious violence to the law or the record. The above review of the history of the case is set out for the purpose of emphasizing our views hereinafter expressed upon the important and far-reaching question which is involved in the determination of the rights of the parties to this suit.

counsel are as much parties to the case as if they were parties to the record."

In *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747, it was held that a judge was disqualified from hearing a proceeding to revoke letters of administration, the determination of which would be conclusive as to distribution, by virtue of a statute disqualifying a judge from hearing a cause when he is related to either party within a certain degree, or is a party or is interested, where attorneys in the cause were related to the judge, within the specified degree and were in effect equitable owners of a portion of the estate, since the administrator had contracted to convey a portion of the estate to them, conditional upon the outcome of the proceedings.

But under a statute providing that a judge shall not preside over a cause in which he is interested, or is related to a "party" within such degree as to exclude him from jury service, it was held in *Hundley v. State*, 47 Fla. 172, 36 So. 362, that a judge so related to an attorney employed upon a contingent fee was not disqualified from hearing the cause.

So, under a statute or constitutional provision disqualifying a judge from hearing a cause in which he is interested, or is related within a certain degree to a "party," relationship within such degree to an attorney employed upon a contingent fee is held in some cases not to disqualify the judge. *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768 (where the question was raised after judgment, in a suit to enjoin the enforcement thereof, and it appeared in the opinion, though without apparent weight, that at the time of the trial the judge was unaware of the contract); *George Knapp & Co. v. Campbell*, 14 Tex. Civ. App. 199, 36 42 L.R.A. (N.S.)

Passing by the other issues raised by the record and discussed in the briefs of counsel, and they are many, we come to the determining factor in the case. In the motion made by appellant to set aside the verdict of the jury and grant it a new trial, we find the following suggestion, *viz.*: "Because Hon. W. A. Henry, the presiding judge, was incompetent to hear the case, for the reason that Messrs. Barbour and Henry, who were counsel for the plaintiff, are both related to said presiding judge, the former being a brother-in-law and the latter a son, and said Barbour & Henry had said case upon a contingent fee. That the assignment of said interest of said Barbour & Henry was not filed with the papers, and was not known to counsel for defendant until after said cause was tried." Upon the hearing of the motion, an agreement was introduced in evidence, and reads as follows: "It is agreed in this case that there was no assignment in writing to the attorneys, but that it was agreed with the plaintiff, Kirk, that they were to be paid a certain percentage of the recovery as com-

*S. W. 765; Missouri, K. & T. R. Co. v. Mitcham*, 57 Tex. Civ. App. 134, 121 S. W. 871 (where it appeared that a percentage of an amount which might be realized "was conveyed" to the attorney).

So, in *Allison v. Southern R. Co.* 129 N. C. 336, 40 S. E. 91, there is a *dictum* to the effect that a judge would not be disqualified to preside at a case in which his son was attorney, although he knows the latter is employed on a contingent fee.

The holding in *Dunbar v. Wallace*, 84 Ark. 231, 105 S. W. 257, was merely to the effect that mandamus would not lie to compel a judge to permit the filing of a suggestion of his disqualification from hearing a cause because the fee of an attorney related to the judge within a certain degree was contingent. But the court intimated that a different conclusion might have obtained had there been filed an allegation that such attorney had a direct pecuniary interest in the subject-matter of the litigation.

The holding in *Knickerbocker v. Worthing*, 138 Mich. 224, 101 N. W. 540, is merely that where the existence of a contract for a contingent fee by an attorney employed in the case and related to the trial judge became known after the beginning of the trial, but the contract was abrogated at a recess, it is unnecessary to decide whether or not a disqualification existed within a statute.

In *People v. Ebey*, 6 Cal. App. 769, 93 Pac. 379, it was held that disqualification by relationship to an attorney for a defendant extends to arraignment of prisoners and entry of plea, under a statute disqualifying a judge to sit or act as such in any action or proceedings where he is related within a specified degree to any attorney of either party.

R. S. N.

pensation for their services; that this fact was not known to the attorneys for the defendant until after the trial, and that the circuit judge knew nothing of what the agreement between the plaintiff and his attorneys was until the matter was presented on this motion. It is also admitted that J. F. Barbour is the brother-in-law, and W. A. Henry, Jr., is the son, of the presiding judge."

This presents a question to this court of paramount importance to litigants in the courts of the state, as well as to the general public. All are interested in the integrity, independence, and impartiality of the judiciary, the most important and powerful branch of our government. Not only must the judges presiding over the courts be honest, unbiased, impartial, and disinterested in fact, but it is of the utmost importance that all doubt or suspicion to the contrary must be jealously guarded against, and, if possible, completely eliminated, if we are to maintain and give full force and effect to the high ideas and salutary safeguards written in the organic law of the state. The first clause of § 165 of the Constitution reads as follows: "No judge of any court shall preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties." The only difficulty in construing this constitutional limitation upon the power of judges to preside in the trial of causes lies in the interpretation and definition of the word "parties."

The courts of sister states have been called upon to define this word appearing in statutes designed to cover the same conditions provided for in our Constitution. Some of the courts have adopted the narrow and technical signification of the word, and confined its application to parties to the record *eo nomine*, while others have given a broader and more liberal meaning to the statute by holding that by "parties" was meant every person who had a pecuniary interest in the lawsuit, whether their names were mentioned in the pleadings or not. The Alabama court, speaking of a statute similar in its provision to our Constitution, says: "The purpose of the statute is to secure to litigants a fair and impartial trial, by an impartial and unbiased tribunal. Next in importance to the duty of rendering a righteous judgment is that of doing it in such manner as will beget no suspicion of the fairness or integrity of the judge." *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 So. 432. "The principle of disqualification is 42 L.R.A. (N.S.)

to have no technical or strict construction, but is to be broadly applied to all classes of cases where one is appointed to decide the right of his fellow citizens. . . . Disqualifying statutes are not to be construed in a strict, technical sense, but broadly, with liberality. The term 'party,' used to indicate persons to whom the judge is related, and who are connected with the litigation, is not confined to parties of record." 12 Am. & Eng. Enc. Law, pp. 41, 42.

The supreme court of Texas, construing a statute which contains substantially the same language as the clause of our Constitution, said: "A narrow or contracted construction of the term 'party,' which confines it to the very person named on the docket as such, . . . would often defeat the end had in view, of having justice impartially administered, free from the bias and influence produced by the interest held in the cause by the judge or his relations." No judge can sit who is of such affinity to either party that he might be challenged as a juror, and there can be no doubt but that the statute extends to the party beneficially interested, as well as the real party. *Hodde v. Susan*, 58 Tex. 394. See also *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

In the case of *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616, the supreme court of Georgia, construing the word "party" in a statute referring to the same subject-matter that is referred to in § 165 of our Constitution, said: "If one not a party to the record, but directly and pecuniarily interested in the result of the cause, would be such a party thereto as to disqualify one of his kinsmen from being a juror, he would also be such a party as to disqualify his kinsman from presiding as judge."

In *Arkansas* a lawyer engaged in the trial of a cause suggested to the court that R. C. Bullock, one of the attorneys in the case, was interested in the trial of said cause, and his fee depended upon the rendition of a judgment in favor of his client; that said R. C. Bullock was related to the judge presiding at the trial, and for this reason he asked the judge to decline to preside at the trial. The judge seemed to be very sensitive where he considered his judicial dignity was involved, and fined the lawyer for contempt. The lawyer appealed to the supreme court of the state. The Constitution of the state of Arkansas provides that "no judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity." Const. art. 7, § 20. The supreme

court of Arkansas, construing this provision of the Constitution, said: "While the Constitution speaks of a 'party' to the cause, we are of the opinion that, both upon sound reason and according to the weight of authority, the word should not be construed in a technical and restricted sense to mean a party to the record, but it should be held to mean anyone who is pecuniarily interested directly in the result of the suit, although not a party to the record, and not necessarily bound by the judgment. Any other construction totally disregards the spirit and defeats the purpose of the constitutional prohibition, for if a judge may be influenced at all in his judgment by the fact that a person who is directly interested in the result of the suit is related to him, the potency of the influence is not lessened by the absence of the related party from the record." The court overruled the chancellor in adjudging petitioner to be in contempt, because the motion suggested legal ground for disqualification of the chancellor. *Johnson v. State*, 87 Ark. 45, 18 L.R.A. (N.S.) 619, 112 S. W. 143, 15 Ann. Cas. 531.

As before said, some of the other states place a more technical and restricted construction upon the meaning of the word "party," and the case of *Allison v. Southern R. Co.* 129 N. C. 336, 40 S. E. 91, is quoted by many of the courts as authority for the proposition that a judge is not disqualified because of the relationship of an attorney who is interested in the suit, when the fee of such lawyer depends upon the result of the suit. We think a careful reading of this case will demonstrate that there is no statutory or constitutional prohibition in the state of North Carolina, and for this reason the North Carolina court has adhered to the common-law rule, which only disqualified judges because of some interest of their own in the result of the suit to be tried.

We are convinced that the broad and liberal rule of construction is the soundest and wisest rule, and, adopting this rule as our guide, we conclude that the circuit judge was disqualified to preside at the trial of this case. If the numerical weight of authority rested with the narrow view, we would unhesitatingly follow the lead of those courts adopting a broad and liberal construction of statutes and Constitutions similar in language to our own Constitution. In the absence of precedent, we would feel constrained to create a precedent in harmony with our views. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties in-  
42 L.R.A. (N.S.)

involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence *aliunde* the record. The real parties in interest furnish the reason for the judge to recuse himself when it becomes known that they are related to the judge, although they may not be parties *eo nomine*.

Was the suggestion made in time by appellant? The facts were called to the attention of the court by the motion for a new trial, and while the case was still within his control. It was also admitted that appellant's attorney did not know of the interests of appellee's attorneys in the litigation until after the trial. We think the point was made in time.

Since the disqualification of the judge may be waived by the consent of the parties and of the judge, his judgment was not void *per se*, but simply voidable. It follows, therefore, that the disqualification of the trial judge must be seasonably suggested; that is to say, whenever a knowledge of his disqualification comes to the complaining interest, should such party "sit down upon the stool to do nothing," he will be held to have waived the disqualification of the judge, and to have consented to his presiding in the cause.

In some jurisdictions it is held that the statute disqualifying the judge deprives him of all jurisdiction, and for this reason his acts are absolutely void. These decisions are usually based on the peculiar language of the statutes construed, and which, as a general proposition, in their very terms disqualify the judge when his own interest, or the interests of a relative, may be affected by the decisions of the judge; and for this reason his judgment is entirely incapable of being made good, even by express consent. It will be noted that our Constitution provides that the disqualification may be waived by consent, and it is our opinion that consent will be conclusively presumed after the case has gone to final judgment, unless it affirmatively appears that the suggestion of the disqualification of the judge was made at some time before final judgment.

A very exhaustive and interesting collation of the authorities touching the void and voidable judgments of disqualified judges may be found in the notes to the New Hampshire case of *Moses v. Julian*, reported in 84 Am. Dec. 114.

And for the reasons given above, the case is reversed and remanded.

A suggestion of error having been filed, Cook, J., on July 1, 1912, handed down the following additional opinion:

In response to the suggestion of error,



we desire to say that we entertain no doubt as to the soundness of our views expressed in the opinion heretofore rendered, touching the disqualification of the trial judge.

We recede from the rule of pleading laid down by us in the opinion, and now say that the statute of limitations must be specially pleaded, and the trial court was correct in so ruling.

The rules of this court adopted January 4, 1910 (95 Miss. XL, 54 So. v.) have no application to the practice or procedure in other courts, and this is manifested by the language employed in the rules adopted. This court has no authority to prescribe rules for the government of trial courts, and has never attempted to usurp such power.

The order heretofore entered, reversing and remanding this cause, is affirmed.

#### KENTUCKY COURT OF APPEALS.

E. J. NOBLE et al., Appts.,  
v.

KASH C. WILLIAMS et al.  
(150 Ky. 439, 150 S. W. 507.)

Contract — implied — advance by officer — reimbursement.

A teacher who, in order to maintain a

*Note. — Right of school-teacher to be reimbursed for money expended for school purposes without precedent authority.*

The power of a school-teacher to hold a school district employing him upon an implied contract for articles purchased by him for the district is neither greater nor less than that of any other individual, and hence the extent of the power is to be determined by the rules applicable to other persons; therefore the following notes on the more general question will be found applicable: See notes in 41 L.R.A.(N.S.) 473; 39 L.R.A.(N.S.) 72; and 27 L.R.A.(N.S.) 1117, as to the liability of a municipality or other public corporation on an implied contract; and the notes in 39 L.R.A.(N.S.) 43, and 27 L.R.A.(N.S.) 1125, as to the liability of a municipality or other public corporation on implied contracts for labor or services rendered.

But one case other than NOBLE v. WILLIAMS has been found passing upon the specific question of liability of a school district to a teacher employed by it, on an implied contract for articles purchased by the teacher for school purposes. This case (Taylor v. School Dist. 60 Mo. App. 372) is in harmony with the doctrine of the NOBLE CASE. It is here held that a school-teacher employed to teach a school for a period of time is not thereby vested with any of the powers conferred by statute upon the board of directors, and where the board of direc-

school which he is employed to teach, pays the rent of the school building and furnishes necessary supplies without request from the school board or promise of reimbursement, cannot compel the board to repay the advances.

(November 7, 1912.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Breathitt County in defendants' favor in an action brought to compel repayment of money advanced for rent of a school building and for necessary school supplies. Affirmed.

The facts are stated in the opinion.

Mr. G. W. Fleenor for appellants.

Mr. Chester Bach for appellees.

Winn, J., delivered the opinion of the court:

According to the allegations of the petition, the appellants, the plaintiffs, were hired to teach the public school in Jackson, Kentucky, for the fall term of 1908. The school board failed to pay rent for the schoolhouse, to buy the coal, to furnish the seats, crayons, blackboards, and the like, incident and necessary to the conduct of the school. Plaintiffs allege that they, in order to conduct the school, were obliged to and did pay the rent and buy these supplies.

tors are empowered by statute, by means of a written contract, to employ a janitor, a teacher employed by them to teach the school is not authorized to employ a janitor, although the board of directors fail in their duty in this regard, and the janitor work is essential to enable the school to be carried on. The court says: "The fact that the school could not have been carried on without the services of a janitor does not strengthen the plaintiff's claim for compensation. Suppose the defendant's directors had refused to keep the schoolhouse in repair and good condition, or to provide fuel and other material necessary for the use of the school, as in duty bound to do under the statute, would the plaintiff have been justified in having these neglected duties performed by others at the expense of the district? Most certainly not. If, in consequence of the neglect of these duties, the plaintiff could not carry on his school for the term, this would not exonerate the defendant from liability to plaintiff for his wages under the contract. But the entering into a valid contract with plaintiff to teach the district school did not invest him with any of the powers conferred upon the board of directors by the statute. He had no more power to employ a janitor than he had to repair the schoolhouse or provide fuel at the expense of the district. These functions belonged to the board of directors, and no other person could exercise the same for them, and they only in the mode prescribed by statute."

A. G. S.

They allege no request by the school board that they should do so, nor any promise by the board to reimburse them. They sought to recover, nevertheless, against the appellate board, for these expenditures. The circuit court sustained a demurrer to their petition, and they appeal.

The circuit court was right. The teachers, in contracting and paying these obligations, were volunteers. No man, entirely of his own volition, can make another his debtor. The school board could have been required by mandamus, at the suit of any proper party, to furnish a place for the conduct of the school. The teachers had no right to supply it themselves, and then recover the rent. They had their teaching contract; and if the board made it impossible for them to teach, by failing to furnish a place for conducting the school, they had their right of action on their contract, subject to the customary principles involved in such cases. They adopted neither of these courses, but instead voluntarily paid an obligation which was not theirs.

Judgment affirmed.

#### WASHINGTON SUPREME COURT.

(Dept. No. 2.)

JOHN MINOR, Respt.,

v.

CHARLES C. STEVENS, Appt.

(65 Wash. 423, 118 Pac. 313.)

#### Automobile — collision with pedestrian — care which latter must use.

1. A pedestrian injured by an automobile in a public street cannot hold the owner

*Note. — Reciprocal duty of operator of automobile and pedestrian to use care.*

The present note includes only the cases which have passed upon the question under consideration since the writing of the note to Baker v. Close, 38 L.R.A.(N.S.) 487.

In general—duty of operator of car.

The duty of a driver of an automobile to keep a lookout to avoid injury to pedestrians and others using the public streets is the same as that which the law imposes upon the driver of a team, except that the ordinary speed of such machines increases the danger of injury to others in the street, and calls for more watchfulness on the part of the drivers. Williams v. Benson, 87 Kan. 421, 124 Pac. 531.

While the drivers of automobiles enjoy the same rights on the highway as are possessed by pedestrians, the nature of the duty imposed upon them is to be viewed and determined as commensurate with the risk

liable in damages if he might, by the exercise of his ordinary faculties, have avoided the accident.

#### Evidence — conduct of chauffeur after accident.

2. The conduct of a chauffeur after collision of his machine with a pedestrian is not relevant in an action to hold the owner of the vehicle liable for the injury, except in so far as it may be part of the *res gestæ*, and tend to throw light on the act which is charged to be negligent.

#### Same — relation of master and servant — method of payment.

3. The method and means by which a chauffeur in charge of an automobile receives his compensation is material upon the question whether he is the servant of the owner, so that the latter will be liable for his acts, or an independent contractor for whose acts the owner is not liable.

(Dunbar, Ch. J., dissents.)

(October 27, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action brought to recover damages alleged to have been caused by the negligence of a chauffeur in the employ of defendant. Reversed.

The facts are stated in the opinion.

Mr. H. W. Lueders, for appellant:

The burden of proof rested upon the respondent to show the relation of master and servant, or principal and agent, between appellant and Frago, and further, that Frago was acting within the scope of his authority.

Braverman v. Hart, 105 N. Y. Supp. 107; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl.

entailed through the probable dangers attending the particular situation. Bongner v. Ziegenhein, 165 Mo. App. 328, 147 S. W. 182.

The degree of care used by the driver of such a machine should be commensurate with the dangers naturally incident to the use of the machine in the particular place; and while it is true that he is not required to anticipate or guard against anything that appearances would not usually suggest to an ordinarily prudent person, yet an instruction that a driver should exercise such skill and care in the management of his machine "as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions" does not overstate the rule. Domke v. Gunning, 62 Wash. 629, 114 Pac. 436.

A statute increasing the common-law liability, and providing that a person operating an automobile on a public highway "shall use the highest degree of care that a very careful person would use under like

525, 10 Ann. Cas. 731; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; Lampe v. Jacobsen, 46 Wash. 533, 90 Pac. 654; 2 Thomp. Neg. § 525; Clark v. Buckmobile Co. 107 App. Div. 120, 94 N. Y. Supp. 771; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; Hardy v. Shedden Co. 37 L.R.A. 39, 24 C. C. A. 261, 47 U. S. App. 362, 78 Fed. 610; Garven v. Chicago, R. I. & P. R. Co. 100 Mo. App. 617, 75 S. W. 193; Berman v. Schultz, 84 N. Y. Supp. 292; Quigley v. Thompson, 211 Pa. 107, 60 Atl. 506; Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E.

392; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946.

Plaintiff was guilty of contributory negligence.

Dimuria v. Seattle Transfer Co. 50 Wash. 633, 22 L.R.A.(N.S.) 471, 97 Pac. 657; Borg v. Spokane Toilet Supply Co. 50 Wash. 204, 19 L.R.A.(N.S.) 160, 96 Pac. 1037.

Messrs. Frank C. Neal and Davis & Neal, for respondent:

The relationship of master and servant existed between appellant and the driver Frago at the time of the accident complained of.

26 Cyc. 1520; Corbin v. American Mills, 27 Conn. 274, 71 Am. Dec. 63; Riggs v.

or similar circumstances to prevent injury or death to persons on . . . highways or places much used for travel" requires persons operating automobiles to keep a sharp lookout for pedestrians in the street. Bongner v. Ziegenhein, supra.

And under this statute the law casts upon the driver of an automobile in a public street the obligation to exercise the highest degree of care for the safety of others; and the measure of care thus imposed is to be determined by the circumstances of the particular case; and it is the duty of such driver to guard against all movements of persons likely to take place in the highway, which a prudent man, exercising high care, should anticipate as likely to occur. Ibid.

Where an instruction is given that both the driver of an automobile and a pedestrian had a right to use the street, and that it was the duty of the pedestrian, in starting across the street, to exercise reasonable care for her own safety, and the duty of the defendant, in driving his automobile, to exercise reasonable care so as to avoid injuring anyone or colliding with any other person upon the street, and further on an instruction is given that, if the jury found from the evidence that the driver of the machine failed to exercise such care as an ordinarily prudent person would exercise under the circumstances, he was liable, it was held that an intervening instruction that the operation of an automobile upon the busy streets of a city necessitates "exceeding carefulness" on the part of the driver, which was apparently given in order to define what would constitute ordinary care on the part of an automobile driver, did not render the instruction erroneous. Domke v. Gunning, supra.

But an instruction that "it is the duty of the operator of an automobile upon a highway or street to avoid causing injury, and this duty requires him to take into consideration the character of his machine, whether in its operation it is practically noiseless, its power, the manner in which it runs, whether it is operated in a populous part of the city and upon a much traveled street, and from these and all other perti-

nent considerations to proceed with that speed and caution which ordinary care requires according to the place and the presence of other travelers and vehicles," was held erroneous, since the first part of the instruction imposes upon the driver of an automobile the obligations of an insurer, when in fact his duty is discharged by using ordinary care to avoid causing injury, in view of the condition and circumstances; and the latter part of the instruction does not cure the error contained in the first part. Rump v. Woods, — Ind. App. —, 98 N. E. 369.

#### —rights and duties of pedestrians.

In Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, where a pedestrian who alighted from a street car was struck and injured by an automobile passing on the wrong side of the car, it was held that a pedestrian has a right to the free and unobstructed passage of the street. The court in this case said, quoting from Raymond v. Lowell, 6 Cush. 530, 53 Am. Dec. 57: "There is no law or principle of law or of reason which confines foot passengers to particular crossings. Such a restriction would be very inconvenient and annoying. The street should be kept in such condition that foot passengers may be able to cross, with a reasonable degree of safety, using proper care themselves, at any and all places. The necessity of this might be illustrated very fully by reference to the common and ordinary course of business. A person who is left by an omnibus in the middle of the street should be able to go in safety to the sidewalk, at the nearest point, and not be compelled to make his way among the carriages in the middle of the street, till he can reach a place particularly set apart and designated for the purpose of crossing." (See note to this case, post, 1188, as to rule of road as affecting street cars or vehicles meeting or passing.)

And in Vesper v. Lavender, — Tex. Civ. App. —, 149 S. W. 377, it was held that a pedestrian has a right to go upon the street for the purpose of crossing, and that

Standard Oil Co. 130 Fed. 199; Wadsworth Howland Co. v. Foster, 50 Ill. App. 513; Knust v. Bullock, 59 Wash. 141, 109 Pac. 329; Delano v. LaBounty, 62 Wash. 595, 114 Pac. 434; Kneff v. Sanford, 63 Wash. 503, 115 Pac. 1040.

Chadwick, J., delivered the opinion of the court:

Plaintiff sues to recover damages alleged to have been suffered because of the negligence of a chauffeur in the employ of the defendant, who is engaged in the business of carrying passengers for hire. Several defenses are interposed, among others, that of contributory negligence. It appears that, about 4 o'clock in the morning, when it was raining and sleeting, plaintiff was on his

way to his work, and while crossing a street in the city of Tacoma was run down by respondent's automobile, and sustained the injuries upon which this action is predicated. Respondent, who had his umbrella well down over his head, testifies that he did not see or hear the machine, although there is testimony tending to show that the horn was sounded and that the muffler was cut out. As we view the case, a further review of the testimony is unnecessary. Although the defense of contributory negligence would have been covered by the general verdict, the trial judge nevertheless submitted a number of special verdicts, among them the following: "Could the plaintiff, in the exercise of his ordinary faculties, have heard the horn or noise of the machine, seen the

while doing so, he has an equal right to the use of the street with those who use automobiles, each being required to use the street with a reasonable regard for the safety and convenience of the others.

And a blind person has the same rights on the public street as any other person; and it is not ordinarily negligent for such a person to go upon the streets unattended, if he exercises ordinary care; but the fact that a person is blind will not excuse him from his obligation to use due care, and he is nevertheless bound to exercise that degree of care that an ordinarily prudent person would have exercised under the circumstances, and the fact that he is blind requires of him a greater use of his other senses to discover, if possible, whether any vehicle is approaching the street over which he is crossing. *McLaughlin v. Griffin*, — Iowa, —, 135 N. W. 1107. (Generally as to care required of one of defective sight in using street, see note in 14 L.R.A. (N.S.) 648.)

The conduct of a child in using care to avoid automobiles is not to be measured by that of an adult, but by that of the ordinarily careful child of like years. *Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592.

#### Application of general rules—speed.

As to qualification of witness to testify as to speed, see note in 34 L.R.A. (N.S.) 778.

If the driver of an automobile was violating the statutory provision as to speed at the time of the injury, this was negligence *per se*; and if the proximate cause of the injury, it rendered him liable unless the pedestrian was guilty of contributory negligence. *Fox v. Barekman*, — Ind. —, 99 N. E. 989.

Where a person who is not careless, but who is properly walking along a track or across a street, is injured by an automobile rapidly and negligently driven upon him, before he has reasonable opportunity to escape, the party so driving the automobile is liable in damages for injuries proximately caused by the negligence.

*Goldring v. White*, — Fla. —, 58 So. 367.

The question in an action brought to recover for injuries sustained by a pedestrian who was run into by an automobile, whether the driving of the car at the rapid rate at which it was moving was wanton, is for the jury. *Barbour v. Shebor*, — Ala. —, 58 So. 276.

The jury are authorized in finding that an automobile was running in excess of the speed allowed by a statute providing that "any person operating a motor vehicle upon any public highway shall not operate the same at any rate of speed greater than is reasonable and proper, having regard to the use in common of such highway, or so as to endanger the life or limb of any person, and that in no event shall such motor vehicle be operated at a greater rate of speed than 20 miles per hour," where there is evidence that the machine was traveling, according to some witnesses, at from 25 to 35 miles an hour, and the decedent who, with others, was walking along the highway, turned out for it, but the car, when a short distance from him, began to leave the road, due, as the defendant claimed, to a defect in the steering gear, and the car, after it struck the decedent, continued for a distance of 141 feet before stopping. *Fox v. Barekman*, *supra*.

So the jury are warranted in finding the driver of an automobile negligent, where it appeared that while he was driving his car, straddling a street car track, at a speed of at least 8 or 10 miles an hour, on a slippery pavement, in attempting to turn into the space between the track and the curb, the wheel of his car caught in the rail, causing the car to skid across a space of 18 feet, over the curb and onto the pavement, striking a pedestrian standing 2 feet from the curb. *Van Winckler v. Morris*, 46 Pa. Super. Ct. 142.

And the question of negligence of defendant, who ran a car through an opening made by a crowd in the street for its passage, was held to be properly submitted to the jury, where the evidence in behalf of plaintiff tended to show that the car was

lights, and observed the approaching vehicle by glancing in the direction from whence the noise and lights of the automobile came!" To which the jury answered: "We do not know." The court instructed the jury quite fully on the issue of contributory negligence; one of his instructions being: "It is the duty of a pedestrian, traveling in public streets of the city, to reasonably exercise for his personal safety the faculties with which he is endowed by nature, for self-protection; and if he fails so to do and is, by reason of such failure, injured, he has at least contributed by his negligence to his injury, if it has not wholly resulted therefrom, and cannot legally recover anything from anyone on account of such injury." It is hardly possible to lay down a fixed rule in

this class of cases; for, as has been said, negligence is a relative and comparative term, and each case must depend upon its own circumstances. Yet, nevertheless, there is a duty on all parties to exercise reasonable care to prevent accidents and collisions. *Babbitt, Motor Vehicles*, ¶ 272; *Berry, Automobiles*, § 171. Although a higher degree of care rests upon the driver of a vehicle, because of the dangerous instrumentality which he controls, yet it is universally held that the right to the street lies in both parties, and their duty to exercise due care is reciprocal, whatever the character of the vehicle may be. See *Hellieson v. Seattle Electric Co.* 56 Wash. 278, 105 Pac. 458, where the authorities are collected.

In *Hannigan v. Wright*, 5 Penn. (Del.)

running 5 or 6 miles an hour, and that the guard struck the decedent, the car traveling 6 feet before it could be brought to a stop, although there was evidence for the defendant that he was going very slowly, and that the child darted from the crowd, and ran against the machine. *Haake v. Davis*, 166 Mo. App. 249, 148 S. W. 450. The court in this case said: "It was the duty of defendant, in running his car, to exercise care commensurate with the exigencies of the situation. . . . An ordinarily careful and prudent person in his position would have realized the danger of running through a large, noisy, mixed crowd in any but the most cautious manner. In such cases the greatest care is only ordinary care. We hold that plaintiff's evidence presented issues of fact for the jury to determine, and that the court did not err in overruling the demurrer to the evidence."

And in the last case it was held that an instruction that it was the duty of the operator of the machine, in running it through the streets of a populous city, to use ordinary care so to regulate the speed of his automobile as not to injure anyone, and that a failure to use such care is negligence, did not contain the suggestion that the operator of the machine was an insurer of the safety of pedestrians, and was not erroneous.

So the question of the defendant's negligence was for the jury where a boy twelve years of age, while selling papers near a square where passengers on street cars are accustomed to change, was run into and injured by an automobile which was being driven at a rapid rate of speed,—as high, according to the testimony of some witnesses, as 18 or 20 miles an hour,—although the jury would be warranted in finding that it was negligent to run an automobile at the place in question under the circumstances at the rate of 8 miles or even less an hour, there being other testimony, as to the insufficiency of the sounding of the horn. *Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592.

While the wrongful conduct of the driver of an automobile in operating his machine

at an excessive rate of speed will not excuse a pedestrian crossing the street, from the exercise of ordinary care, yet such a person, in the absence of knowledge to the contrary, has a right to presume that all persons using the street, including drivers of vehicles, will use ordinary care to avoid injuries to pedestrians, and has a right to presume that automobiles will not be run at an unlawful or dangerous rate of speed, but that they will be operated at such a rate and with such care as reasonable prudence requires, in view of all the conditions and circumstances, and the jury has the right to consider these presumptions, in determining whether or not his conduct was reasonably prudent under the circumstances. *Rump v. Woods*, — Ind. App. —, 98 N. E. 369.

And where a pedestrian looked before starting to cross the street, and saw an automobile 800 feet away, she had the right to assume that it was not running at such an excessive speed as to make it dangerous for her to attempt to cross a street the traveled portion of which was 24 feet wide, with ample room for an automobile to pass without striking her, provided the driver was on the lookout and using ordinary care. *Williams v. Benson*, 87 Kan. 421, 124 Pac. 531.

While a pedestrian crossing a street has a right to presume that persons in charge of automobiles will use ordinary care to avoid injuring him, and if he uses such care as would be ordinarily requisite to protect himself from injury by machines carefully operated, he has generally discharged his full duty, and is not guilty of contributory negligence, yet, if he knows that a machine is being operated upon a street in a negligent, reckless, or unlawful manner, a special duty arises to use such additional care as reasonable prudence would dictate, in view of the increased danger occasioned. *Rump v. Woods*, supra.

But the rule which requires one to avoid the consequences of another's negligence does not apply until such person sees the danger or has reason to apprehend it. *Wadley v. Dooly*, 138 Ga. 275, 75 S. E. 153.

537, 63 Atl. 234, the court said: "A traveler on foot has the same right to the use of the public streets of a city as a vehicle of any kind. In using any parts of the streets, all persons are bound to the exercise of reasonable care to prevent collisions and accidents. Such care must be in proportion to the danger or the peculiar risks in each case. It is the duty of the person operating an automobile, or any other vehicle, upon the public streets of a city, to use ordinary care in its operation, to move it at a reasonable rate of speed, and cause it to slow up or stop if need be, where danger is imminent, and could, by the exercise of reasonable care, be seen or known in time to avoid accident. Greater caution is required at street crossings and in the more thronged streets of a

city than in the less obstructed streets in the open or suburban parts. There is a like duty of exercising reasonable care on the part of the pedestrian. The person having the management of the vehicle and the traveler on foot are both required to use such reasonable care as the circumstances of the case demand; an exercise of greater care on the part of each being required where there is an increase of danger. The right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other; and both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise

—duty to stop, look, and listen.

The "look and listen" law applicable to railroads has no application in cases involving injuries to pedestrians by automobiles, but the drivers of such machines and pedestrians must each exercise reasonable care. *Barbour v. Shebor*, — Ala. —, 58 So. 276. The court here said: "There is no warrant in law for such application. A railroad acquires a right of way for the express purpose of running trains at a rapid rate of speed over the same, and travelers on the public highways, knowing this fact, are required to observe due caution in approaching the tracks. Even as to street railroads, the tracks mark the line of danger, so that the pedestrian knows just where to look and how to avoid the point of peril; but automobiles have no special privileges in the streets, more than other vehicles. They simply travel upon the streets with the same privileges and obligations as other vehicles, and the mere fact that they can run faster than other vehicles does not give them any right to run at a dangerous rate of speed, any more than the fact that one man drives a race horse gives him the right to travel the streets at a higher rate of speed than another who drives a plug. The simple rule is that drivers on the streets and pedestrians, each recognizing the rights of the other, are required to exercise reasonable care."

And to the same effect are *Adler v. Martin*. — Ala. —, 59 So. 597, and *Williams v. Benson*, 87 Kan. 421, 124 Pac. 531.

And in *Bongner v. Ziegenhein*, 165 Mo. App. 328, 147 S. W. 182, the "look and listen rule" applicable to those about to cross a railroad was held not to apply to a pedestrian crossing a street, and it was held that the fact that the plaintiff, in an action brought to recover for injuries sustained through being run into by an automobile, had taken three steps into the street after alighting from a street car without looking for approaching vehicles did not warrant the direction of a verdict for the defendant.

While it is not negligent, as a matter of law, for one to attempt to cross a public

street without looking or listening for the approach of automobiles, still the jury may find from the existing circumstances that a failure to look or listen constituted negligence. *Vesper v. Lavender*, — Tex. Civ. App. —, 149 S. W. 377.

—keeping lookout.

An instruction that a person on foot, while lawfully using a street, is not required to be continuously looking or listening to ascertain whether automobiles are approaching, under the penalty, on failure to do so, of being presumed negligent, is erroneous, since it in effect instructs the jury as a matter of law that ordinary care does not require a pedestrian crossing the street to be continuously looking for automobiles, which fact must depend upon the circumstances, and is a question for the jury. *Rump v. Woods*, — Ind. —, 98 N. E. 369.

In *Williams v. Benson*, 87 Kan. 421, 124 Pac. 531, it was laid down that foot travelers have a lawful right to the use of the public highway, and have the right to assume that others who may be lawfully using it will exercise a proper degree of care, and that when pedestrians are about to cross a street, they are not required to be constantly upon the lookout to avoid injury from other travelers.

—looked, but did not see.

Where the facts stated in the answers to interrogatories showed that the plaintiff, who was run into by an automobile on a street running north and south, looked south just before he stepped from his milk wagon, and did not see the automobile which collided with him approaching, that he picked up two bottles of milk, and started out upon the street while his wagon was still moving, but did not look to the south a second time before starting across the street, that if he had done so he would have seen the automobile within 25 feet of him, and could have avoided the injury, it was held that such facts did not show that the person injured was guilty of con-

under like circumstances. . . . It is true that a person crossing a public street of a city is required to make a reasonable use of all his senses in order to observe an impending danger, and if he fails to do so, and is injured by reason of such failure, he is guilty of such negligence as will prevent any recovery for the injury sustained. Such reasonable use of the senses, however, means such use as an ordinarily prudent and careful person would have used under like circumstances. And so in the case before you, if the plaintiff saw the automobile before it struck her, or, by the reasonable use of her senses, could have seen it in time to avoid the injury, she could not recover; but if she could not, under the conditions and circumstances existing at the time of

the accident, by the exercise of reasonable care, have avoided it, she would not be guilty of such negligence as would defeat her right to recover." This we conceive to be a fair statement of the law. In *Wilkins v. New York Transp. Co.* 52 Misc. 167, 101 N. Y. Supp. 650, where the facts approximate those in the case at bar, it was held that the pedestrian was in duty bound to use his senses if, under the circumstances, their exercise would have prevented the accident. See also *Huddy, Automobiles*, p. 140.

It will thus be seen that the issue of contributory negligence was left undetermined by the jury, and no judgment can be justly entered upon the verdict so long as it appears that plaintiff might, by the exercise of reasonable care or the "exercise of his or-

tributory negligence as a matter of law, the interrogatories not showing how much time elapsed from the time he started south till he was struck, and evidence being admissible under the issues from which the jury might have properly found that he was in the exercise of ordinary care. *Rump v. Woods*, *supra*.

And where the evidence in the preceding case showed that the driver of the milk wagon looked in the direction from which the machine which struck him came, before alighting, and that he had an unobstructed view of the street for 450 feet, and saw no automobile approaching from that direction, it was held, in determining whether or not he used ordinary care in attempting to cross the street without again looking after he alighted from the wagon, that the jury had a right to consider whether or not a man of ordinary prudence would have believed under the circumstances that he could cross before an automobile driven at a reasonable rate of speed would cover that distance. *Ibid*.

And it was held in this case that where there was evidence that the person who alighted from the wagon used some care in looking for approaching automobiles from the direction in which the car which struck him came, the question of whether or not he used due care was for the jury. *Ibid*.

—failure to look.

The question of whether or not an omission to look up and down a street before crossing shows a want of due care is a question for the jury where the evidence shows that a pedestrian stepped out from between the uprights of a bridge, and walked leisurely across it without apparently paying any attention to passing vehicles, and that when from 3 to 5 feet from the curb, he was run down by an automobile which was approaching at about 12 miles an hour, and was from 30 to 50 feet distant when he started to cross. *Adler v. Martin*, *supra*. The court said: "We are satisfied that it cannot be affirmed, as matter of law, that a pedestrian's omission, in crossing a street, 42 L.R.A. (N.S.)

to first look up and down the street for approaching vehicles, is or is not negligence *per se* on his part. He must use due care to avoid collisions with them; but what is due care in this regard will depend upon the character of the street, the extent of its use by vehicles, the kind of vehicles that frequent it, and upon the locus of the attempted crossing, i. e., whether it is at a regular and general crossing, or at a point not generally so used, or, as in the present case, at a point where there is no occasion at all for crossing, and crossing is very infrequent. Other considerations, also, may obviously increase or diminish the hazards of inattention. Due care is relative always; and precautions that might be safely omitted on the sleepy streets of a village are every moment essential to the life of foot travelers on Broadway in New York. We therefore hold that the trial court erred in instructing the jury, as matter of law, that a pedestrian is under no duty, when going to cross a street, to look up and down the street to see if any automobile is coming. Whether or not the omission to do so in this case exhibited a want of due care was a question for the jury to determine, in view of the circumstances of this particular case. We have stated the general rule only, and are not to be understood as declaring that a pedestrian may not in any case so act upon a street as that his conduct may be pronounced negligent as matter of law."

In *Terrill v. Walker*, — Ala. —, 59 So. 775, in an action brought to recover for injuries sustained by a pedestrian who was run into by an automobile, a plea of contributory negligence was held good which alleged that the road where the injury occurred at the time of the accident was frequently used by automobiles and other vehicles, that the plaintiff was walking along the side of the road on the path commonly used by pedestrians, which ran along the side of a well-defined roadway, used by automobiles, which road did not include the path along which the plaintiff was walking, and that the plaintiff knew that the road was frequently traversed by automobiles

inary faculties," as the special verdict puts it, have prevented the accident.

In the event of a new trial, we think an interrogatory propounded to and answered by the witness Maud Heney, and to which an exception was taken, should be excluded. The conduct of Frago, the chauffeur, subsequent to the accident, would not be relevant or material, except in so far as it is a part of the *res gestæ* and might tend to throw light on the act which is charged to be negligent.

The principal defense urged by appellant was that Frago was not a servant, but a lessee of his machine, and in no way subject to his control. We find no error in the order of the court denying a nonsuit on this ground. It was a question for the jury.

and vehicles, but negligently left the pathway and attempted to cross the road in front of the approaching automobile, and in dangerous proximity thereto, without first endeavoring to ascertain whether any vehicle was in dangerous proximity, although she could have ascertained this by the use of ordinary diligence.

#### —duty when approaching street crossing.

A cause of action on general demurrer was held to be stated in *Cannon v. Burns*, — Tex. Civ. App. —, 136 S. W. 77, where the plaintiff's petition in an action brought to recover for injuries received by being run into by an automobile alleged that while he was walking along a street, the defendant drove an automobile against him at a point on the street upon which the plaintiff was walking, where it intersected another, with great force and violence, in consequence of which the plaintiff was injured, and alleging further that the automobile in question was a heavy machine, capable of inflicting serious injury, and that its movements were comparatively noiseless, but that the defendant gave no signal, by horn or otherwise, of its approach, but negligently ran it at a high rate of speed, and negligently failed to keep a lookout ahead.

#### —duty where pedestrian is crossing street diagonally.

The evidence is insufficient to show that the driver of an automobile wilfully, that is, intentionally and designedly, ran his car into the deceased, where it appears that the latter, a pedestrian, stepped out from the sidewalk between the uprights of a bridge, and started diagonally across it when the defendant's automobile was 30 to 50 feet away, and approaching at a speed of about 12 miles an hour, that neither the pedestrian nor the driver of the machine, who was looking straight ahead, paid any attention to the other, and that the latter did not see the pedestrian until he was within about 4 feet of the machine, when he used every effort to stop it, and avoid 42 L.R.A. (N.S.)

*Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Delano v. La Bounty*, 62 Wash. 595, 114 Pac. 434; *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329.

But, in submitting the case to the jury, the court said that "the manner, the method, and means by which he [the chauffeur] received compensation for his work, is immaterial. The relationship of master and servant is determined by the right of the master to control the servant; and you may take into consideration any evidence showing that the driver was, at the time of the accident complained of, subject to be discharged by him for disobedience to orders or misconduct." This is an inaccurate statement of the law. If the jury should find from the evidence that Frago was the servant of ap-

a collision; and the driver's act not being wilful, no recovery can be allowed where the deceased was guilty of contributory negligence. *Adler v. Martin*, — Ala. —, 59 So. 597.

#### —duty to slow up or stop.

Where there is an allegation that the driver of an automobile who ran into a pedestrian was negligent in failing to stop his machine after he discovered that the steering gear would not work, instead of trying to guide it back into the road, and there was evidence that the machine was supplied with a brake which would stop the car in a less distance than that at which the driver was from the pedestrian when he first discovered the defect in the gear, it was held that the jury were warranted in finding that the driver was guilty of negligence in failing to apply his brake. *Fox v. Barekman*, — Ind. —, 99 N. E. 989.

In an action for injuries to a pedestrian through being run into by an automobile, where the issue of discovered peril is presented by the evidence, the court properly refused an instruction that it was negligence on the part of the plaintiff not to have looked and listened for the approach of automobiles or other vehicles, before stepping from the sidewalk into the street, and that if she so acted and the collision was due to, or contributed to by, such failure, she could not recover. *Vesper v. Lavender*, — Tex. Civ. App. —, 149 S. W. 377.

#### —duty near street cars.

Street cars and automobiles are vehicles within the meaning of a statute providing that "the driver of a carriage or other vehicle passing a carriage or other vehicle traveling in the same direction shall drive to the left of the middle of the traveled part of the bridge or way, and if it is of sufficient width for the two vehicles to pass, the driver of the leading one shall not wilfully obstruct the other;" and it is a violation of such statute for an automobile to pass a street car going in the same direction on the right side. *Foster v. Curtis*, 213



pellant, and under his direction and control, then the manner, method, and means by which he received compensation might become immaterial. But in determining that question upon a disputed state of facts, the method and manner of his payment is material testimony, and should have been submitted to the jury.

Other errors are assigned, but we find no merit in them.

For the reasons suggested, this case is reversed and remanded for a new trial.

Ellis, Morris, and Crow, JJ., concur.

Dunbar, Ch. J., dissenting:

If I understand the majority opinion, the judgment is reversed because the jury, in re-

sponse to the following special interrogatory: "Could the plaintiff, in the exercise of his ordinary faculties, have heard the horn or noise of the machine, seen the lights, and observed the approaching vehicle by glancing in the direction from which the noise and lights of the automobile came?" answered, "We do not know," on the theory, as stated, that the answer left the issue of contributory negligence undetermined by the jury. This conclusion I think is unwarranted. There was testimony offered on the subject of contributory negligence, and it is conceded that the jury was fully and properly instructed in that regard. It is not questioned by the majority that there was sufficient testimony to sustain the verdict, and, if the special interrogatory had not been

Mass. 79, 99 N. E. 961. (See note to this case, post, 1188, as to applicability of rule of road as affecting street cars and vehicles meeting or passing.)

Where the driver of an automobile knew that the street car, in the rear of which he had been traveling, and for which he had twice slowed down upon its discharge of passengers, would probably stop at a street which he was approaching, to discharge other passengers, and knew also that passengers would make their exit from the front end of the car, and walk before him on the pavement, the law cast upon him the duty to keep a diligent watch and lookout for those alighting from the car, and to sound an alarm as a warning of the approach of his machine, and to propel it at such a rate of speed as will enable him, by exercising high care, to prevent injury to pedestrians; and it is his duty to sound a warning from the time he observed the car slowing for the purpose of stopping to discharge passengers, and not merely to sound the warning as the passengers are stepping from the car. *Bongner v. Ziegenhein*, 165 Mo. App. 328, 147 S. W. 182.

And it was held in this case that the evidence was sufficient to take the case to the jury upon the question of the defendant's negligence, where it appeared that the plaintiff, immediately after alighting from the front end of the street car, which had stopped at a street crossing, was struck by the defendant's automobile, which had been following the street car for some distance, and which had twice slowed up to avoid passengers alighting from it at other stopping places, and it appeared that although the driver of the machine could have observed that the street car was slowing down at the crossing where the accident occurred, and had knowledge that passengers would probably alight from the front end of the car, he failed to sound any warning of the approach of his machine, which was running about 4 miles an hour at the time of the injury, and ran 15 feet before it was run into the curb and stopped. *Ibid.*

In *Shields v. Fairchild*, 130 La. 648, 58 So. 497, there was held to be no reason for

reversing a judgment in favor of a pedestrian who was struck by an automobile, where the chauffeur saw a street car stop when he was half a block away, but did not look again in that direction until he was nearly upon the pedestrian, who, it appeared, had alighted from the street car, and walked across a considerable width of the street, under a bright light.

In *Wellington v. Reynolds*, — Ind. —, 97 N. E. 155, it was held that a complaint in an action brought by a pedestrian who was injured by being run into by an automobile, which shows that he was in the middle of a street, trying to catch a street car, and that the driver of the automobile which ran into him was coming up behind and gradually approaching him, and that the driver saw the pedestrian, but that the latter was unaware of the presence of the machine, sufficiently alleged the duty of the driver of the automobile to exercise ordinary care to avoid running against the pedestrian, although no direct allegation of this duty is made.

A petition in an action brought by one who was struck by an automobile, shortly after alighting from a street car, which avers that the defendant neglected and failed to keep a sharp and diligent and careful watch and lookout for the plaintiff, and failed to sound the horn or bell, or in any manner give him warning of the approach of the automobile when approaching such street crossing, at a regular stopping place for street cars, charges but one compound negligent act,—that is, the omission to make observation for plaintiff's safety, and warn him of the approach of the automobile. *Bongner v. Ziegenhein*, *supra*.

In *Wadley v. Dooley*, 138 Ga. 275, 75 S. E. 153, where the negligence alleged against the defendant was in substance that he was driving a heavy and powerful automobile at a high rate of speed along the public street on which the plaintiff alighted from a street car, and in passing the car, which stopped to allow the plaintiff to alight, the defendant did not slow up after the car had stopped, although he had full opportunity to see it and to see that it had

propounded, as I understand the opinion, the judgment would be affirmed. In the first place, the interrogatory is so mixed in its terms that the jury could not intelligently answer it. Of course, the plaintiff could not have heard the noise of the machine by

glancing in its direction; nor is a pedestrian required, in the exercise of his ordinary faculties, to glance up and down or across the street in anticipation of the approach of an automobile. The question, therefore, which was propounded, assumed a duty

stopped to leave passengers, and that he gave no signal of his approach, "but recklessly rushed by said car in said automobile, without regard to the safety of person alighting therefrom or crossing therefrom to the sidewalk," and that the plaintiff was in plain view, that the defendant was either "negligently not looking out, or was recklessly careless in not avoiding plaintiff, and in driving too close to her,"—it was held proper to refuse a charge that if the jury believed from the evidence that the plaintiff got off the street car and did not see the approaching automobile, and did not look to see it, but that she was standing in the street with her back to the curbing, facing the street car from which she had alighted, and, without looking, she suddenly turned from her position toward the curbing, and in the direction in which the automobile was coming, and that such action on her part was negligent, and that this negligence was the real and proximate cause of her injury, then she could not recover, even though the jury believed from the evidence that the defendant was negligent in the manner alleged, since it was held that if the defendant was negligent in the manner alleged, then, as the plaintiff was negligent, as stated in the requested charge, such negligence on her part could not be the "real and proximate cause of her injury."

#### —duty in emergency.

Where the driver of an automobile knows that a pedestrian in front of him has become somewhat disconcerted because of the approach of the car, or for some other reason, and if, by the use of ordinary care, he could discover that the person was blind, it is his duty to stop his machine upon discovering that fact, in order to prevent an accident; and if he fails to do so, he is guilty of negligence. *McLaughlin v. Griffin*, — Iowa, —, 135 N. W. 1107.

And where the defendant who was driving an automobile which collided with the plaintiff, saw that the latter was in a situation of danger, and negligently failed to do what was necessary and proper to avoid injuring her, the court promptly submitted the issue of discovered peril. *Vesper v. Lavender*, — Tex. Civ. App. —, 149 S. W. 377.

In *Johnson v. Scott*, — Minn. —, 138 N. W. 694, where an action was brought to recover for injuries sustained by a pedestrian who was run down by an automobile, the evidence was held sufficient to warrant the deduction that the defendant saw the pedestrian's peril in time to avoid striking him with the machine if he had used ordinary care in its management, and the case 42 L.R.A.(N.S.)

was held properly submitted to the jury on the question of the defendant's wilful negligence. The particular evidence involved does not appear. (Generally as to the care of one in sudden emergency, see note in 37 L.R.A.(N.S.) 43.)

#### —law of the road as affecting pedestrians.

Pedestrians and others lawfully using a public way have a right to presume that drivers of free teams and vehicles, including automobiles, will act in conformity with the "law of the road" as laid down by the statutes; and if a driver of an automobile neglects to obey such law and an injury results, his failure to comply with the statute is a circumstance which the jury may consider in determining whether he was careless and, unless explained, it is indicative of his negligence. *Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961. (See also note to this case, post, 1188.)

But where the circumstances are such that, in the exercise of reasonable care, the statute requiring an overtaking vehicle to drive to the left cannot be literally obeyed, no inference of negligence can be drawn from a failure to drive to the left. *Foster v. Curtis*, 213 Mass. 79, post, 1188, 99 N. E. 961.

#### —jumping in front of automobile.

The question of contributory negligence is for the jury in an action brought to recover for injuries sustained by a newsboy, through being run into by an automobile while selling papers, in a square in which there were many people, where there was some testimony that he suddenly jumped in front of the machine, but there were also other versions of his conduct, which were in his favor. *Rasmussen v. Whipple*, 211 Mass. 546, 98 N. E. 592. The court in this case said: "If he suddenly left the crowd of people and jumped in front of the approaching car, as the defendant testified, or if he had safely crossed in sight of the machine, and then suddenly ran back just in front of it, as the driver said, his conduct would generally be condemned as careless. But there were other versions of the conduct of the deceased which the jury apparently accepted, and we cannot say as matter of law that they were not warranted in doing so. Taking the evidence most favorable to the plaintiff, and recognizing that the standard of care by which the conduct of his intestate must be measured is not that of an adult, but of the ordinarily careful boy of twelve years, we are of opinion that the case comes within the general rule that when a minor lawfully walking in the highway is run over by a vehicle,

which the law does not impose upon the pedestrian, and ought not to have been submitted.

I have no fault to find with the quotations in the opinion regarding the duty of pedestrians. They simply announce the doctrine

that a pedestrian must exercise such care as, under the circumstances, is reasonable. If a pedestrian hears the horn of an automobile, he ought to recognize the signal as one of danger and govern himself accordingly. Or, if he sees an automobile approaching

the question of his due care, as well as that of the negligence of the driver, is usually one of fact for the jury."

And where, in an action brought to recover for injuries sustained by a child who was run into by an automobile while on the edge of a crowd in the highway, no witness for the plaintiff testifying that they saw the car strike the child, but there was testimony that she was seen standing close to the line of the crowd, which had opened to allow the passing of the car, and was seen to fall, and it appeared that the rear wheel ran over her, it was held that the evidence supported an inference that the driver of the car brushed the side of the machine against the child while she was standing still, and injured her, and warranted a submission of the question of the defendant's negligence to the jury, although the defendant testified that the collision was caused by the child darting out from the crowd and running against his car. *Haake v. Davis*, 166 Mo. App. 249, 148 S. W. 450.

#### —crossing in front of racing car.

Where a boy fifteen or sixteen years of age, who went to the place where an automobile race was to be held, for the express purpose of being a spectator, and was warned against crossing a certain road, notwithstanding that he saw a racing car coming 400 or 500 feet away, at a high rate of speed, and notwithstanding his knowledge of the danger of the situation, proceeded on his way, and was struck when about half way across the road, it was held that he was guilty of contributory negligence. *Baldwin v. Locomobile Co.* 143 App. Div. 599, 128 N. Y. Supp. 429.

#### —duty in turning street corners.

When an ordinance makes it the duty of a person driving an automobile on the streets of the city "on turning the corner of any street" to "leave a space of at least 6 feet between the curb and . . . automobile," and it appears that on the lot fronting on the street where an automobile collided with a pedestrian a building was being erected, and *débris* therefrom had been piled on the corner of the street, around which a fence or barricade had been constructed, and pedestrians traveling along the street, on reaching the corner, were obliged to leave the regular walk and step into the street, and walk around the outside of this fence or barricade, such fence becomes the curb within the meaning of the ordinance, and the driver of an automobile is guilty of violating it where he drives along the street and fails to keep his machine 6 feet from the fence or bar-

ricade. *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

#### —Miscellaneous.

A statute providing that persons operating or controlling automobiles on public roads shall use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury or death to persons traveling or crossing on the streets is in derogation of the common law, and it is therefore to be strictly construed, but not so as to defeat the obvious intention of the legislature. *Nicholas v. Kelley*, 159 Mo. App. 20, 139 S. W. 249.

An instruction that if the plaintiff was struck by the defendant's automobile by accident, the jury should find for the defendant, and that "by accident" is meant such an unexpected catastrophe as occurs without anyone being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done, or omitting to do, the particular thing that caused such catastrophe,—correctly defines accident. *Vesper v. Lavender*, — Tex. Civ. App. —, 149 S. W. 377.

A plea in an action for injuries received by a pedestrian who was struck by an automobile, which does not state how far the pedestrian was from the machine when he stepped in front of it, but merely alleges that he stepped "immediately in front of it," makes a good answer to a count which was for simple negligence, since such words will be taken to indicate close proximity. *Barbour v. Shebor*, — Ala. —, 58 So. 276.

Where it appears that the plaintiff, in an action to recover for injuries received through being run into by an automobile, was not struck as she stepped from the sidewalk, but while she was in the act of crossing the street, an instruction in effect that she was guilty of negligence if she failed to look and listen before stepping from the sidewalk is not applicable, and therefore is properly refused. *Vesper v. Lavender*, *supra*.

Where there is testimony in an action brought by a pedestrian to recover for injuries received through being run into by an automobile, to sustain the allegations of negligence, which covered the defendant's conduct during the entire period that the plaintiff was in any danger from the automobile, there is no error in submitting the issue of the defendant's negligence in failing to stop his car, and in not confining the jury to a consideration of defendant's act in failing to give a signal of his approach. *McLaughlin v. Griffin*, — Iowa, —, 135 N. W. 1107. J. T. W.

in his direction, it is a notification of danger. It might even be his duty if he were turning a sharp corner and suddenly precipitating himself upon the street in a place where the driver of an automobile could not reasonably see him, to look to see if there was anything that would endanger him. But in this case the respondent was maintaining a uniform direction, crossing the street in a direct line with the walk upon the side of the block he had traversed. Under such circumstances, if it is held to be the duty of the pedestrian to glance around for the purpose of discovering automobiles before he can recover, the crosswalks of the streets of cities will become death traps to the unwary travelers. In this case the automobile was traveling in the street parallel to the walk traveled by the pedestrian, and, while the respondent was pursuing his undeviating way, it turned abruptly to cross the walk he was upon, and ran him down. Under such circumstances the driver was guilty of gross negligence, and there was no room for the interrogatory proposed.

Another conclusive answer to the opinion is that it is the settled law of this jurisdiction that contributory negligence is an affirmative defense. The burden is therefore upon the defendant to prove it, and when it is shown by an answer to the interrogatory that the jury did not know whether contributory negligence was attributable to the plaintiff or not, the defendant has failed to sustain a defense on that issue. It is evident that the majority has seized upon the wrong horn of the dilemma.

Petition for rehearing denied February 6, 1912.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

J. SIDNEY FOSTER

v.

THOMAS P. CURTIS.

(213 Mass. 79, 99 N. E. 961.)

#### Highway — automobile overtaking street car — passing on left.

1. An automobile overtaking and passing a street car is within the operation of a

*Note. — Rule of the road as affecting street cars and vehicles meeting or passing.*

Generally, as to rules of road governing vehicles proceeding in opposite directions, see note to *Smith v. Barnard*, 41 L.R.A. (N.S.) 322.

As to rules of the road governing vehicles proceeding in the same direction, see note 42 L.R.A. (N.S.)

statute providing that the driver of a carriage or other vehicle passing another carriage or other vehicle traveling in the same direction shall drive to the left.

#### Same — collision between pedestrian and automobile — liability.

2. A passenger alighting from a street car at a place other than a cross walk has a right to presume that the driver of an automobile following the car will pass to the left, as required by statute, and the jury may consider the driver's failure to do so to the injury of the passenger, as evidence of negligence on his part.

#### Same — statutory exception of street car — effect.

3. A provision in a statute requiring vehicles overtaking others on the highway to pass to the left, that it shall not apply to horse railroads, does not take out of its operation an automobile overtaking a street car.

#### Same — tracks on side of street — effect.

4. The driver of an automobile will not be negligent in failing to obey a statutory direction to pass an overtaken street car on the left of the middle of the way, if the car tracks are located along the side of the road, so that the statute cannot, in the exercise of reasonable care, be literally obeyed.

(Rugg, Ch. J., and Hammond and Loring, JJ., dissent.)

(November 25, 1912.)

**EXCEPTIONS** by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been received while alighting from a street car, from being run into by defendant's automobile, which resulted in a verdict for defendant. Sustained.

The facts are stated in the opinion.

Messrs. Samuel R. Cutler and Harry W. James, for plaintiff:

Evidence that defendant was disobeying the law of the road at the time of the injury would justify the finding that he was negligent, and that such negligence caused the injury.

*McGourty v. DeMarco*, 200 Mass. 57, 85 N. E. 891; *Damon v. Scituate*, 119 Mass. 66, 20 Am. Rep. 315; *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583; *Perlstein v. American Exp. Co.* 177 Mass. 530, 52 L.R.A.

to *Hackett v. Alamito Sanitary Dairy Co.* 41 L.R.A. (N.S.) 337.

And as to rules of the road governing vehicles at intersection of streets and when turning across street, see note to *Molin v. Wark*, 41 L.R.A. (N.S.) 346.

As to reciprocal duty of operator of automobile and pedestrian to use care, see also note to *Baker v. Close*, 38 L.R.A. (N.S.) 487, and especially pages 493 et seq., as to the

959, 59 N. E. 194; Reynolds v. Hanrahan, 100 Mass. 313.

If two automobiles are going in the same direction, and at the moment there is not sufficient room to allow the rear car to pass to the left, it is the duty of the rear car to wait until a place is reached where this may be done.

Mark v. Fritsch, 195 N. Y. 282, 22 L.R.A. (N.S.) 632, 133 Am. St. Rep. 800, 88 N. E. 380.

Messrs. Walter I. Badger and William Harold Hitchcock, for defendant:

Violation of the statute by defendant does not of itself necessarily justify a verdict

for the plaintiff, independently of all other matters. It is merely a circumstance to be considered by the jury, together with all the other facts in the case, in determining whether or not the defendant was negligent. It does not alone, by itself, necessarily warrant a finding of negligence irrespective of all the other circumstances.

Smith v. Conway, 121 Mass. 216; Clinton v. Revere, 195 Mass. 151, 80 N. E. 813; Meservey v. Lockett, 161 Mass. 332, 37 N. E. 310.

The law of the road had no application to this case.

Driscoll v. West End Street R. Co. 159

duty near street cars. See also supplementary note to Minor v. Stevens, ante, 1178.

Where passenger is struck by vehicle overtaking street car.

The decision of the majority of the court in *FOSTER v. CURTIS*, that an automobile overtaking a street car is within the terms of a statute providing that the driver of a carriage or other vehicle passing another carriage or other vehicle traveling in the same direction shall drive to the left, and the further holding that a passenger alighting from a street car at a place other than a cross walk has the right to presume that the driver of an automobile following the car will pass to the left, as required by the statute, are opposed to the only case disclosed which involved like facts.

Most of the cases disclosed involve injuries resulting from collisions between street cars and vehicles. The case of *Marsh v. Boyden*, 33 R. I. 519, 40 L.R.A. (N.S.) 582, 82 Atl. 393, however, like that of *FOSTER v. CURTIS*, deals with the question of the applicability of the rules of the road as between a passenger alighting from a car and an overtaking vehicle. In that case it was held that a passenger who was injured by an automobile when alighting from a street car could not rely upon the violation by the driver of his supposed duty to pass to the left of the car when overtaking it. The court in this case said: "In our opinion the prayer for instruction should have been granted, and the charge given is objectionable because the rule of the road could not properly be invoked in the case at bar. If the rule of the road had any application at all, it must have been with reference to the street car or the people thereon; but the plaintiff, at the time of the accident, had ceased to be a passenger on the car, and there was no interference with the car or collision in which it and the automobile of the defendant were involved. The plaintiff was not injured in consequence of the neglect of any duty which the defendant owed to the car or its occupants."

Where street car and vehicle are proceeding in the same direction.

There is some authority in cases where a car and a vehicle are proceeding in the 42 L.R.A. (N.S.)

same direction, that the vehicle must observe the rules of the road.

Thus, in *Burton v. Nicholson* [1909] 1 K. B. 397, where it was sought to convict a driver of a motor car for having driven past a tram car proceeding in the same direction on the left side, and an article of the motor car order provided that a person driving or in charge of a motor car should, when "passing any carriage, horse, or cattle proceeding in the same direction, keep the motor car on the right or off side of the same," and it was further provided in another article that "carriage" was to include "wagon, cart, or other vehicle," it was held that a tram car was a "carriage" or "vehicle" within the meaning of these articles, and that therefore a motor car must pass tram cars proceeding in the same direction on the right side. In this connection it is to be noted that the rule of the road in the United States, when applicable, requires the overtaking vehicle to turn to the left, and the overtaken vehicle to the right.

And in *Schlitz v. Nassau Electric R. Co.* 44 App. Div. 542, 60 N. Y. Supp. 822, the driver of a drag drawn by six horses was held guilty of contributory negligence where he was driving along a street upon which there were two street railway tracks, upon which he knew that cars were running at intervals of one minute, and upon the approach of a car from behind, turned to the left onto the other track, where he was struck by a car approaching on that track. The court said: "In accordance with the law of the road, it became his duty to drive to the right, and it also became his duty to remove the drag from the track, to permit the car in its rear to pass, as the car then had the paramount right of way in the track. While turning to the left did not conclusively establish contributory negligence upon the part of the plaintiff, yet it created the presumption that by his act he contributed to the accident, and such presumption becomes conclusive unless his presence upon the wrong side of the road be explained and justified. . . . As we view the evidence, there was no sufficient justification given of his presence upon that side of the road. As we have already observed, he might have exercised his lawful right and driven to the right of the track.

Mass. 142, 34 N. E. 171; *Lovejoy v. Dolan*, 10 Cush. 495; *Garrigan v. Berry*, 12 Allen, 84; *Norris v. Saxton*, 158 Mass. 46, 32 N. E. 954.

Braley, J., delivered the opinion of the court:

The scene of the accident was a public way in the center of which the double tracks of a street railway were so located as to leave an equal space between the outer rails and the opposite curb. The plaintiff had just alighted from the right-hand side of an open electric car, and while in the act of stepping forward to cross the street to the curb in front, the defendant's automobile, which had been following in the rear, turned to the right to pass the car

and in passing struck and injured him. If the defendant had gone by on the left, the plaintiff would not have been injured, and in submitting to the jury the question of the defendant's negligence, the presiding judge was requested by the plaintiff to rule that "the fact that the defendant was disobeying the law of the road will justify the jury in finding for the plaintiff, if the plaintiff was in the exercise of due care." *Damon v. Scituate*, 119 Mass. 66, 69, 20 Am. Rep. 315; *Finnegan v. Winslow Skate Mfg. Co.* 189 Mass. 580, 582, 76 N. E. 192. The verdict having been for the defendant, the exceptions are to the refusal to give this request, and to the instructions that the defendant's conduct "was not a violation of the law of the road, and was not of itself

He was also authorized to drive to the left, if the conditions existing at the time, of which he had notice, or of which he ought to have taken notice, rendered such course free of danger either to himself or others. The fact that the accident happened almost immediately upon his turning to the left established the close proximity of the car. The driver then knew, for he so testified, that these cars were running upon each track at intervals of about a minute, and it is quite evident that to control six horses and haul an unwieldy drag across these tracks would occupy the whole of that space of time; consequently, whether he saw the approaching car, or did not see it, he was chargeable with the knowledge that the transference of his horses and drag from one side of the street to the other would almost certainly bring him in contact with an approaching car, and if a collision did not occur the progress of the car would be impeded, and he would, in any event, infringe upon the paramount right of way which the moving car possessed. In view of these circumstances, it is clear that the plaintiff, when he chose to go to the left in the wrong place, rather than to turn to the right and be in the right place, took upon himself the risks incident to that situation, and of which he knew or with which he was chargeable. The collision was therefore the direct result of his wrongful act, and he was properly chargeable with negligence."

And in *Bohlen v. Chicago City R. Co.* 141 Ill. App. 261, where an overtaking car collided with a wagon, it was held that the contention of the company that if the driver of the wagon could not have turned to the right, he should have turned to the left, and was guilty of negligence in failing to do so, could not be sustained, where it appeared, among other things, that to turn to the left was to go upon the track used by cars going in the opposite direction, and that, if that track was safely crossed, it would require him to go on the left side of the street, in violation of the "rule of the road."

But in *Hughes v. Camden & S. R. Co.* 65 N. J. L. 203, 47 Atl. 441, where there was 42 L.R.A. (N.S.)

evidence in an action by one injured by being run into by an electric car, that it was dangerous to turn to the right to allow a car coming from behind to pass, and that consequently he turned to the left upon another track, and after the car had passed, and while attempting to turn back into the right side of the street, he was struck by a car coming from the opposite direction, it was held that the questions whether there was danger in turning to the right in the first instance, such as a traveler in the exercise of reasonable prudence would avoid, and whether, after he reached the left-hand track, he took reasonable care to observe and give place to a car approaching upon that track, were for the jury.

And in *State Consolidated Traction Co., Prosecutor, v. Reeves*, 58 N. J. L. 573, 34 Atl. 128, it was held that it was not the duty of the judge to instruct the jury that a driver was chargeable with such negligence as would bar a recovery where it appeared that, upon a car coming up behind him, he turned from the right-hand to the left-hand track, and after the car had passed, attempted to turn back again, but was prevented from doing so by a wagon, and while still attempting to turn back upon the other track, was struck by a car coming toward him on the left-hand track.

So, in *Wood v. Boston Elev. R. Co.* 188 Mass. 161, 74 N. E. 298, where the plaintiff's wagon was struck by a car approaching from behind as he was attempting to cross over the track from the left-hand side, it was held that he was not negligent as a matter of law in being on the left-hand side of the street.

See also *Clinton v. Revere and McGourty v. DeMarco*, set out by the court in *Foster v. Curtis*.

Where street car and vehicle approach from opposite directions.

The question of the applicability of the rules of the road has arisen in a number of cases where it was sought to recover against a street railway for an injury re-

negligence." A majority of the court are of opinion that the request was appropriate, and that the instructions were erroneous. By Rev. Laws, chap. 54, § 2, "the driver of a carriage or other vehicle passing a carriage or other vehicle traveling in the same direction shall drive to the left of the middle of the traveled part of a bridge or way; and if it is of sufficient width for the two vehicles to pass, the driver of the leading one shall not wilfully obstruct the other."

It has been decided that in the concurrent use of our public ways an automobile is to be classed as a vehicle. *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396; *Trombley v. Stevens-Duryea Co.* 206 Mass. 516, 92 N. E. 764; *Lynch v. Fisk Rubber Co.* 209 Mass.

16, 95 N. E. 400; *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404. But the defendant contends that an electric street car should not thus be defined, and if it is not a vehicle as an object of travel, his liability at common law depended upon whether he acted with reasonable prudence in passing upon the right instead of on the left, and the jury correctly settled this issue in his favor. *Smith v. Conway*, 121 Mass. 216, 219. It was assumed in *Clinton v. Revere*, 195 Mass. 151, 154, 80 N. E. 813, where the plaintiff, riding a bicycle and following an electric car and furniture wagon moving abreast, turned to the right to pass between the car and the wagon and was injured by a defect in the way, that his failure "to observe the requirements of Rev.

sulting from a collision between a car and a vehicle proceeding in the opposite direction. In cases of this character the ordinary statutes requiring travelers to pass to the right have generally been held inapplicable, even to the vehicle.

Thus, in *Spurrier v. Front Street Cable R. Co.* 3 Wash. 659, 29 Pac. 346, a section of the Code providing that "whenever any persons driving any vehicle shall meet on any public highway in this territory, whether owned or kept by a corporation or private person, the persons so meeting shall seasonably turn their vehicles to the right of the center of the road, so as to permit each vehicle to pass without interfering with or interrupting the other," was held inapplicable to vehicles meeting street cars. The court said: "The very language of the law conclusively shows that it has no reference to railroads. It is the duty of the person meeting the street car to keep off of the track if he can, and it makes no difference in getting off whether he turns to the right or to the left. Sometimes the situation might be such that he could best avoid a collision by turning to the right, while in other cases it might be the height of folly to turn to the right, and would show the most culpable negligence and lack of prudence. This law, as applied to free vehicles, is founded on good reasons, and its observance tends to prevent collisions, but it could have no application to cars running on fixed tracks, and was evidently not so intended by the legislature. The contention of the appellant that the court erred in refusing the seventeenth instruction, for the reason 'that as the plaintiff, Mrs. Spurrier, was on the wrong side of the street at the time of the accident, the presumption arises that the collision was due to her fault,' is entirely without foundation. We do not understand that there is any right or wrong side of the street. A street is a public highway, made for the convenience, accommodation, and use of the public, and any person has a right to travel on any part of it, provided he does so with a proper regard for the rights of others, including, of course, the rights of street railways, and on this 42 L.R.A.(N.S.)

subject the instruction of the court was full and fair."

And in *Hegan v. Eighth Ave. R. Co.* 15 N. Y. 380, it was held that the statute requiring carriages, when meeting in the highway, to turn to the right, was not applicable to the meeting of street cars with common vehicles, and that the fact that one who was struck by a car turned off from the track to the left would not of itself render him guilty of contributory negligence. The court said: "I am of opinion that this statute has no application to the meeting of railroad cars with common vehicles. The former run in a grooved track, and cannot turn to the right or to the left. The statute refers to cases where there is an equal ability in the carriages which are about to meet, commensurable with the mutual obligation which the statute imposes. The cart or carriage about to meet a railroad car must yield the whole track, but I do not see that there is any greater obligation to turn upon the right side than upon the left. The evidence is that, in this instance, the right side was so encumbered with other carts that there was no room to turn in that direction. There was nothing wrong then in the plaintiff's attempting to turn off towards the left. Besides, by turning to the left, he could go into King street, which was his destination."

And in an action against a street railway company to recover for the death of one who was killed in a collision between a street car and the buggy in which the deceased was riding, where there was evidence that the deceased had ample room and opportunity to turn to the left of the track, but that he turned to the right of it, and was run into while attempting to get through a narrow place before the car reached him, it was held that a city ordinance requiring all persons meeting each other in vehicles to turn to the right was inadmissible, such ordinance not being applicable to such case, even for the purpose of showing that the deceased was in the exercise of ordinary care in driving to the right. *Culbertson v. Metropolitan Street R. Co.* 140 Mo. 35, 36 S. W. 834. The court

Law, chap. 34, § 2, by turning and passing by to the left of the car," was not decisive, as the jury were to determine whether he acted with ordinary care. And in *McGourty v. DeMarco*, 200 Mass. 57, 60, 85 N. E. 891, 892, where the plaintiff, in alighting from a street car, was run into from behind by a team owned by the defendant and driven by his son, it was said: "If the defendant was, as his counsel assumed in their brief, and as the jury certainly might find, attempting to pass the car from behind on his right hand, in violation of Rev. Laws, chap. 54, § 2, the jury might find that this, under the circumstances, was negligence on the driver's part, such as *McGourty* was not called upon to anticipate." See also *Keeney v. Springfield Street R. Co.* 210

said: "This ordinance, in the very nature of things, is only applicable to those persons who are driving in vehicles which are free to move to the right or left as occasion may require, and not to street cars running in grooved tracks or on fixed rails, and which cannot be moved from these fixed tracks without great danger to passengers therein and to the car itself. The ordinance would be absurd if it was intended to apply to railroads. *Booth, Street Railways*, § 302; *Spurrier v. Front Street Cable R. Co.* 3 Wash. 659, 29 Pac. 346; *Hegan v. Eighth Ave. R. Co.* 15 N. Y. 380. This much counsel for plaintiff concedes now, but urges that it was not introduced for such purpose, but was introduced to show deceased was in the exercise of ordinary care in driving to the right. We are not impressed with this reasoning. The effect of the evidence was obvious. It said to the jury that plaintiff's husband was in the exercise of care and obeying a positive ordinance in driving to the right, when in fact that ordinance was wholly inapplicable to the case. It could not possibly throw any light on the conduct of deceased in driving to the right at that point. It was his duty to get off of the track, as the cars had the right of way, and it was a matter of no concern whether he went to the right or to the left, if there was sufficient roadway on both sides. The point wherein he was charged by defendant with gross contributory negligence was that, seeing there was not sufficient roadway between the tracks of defendant and the elevated stone sidewalk on the right, he recklessly attempted to beat the car through this narrow passage; and the effect of this evidence was to justify him in going to the right instead of the left, which offered a safe roadway."

In *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379, it was held that a man driving a wagon on a street car track on the left side of a bridge, when he saw a car approaching on that track, was not guilty of contributory negligence in turning across the right-hand track, although he knew that there was a 42 L.R.A. (N.S.)

Mass. 44, 48, 96 N. E. 73. A further examination of the statute, in the light of our decisions, confirms this construction. The relative rights of the general public to use the highway through which a street railway runs were defined some fifty years ago by Chief Justice Shaw in *Com. v. Temple*, 14 Gray, 69, 75, as being equal, "in the absence of any special regulation by law." In construing Stat. 1856, chap. 302, § 5, which made the wilful and malicious obstruction of the use of the track of the street railway of the company incorporated by the statute a criminal offense, he further says, in considering the exceptions of the defendant, who had been convicted of a violation of the act by obstructing a horse car when traveling over the street with a heavily

car approaching on that track behind him, but so far away that he could safely cross it if the car was going at its ordinary rate of speed, especially when the bridge was so narrow that he could not possibly turn to the left. Concerning the argument that there could be no wrong side of the road as respects electric cars, the court said: "The defendant argues that there could be no wrong side of the road as respects an electric car, and that the court, in taking that idea into consideration, gave the plaintiff the benefit of an exculpatory circumstance to which he was not entitled; that the 'law of the road' has no application to the meeting or passing of vehicles and street cars. Whether or not this last claim is correct, we do not now consider. There is, however, a law of the road, a right side and a wrong side of the road, as to all private vehicles, established by universal usage. It is altogether likely that *Laufer* knew nothing of the law of the road as found in the statutes or in the decisions of the courts. He did know of the universal usage of all wagons to turn to the right. He was in a wagon. There was a wrong side and a right side of the road as to him. And, in searching for the influences which might reasonably have affected his conduct at that time, this usage seems a very probable one. He did not know that the west-bound car was going to stop. As affecting his conduct, that car was not going to stop at all. He had no time for deliberation. He was compelled to act at once, or abide the consequences of a serious and perhaps fatal collision. It would seem unreasonable to hold that *Laufer* should, under such circumstances, remember and act upon any distinction in this respect between an ordinary wagon and a street car. But the whole discussion on this part is made unnecessary by the further fact stated in another part of the finding, that the drawbridge was so narrow that *Laufer* could not possibly have turned to the left."

In *Walsh v. Peoria R. Co.* 157 Ill. App. 453, where the driver of an automobile sought to recover for an injury received through colliding with a street car proceed-



loaded team: "The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the car came up, the conductor asked the defendant if he would remove his team from the track; he did not, but continued upon it, at the same rate of speed, several hundred feet, and then turned off. Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the traveled part of the road. The public, by the grant of the franchise, had granted the right to move on that precise line, and had given to all passengers the right to be

carried on that line at the usual rate of speed at which passengers are carried by horses, subject only to occasional necessary impediments. The cars cannot so move, and the passengers cannot be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning out. The wagon therefore was, for the time being, an unnecessary obstruction of the public travel, and therefore unlawful." While the motive power has been changed, no departure has been made from the principles of this decision, which have been affirmed whenever, in the concurrent use of our public ways by other travelers and street cars, it has been necessary to refer to their respective rights. *Driscoll v. West End Street R. Co.* 159 Mass. 142, 34

ing in the opposite direction, he was held guilty of contributory negligence where it appeared that he was on the wrong side of the street and passed behind a standing street car in a blinding storm running at a high rate of speed, and turned onto the track intended for cars coming toward him.

It has been held in New Jersey that an electric railway company is bound to take notice that the law requires other carriages using the parts of the highway covered by its tracks, upon meeting its cars coming from an opposite direction, to keep to the right, unless they are powerless to do so, and to expect that such other carriages might so turn upon its right-hand track at any moment in obedience to the law; and that it is the duty of a motorman to use reasonable care to govern the speed and motion of his car in accordance with the necessities which such a situation might at any instant create. *Adams v. Camden & S. R. Co.* 69 N. J. L. 424, 55 Atl. 254. And in this case it was held that one driving a team at night along the left-hand track of a street railway, who, upon seeing a car coming toward him on that track, turned to his right and drove upon the right-hand track, where he was almost immediately struck by a swiftly moving car, which ran into the back of his wagon, was not conclusively guilty of contributory negligence, he having testified that he looked before turning onto the car track, but saw no car in sight. And it was further held that the fact that such driver had room on his left hand to pass the car which he met would not change the result, since, if he had turned to the left, he would have taken the risk of being upon the wrong side of the road, in meeting carriages which might rightfully be proceeding on that side.

In *Kane v. Worcester Consol. Street R. Co.* 182 Mass. 201, 65 N. E. 54, where nothing of the facts appears except that a water cart which was being driven along with the left wheels inside the right rail was struck as it turned to the left across the track, by a car approaching from the opposite direction, exceptions to a verdict for defendant were sustained, because the 42 L.R.A. (N.S.)

jury were told in various forms that a mistake of judgment on the plaintiff's part, as to which was the safer course, would prevent his recovery. *Holmes, Ch. J.*, remarked that such instruction was erroneous, unless the judge was prepared to direct a verdict for defendant; and added a choice may be mistaken and yet prudent.

Where injury occurs while traveler is crossing or turning into street.

In an action against the owner of a wagon for an injury received by the plaintiff, who was injured through a collision between the wagon and a street car, the question of the right-hand side or the wrong side of the street does not enter into the case, where it appears that the defendant's wagon was not traveling along the street upon which the car was running, but was attempting to cross it. *Iaquinto v. Bauer*, 104 App. Div. 56, 93 N. Y. Supp. 388.

In *Galbraith v. West End Street R. Co.* 165 Mass. 572, 43 N. E. 501, where a street car collided with a wagon which had just turned into the street, it was held proper to refuse the plaintiff's requested charge that it was the driver's duty, by the law of the road, to go at once, upon turning into the street, to the right-hand side, since the question whether the deceased was in the exercise of reasonable care in so turning was for the jury.

Where collision occurs with standing vehicle.

In *Shaffer v. Roesch*, 215 Pa. 287, 64 Atl. 511, it was held that an ordinance which required wagons, in stopping on the street, to stop on the right side, the purpose of which being to regulate traffic, was immaterial, and not admissible in an action brought to recover for an injury received while the plaintiff was in the act of stepping from the running board of a street car when he was struck by the swing gate on a wagon which was standing on the left-hand side of the street.

N. E. 171; Benjamin v. Holyoke Street R. Co. 160 Mass. 3, 5, 39 Am. St. Rep. 446, 35 N. E. 95; O'Brien v. Blue Hill Street R. Co. 186 Mass. 446, 447, 71 N. E. 951; Kerr v. Boston Elev. R. Co. 188 Mass. 434, 435, 436, 74 N. E. 669; Callahan v. Boston Elev. R. Co. 205 Mass. 422, 423, 91 N. E. 388, 18 Ann. Cas. 510.

A vehicle is a means of conveyance, and the term has not been restricted to horse-drawn carriages, but includes bicycles, motorcycles, automobiles, or a street car, which, since the leading case, is assumed to be a vehicle having no paramount right, when being operated, to inconvenience other travelers, except in so far as the legislature has granted an exception to street railway companies. Said Holmes, J., in *White v. Worcester Consol. Street R. Co.* 167 Mass. 43, 44, 45, 44 N. E. 1052: "Their tracks are in the highway, where all vehicles have a right not merely to cross, but to travel. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them, but, subject to that and to the respective powers

of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. See *Galbraith v. West End Street R. Co.* 165 Mass. 572, 580, 43 N. E. 501. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable delay upon the track." *O'Brien v. Blue Hill Street R. Co.* 186 Mass. 446, 71 N. E. 951; *Williamson v. Old Colony Street R. Co.* 191 Mass. 144, 5 L.R.A. (N.S.) 1081, 77 N. E. 655; *Stubbs v. Boston & N. Street R. Co.* 193 Mass. 513, 79 N. E. 795; *Chaput v. Haverhill, G. & D. Street R. Co.* 194 Mass. 218, 80 N. E. 597; *Jedredy v. Boston & N. Street R. Co.* 198 Mass. 232, 84 N. E. 316; *Lockwood v. Boston Elev. R. Co.* 200 Mass. 537, 22 L.R.A. (N.S.) 488, 86 N. E. 934; *Eldredge v. Boston Elev. R. Co.* 203 Mass. 582, 89 N. E. 1041; *O'Brien v. Lexington & B. Street R. Co.* 205 Mass. 182, 91 N. E. 204; *Hatch v. Boston & N. Street R. Co.* 205 Mass. 410, 91 N. E. 523; *Carroll v. Boston Elev. R. Co.* 205 Mass. 429, 91 N. E. 525; *Eustis v. Boston Elev. R. Co.* 206 Mass. 143, 91 N. E. 881. See also

#### Effect of using tracks contrary to custom.

Though it has been held that the mere fact that a street car is proceeding upon the left-hand track, contrary to custom, will not of itself charge the company with fault and render it liable for damages resulting from an accident (*Altreuter v. Hudson River R. Co.* 2 E. D. Smith, 151), it is nevertheless generally held that such fact is properly considered as an element in determining the question of negligence or contributory negligence.

Thus, in *North Chicago Street R. Co. v. Irwin*, 202 Ill. 345, 66 N. E. 1077, it was held that the trial court did not err in permitting the plaintiff to prove the existence of the custom of running all north-bound cars on the east track, and all south-bound cars on the west track, since the existence of this custom entered into the consideration of the question whether the motorman was in the exercise of ordinary care in running his car northward on the west track at the rate of speed at which he was proceeding, although there was no allegation in the declaration that he was negligent in so doing.

And, in *R. F. Stevens Co. v. Brooklyn Heights R. Co.* 59 App. Div. 23, 68 N. Y. Supp. 1088, the fact that a car was going up town on the down-town track was, in connection with other circumstances, held sufficient to carry to the jury the question of negligence in striking a wagon which was crossing at an intersecting street.

So, in *Minnich v. Wright*, 214 Pa. 201, 63 Atl. 428, the fact that a south-bound car was, contrary to custom, running on the east or north-bound track, was one of the

reasons, in connection with the fact that the collision occurred at a curve where decedent's view was obstructed, rendering it difficult to determine on what track the car was proceeding, for holding that one driving a wagon north on the same track was not guilty of contributory negligence in colliding with the car. The court said: "If we assume that the deceased saw a car approaching, was he not justified in believing, and did he not believe, that it was on the west track, the one on which a car traveling south was accustomed to, and usually did, travel? Had he reason to believe from what his view of the car disclosed, that it was approaching on the east or north-bound track; or was he warranted in believing, under existing conditions, that the car was traveling on the west or south-bound track, the one on which, under the rules of the road as well understood in this country, an electric car is presumed to, and usually does, travel? These were questions for the jury, and the answers to them would doubtless control the jury's conclusion. If the car had been approaching on the south-bound track, there would have been no occasion for the deceased to leave the north-bound track, and his action in that respect, which as a prudent and careful man he should have taken, would have depended upon what his view of the car disclosed to him. If, however, he saw, before he rounded the curve, that the car was traveling on the north-bound track, his duty required him, if conditions permitted, to turn from the track, and failing to observe this duty would convict him of negligence."

J. T. W.

Burton v. Nicholson [1909] 1 K. B. 397, 78 L. J. K. B. N. S. 295, 100 L. T. N. S. 344, 73 J. P. 107, 25 Times L. R. 216, 7 L. G. R. 535, where the court held that the driver of a carriage overtaking a tram car must observe the law of the road.

The right of the plaintiff as a pedestrian to free and unobstructed passage also has not been abridged by modern conditions of travel. "There is no law, or principle of law or of reason, which confines foot passengers to particular crossings. Such a restriction would be very inconvenient and annoying. The street should be kept in such condition that foot passengers may be able to cross with a reasonable degree of safety, using proper care themselves, at any and all places. The necessity of this might be illustrated very fully by reference to the common and ordinary course of business. A person who is left by an omnibus in the middle of the street should be able to go in safety to the sidewalk at the nearest point, and not be compelled to make his way among the carriages in the middle of the street, until he can reach a place particularly set apart and designated for the purpose of crossing." Fletcher, J., in *Raymond v. Lowell*, 50 Cush. 530, 531, 53 Am. Dec. 57; *Slayton v. West End Street R. Co.* 174 Mass. 55, 54 N. E. 351; *Eustis v. Boston Elev. R. Co.* 206 Mass. 143, 144, 91 N. E. 381; *Mullen v. Boston Elev. R. Co.* 209 Mass. 79, 80, 95 N. E. 391, and cases cited. *Berry v. Newton & B. Street R. Co.* 209 Mass. 100, 95 N. E. 95.

The statute in question has not provided merely for the protection of travelers in vehicles; pedestrians also are entitled to rely upon the presumption that it will be observed. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237. It should receive a construction not only in harmony with what has been declared to be the reciprocal rights and duties of travelers as defined by the authorities cited, but which will not create an exception where none is necessary to effectuate the legislative intention. The law of the road first appears in Stat. 1820, chap. 65. It was not, however, until Gen. Stat. chap. 77, that § 2 (now Rev. Laws, chap. 54, § 2) was enacted, and § 5, that "the provisions of this chapter shall not apply to horse railroads," was also added. Re-enactment followed in Pub. Stat. chap. 93. In the last revision § 5 is omitted. The reason given by the commissioners is that it is superfluous, as "the history and subject-matter of this chapter show that it has no application to railways, whether operated by animal power or electricity." Commissioners' Report on Pub. Stat. chap. 54, note.

If the acceptance and adoption of the 42 L.R.A. (N.S.)

report without change is decisive that no express repeal of the existing law was intended, yet the legislature must be understood to have acted under the well-recognized rule that if a statute which previously has received judicial construction is codified with the purpose of not making any substantial change in the law, it will be presumed that the intention was to adopt the construction given by this court, even if there may be changes in phraseology. Rev. Laws, chap. 228, § 2; *Com. v. Lancaster Mills*, 212 Mass. 315, 98 N. E. 864; *Paszowski v. Stony Brook Paper Co.* 210 Mass. 86, 96 N. E. 129; *Wright v. Dressel*, 140 Mass. 147, 149, 3 N. E. 6; *Bent v. Hubbardston*, 138 Mass. 99, 100; *Shelton v. Sears*, 187 Mass. 455, 73 N. E. 666. If, therefore, § 5 of chapter 93 of the Pub. Stat. being merely declaratory of the law of the road as defined by this court, is to be treated as still in force, how far does it affect the preceding sections of Rev. Laws, chap. 54? The first two sections are commands addressed to the drivers of carriages and other vehicles on a road or bridge. By § 1 every such driver is required to drive his vehicle seasonably "to the right of the middle of the traveled part of such bridge or way;" and by § 2, if passing a vehicle going in the same direction, he is required "to drive to the left of the middle of the traveled part." Where vehicles are moving in the same direction over a roadway sufficiently wide for them to pass abreast, the statute is silent as to any duty of the vehicle ahead, except that "the driver of the leading one shall not wilfully obstruct the other." The comprehensive words of these sections should be given their ordinary and natural significance. Rev. Laws, chap. 8, § 4, cl. 3.

Although street cars are vehicles within the meaning of the statute, their drivers are relieved from the requirement of turning to either side of the middle of the traveled part of the road. The reason is obvious. The cars need not turn, because they cannot diverge from the tracks on which they run. Persons lawfully using a public way have a right to presume that drivers of free teams and vehicles will act in conformity with these directions, and if a driver neglects to obey them, and injury results, this is a circumstance which the jury may consider in determining whether he was careless, and unless explained it is indicative of his negligence. Besides, if the exemption applicable to street cars were held to include the defendant, the practical results would be serious.

Street railways are not chartered and granted locations in our public ways for the benefit of the promoters or owners. "The

accommodation of travelers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit for which these special modes of using the highway are granted, and not the profit of the proprietors." *Com. v. Temple*, 14 Gray, 69, 76; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 517, 518, 28 Am. Rep. 264; *Pierce v. Drew*, 136 Mass. 75, 81, 49 Am. Rep. 7; *Lorain Steel Co. v. Norfolk & B. Street R. Co.* 187 Mass. 500, 503, 73 N. E. 646. It is common knowledge that passengers generally leave street cars from the right-hand side, whether the cars run on single or double tracks, which, in cities and large villages, usually are located in the center of thoroughfares where travel is most frequent. And if the drivers of other vehicles are required to observe a street car as being within the law of the road, passengers in alighting will be freed from the needless hazard of personal injuries from the undue proximity of vehicles passing in either direction. The not infrequent condition requiring a prudent driver, if the tracks are double, to ascertain whether a car is approaching on the parallel track before turning his vehicle upon it, is but incidental to ordinary travel in streets in which cars are being operated. If an oncoming team were moving over the same area, he would be required to use similar precautions to avoid a collision, or even, if necessary, to wait for it to pass.

It may be suggested that in some country roads and village streets, or perhaps in cities, tracks are located at the extreme edge of the highway, where of necessity passengers alight from the left-hand side, and the inconvenience of drivers of vehicles who wish to pass may be increased, and the safety of pedestrians correspondingly imperiled. The requirement, however, is only that the passing vehicle shall "drive to the left of the middle of the traveled part" of the way, and, as we have pointed out, where the jury find the circumstances to be such that, in the exercise of reasonable care, the statute could not be literally obeyed, no inference of negligence can be drawn. If, under modern conditions of travel in our congested streets, there is danger in requiring the driver of a carriage or other vehicle passing another carriage or vehicle traveling in the same direction to "drive to the left of the middle of the traveled part of a bridge or way," as is intimated in the dissenting opinion, yet we cannot disregard the express requirement of the statute; it is for the legislature to provide a remedy.

Exceptions sustained.  
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The Chief Justice and Justices Hammond and Loring express their dissent from the opinion of the majority of the court, by reason of their belief in the evil consequences to the public traveling upon highways in trolley cars and other vehicles and on foot, which will arise from it. The only question involved is whether, under Rev. Laws, chap. 54, § 2, the driver of a motor or horse-drawn vehicle overtaking and passing an electric car going in the same direction must leave it on his right or on his left. That question has never been decided by this court. In *Burton v. Nicholson* [1909] 1 K. B. 397, 78 L. J. K. B. N. S. 295, 100 L. T. N. S. 344, 73 J. P. 107, 25 Times L. R. 216, 7 L. G. R. 535, the law under consideration was different in its language and history from our statute, and the court there felt compelled to hold that other vehicles passing tram cars must observe as to them the law of the road, although recognizing that so construed it was almost impossible "to be obeyed in a reasonable manner in practice." Within less than four months after that decision, the order was annulled by the legislative body. See Statutory Rules and Orders for 1909, p. 497.

A penal statute ought not to be interpreted so that it cannot be reasonably obeyed, or so that it will require further legislation to make it workable, unless no other course is open. We think it is plain that it was not the intent of the legislature to include electric cars or horse cars within the law of the road, and for these reasons:

(1) It is shown by the history of the statute. The first statute as to the use of the road by travelers in carriages and other vehicles was Stat. 1820, chap. 65. This act contained regulations as to travelers meeting upon the highway, but none as to travelers going in the same direction passing one another. It was embodied in substance in Rev. Stat. chap. 51, without change. When the General Statutes were enacted, § 2, now under consideration, appeared for the first time, and another section, numbered 5, was added, stating expressly that the provisions of the chapter should not apply to horse railroads. Gen. Stat. chap. 77. The reason for this undoubtedly was that the first statutes authorizing the construction of horse railroads were passed in 1853, and a considerable number had been passed before 1860. Gen. Stat. chap. 77, appears substantially without change in Pub. Stat. chap. 93. The commissioners for consolidating and arranging the Public Stat-

utes, in their report of 1901, append to chapter 54 a note to the effect that they have omitted § 5 "as superfluous. The history and subject-matter of this chapter show that it has no application to railways, whether operated by animal power or by electricity." The law of the road as reported by the commissioners was adopted without change by the legislature, which means that the report and note were approved. Hence the purpose of the legislature in omitting from the law of the road in the Revised Laws the express exemptions of horse cars, and by necessary implication of electric cars, which had been in the two immediately preceding compilations of the statute law, was not to change in any respect the law as it had been for more than forty years. The primary significance of the exemption of horse railroads in Gen. Stat. chap. 77, and in Pub. Stat. chap. 93, is that the drivers of the cars of horse and electric railways are not bound to observe the law of the road. An equally necessary conclusion, however, is that such cars are not to be regarded as carriages or vehicles by other travelers. To say that the statute "shall not apply to" such cars is equivalent to saying that they are not "carriages" and "other vehicles" within the meaning of those words in the statute. They are exempted from the section touching the passing of one carriage or vehicle by another going in the same direction, as much as from the section concerning those which meet going in opposite directions. They are excepted out of the statutory provisions both as objects and subjects of travel.

(2) There are in the commonwealth many miles of electric railways constructed upon the side of highways. It is impossible to treat the law of the road as applicable to cars upon tracks so laid. The legislature cannot have intended to make the law of the road applicable in case of cars when it is impossible to obey it in these not infrequent instances where tracks are laid on the side of public ways.

(3) The traveling public almost universally, according to our observation, has construed the statute in practice as not applying to street cars. When a statute regulating the daily conduct of thousands of people has received an interpretation by substantially universal custom, it ought not to be set aside unless strongly required.

(4) The public construction of the meaning of the statute secures a far larger degree of safety than any other interpretation. There is no danger to any traveler in the careful passing by any vehicle to the right

of an electric car going in the same direction, while there is or may be great peril in passing to the left from behind the obstruction to sight and hearing, which an electric car usually is, into the face of other traffic. The passenger alighting from the street car, either on the right or left side, is protected by the general requirement of due care from other travelers.

(5) It is well-nigh impossible to obey the statute interpreted in any other way. Heavily loaded vehicles on congested streets must be almost constantly violating the law (see *Bryant v. Boston Elev. R. Co.* 212 Mass. 62, 98 N. E. 587), or else cause great and unnecessary congestion of traffic. Many car tracks are laid in the center of roads where there is not room for two motor cars or carriages to pass on one side of the tracks. To require an overtaking automobile or carriage to drive to the left from behind an electric car, into automobiles or carriages going in the opposite direction, to say the least, introduces confusion into travel, which may result in imminent hazard of injury.

(6) The traveler alighting from the right-hand side of a street car will be subjected, under the other interpretation, to the danger of vehicles approaching from a direction opposite to that in which the car is moving, while those alighting from either side must be prepared to avoid them coming from a direction to which they have been unaccustomed. The question is not whether the driver of an automobile should stop before passing a stationary car. That situation is not covered by the law of the road nor by this decision. It is governed by the general rules of negligence.

(7) The other rule finds support in the provisions of Rev. Laws, chap. 54, § 2, which, if construed literally, requires one vehicle passing another to do the very thing which has been shown to be inherently dangerous, namely, to go to the left of the middle of the way; that is to say, into that part of the way appropriated to traffic going in the opposite direction. In the crowded streets of cities not only is this not the rule observed in practice, but passing vehicles are never allowed in the left of the middle of the way, even if they cannot otherwise pass those in front of them. Whether this section should or should not be construed to apply to those ways only when there is only room for two vehicles abreast, it ought not to be decisive of the question under discussion.

We think the ruling requested was refused rightly.

## GEORGIA SUPREME COURT.

JACK RUIS, Plff. in Err.,

v.

W. J. BRANCH, Sheriff, et al.

(138 Ga. 150, 74 S. E. 1081.)

**Judicial sale — suppressing bid — cancellation of deed.**

A combination between a defendant in execution and a prospective bidder to suppress the usual competition at a sheriff's sale is illegal from considerations of public policy; but equity will not cancel the sheriff's deed made in pursuance of the sale, at the instance of the defendant, on the ground that bidders were deterred from

Headnote by EVANS, P. J.

**Note. — Suppression of competition at execution or other judicial sale.**

I. Scope, 1198.

II. General rule, 1198.

III. As to result of express or implied contract.

a. In general.

1. Enforceability, 1199.

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d. Where all parties in interest assent, 1204.

e. Purchase by one and sale to another, 1206.

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h. Bidding as agent, 1206.

IV. Conspiracy to suppress competition as ground for avoiding sale, 1206.

V. Collateral attack, 1207.

VI. Effect of statements or conduct of purchaser at sale, which had a tendency to chill bidding.

a. False statements, 1207.

b. True statements, 1209.

c. Conduct of purchaser at sale, 1211.

VII. Statements and conduct of officer conducting sale as ground for avoiding sale, 1211.

**I. Scope.**

This note does not include cases where competition is incidentally suppressed by the officer's violation of, or noncompliance with, statutory regulations of judicial sales. Nor does it include cases of sales *en masse* instead of by parcels. It includes only those cases where the suppression of competition was considered as a factor in the decision, because of public policy, and does not cover questions arising under the statute of frauds. The note is further confined strictly to cases involving execution or other judicial sales. As to suppression of competition at auction sales generally, see note in 20 L.R.A. 545.

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bidding as a result of the agreement between him and the purchaser.

(May 15, 1912.)

**E**RROR to the Superior Court for Appling County to review a judgment dismissing a petition on demurrer in an action brought to cancel a sheriff's deed and for other relief. Affirmed.

The facts are stated in the opinion.

Messrs. Wade H. Watson and V. E. Padgett for plaintiff in error.

Messrs. Levi O'Steen and Lankford &amp; Dickerson for defendants in error.

Evans, P. J., delivered the opinion of the court:

The action is by Jack Ruis against W. J.

The legality of agreements to purchase property at judicial sales for joint benefit has been fully treated in a note to *Coal & Coke R. Co. v. Marple*, 38 L.R.A. (N.S.) 719. Hence that subject is not included herein. A few cases involving such agreements are cited in this note as bearing upon the general principles involved in the subject treated, but this note is not exhaustive as to such cases.

As to setting aside judicial sales generally, see note in 9 L.R.A. 731.

And as to the relief that may be granted to the purchaser when a judicial sale is set aside for fraud, see note in 69 L.R.A. 53.

As to the right of the creditor to enforce promise of one allowed to secure property at judicial sale upon faith of his promise to pay owner's debts, see note to *Satterfield v. Kindley*, 15 L.R.A. (N.S.) 399.

**II. General rule.**

It is the policy of the law to encourage bidding and free competition at judicial sales. As a general rule, all contracts made with a view of suppressing competition, or securing the property for less than it would otherwise bring at the sale, are illegal as constituting a fraud upon the owner of the property and others whose interests will be affected thereby. The sale, however, is not void, but merely voidable at the option of those whose interests have been adversely affected. But not all agreements to refrain from bidding at judicial sales can be said to amount to such fraud as to render the contract unenforceable, or as furnishing grounds for avoiding the sale. Agreements between creditors, with the assent of the debtor, that certain debts will be taken care of provided the creditors will abstain from bidding, are generally upheld, since such adjustments are often convenient and beneficial to all concerned. Likewise, agreements by the purchaser that he will permit the debtor to redeem if the latter refrains from bidding are generally held enforceable. And, as shown in the note in 38 L.R.A. (N.S.) 719, the majority of the cases hold that contracts to purchase property

Branch, sheriff, Lott & Peterson, and Wash and E. D. Douglas, to cancel a sheriff's deed, and for other relief. The petition, after amendment, was dismissed on demurrer. In the original petition it was alleged as follows: Martha J. Taylor obtained against the plaintiff a judgment for \$500. She held, as security for the note which was the basis of the judgment, a deed to his land. He also owed Lott & Peterson \$375, which was secured by a second mortgage on the land and a mortgage on a mule. Execution issued on the Taylor judgment, and it was duly levied on the land described in the security deed, and the land was advertised for sale. On the day of sale the attorney of Martha J. Taylor informed the plaintiff that he had seen Lott & Peterson, and that they had in-

structed him to bid off the property, and they would execute to the plaintiff their bond to reconvey to him the land upon the payment of their mortgage and the Taylor judgment within twelve months. Thereupon the plaintiff and the attorney informed the sheriff of this arrangement, and also informed other bidders, who were deterred from bidding on the land for the reason that they did not care to interfere with the plaintiff in redeeming his property. The sheriff was requested not to run the property any more than was absolutely necessary. In accordance with their agreement the land was bid off by the attorney, and a deed was executed by the sheriff to Lott & Peterson. After the sale the plaintiff applied to Lott & Peterson to perform their

for joint benefit, when entered into with honest motives, either because of the great value of the property or the fact that neither party desires the whole, are enforceable and furnish no grounds for avoiding the sale.

The broad rule announced in some of the earlier cases, that every agreement the consideration of which is the forbearance of bidding at a public sale is *per se* void, is no longer maintained. In many of the cases it is held to be a question as to whether there was fraudulent intent. This is especially true in the case of a purchase for joint benefit.

### III. As to result of express or implied contract.

#### a. In general.

##### 1. Enforceability.

A check given as the consideration for the withdrawal of a bid made at an administrator's sale by the payee, in order to permit the drawer to secure the property on a lower bid, is not collectable, as such a contract is illegal. *Goldman v. Oppenheim*, 118 Ind. 95, 20 N. E. 635.

An agreement between the purchaser at a judicial sale and a prospective bidder, that the former will secure the latter against liability as an indorser of a note on which the former is in no way liable, in case the latter will refrain from bidding, is invalid, and the assignment of an insurance policy for that purpose is invalid as against the creditors of the assignor, as based upon an illegal consideration. *Merchants' Ins. Co. v. Addison*, 9 Rob. (La.) 486.

An agreement between two prospective bidders at a bankrupt sale, that the one will give up and discharge a debt owed to him by the other, on consideration of the other's not bidding against him, is void, and the fulfillment of the agreement by the non-bidder does not discharge the debt. *Gardiner v. Morse*, 25 Me. 140.

And a note given as the consideration for

a contract to refrain from bidding at a judicial sale cannot be collected by the payee. *McClelland v. Citizens' Bank*, 60 Neb. 90, 82 N. W. 319.

A note of which part of the consideration was the refraining from bidding at a statutory assignee's sale of personal property is invalid in the hands of the payee, but valid in the hands of an innocent purchaser who discounted it before maturity in the usual course of business. *Atlas Nat. Bank v. Holm*, 19 C. C. A. 94, 34 U. S. App. 472, 71 Fed. 489.

A note given as the consideration in an agreement to refrain from bidding at a judicial sale is void, and collection cannot be enforced. *Jones v. Caswell*, 3 Johns. Cas. 29, 2 Am. Dec. 134. In this case the maker of the note had innocently purchased property encumbered with a judgment. At the sale on execution thereon, he gave the note to the execution creditor to induce him not to bid above the amount of his judgment and costs. The creditor thus had his full claim from the sale and the note for refraining from bidding. The agreement was said to be unconscionable.

Where the lessee of property about to be sold at a judicial sale thought of purchasing the property to protect his interest, but was induced to refrain from bidding by the promise of another that if the other purchased he would lease the property to the same lessee at a stipulated rental for five years, it was held in *Noble v. McGurk*, 16 Misc. 461, 39 N. Y. Supp. 921, that the purchaser, having received the benefit of the agreement, could not allege as a defense to an action upon it that it was void as against public policy.

##### 2. As grounds for avoiding sale.

An agreement whereby one prospective bidder pays another for not bidding against him at an administrator's sale, and thereby secures the property at a lower price than the suppressed bidder intended to bid, is an illegal contract, and the sale will be set aside and the deed canceled at the suit of the administrator brought after tender

agreement by executing to him their bond to reconvey, when they denied that they authorized the attorney to make any agreement, and refused to negotiate with him, and conveyed the land to E. D. and Wash Douglas. It was alleged that the property was worth \$1,250, and would have brought approximately this sum, but for the announcement of the above-mentioned agreement respecting its sale. About two years after the filing of the petition it was amended by alleging that on the day of the sale the plaintiff informed the attorney that he had arranged with the judgment creditor, Taylor, that if he could raise \$150 or \$200 the sale would be postponed, and that he had about perfected a sale of the timber, which would yield this sum, whereupon the

attorney said that he had seen Lott & Peterson, and they had agreed to buy the land on the terms stated in his original petition; that when the sheriff offered the land for sale, the attorney publicly announced that whoever might bid off the property would have to pay, in addition to his bid, the amount of the Lott & Peterson mortgage; that the sheriff did not sell the land in the usual manner, did not read the advertisement or cry aloud the land, but stepped to the front of the courthouse door and announced that he would sell the Ruis property, addressing his remarks to the attorney and to the plaintiff; that the attorney bid on the property \$610, the judgment creditor bid \$615, and the attorney bid \$620, when the property was knocked off to him

of the bidder's money to him. *Barnes v. Mays*, 88 Ga. 696, 16 S. E. 67.

And where the purchaser gets the property for less than a fair price by paying, or offering to pay, money to others to refrain from bidding, the sale will be set aside at the instance of the injured party. *Goble v. O'Connor*, 43 Neb. 49, 61 N. W. 131.

But it has been held that where a purchaser at a sheriff's sale bribes a bidder to refrain from bidding, and yet is compelled to pay full value for the property, he takes a good title, unless it is shown affirmatively that it would have sold for more but for his fraud. *Abbey v. Dewey*, 25 Pa. 413.

***b. Where person refraining from bidding has an interest to protect.***

A contract between a prospective purchaser at a judicial sale and the second lien creditor, that, in consideration of the latter's forbearing to bid at the sale, the former will bid in the property for sufficient to pay the first lien, and pay the latter \$700, is void as against public policy, and the payment of the \$700 cannot be enforced, even after the contract is in all other respects fully performed. *Dudley v. Odom*, 5 S. C. 131, 22 Am. Rep. 6.

An agreement between two judgment creditors whereby one transferred to the other his judgment and refrained from bidding at a mortgage foreclosure sale of the judgment debtor's property, which mortgage lien was prior to both judgments, and the other agreed to pay him \$600 for the judgment so transferred, in instalments, and bid in the property, is invalid, and cannot be enforced. *Brackett v. Wyman*, 48 N. Y. 667.

An agreement between two persons interested in an estate, whereby one sells his interest and agrees not to bid at the sales of the property, and the other is to pay a stipulated price, is void as suppressing competition, and it cannot be enforced. *Ingram v. Ingram*, 49 N. C. (4 Jones, L.) 188.

An agreement between a purchaser at a sheriff's sale and a judgment creditor, that

in consideration of the latter's refraining from bidding, the former will pay his judgment if the defendant's property is not sufficient, is void as suppressing competition, and cannot be enforced. *Slingluff v. Eckel*, 24 Pa. 472.

An agreement between two judgment creditors of a decedent, that the one will pay the prior lien of the other if the other refrains from bidding at the orphans' court sale of the property, is void as against public policy, and cannot be enforced by the refraining creditor against the purchaser. The agreement suppresses competition, and is a fraud upon the heirs of the deceased judgment debtor. *Barton v. Benson*, 126 Pa. 431, 12 Am. St. Rep. 883, 17 Atl. 642.

It was further held in *Phelps v. Benson*, 161 Pa. 418, 29 Atl. 86, that the title of the purchaser in *Barton v. Benson*, supra, was void, he having purchased the property under the illegal agreement for less than a fair price. The fact that the real value of the property was less than the amount of the liens, so that the widow and the heirs lost nothing, did not estop them from bringing the action.

In *Hay's Estate*, 159 Pa. 381, 28 Atl. 158, where the execution creditor at a sheriff's sale bought the lien of another judgment creditor as part of an agreement that the other should not bid, the agreement was held to be void as suppressing competition: hence the purchaser was not subrogated to the rights of the defendant against third persons whose interests were necessarily affected adversely if bidding was suppressed.

An agreement between a prospective bidder and a lien creditor at a judicial sale, that the latter will refrain from bidding, and in consideration thereof the former will pay him the difference between a stipulated sum and the purchase price, is void as against public policy, and cannot be enforced, even after the bidder has purchased the property below the stipulated price. *Bolling v. Mullins*, 111 Va. 250, 63 S. E. 982.

An agreement between a judgment creditor and one owning an interest in the land, to the effect that only the creditor shall



without requesting other bids; that E. D. and Wash Douglas had notice of all these facts when they purchased the land from Lott & Peterson; that since the filing of the petition all the defendants, except the sheriff, have been in possession of the land, and they have removed timber therefrom of the value of \$300, have received rents of the value of \$600, and appropriated to their use fertilizers in the stables belonging to the plaintiff, of the value of \$30, and that these sums aggregate \$930, which is \$310 in excess of the purchase price of the land at sheriff's sale. He prayed for cancellation of the sheriff's deed and the deed from Lott & Peterson to E. D. and Wash Douglas, for an accounting, for judgment for the excess over what the land brought at sheriff's sale,

and for general relief. He offered, should the amount of the rents, issues, and profits be insufficient to repay the purchasers the amount of their bid, to account for the difference.

The petition is projected on the theory that the sheriff's sale was void, and it is prayed that the sheriff's deed to the purchasers and the deed to their vendees with notice be canceled. The plaintiff is not seeking specific performance of any agreement between himself and the purchasers. What he demands is the cancellation of the deeds on the ground that the effect of his arrangement with the attorney who bid for the purchasers, and the attorney's statement (while the sale was in progress) that prospective buyers would take title subject

bid at the sale on execution issued against the owner of the remaining interest, is void as against public policy, and will not be enforced at the instance of one of the parties thereto. *Packard v. Bird*, 40 Cal. 378.

It was held in *Garrett v. Moss*, 20 Ill. 549, that an agreement between the senior and the junior mortgagees, that the former would, on foreclosure, bid the amount of his claim upon a part of the mortgaged land, thereby releasing the lien of his mortgage upon the other part, and ordering the sale so as to enable the agreement to be carried out, was not a suppression of competition, since neither had agreed not to bid on the part the other proposed to buy.

Where a purchaser at a foreclosure sale on a first mortgage represented to the second mortgagee that he held a third mortgage on the property, and agreed with him that he would pay the amount of the second mortgage in consideration of its owner refraining from bidding, the contract is not *per se* void, but will be enforced where the jury find that there was no fraudulent intent on the part of the refraining bidder. *Delisi v. Ficarrota*, 76 Misc. 488, 135 N. Y. Supp. 653.

An agreement that one party shall reduce his claim against a third party to judgment, sell the property on execution, and that the other party to the agreement shall bid therefor the amount of the judgments, is not invalid as suppressing competition. *Wicker v. Hoppock*, 6 Wall. 94, 18 L. ed. 752.

The fact that the plaintiffs in an execution sale agreed among themselves not to bid against each other is not necessarily fraudulent as to the debtor. *Young v. Smith*, 10 B. Mon. 293.

An agreement between the purchaser of land at a sheriff's sale, and one who is asserting a claim to the land, that the former will pay the latter to refrain from bidding, is not void as against public policy, the mere withdrawal of the claim being all that was contemplated by the parties. *Waddell v. McCabe*, 4 U. C. Q. B. O. S. 191.

And in *Myers v. Dorman*, 34 Hun, 115, an agreement between a judgment creditor 42 L.R.A. (N.S.)

who became the purchaser, and two other judgment creditors, that the two latter would refrain from bidding at a sale on a prior judgment against the defendant, and in consideration thereof the former would bid in the property and pay their claims in full, was held valid, as against the contention that it was a suppression of bidding. The court held that the object was primarily to protect their interests, and the suppression of competition was only incidental.

Nor is a contract between an execution creditor and another person, that the latter will bid the amount of the judgment with interest and costs, but will have the right to refuse to bid more, invalid as against public policy, for it does not suppress competition. *Spitzley v. Rivard*, 152 Mich. 670, 116 N. W. 547.

An agreement between a mortgagee who has started foreclosure proceedings and his assignee of the mortgages, with right to be substituted, to the effect that the former will bid in the property at the foreclosure sale for the latter for not more than the amount of the claims with costs, is not illegal as preventing competition. *Benedict v. Gilman*, 4 Paige, 58.

An agreement between a purchaser at a sheriff's sale (the purchaser had previously bought the land from the judgment debtor for a stipulated price, and was to pay off the execution and such other debts as the judgment debtor should designate, not to exceed the stipulated price) and a creditor who had no lien upon the land, that the latter should not bid, and the former should pay his claim if the judgment debtor gave his consent, is not void as suppressing competition. *Graham v. Reid*, 13 N. C. (2 Dev. L.) 364.

A judicial sale will not be set aside because the purchaser had, before the sale, agreed with the creditor to pay the latter the amount of his claim on condition that he refrain from bidding. *Berard v. Barrette*, 5 Rev. Leg. 703, cited in 1 Quebec L. Dig. 1271.

If the execution creditor promises to protect another creditor, thus inducing him to

to a second mortgage on the property, was to chill the bidding and allow the purchasers to obtain the land at an undervalue. The plaintiff's proposition, stated differently, is that he and the purchasers conspired to deter bidding at the sale in order that the land might bring less than its value, and when this was accomplished the purchasers refused to consummate the arrangement which induced him to enter into the conspiracy to depress the sale, and that this refusal on the part of the purchasers justifies a rescission of the sale.

It may be declared to be the settled policy of the law that sheriffs' sales shall be fairly conducted, and in such manner that the property to be sold shall not be needlessly sacrificed. Whenever it is made to ap-

pear that a sale under process is infected with fraud, irregularity, or error to the injury of either party, the sale will be set aside. Civil Code, § 6032. A combination to suppress the usual competition at a sheriff's sale is illegal from considerations of public policy. *Jones v. Caswell*, 3 Johns. Cas. 29, 2 Am. Dec. 134. This is unquestionably the general rule. But the principle that a party to a fraudulent agreement cannot maintain a suit founded upon the refusal of the other party to the fraud to carry such agreement into effect is applicable alike to sales under execution as to privately executed sales. In conducting a sale under execution the sheriff acts as the agent of the defendant in execution appointed by the law. *Dozier v. McWhorter*, 113

refrain from bidding at a sheriff's sale, and then bids in the property at a price less than value, the sale is void, and the other creditor is not estopped from setting up the fraud, but he may seize the property on his own execution. *Johnson v. Oberholtzer*, 1 Walk. (Pa.) 103.

Where two sureties of an execution debtor, with the object of indemnifying themselves as such, agreed that only one should bid, and that if he bought the property the other should share in the benefits of a resale, and later the one who was to do the bidding bought a judgment of an execution creditor and bid in some property at a considerable sacrifice, it was held in *Martin v. Evans*, 2 Rich. Eq. 368, that the sale would be set aside at the instance of other creditors.

In *Hawley v. Cramer*, 4 Cow. 717, several creditors had a single joint bond securing the total amount of their claims and an attorney selected as trustee therefor; some of them attended the sale, which had been brought about by the attorney on one of the claims, and authorized the attorney to bid for them jointly, without competition from each other. He bought the property for about one fifth of its value, and sold it to an innocent purchaser for full value. He divided the amount bid among all of the creditors named in the bond, and the balance realized on the private sale was all given to those who authorized the bid. On a suit by those in the bond who had not authorized the bid, against the attorney and the others, it was held that the sale was illegal as stifling competition, but in the hands of an innocent purchaser, the property would not be disturbed; that the whole fund realized on the property by the attorney must be divided ratably among all those in the bond.

#### *c. Where debtor was a party.*

An agreement between a lien creditor and the debtor, that the former will bid for and purchase the property at the orphan's court sale, at a sum sufficient to pay all claims 42 L.R.A. (N.S.)

against the property, on condition that the debtor refrain from bidding, is not illegal as suppressing competition. *Neely v. McClure*, 1 Sadler (Pa.) 98, 1 Atl. 719.

An agreement between the judgment debtor and another person, that the latter shall bid in the property, provided that he shall not be compelled to pay more than a stipulated amount, and in case he gets the property, shall sell an interest in it to the former, on easy terms of payment, is not a suppression of competition. *Bame v. Drew*, 4 Denio, 290.

The judgment debtor and a prospective purchaser at a judicial sale, believing the property to be worth \$1,000, may agree that the latter will bid in the property and pay to the former the difference between \$1,000 and the bid, and such a contract is not necessarily void or voidable. *Mathews v. Starr*, 68 Ga. 521.

Accordingly, it was held in the above case that where the debtor, relying on such an agreement, made no further effort to pay the judgment, which he could have done, and refrained from bidding or procuring bidders, the purchaser was liable under the contract.

This rule was, in *McDonald v. May*, 1 Rich. Eq. 91, applied as to personal property, but as to real estate it was held that parol testimony was not admissible to prove such an agreement, no doubt because of the statute of frauds.

Where bidding is prevented by an agreement between the purchaser, the judgment debtor, and his creditor, and the price is inadequate, the debtor is entitled to relief against the purchaser or his vendee with notice. *Plaster v. Burger*, 5 Ind. 232. The agreement was to the effect that the debtor should be allowed to redeem the property. The court does not indicate in what form the relief is to be given.

In *Lloyd v. Currin*, 3 Humph. 463, it is said that if there was a parol agreement between the debtor and the creditor, made before the constable's sale of personal property, to the effect that the latter would bid in the property and hold it as security for the debt, and allow the former to redeem

Ga. 587, 39 S. E. 106. The sale of the defendant's property at less than its market value was caused by his own act. He participated in the acts of the agent of the purchaser, which depressed the sale of his land. It was his own conduct which depreciated the price of his property. Prospective purchasers yielded to the appeal made in his behalf, and in his presence, that they refrain from bidding on his land. "Detering bidders at a sheriff's sale for the benefit of the defendant and with his consent would not vitiate the sale as between him and the purchaser." O'Kelley v. Gholston, 89 Ga. 1, 15 S. E. 123. In that case the purchaser made certain statements at the sale, and begged those present not to bid, saying if they did, they would deprive the

defendant in execution, who was an old man, of his home and property; whereas, if they would not bid and let him buy it, he would allow the defendant to remain in possession during life. The court stated the general rule in the quoted language, but said it would not control if the defendant was of weak mind, and the purchaser, by deceitful means and artful practices, took a fraudulent advantage of his mental condition. In the case at bar the plaintiff was laboring under no disabilities, and deliberately entered into a scheme to deter bidders upon the oral promise of the purchaser's agent that he would buy it in for him. The sale resulted just as he planned it, and he should not be permitted to vacate it because the

it any time, the sale would create only a mortgage.

And in *Loyd v. Currin*, supra, it was also said that if the creditor had said before the sale, and under circumstances to prevent others from bidding, whether he had any intent to produce that effect or not, that all he wanted was his money, and that he would give up his property at any time the debtor paid him, he would be held to be a trustee for the benefit of the debtor or of other creditors. But if he had said the same thing only after the sale, there being no previous agreement, the statement would not bind him.

In *Neely v. Torian*, 21 N. C. (1 Dev. & B. Eq.) 410, where a prospective purchaser induced a judgment debtor to allow real estate to go to sale when there was sufficient personal property to satisfy the judgment, by agreeing with him to bid it in and allow him to redeem, and competition was suppressed by that agreement becoming known, the said purchaser, getting the property for less than a fair value, was held to be a trustee for the debtor, notwithstanding the statute of frauds.

And in *Turner v. King*, 37 N. C. (2 Ired. Eq.) 132, 38 Am. Dec. 679, it was held that where the purchaser at a sheriff's sale had agreed with the debtor to purchase the real estate and allow the debtor to redeem on repaying the expenditure and certain debts owed to the purchaser, and this agreement had become known at the sale, preventing at least two persons from bidding, and enabling the purchaser to get the property for about half of its value, the agreement would be enforced at the suit of the debtor.

And in *Beegle v. Wentz*, 55 Pa. 369, 93 Am. Dec. 762, where the judgment debtor waived the benefit of the exemption laws after he had demanded an appraisal thereunder, on the verbal promise of the judgment creditor that the latter would bid in the property and make a deed to the former for 15 acres thereof, the court held that the creditor, after purchasing at the sheriff's sale, was a trustee of the 15 acres for the benefit of the debtor, regardless of 42 L.R.A. (N.S.)

the statute of frauds; but it was pointed out by the court that it was not an agreement for the sale of lands, but was rather an agreement to allow the defendant to retain title to what was already his. The question of suppressing competition does not seem to have been raised.

The facts in the case of *Trapnell v. Brown*, 19 Ark. 39, were almost identical with those in *Ruis v. Branch*, one of the objections being that the agreement was void because it was made for the purpose of defrauding creditors. The agreement was sustained. The court remarked that the creditors were not complaining, and further that it would not benefit them to declare the agreement void and allow the defendant to retain the property thus fraudulently acquired.

In *Brook v. Saul*, 2 Ch. Chamb. Rep. (Can.) 145, it was alleged that the purchasers at a judicial sale told the debtor that if he did not bid beyond the bid which they had just then made, he might have the property for that sum, and the court refused to open the biddings. But the circumstances were such as to convince the court that the debtor's conduct at the sale had not been in any way affected or his position altered by the acts of the purchasers. Hence, it was held that he must be left to his bill for specific performance. An agreement between the debtor and a judgment creditor that the debtor will not dispute any of the claims of record of the creditor against him, will give up all receipts for payments which have not been credited of record on the claims, and will interpose no objections or hindrances to a sheriff's sale of his real estate on the creditor's judgment, in consideration of which the creditor agreed to purchase the property, or see that it went for a fair price if others bought it, and, in case she purchased it, to sell it on term payments, appropriating the proceeds first to her own claims and the balance to the debtor or his family, and further pay to the debtor \$200 on or before a certain date, is not necessarily against public policy as suppressing competition, and a sale to the creditor by

purchaser broke faith with him in keeping his promise.

This is not a case of a purchaser who, without any agreement or connivance with the defendant in execution, deters bidders by falsely representing that he is buying the property for the benefit of the defendant. In such a case the defendant does not participate in the purchaser's conduct, and comes into court with clean hands, and is entitled to reparation for the injury accruing from the purchaser's false representation. According to his own pleadings the

plaintiff in the case at bar conspired with the purchaser to depreciate the sale of his own property, conspired with him to taint the purity of the sheriff's sale; and equity will not relieve him from a condition resultant from his own conduct. Both he and the purchaser were involved in the effort to prostitute a judicial sale, and in such cases the maxim *potior est conditio defendentis* applies.

Judgment affirmed.

All the Justices concur.

the sheriff is not necessarily void as to judgment creditors holding liens subsequent to those of the said judgment creditor. The jury should be permitted to determine whether or not fraud was contemplated and accomplished. *Barton v. Hunter*, 101 Pa. 406.

And it was held in *Meade v. Conroe*, 113 Pa. 220, 8 Atl. 374, that the facts that the junior judgment creditor bought the prior judgments, including the one upon which execution had been issued, and purchased the property for an inadequate price, and agreed to allow the debtor to redeem, are not sufficient evidence of fraudulent collusion between him and the debtor to defraud the latter's creditors, as to justify the court in setting aside the sale at the suit of the creditors.

Where the mortgagee, through its agent, tells the mortgagor at the foreclosure sale that it will allow him to redeem by paying its claim in full, and that his interest shall be protected, and also tells his attorney not to bid, who complies with the request, and then it buys the property at less than value, the sale will be set aside at the instance of the mortgagor, if the mortgagee refuses to allow him to redeem. *Banta v. Maxwell*, 12 How. Pr. 479.

Where competition in the bidding at a sheriff's sale is suppressed by an agreement between the purchaser and the debtor, and by the other bidders being informed that the purchaser was bidding for the debtor, the sale will be set aside at the suit of the creditors. *Trimble v. Turner*, 13 Smedes & M. 348, 53 Am. Dec. 90.

And in *Miltenberger v. Morrison*, 39 Mo. 71, although the question was not properly before the court, it was said that the sale would be set aside at the suit of an attaching creditor, where the bidding at the sheriff's sale was suppressed by an agreement between the debtor and the purchaser.

The fact that an insolvent judgment debtor consented to an agreement between the purchaser and one holding a claim against the debtor, that the purchaser would pay in instalments \$600 for the other's claim on condition that he refrain from bidding at the judicial sale at which the debtor's property is sold, does not make the agreement valid, and it is not enforceable. The court remarked that the other creditor or creditors, generally, were interested. *L.R.A. (N.S.)*

ested in the matter. *Meech v. Bennett, Hill & D. Supp.* 191.

Where there is an agreement between the purchaser at a sheriff's sale and the debtor, that the former is to purchase the property and allow the latter to redeem, and, because of these facts becoming known, the purchaser was enabled to bid in the property for less than value, the debtor having become insolvent and unable to redeem, the creditors are entitled to a resale of the property, and the proceeds shall be applied first to the reimbursement of the purchaser at the first sale, and the balance to their claims. *English v. Tomlinson*, 8 Humph. 378.

A judgment debtor whose property was sold to his lessee at a judicial sale, for an inadequate price, is not estopped from attacking the sale by the fact that there was an agreement between his agent and the lessee whereby the latter was to bid in the property for the amount of the judgment, but have the deed made to the agent, who had previously agreed with the judgment debtor to convey to him as soon as the rents had reimbursed the agent for his outlay, the trial court having found that the purchaser made the agreement for the purpose of avoiding competition in the agent's bidding. *Stuart v. Brown*, 135 Ind. 232, 34 N. E. 976.

In *Vannoy v. Martin*, 41 N. C. (6 Ired. Eq.) 169, 51 Am. Dec. 418, where the purchaser at a sheriff's sale had prevented the friends of the debtor from assisting him or bidding, by agreeing with the debtor to allow him to redeem by paying the expenses and certain debts owed to the purchaser, it was held that the purchaser took only the legal title, which he held for security, and further, after the property had been again sold on execution against the purchaser for his debts, the purchasers at the second sale took only such interest as the first purchaser held, whether or not they had notice of the first debtor's equity.

#### d. Where all parties in interest assent.

Where all parties interested agree that one shall bid in the property at a judicial sale at a fixed price, without competition from the others, the sale may be valid. *Hopkins v. Ensign*, 122 N. Y. 144, 9 L.R.A. 731, 25 N. E. 306.

An agreement between the owner of a life

estate in the property on the one part, and all of the creditors on the other part, to the effect that the said owner should bid in the property and give a mortgage thereon to one of the creditors, was substantially such an agreement, at least to the extent that the remainderman could not resist the foreclosure of the mortgage, his remedy, if he has any, being by bill in equity to have the sale set aside. *Ibid.*

In *Fairy v. Kennedy*, 68 S. C. 250, 47 S. E. 138, the court held such a contract valid "for the obvious reason that there is no one left to be defrauded."

*RUIS v. BRANCH* seems to involve such a contract. The contract was made between the attorney for the second lien creditor and the judgment debtor, but the former was also the attorney for the first lien creditor, and the arrangement brought about the payment of her claim in full. So far as is disclosed, these are all the parties interested. Yet the court holds that the agreement was fraudulent; but because the debtor was a party to the fraud, he was held to be estopped from attacking the validity of the sale. To hold that a contract is *per se* fraudulent as against the public, because it belongs to a certain class, even though injury to no one will result if the contract be fully performed, and then to apply the doctrine of estoppel to the party who has been injured by the other's breach of the contract, because he, relying upon the other's good faith, to his own injury, fully performed his duty under the contract, is surely a wrong application of that equitable doctrine. From the cases below cited it will be seen that the overwhelming weight of authority is that such a contract is valid. Some few cases hold that where the contract is verbal, the statute of frauds is a barrier, but even then relief is usually granted by setting aside the sale. Had the plaintiff prayed for specific performance of the contract, as the court seems to indirectly suggest, would not his petition necessarily disclose the so-called fraudulent acts as constituting the consideration?

*Baier v. Berberich*, 6 Mo. App. 537, affirmed in 77 Mo. 413, is very similar in point of facts to *RUIS v. BRANCH*. The plaintiff prayed that the purchaser be declared to be a trustee, but was not able to offer the money necessary to reimburse him. The court, finding that neither the annulment of the sale nor the order of specific performance would do justice to all parties, ordered that the defendant should take the land burdened with a lien in favor of the plaintiff, the amount to be fixed by subtracting the bid from the real value of the land plus costs.

Where there are but three parties interested, two of them owning each a one-third interest in the land, and the other being the execution creditor whose levy covers the two-thirds interest owned by the other two, it was held in *Kell v. Worden*, 110 Ill. 310, that an agreement among the three at the time of the sale, to the effect that the judgment creditor should bid in the property

at a specified sum, the others not bidding, and that the sale should affect only the one-third interest owned by one of the parties, is a valid contract, and that a vendee of the interest thus acquired by the judgment creditor took only the one-third interest affected, as against the owner of the other one-third interest, which was not to be affected by the sale.

A written contract between the execution creditor and a subsequent judgment creditor, that the former will pay the latter's claim on the consideration that he refrain from bidding at the sale, is not invalid if made with the knowledge and consent of the debtor and of the other creditors who would be affected by the suppression of that particular bidder. On a suit for the collection of the judgment according to the agreement, the jury should determine whether or not all the interested parties acquiesced in the agreement. *Maffet v. Ijams*, 103 Pa. 266.

In *Barton v. Benson*, 126 Pa. 431, 12 Am. St. Rep. 883, 17 Atl. 642, a similar agreement was held to be void where it appeared that the contract had not been made known to the heirs of the deceased judgment creditor, even though the value of the property might not equal the amount of the liens. The court points out the distinction between this case and that of *Maffet v. Ijams*, supra, saying that in this case all the parties at interest had not acquiesced in the agreement.

In *Hamburg Mfg. Co. v. Edsall*, 5 N. J. Eq. 249, affirmed at page 658, an agreement among the creditors in writing and a verbal agreement of the owner of nearly all the stock of the corporation as judgment debtor, that the debtor should be allowed to redeem, chilled the bidding by suppressing competition. The purchaser, who bid as agent under the written agreement, was held to be trustee for the stockholder and the other creditors of the corporation.

A judgment creditor, afterward holder of the sheriff's deed in his own name, was, in *Faust v. Haas*, 73 Pa. 295, held to be a trustee *eo maleficio* for the debtor, where the property had been knocked down on the bid of an attorney who was bidding for the debtor under a parol agreement whereby one judgment creditor was to furnish the money, later another judgment creditor agreeing that he would not bid against the attorney if the deed be made to this judgment creditor, and that he be later secured in the amount of his judgment. The deed was made to him and he brought an action to recover possession. All parties interested seemed to have acquiesced in the agreement.

In *O'Kelley v. Gholston*, 89 Ga. 1, 15 S. E. 123, infra, referred to in *RUIS v. BRANCH* as authority, the supreme court does say: "Deterring bidders at a sheriff's sale for the benefit of the defendant, and with his consent, would not vitiate the sale as between him and the purchaser." The agreement there alleged, however, was that the debtor should remain in possession dur-

ing life. The suit was by the debtor's administrators, and there was no allegation of breach of the contract on the part of the purchaser, at least as to part of the land. In such cases most courts hold that the fraud is in the breach of the contract, not in its fulfillment.

**e. Purchase by one and sale to another.**

It has been held that a contract between two prospective bidders at a judicial sale, that one shall refrain from bidding, and the other, after purchasing, shall sell the property to the refraining bidder (at an advance), is illegal as suppressing competition. *Loyd v. Malone*, 23 Ill. 43, 74 Am. Dec. 179; *Mills v. Rogers*, 2 Litt. (Ky.) 217, 13 Am. Dec. 263; *Durfee v. Moran*, 57 Mo. 374; *Hook v. Turner*, 22 Mo. 333; *Whitaker v. Bond*, 63 N. C. 290.

But it has also been held that this rule is not absolute, and that such a contract is not necessarily illegal. *Phippen v. Stickney*, 3 Met. 384; *Kearney v. Taylor*, 15 How. 520, 14 L. ed. 797; *Citizens' Bank v. Ober*, 1 Woods, 80, Fed. Cas. No. 2,731.

If an agreement that one party shall bid in property for another at a sale on distress for rent includes an understanding that anyone shall abstain from bidding, the agreement is void and cannot be enforced. *Brisbane v. Adams*, 3 N. Y. 129.

An agreement between two intending bidders at a guardian's sale, to the effect that only one shall bid and the other shall purchase from him at a slight advance on his bid, is illegal, and the sale to him will be set aside at the instance of the guardian. *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52.

An administrator's sale will, at the suit of the heirs, be set aside where a fair market price was not obtained, on the ground that the bidding was chilled by the purchaser, who induced one bidder to cease bidding by offering him the land at a slight advance, and another by offering to sell him a desired portion of the land at the same rate per acre as should be paid for the whole piece. *Ingalls v. Rowell*, 149 Ill. 163, 36 N. E. 1016.

**f. Purchase for joint benefit.**

As to validity and effect of an agreement to purchase property at judicial sale for joint benefit, see note in 38 L.R.A.(N.S.) 719.

**g. Contract for sale of bid.**

A contract to sell the bid or interest of the successful bidder at a judicial sale, before its confirmation, for more than the amount bid, is illegal as suppressing competition, unless the advance on the bid inures to the benefit of the parties to the suit, and such a contract cannot be enforced. *Camp v. Bruce*, 96 Va. 521, 43 L.R.A. 146, 70 Am. St. Rep. 873, 31 S. E. 901. It would seem in this case, however, that the bid was not a final one until confirmed, since the practice of making upset bids was allowable. 42 L.R.A.(N.S.)

The court will not confirm a sale on such a bid if it knows the facts. *Holder v. Ruffin*, Tamlyn, 341, 31 Revised Rep. 104.

In *Nitro-Phosphate Syndicate v. Johnson*, 100 Va. 774, 42 S. E. 995, the court quoted with approval from *Camp v. Bruce*, *supra*, but holds that the proof of such an agreement on the part of the bidder in this particular case was insufficient, and for that reason refuses to set the sale aside.

Where the purchaser, acting in collusion with the debtor, who was insolvent, bought off a higher bid, so that his own would be accepted, it was held that the creditors who were thereby defrauded might recover damages. *Jacobs v. Ransom*, Montreal L. Rep. 5 Q. B. 260.

**h. Bidding as agent.**

Bidding at a judicial sale may properly be done by one person as agent for another, and this does not suppress competition. *Quigley v. Breckinridge*, 180 Ill. 627, 54 N. E. 580; *Ingalls v. Rowell*, 149 Ill. 163, 36 N. E. 1016; *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120.

**IV. Conspiracy to suppress competition as ground for avoiding the sale.**

A judicial sale will be set aside at the instance of the party defrauded, where the purchaser conspires with others to prevent free competition, and accomplishes the purpose, thereby obtaining the property for less than its value. *Fleming v. Hutchinson*, 36 Iowa, 519; *Wooton v. Hinkle*, 20 Mo. 290; *Martin v. Ranlett*, 5 Rich. L. 541, 57 Am. Dec. 770; *Fuller v. Abrahams*, 6 J. B. Moore, 316, 3 Brod. & B. 116, 23 Revised Rep. 626; *Mills v. Rogers*, 2 Litt. (Ky.) 217, 13 Am. Dec. 263; *Underwood v. McVeigh*, 23 Gratt. 409; *Black v. Bayless*, 86 N. C. 527; *Spencer v. Champion*, 13 Conn. 11; *Stovall v. Farmers' & M. Bank*, 8 Smedes & M. 305, 47 Am. Dec. 85.

Where the execution was against the administrator and heirs, the administrator conspiring with the purchaser to suppress bidding, and profit by the low prices, the sale was set aside. *Barbour v. Morris*, 6 B. Mon. 120.

In *Easton v. Mawkinney*, 37 Iowa, 601, a tax sale was held to be void on the ground of unlawful combination of bidders preventing competition, where the bidders formed a ring, and each in his turn bid in a piece or tract without competition from the others. The same principle is affirmed in *Crumb v. Davis*, 54 Iowa, 25, 6 N. W. 53; *Kerwer v. Allen*, 31 Iowa, 578.

Where several persons at a commissioner's sale conspired together not to bid against each other, and promised others to sell them parts of the lands, and in other ways chilled the bidding, and the land was sold for less than its full value, the sale should not be confirmed by the court. *Swofford v. Garmon*, 51 Miss. 348.

A purchaser guilty of a conspiracy to keep others from the sheriff's sale, or to prevent them from bidding, takes no title

whatever by his deed, and a judgment creditor who innocently accepts his part of the purchase money from such a sale is not thereby estopped from setting up the fraud to defeat the purchaser's title. *Foulk v. McFarlane*, 1 Watts & S. 297, 37 Am. Dec. 467.

Where competition in bidding is suppressed at a sheriff's sale of personal property, by the fraud of the execution creditor, who becomes the purchaser, the sale passes no title as against subsequent execution creditors, even though the defendant in execution consented. *McMichael v. McDermott*, 17 Pa. 353, 55 Am. Dec. 560.

A sale of personal property to the execution creditor is void as against other creditors having a subsequent levy, where the sale was upon five days' notice (the statute requiring six) by agreement between the purchaser and the debtor, for such an agreement is fraudulent as to other creditors. *Gibbs v. Neely*, 7 Watts, 305. The presence of the junior creditor at the sale did not cure the defect, since shortening the time of the notice to the public would naturally suppress competition. *Ibid*.

Where a judgment creditor, with the knowledge and consent of the debtor, issues an execution ordering a sale for specie only, and the sheriff, apparently in the conspiracy, advertises the sale so as to lead the public to expect that paper money will be accepted, and then refuses anything but specie at the sale, and sells the property for one third of the amount that is offered in paper, the sale is void as to other creditors, even though the purchaser denies all knowledge of the fraud. *Farr v. Sims*, Rich. Eq. Cas. 122, 24 Am. Dec. 396.

Where the purchaser and others conspired with the attorney for the judgment creditor, so as to have valuable property sold at sheriff's sale without notice to the owner for a very inadequate price, the sale will be set aside, even though there have been leases, sales, and mortgages made thereon after the sale, if it appears that these are not bona fide, but made simply to give the appearance of bona fide transactions. *Bruce v. Kelly*, 7 Jones & S. 39.

And where competition was suppressed by a conspiracy between the purchaser and another, by means of a fraudulent bill of sale, because of which the sheriff was forbidden to sell, the sale was set aside. *Rowe v. Cockrell*, Bail. Eq. 126.

The sheriff's sale of a corporation's property will be set aside as fraudulent where the officers and a few bondholders enter into a conspiracy to sell out the corporation's property at sheriff's sale, and buy it at a sacrifice, and actually accomplish the purpose by suppressing the bidding. *Jackson v. Ludeling*, 21 Wall. 616, 22 L. ed. 492.

In *Hurst v. Fisher*, 64 Ohio St. 530, 60 N. E. 626, where the purchaser of land at a sheriff's sale had been one of the appraisers at the time of making an appraisal, and intending to bid, made an agreement with another prospective bidder to share the purchase with him, endeavored to and prob-

ably did prevent others from bidding, and bid in the property for less than full value, the sale was set aside.

In *Mapps v. Sharpe*, 32 Ill. 13, a sheriff's sale on mortgage foreclosure was set aside, where it appeared that a second mortgagee had procured an injunction against the first mortgagee to prevent him from selling the part of the land covered by both mortgages until he had exhausted that covered only by the first mortgage, and a few minutes before the sale the two mortgagees had agreed that the injunction should be dismissed, and the second mortgagee should bid in the land, which was done at an inadequate price. This action surprised the defendant and other bidders, thus suppressing competition, and was unfair to the mortgagor, who was not a party to the agreement.

Where personal property is sold at a judicial sale in one state, and removed by the purchaser to another state, the courts of the latter state have jurisdiction to set the sale aside because of a conspiracy to suppress competition in the bidding. *White v. Trotter*, 14 Smedes & M. 30, 53 Am. Dec. 112.

#### V. Collateral attack.

It has been held that a sheriff's sale of real estate, where the purchaser suppressed competition, cannot be collaterally attacked in an action at law. Such a sale is at most only voidable by action in equity at the suit of the injured party. *Crews v. First Nat. Bank*, 77 N. C. 110; *Hill v. Whitfield*, 48 N. C. (3 Jones, L.) 120.

#### VI. Effect of statements or conduct of purchaser at sale, which had a tendency to chill bidding.

##### a. False statements.

A false statement made by the purchaser to the attorney of an interested party, to the effect that the sheriff's sale would not be held that day, for the purpose of preventing, and which actually does prevent, the attorney from attending the sale in the interest of his client, will, when coupled with other fraudulent collusions between the purchaser and the sheriff, chilling competition, and with gross inadequacy in the selling price, be sufficient cause for setting aside the sale at the instance of the party defrauded. *Dutcher v. Leake*, 44 Ill. 398.

It was further held in the above case that the party who made the false statement causing the deed to be made in the name of his brother, who paid nothing, was either the real purchaser or was in collusion with him, and in either case the brother was held not to be a bona fide purchaser.

And in *Peebles v. Reading*, 8 Serg. & R. 492, it is said: "If, by artifice of the purchaser declaring he was buying for the owner, others were prevented from bidding, and the land was sold at great undervalue, this would make him a trustee."

Where a bidder makes false representa-

tions to deter bidders at a judicial sale, and is successful, obtaining the property for less than fair value, the sale is voidable at the suit of the injured party. *Vantrees v. Hyatt*, 5 Ind. 487; *Lynch v. Reese*, 97 Ind. 360; *Stewart v. Nelson*, 25 Mo. 309; *Liles v. Rhodes*, 7 La. 87; *Bethel v. Sharp*, 25 Ill. 173, 76 Am. Dec. 790; *Jackson v. Morter*, 82 Pa. 291.

A judicial sale will be set aside at the cost of the purchaser, where the judgment and all the costs, except a small fee for the master has been paid, and the purchaser induced the debtor not to attend the sale by a promise to see the master and pay the fee, but in reality induced the master to sell, and then bid in the property at a shockingly low price. *Slocum v. Glass*, 3 How. Pr. 178.

And it was held in *McLeod v. Bullard*, 84 N. C. 515, that where the purchaser suppressed competition at the sheriff's sale by stating that he was purchasing for the benefit of the judgment debtor, or allowed others to make the statement without contradiction from him, the sheriff's deed to him was voidable at the suit of the judgment debtor.

And the same principle is sustained in *Stewart v. Severance*, 43 Mo. 322, 37 Am. Dec. 392; *McNew v. Booth*, 42 Mo. 189; *Toole v. Johnson*, 61 S. C. 34, 39 S. E. 254; *Bethel v. Sharp*, 25 Ill. 173, 76 Am. Dec. 790.

In an action to set aside a sheriff's sale because of the purchaser's suppression of the bidding by false statements, it is necessary to allege that the property was sold for less than a fair value. *Lynch v. Reese*, 97 Ind. 360.

A statement made at a judicial sale by the judgment creditor, to the effect that he was bidding for the purpose of allowing the defendant to redeem, is a sufficient suppression of competition to invalidate the sale at the suit of the judgment debtor, if the creditor secures the property at an inadequate price and refuses to allow the debtor to redeem. *Forelander v. Hicks*, 6 Ind. 448.

And in *Hill v. Whitfield*, 48 N. C. (3 Jones, L.) 120, the court states that, had the action been in equity instead of at law, the purchaser would have been treated as a trustee, where he had suppressed competition at a judicial sale by publicly stating that he was purchasing for the defendant, and was only forcing the sale to bring the defendant to a settlement, but that he would not take the land from him.

False statements by the purchaser at a judicial sale, to the effect that he is bidding to save the indorsers, that the lands are being sold subject to encumbrances, and that parts of the land have very little value, for the purpose of suppressing competition, are sufficient to set the sale aside where the price is inadequate. *Grant v. Lloyd*, 12 Smedes & M. 191.

Where the plaintiff in a foreclosure proceeding purchases the property for less than value, the sale should be set aside, if it appears that the reasonable request of the

owner of the property as to the time of the sale and the order in which the parcels should be offered (it appeared evident that no harm could come from complying with the request, and good might result therefrom) was refused; also that statements were made by one who would benefit by the plaintiff's purchase, which would naturally have the effect of chilling the bidding, although they probably were not made for that purpose. *King v. Platt*, 37 N. Y. 155, 35 How. Pr. 23.

Where a purchaser makes false statements to the effect that he is bidding at a sheriff's sale with the understanding with the defendant that the latter will be allowed to redeem, with the intention of suppressing competition, and by this means enables himself to get the land for less than its value, and for less than it would have brought at a fair sale, no title whatever passes to him by the sheriff's deed. *Hogg v. Wilkins*, 1 Grant, Cas. 67.

It was further held in the above case, that if the representations were true, and he made them with no design but that of informing his neighbor of the existing fact, he was guilty of no fraud, and his title was good; and that, if he later changed his mind and refused to fulfil his agreement, equity, because of the statute of frauds, would not compel him to do so.

It was held in *Gilbert v. Hoffman*, 2 Watts, 66, 26 Am. Dec. 103, that where a purchaser at a sheriff's sale fraudulently and falsely misrepresented the quality and condition of the land so as to enable him to obtain it at a low price, the sheriff's deed to him was absolutely void, and that the injured party need not tender him the purchase money or pay the same into court before bringing action.

And the same was held to be the rule where the purchaser had secured the property at a price below its value by falsely representing at the sheriff's sale that he was purchasing for the debtor, and that the sale was subject to former liens which the purchaser would have to pay. *McCaskay v. Graff*, 23 Pa. 321, 62 Am. Dec. 336.

In *Sharp v. Long*, 28 Pa. 439, the court approves the doctrine that where one about to bid at a sheriff's sale falsely represents that he is purchasing for the benefit of the debtor, thus suppressing competition by creating sympathy, and by that means gets the property for less than its value, the sale is void, and may be set aside at the suit of the debtor without an offer to reimburse the purchaser for his outlay.

Where the defendant in a judgment which is being sold on execution sale suppresses competition by representing that the judgment is worthless, and then has an agent purchase the same below its face value, the sale will be set aside. *Eastin v. Dugat*, 10 La. 187, 29 Am. Dec. 461.

And where the purchaser of personal property at a sheriff's sale falsely states that he is purchasing the property for the use of defendant, as an act of benevolence, and thereby secures it at less than value,



the sale is void as against subsequent execution creditors. *Walter v. Gernant*, 13 Pa. 515, 53 Am. Dec. 491.

Where the holder of a bond secured by a mortgage enters judgment on the bond, issues execution thereon, exhibits his mortgage at the sale, and states that the sale is only to complete title, thus creating the erroneous impression that only the mortgagor's equity of redemption is being sold, and then bids in the property at a sacrifice, it is held in *Martin v. Ranlett*, 5 Rich. L. 541, 57 Am. Dec. 770, that a verdict of a jury finding fraud should not be disturbed.

In *Martin v. Blight*, 4 J. J. Marsh. 491, 20 Am. Dec. 226, where the purchaser at a sheriff's sale had kept a bidder away by agreeing to act as his agent in bidding at the sale, but repudiated his agency at the sale, and publicly stated that he would sell to the debtor at very low prices, thus further chilling the bidding, it was held that the sale would be set aside at the suit of the debtor.

And in the same case, it was held that if the eliminated bidder had been engaged by the debtor to bid for him, and, the debtor, knowing that the purchaser was to be the actual bidder, had deposited some funds with him to apply on the purchase, and was himself absent from the sale, this was all the more reason that relief should be granted to the debtor.

A sheriff's sale of property for an inadequate price, to a purchaser who made an unauthorized statement at the sale regarding liens upon the property, will be set aside at the instance of the creditor. *Wood v. Hennen*, 9 La. Ann. 264.

And equity will relieve one whose land was purchased at a tax sale for the amount of the judgment and costs, where the purchaser discouraged bidding by asserting that he knew the owner, and that the land would be redeemed. *Slater v. Maxwell*, 6 Wall. 268, 18 L. ed. 796.

In *Cocks v. Izard*, 7 Wall. 559, 10 L. ed. 275, a tenant who attended the judicial sale of his landlord's property in the absence of and without the knowledge of the latter, chilled the bidding by declaring that he was purchasing for the landlord, and bought the property for a very inadequate price, was held to hold the title in trust for the landlord.

False statements that depress the bidding at a sheriff's sale, and cause the property to sell for less than value, even if made by a stranger, ought not to be allowed to injure the party entitled to the balance of the proceeds; but if it appears that the statements were made by the authority of, or were acquiesced in by, the latter party, she cannot complain. *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398, 35 S. E. 92.

And where the purchaser at a sheriff's sale falsely represents to a prospective bidder that he is bidding for the same party for whom the other intended to bid, and thus keeps the other from bidding, and gets the property for a very inadequate price, 42 L.R.A. (N.S.)

the sale will be set aside. *Allen v. Stephanes*, 18 Tex. 658.

But where the purchaser (the son-in-law of the judgment debtor) falsely represented to an attorney for the execution creditor, that he was purchasing for the use of the judgment debtor, and thereby secured time in which to pay part of the purchase money, it was held in *Gilbert v. Carter*, 10 Ind. 16, 68 Am. Dec. 655, that, since the representation was made only to the attorney, who would probably not have bid above the amount of the judgment, and the bid of the purchaser was for that amount, the sale was valid, and did not come within the rule that invalidates a sale because of false representations made to chill the bidding.

And it was further held that since the sale was valid, and no agreement was shown between the purchaser and the judgment debtor based upon a valid consideration, there was no trust, either express or implied, for the benefit of the latter. *Ibid*.

Where a purchaser at a judicial sale confidentially told one prospective bidder that he was bidding to allow the owner to redeem, but the property sold for a reasonably good price, and it is not shown that the person so told would have bid more, equity will not declare a trust in favor of the debtor, at least where he does not offer to reimburse the purchaser for his outlay and improvements. *Crutchfield v. Thurman*, 4 Bush, 498.

It was held in *Hill v. Whitfield*, 48 N. C. (3 Jones, L.) 120, that fraud on the part of the purchaser in suppressing competition at a judicial sale could not be pleaded as a defense in an action of ejectment for the land, such a plea being cognizable only in equity, and not in actions at law.

It was held in *Carson v. Law*, 2 Rich. Eq. 296, that a sheriff's sale of real estate would not be set aside on the ground that the purchaser, who was also a judgment creditor, had announced at the sale that whoever bought would have to pay cash, especially where it was not shown that this had any effect upon the bidding.

#### *b. True statements.*

True statements without any concealment of facts, made by the mortgagor, who becomes the purchaser, at the master's sale on foreclosure, to the effect that she is a widow, dependent on the land for support, and that she intends to bid, will require the sale to be set aside, at the suit of the mortgagee's receiver, if bidding was actually chilled. *Herndon v. Gibson*, 38 S. C. 357, 20 L.R.A. 545, 37 Am. St. Rep. 765, 17 S. E. 145.

And in *Whitaker v. Bond*, 63 N. C. 290, a similar statement by the purchaser at a trustee's sale was one of the grounds upon which the court decided the sale to be invalid.

A sheriff's sale of land is voidable where the purchaser, who was execution creditor and son of the deceased debtor, before and at the time of the sale, privately urged oth-

er persons to refrain from bidding on his account, and bought the property for less than value, to the detriment of the minor heir. *Re Davis*, 17 Grant, Ch. (U. C.) 603.

A statement made by the purchaser's agent when bidding at the sheriff's sale, to the effect that the property was being purchased for the debtor's wife and children, who had been deserted and were in want, was held in *Bunts v. Cole*, 7 Blackf. 265, 41 Am. Dec. 226, to be sufficient to set the sale aside at the instance of the debtor, where competition was actually suppressed and the price was inadequate, no matter how humane were the motives of the purchaser.

And in *Carson v. Law*, 2 Rich. Eq. 296, a sheriff's sale of nine slaves was set aside at the instance of the judgment creditors whose judgments were not reached, on the ground that the purchaser had chilled the bidding and bought the property at less than value, by truthfully stating at the time of making his bid that he would pay \$1,000 for them and send them back to the wife of the debtor. See also *Aldrich v. Wilcox*, 10 R. I. 410.

Where bidding at a judicial sale of personal property is chilled, and the property sold for less than value, by the truthful representations of the purchaser that he intends to allow the debtor to redeem, the creditors are entitled to a decree subjecting the property to resale, that they may apply to their claims the excess brought by the resale over the amount necessary to reimburse the purchaser at the first sale. *English v. Tomlinson*, 8 Humph. 378.

And in *Bank of Alexandria v. Taylor*, 5 Cranch, C. C. 314, Fed. Cas. No. 854, the court refused to confirm a sale, and ordered it to be set aside, where it was shown that the purchaser had announced that he was buying the property for the heirs of the mortgagor, and that he had bid in property worth \$2,000 for \$1,510, the bystanders refusing to bid after this announcement.

Where a purchaser had addressed the company present at an execution sale, stating that he had a claim against, and had been ill-used, by the debtor, and had thus induced them to refrain from bidding, he and a friend becoming the only bidders, the sale passed absolutely no title to him. *Fuller v. Abrahams*, 3 Brod. & B. 116, 6 J. B. Moore, 316, 23 Revised Rep. 626.

An announcement made with the consent of the defendant, by the purchaser at a sheriff's sale when making his bid, that the aged defendant would be allowed to use the land during his life, and that the bid was thus made for the defendant's benefit, does not vitiate the sale as between the defendant or his administrator and the purchaser. *O'Kelley v. Gholston*, 89 Ga. 1, 15 S. E. 123. But the court stated that it would be otherwise if the defendant were mentally incapable of giving his consent or approving the statements made by the purchaser.

And the fact that bidders were deterred from bidding for the property of a street railway company on mortgage foreclosure, by knowledge of the fact that the mortgage

bondholders had authorized a committee to bid up to but not over a certain amount, is no ground for setting aside the sale, even before confirmation. *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 54 Fed. 26.

A judgment creditor selling real estate on execution may state facts regarding defects in the title, but he has no right to express an opinion to the effect that the debtor has no title, and that the purchaser will take no title, etc. Where he pursues the latter course, the sale will be enjoined until the question of title may be determined. *Brady v. Carteret Realty Co.* 67 N. J. Eq. 641, 110 Am. St. Rep. 502, 60 Atl. 938, 3 Ann. Cas. 421.

Where the execution creditors discredit the title at a sheriff's sale of property, and the property is sold for an inadequate price, the sale will be set aside. *Wood v. Drury*, 56 Kan. 409, 43 Pac. 783.

But it has been held that where the purchaser at a judicial sale truthfully states that he is buying the property for the debtor or his family, and others refrain from bidding out of sympathy, the purchaser is not guilty of any fraud, and he takes a good title. *Dick v. Cooper*, 24 Pa. 217, 64 Am. Dec. 652; *Hogg v. Wilkins*, 1 Grant, Cas. 67; *Oram v. Rothermel*, 98 Pa. 300.

One may not depress the bidding at a judicial sale by giving notice of the lien he claims against the property, and then become the purchaser at an undervalue. In such case the sale will be set aside. *Coffey v. Coffey*, 16 Ill. 141; *Stoker v. Greenup*, 18 Ill. 27. In the latter case the sale was made to the deputy sheriff for fees, and later the property was sold to the claimant of the lien. This was held to be an additional ground for setting aside the sale.

Where a party announced at a sheriff's sale that she claims a lien on the property, for the purpose of preventing her claim from being prejudiced, she is not liable for damages because the announcement chilled the bidding and caused the property to sell below value. *Reed v. Hardeman*, — Tex. —, 5 S. W. 505.

And it is not an illegal chilling of the bidding for the wife of the judgment debtor to announce, at the sheriff's sale of real estate being sold as her husband's property, that she holds a deed to the same, which fact is disclosed by the record. *Leake v. Anderson*, 43 S. C. 448, 21 S. E. 439.

Where a purchaser at a judicial sale truthfully represents that he has agreed to allow the judgment debtor to redeem, suppressing competition in that way and securing the property at less than a fair price, equity will compel him to fulfil his agreement with the debtor, even though the contract is verbal and he pleads the statute of frauds in defense. The purchaser is held to be a trustee for those whose interests have been sacrificed. *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Brown v. Lynch*, 1 Paige, 147; *Cox v. Cox*, 5 Rich. Eq. 365; *Keith v. Purvis*, 4 Desauss. Eq. 114; *Trapnall v. Brown*, 19 Ark. 49; *Kinard v. Hiers*, 3 Rich. Eq. 423, 55 Am. Dec. 643 (*Combs v.*

Little, 4 N. J. Eq. 310, 40 Am. Dec. 207. In this case the statute of frauds does not seem to have been pleaded; Brown v. Dy-singer, 1 Rawle, 408; Seylar v. Carson, 69 Pa. 86; Baier v. Berberich, 6 Mo. App. 537, affirmed in 77 Mo. 413; Rich v. Marsh, 39 N. C. (4 Ired. Eq.) 396, 45 Am. Dec. 520.

And in Griffith v. Judge, 49 Mo. 536, where similar representations chilled the bidding, it was held that if they were true, the purchaser was a trustee for the debtor: but if they were not true, the sale should be set aside.

In Sharp v. Long, 28 Pa. 433, the court says that under such circumstances the purchaser might be held to be a trustee for the debtor, but no recovery could be had against him without reimbursement, and that action would have to be brought within a reasonable time; but it was held that the purchaser's declaration after the sale, that he bought the property to provide a home for the debtor, was not alone sufficient to establish a trust.

Public announcement that an execution sale is being held to perfect title to the land and secure indorsers does not render a contract between the judgment debtor and the indorsers illegal, which provided that the property should be sold at a nominal sum to the indorser, who should resell at private sale to pay the note upon which he was liable, even though the debtor may have had other debts; and the indorser, after having so acquired the property and sold it again, will be compelled, at the instance of the debtor, to apply the proceeds in accord with the agreement. White v. Crew, 16 Ga. 416.

### *c. Conduct of purchaser at sale.*

A judicial sale will be set aside where the purchaser by any device, or by concealment of facts when he ought to speak, had prevented competition by keeping parties interested away from the sale. Francis v. Church, Clarke, Ch. 475.

A bidder at a sheriff's sale, having knowledge of the invalidity of prior encumbrances subject to which the property is being sold, will invalidate a sale at an inadequate price to himself, by doing anything, however slight, to prevent others interested from discovering the facts or from being put upon inquiry. Barrett v. Bath Paper Co. 13 S. C. 128.

But, as a general rule, a purchaser at a judicial sale is not bound to disclose facts within his knowledge which make the property much more valuable than the vendor or the public believe it to be. A sale for an inadequate price will not be set aside because he did not speak, unless it be shown that conditions and circumstances made it his duty to speak. Files v. Brown, 59 C. C. A. 403, 124 Fed. 133.

But if a purchaser makes false representations regarding the value of the property, thus concealing facts known to him, and not 42 L.R.A. (N.S.)

to others, the sale should be set aside. Merchants' Bank v. Campbell, 75 Va. 455.

Where the sheriff announces that he is selling property subject to prior liens which greatly reduce the value, all interested in the sale have a right to expect the attorney for the execution creditors to state that the liens referred to are invalid, where he knows that to be the fact, and if he bids in the property for other clients at an inadequate price, under a secret arrangement to pay the execution creditors in full, his silence, when he should have spoken, is sufficient to cause the sale to be set aside at the suit of any injured party. Barrett v. Bath Paper Co. supra.

In Carter v. Harris, 4 Rand. (Va.) 199, a sheriff's sale for less than the value of the property was set aside for several reasons combined, among which was the fact that the purchaser had allowed it to become the impression that he was bidding in order to allow the debtor to redeem.

And an execution sale was, in Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271, at the suit of the creditors, held to be void, even as against a subsequent purchaser with notice, where bidding was prevented by the debtor's request, and the property was bought for him at a low figure.

And in Rodgers v. Rodgers, 13 Grant, Ch. (U. C.) 143, where the son of a decedent, at a judicial sale of the decedent's property, under a secret agreement with the real purchaser, bid in the property at a very low price, others being deterred from bidding against him because of his relationship to the decedent, the court refused to enforce the sale.

In Fenner v. Tucker, 6 R. I. 551, a sale under power in a mortgage was set aside. One of the grounds for the decision was that the purchaser expostulated with a bidder, telling him that he, the purchaser, had lost heavily by the debtor, and urged the bidder not to bid. Whereupon the bidder ceased bidding, and the purchaser secured the property for much less than the bidder intended to bid.

### *VII. Statements and conduct of officer conducting sale as ground for avoiding sale.*

Any action of the auctioneer at a judicial sale that misleads bidders and thereby suppresses competition is sufficient ground for setting the sale aside. Lents v. Craig, 13 How. Pr. 72; Collier v. Whipple, 13 Wend. 224; Marsh v. Ridgway, 18 Abb. Pr. 262; May v. May, 11 Paige, 201; Newman v. Meek, Freem. Ch. (Miss.) 441; Pearson v. Moreland, 7 Smedes & M. 609, 45 Am. Dec. 319; Hopton v. Swan, 50 Miss. 545.

Where the sheriff incorrectly represents at the sale that the mortgage under which he was selling covered all of the property, and that another execution was a prior lien, it was held in Reed v. Diven, 7 Ind. 189, that the sale would be set aside at the in-

stance of the judgment debtor, whether or not the sheriff knew of the falsity of the representation, since the effect would be to chill the bidding in either event.

And it is improper for a sheriff to announce at his sale that he is selling only a conditional estate, which might be redeemed within a year. This announcement, although true, tends to chill the bidding. *Ewald v. Coleman*, 19 Ind. 66.

A statement that the land is being sold subject to be redeemed in one year, under a statute afterwards held inoperative, made by the sheriff at the sale with the effect that the property sold for one third of its value, is sufficient to invalidate the sale at the suit of the debtor. *Seller v. Lingerman*, 24 Ind. 264.

Where an administrator refuses to sell in the most advantageous way, makes statements calculated to suppress bidding, and has the property purchased for himself, the sale will be set aside at the instance of the administrator *de bonis non*. *Forniquet v. Forstall*, 34 Miss. 87.

Where the unwise action of a referee selling property at a judicial sale misled the agent of a party interested, so that he did not know the sale was going on, the sale should be set aside, although it is not certain that the referee acted with improper motives, the creditor having purchased the property at less than value. *Kellogg v. Howell*, 62 Barb. 280.

In *Marsh v. Ridgway*, 18 Abb. Pr. 262, the sheriff, selling under judgment of foreclosure, gave notice that the purchaser bid at his own hazard as to title. There was no evidence of defect in the title. It was held that this announcement was likely to cast suspicion on the title and depress the bidding, and the sale was set aside on motion of the defendant.

A statement honestly made by an officer conducting a judicial sale, that he is selling only the equity of redemption, showing the amount of the mortgages, when the amount was much less, and in fact the mortgages referred to were invalid, is sufficient ground for setting aside the sale, when the statement chilled the bidding and the property sold for a very inadequate price. *Barrett v. Bath Paper Co.* 13 S. C. 128.

Where a sale, because of the active agency of the execution creditor, is not well advertised, bidding thereby suppressed, and the property sold at an immense sacrifice to the execution creditor, the sale should be set aside. *Stockton v. Owings*, Litt. Sel. Cas. (Ky.) 256, 12 Am. Dec. 302.

And in the sale of personal property under execution, the sale is voidable if the officer does not designate distinctly just what property he is selling, and competition is thereby chilled by uncertainty in the minds of the bidders. *Jones v. Portsmouth & C. R. Co.* 32 N. H. 544; *Warring v. Loomis*, 4 Barb. 484; *Sheldon v. Soper*, 14 Johns. 352; *Bostick v. Keizer*, 4 J. J. Marsh. 597, 20 Am. Dec. 237; *Hazzard v. Burton*, 4 Harr. (Del.) 62.  
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And where the referee promised the attorney for the debtor to adjourn a sale of property for ten days, but on the day appointed refused to do so, and sold in the absence of the defendant and his attorney, the sale was set aside without prejudice to the innocent purchaser. *Angel v. Clark*, 21 App. Div. 339, 47 N. Y. Supp. 731.

And an officer conducting a judicial sale may not so use his power of demanding payment in specie as to suppress competition in the bidding. If he does so, the sale will be set aside. *Baring v. Moore*, 5 Paige, 48; *Anthony v. Hutchins*, 10 R. I. 169; *Farr v. Sims*, Rich. Eq. Cas. 122, 24 Am. Dec. 396; *Goldsmith v. Osborne*, 1 Edw. Ch. 560; *Penn v. Tolleson*, 20 Ark. 652; *Koop v. Burris*, 95 Wis. 301, 70 N. W. 473.

And in *Neilson v. M'Donald*, 6 Johns. Ch. 201, demanding specie was considered part of a conspiracy to use a judicial process for the purposes of extortion.

And where the sheriff had, prior to the sale of real estate, made statements which led prospective bidders to believe that full cash payment would not be demanded at once, and then, at the direction of the judgment creditor, demanded full cash payment, selling the property to the judgment creditor for less than his claim and for less than others would have given, it was not an abuse of discretion for the court to set aside the sale and order a resale on the motion of the debtor. *Koop v. Burris*, 95 Wis. 301, 70 N. W. 473.

In *Goldsmith v. Osborne*, 1 Edw. Ch. 560, where the officer, at the request of the mortgagee, demanded specie and other unfair conditions at his foreclosure sale, thus depressing the bidding, and the mortgagee secured the property at a low price, the sale was held to be void, and the purchaser treated simply as a mortgagee.

And it has been held that a party who has been injured by the mistake of the officer holding a judicial sale can have relief by a summary application to the court, or through the medium of a court of equity. *Jackson ex dem. Webb v. Roberts*, 7 Wend. 83; *Groff v. Jones*, 6 Wend. 522, 22 Am. Dec. 545; *Aldrich v. Wilcox*, 10 R. I. 410.

Where a mistake in the date of the sale on the part of the debtor, without any fault on his part, resulted in a sale for an inadequate price, the judicial sale was set aside. *Hintze v. Stingel*, 1 Md. Ch. 283; *Williamson v. Dale*, 3 Johns. Ch. 290.

In *United Security Life & T. Co. v. Safford*, 3 Läck. Leg. News, 51, a postponed sheriff's sale of property to the second lien creditor for merely a nominal sum, to the great injury of the first lien creditor, was set aside on the latter's petition, alleging that he had been and was willing to bid the amount of his claim, but did not attend the sale because he understood and believed, from information which he received, that the postponement was indefinite.

In *Campbell v. Gardner*, 11 N. J. Eq. 423, 69 Am. Dec. 598, where the mortgagor was an aged woman having no one upon whom

she could rely with confidence, and the service of the summons in foreclosure was wholly misunderstood by her, causing her to be absent from the sale, in consequence of which the bidding was suppressed and the mortgagee purchased the property for one fourth of its value, the court granted relief by ordering a conveyance to her upon her paying all of the costs and expenses, although it was shown that the sale was regular and the service of the summons was made as required by law.

And in *Kloeping v. Stellmacher*, 21 N. J. Eq. 328, the court held that "a court of equity will set aside a sheriff's sale, even if there has been no fraud, where there is gross inadequacy of price, and the parties, by reason of mistake or misapprehension, did not attend the sale, and the sacrifice was caused by such mistake or misapprehension." The court cites *Seaman v. Riggins*, 2 N. J. Eq. 214, 34 Am. Dec. 200; *Howell v. Hester*, 4 N. J. Eq. 266, as authority for the proposition.

A sheriff may receive a bid at a judicial sale over the telephone, provided he makes public outcry of the bid at the place of sale, before striking off the property to the bidder. *Victor Invest. Co. v. Roerig*, — Colo. App. —, 124 Pac. 349.

Or a bid by letter is legal if it receives the same treatment as an oral bid, i. e., it must be announced and an opportunity given for advances on the bid. *Dickerman v. Burgess*, 20 Ill. 266.

Or a party may leave an oral bid with the sheriff, provided no discretion to bid more or less is given to the sheriff, and the sheriff must publicly cry the bid. *Brannin v. Broadus*, 94 Ky. 33, 21 S. W. 344; *Scott v. Mann*, 36 Tex. 157; *Wenner v. Thornton*, 98 Ill. 166.

But even in the absence of statute, the sheriff may not bid for himself at his own sale. *Stapp v. Toler*, 3 Bibb, 450.

A sale to the sheriff who is conducting the sale will be set aside where there is evidence of unfairness and the property is sold for less than value. *Carter v. Harris*, 4 Rand. (Va.) 199.

And it seems that he may not bid for another where he has discretion as to the amount of the bid. *Dixon v. Sharp*, 1 A. K. Marsh. 211.

Where the auctioneer, acting for the officer of the law and in his presence, at a judicial sale of personal property, used language which might have been intended to deter bidders, and might have so deterred them, and then knocked down the property on his own bid, it being the only bid he could get, and being very greatly below the value of the property, it was held in *Brotherline v. Swires*, 48 Pa. 69, that the court could not hold as a matter of law that there had been fraud, but that it was a question of fact for the jury. The court said that if the marshal had not been present, a sale to the auctioneer would have been *per se* void.

J. W. M.

## NEBRASKA SUPREME COURT.

VALPARAISO STATE BANK, Appt.,  
v.  
CHRISTIAN J. SCHWARTZ et al.

(— Neb. —, 138 N. W. 757.)

### Contract — for support — assignment.

1. The contract of husband and wife to support his father in their family and furnish him with \$50 per year during his life is a personal contract, and the rights of the father under the contract cannot be subjected by a court of equity to the payment of a judgment against him.

### Deed — for support — right of creditor.

2. In such case, if the consideration for the contract on the part of the father was the conveyance of his homestead of the value of \$3,000, which is exchanged for a home for the husband and wife, upon which the father retains a lien to secure the performance of the contract, the father's interest in the property so conveyed to the husband and wife will not be subjected to the payment of a judgment upon an indebtedness incurred after the transfer of the property to the husband and wife.

### Homestead — extent — other exemptions.

3. The homestead of a family may be taken in property of either the husband or wife; and if their home is owned by them equally as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt.

### Fraud — transfer to hinder creditors — setting aside.

4. If the husband and wife own two town lots equally as tenants in common and reside on one of them as their home which is of the full value of the homestead exemption, the undivided one-half interest of the husband in the other lot will not be exempt from a judgment against him. The transfer by him of such interest to his wife without consideration, to hinder or delay his creditors, will be set aside as fraudulent.

(November 27, 1912.)

Headnotes by SEDGWICK, J.

*Note.* — Right to subject debtor's interest under a contract for his support to the claims of creditors.

It will be observed that the point decided *VALPARAISO STATE BANK v. SCHWARTZ* and suggested by the above title is distinct from the questions in relation to spendthrift trusts, and also from the question whether a conveyance of property in consideration of future support is fraudulent as to creditors.

No other case exactly in point has been discovered. In *McAttee v. McAttee*, 116 Ill. App. 511, however, an order adjudging defendant, in an action for separate mainte-

**A** PPEAL by plaintiff from a judgment of the District Court for Saunders County in defendants' favor in an action brought to subject certain property to the payment of a judgment obtained by plaintiff against defendants. Reversed.

The facts are stated in the opinion.

Mr. E. J. Clements, for appellant:

The statutes of Nebraska do not exempt the interest of Jacob Schwartz in the premises in question from being applied to the payment of plaintiff's judgment against him.

Lynch v. Lynch, 18 Neb. 589, 26 N. W. 390; Prout v. Burke, 51 Neb. 25, 70 N. W. 512; Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683.

Any interest which a judgment debtor has in any money, contracts, claims, or choses in action, due or to become due, not exempt by statute, is subject to the payment of the judgment, by proceedings in equity. This includes an annuity; and the fact that it is for the support of the annuitant does not render it exempt.

German Nat. Bank v. First Nat. Bank, 55 Neb. 86, 75 N. W. 531; 3 Freeman, Executions, 3d ed. § 425; 12 Cyc. 25; Graves v. Dolphin, 1 Sim. 66, 5 L. J. Ch. 45, 27 Revised Rep. 16; Gifford v. Rising, 51 Hun, 5, 3 N. Y. Supp. 392; Degraw v. Clason, 11 Page, 136; Bank of British North America v. Matthews, 8 Grant, Ch. (U. C.) 486; De Hierapolis v. Lawrence, 99 Fed. 321; Bryan v. Knickerbacker, 1 Barb. Ch. 409; Mebane v. Mebane, 39 N. C. (4 Ired. Eq.) 131, 44 Am. Dec. 102.

The interest which Christian J. Schwartz had in the west 18 feet of said lots, at the time the debt in question was contracted, is not exempt, and should be applied to the payment thereof.

Stout v. Rapp, 17 Neb. 462, 23 N. W. 364; Hobson v. Huxtable, 79 Neb. 334, 112 N. W. 658, 116 N. W. 278; Dyson v. Sheley, 11 Mich. 527; Edwards v. Fry, 9 Kan. 417; Ponce'or v. Campbell, 10 Kan. App. 581, 63

nance, in contempt for failure to pay solicitors' fees, was affirmed, notwithstanding that he had no property or money and was unable to work; it appearing that he had conveyed all his property to his children, upon condition that they would support him and pay his debts and "furnish him such money along as he might need." The court conceded that one ought not to be adjudged guilty of contempt for not doing an impossibility, but said that, waiving the question whether the conveyance was not in fraud of the marital rights of the plaintiff, it was of the opinion that, under the contract with his children to pay such money as he might need, they could be compelled by a proper proceeding to furnish him with sufficient funds to comply with the order of the court. And it was apparently for 42 L.R.A.(N.S.)

Pac. 606; Maloney v. Hefer, 75 Cal. 422, 7 Am. St. Rep. 180, 17 Pac. 539; Schoffen v. Landauer, 80 Wis. 334, 19 N. W. 95; Re Ligget, 117 Cal. 352, 59 Am. St. Rep. 190, 40 Pac. 211; Re Allen, 78 Cal. 293, 20 Pac. 679; Cass County Bank v. Weber, 83 Iowa, 63, 12 L.R.A. 477, 32 Am. St. Rep. 288, 48 N. W. 1067; Garrison v. Penn Bros. 23 Ky. L. Rep. 1775, 66 S. W. 14; Hoitt v. Webb, 36 N. H. 158; 15 Am. & Eng. Enc. Law, 2d ed. 584; Bowker v. Collins, 4 Neb. 494.

Messrs. G. W. Simpson and G. H. Simpson, for appellees:

A personal contract, where one party contracts for the services of another, cannot be assigned or transferred so as to transfer the rights of either party to a third person.

Hilton v. Crooker, 30 Neb. 707, 47 N. W. 8; Zetterlund v. Texas Land & Cattle Co. 55 Neb. 355, 75 N. W. 860; Roberts v. Wilkinson, 34 Mich. 120; Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724; Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 38 L. ed. 246, 8 Sup. Ct. Rep. 1308; Delaware County v. Diebold Safe & Lock Co. 133 U. S. 473, 36 L. ed. 674, 10 Sup. Ct. Rep. 399; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Eastman v. Batchelder, 36 N. H. 141, 72 Am. Dec. 295; Milton v. Story, 11 Vt. 101, 34 Am. Dec. 671; Bourget v. Monroe, 58 Mich. 563, 25 N. W. 514; Gardner v. Knight, 124 Ala. 273, 27 So. 298; Chadwick v. Chadwick, 121 Ala. 580, 25 So. 631; O'Brien v. Perry, 130 Cal. 526, 62 Pac. 927.

The real estate described in the petition, and sought to be sold, is the homestead of the defendants, and exempt.

First Nat. Bank v. McClanahan, 83 Neb. 706, 120 N. W. 185; Guy v. Downs, 12 Neb. 532, 12 N. W. 8; Corey v. Schuster, 44 Neb. 269, 62 N. W. 470.

Sedgwick, J., delivered the opinion of the court:

In August, 1909, the plaintiff recovered a

that reason that the order adjudging him in contempt was affirmed.

Although Baxter v. Baxter, — Cal. App. —, 125 Pac. 359, is to the effect that one who has conveyed all of her property in consideration of future support has, in so far at least as the value of the property exceeds the value of the support theretofore rendered, an interest therein subject to execution by an antecedent creditor, the case was really decided upon the ground that the conveyance was in fraud of antecedent creditors, and therefore belongs to a class of cases not within the scope of this note. As to the right as against subsequent creditors to create a trust to pay the income to settlor for life, and after his death, to his heirs or devisees see note to Nolan v. Nolan, 12 L.R.A.(N.S.) 369. R. S. N.

judgment against the defendants Jacob Schwartz and Christian J. Schwartz, in the county court of Saunders county, and caused a transcript of the judgment to be duly filed in the office of the clerk of the district court for said county. Execution was issued thereon and returned wholly unsatisfied, and this action was brought in the district court for Saunders county in the nature of a creditors' bill to subject the interests of the defendants in certain property to the payment of the judgment. The district court found in favor of the defendants, and dismissed the case, and the plaintiff has appealed.

In January, 1907, the defendant Jacob Schwartz, who was a widower, owned 80 acres of land in Seward county, which was his homestead, and which he had occupied as such for many years. He then conveyed this land to one Scott, who was the owner of lots 14 and 15, in block 3, in the village of Valparaiso, in Saunders county, and Scott conveyed the two lots to the defendants Christian J. Schwartz and Betty Schwartz, his wife, who took the lots as tenants in common. Christian J. Schwartz is the son of the defendant Jacob Schwartz. The consideration paid for these lots conveyed to Christian and Betty Schwartz was \$4,500. Christian and Betty Schwartz both testified that the homestead of Jacob Schwartz was exchanged for the lots, and the lots given to them for supporting Jacob Schwartz during life. There was a mortgage of \$1,000 on the farm, and its actual value above the mortgage was \$3,000. Christian and Betty Schwartz paid the remaining \$1,500 for the lots. At the same time and as a part of the same transaction, Christian Schwartz and Betty Schwartz entered into a contract with Jacob Schwartz in which they agreed to "board, clothe, and furnish him with one room," and to pay him \$50 in cash each year during his natural life. This written contract gave Jacob Schwartz a lien upon the two lots as security for the performance thereof on the part of Christian and Betty Schwartz. The parties then made their home in the building upon one of these lots, in which there was also a restaurant kept by Christian and Betty Schwartz. The value of this lot and building is variously estimated by the witnesses from \$1,500 to \$2,500. From a consideration of this evidence we think the value should be found to be \$2,000. The building on the other lot was rented for a barber shop and other purposes. After incurring the indebtedness upon which the said judgment was rendered, Christian Schwartz conveyed to his wife, Betty Schwartz, his undivided one-half interest in the said lots. This conveyance is con-

ceded to have been without consideration.

Plaintiff contends that the interest of Jacob Schwartz in the lots in question under the said contract should be subjected to the payment of the judgment against him, and that the one-half interest in the lot not occupied as a home, which was conveyed by Christian Schwartz to his wife, should also be subjected to the payment of the judgment against him. It is insisted that, as the parties have always resided together in the building upon the one lot and as Christian Schwartz is the head of the family, the defendant Jacob Schwartz has no homestead interest in the property in which he resides, and that his interest therein is therefore not exempt.

1. The arrangement between Jacob Schwartz and his son and daughter-in-law is peculiarly a personal arrangement. Jacob Schwartz himself could not transfer his rights under this contract to a stranger, and clothe that stranger with the power to demand these services and a fulfillment of this contract on the part of Christian Schwartz and his wife. Under such circumstances, a court of equity will not attempt to appropriate the interests of Jacob Schwartz under this contract for the benefit of his creditors. Ordinarily an order to that effect could not be enforced. There are considerations arising out of the relationship of the parties and their mutual undertakings for the benefit of each other that are wholly personal and are incompatible with the substitution of a stranger in the place of either party. See *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3; *Zetterlund v. Texas Land & Cattle Co.* 55 Neb. 355, 75 N. W. 860, and cases there cited. It is suggested that these reasons do not apply to the money consideration of \$50 a year, but the contract is entire and the consideration going to Jacob Schwartz under it cannot be separated. The inducement to take one's father into a family and make him a member thereof, conferring and receiving reciprocal advantage from the relation, may be and perhaps generally is much more than \$50 a year. It cannot be supposed that the same contract would have been made with a stranger, or that the \$50 a year for expenses any more than measures the difference between taking one's own father into the family and performing the same services for a stranger. We do not think that this contract shows such a financial advantage to Jacob Schwartz as a court of equity can appropriate to the payment of a judgment against him.

2. We think the second claim of the plaintiff has more merit. When Christian Schwartz and Betty Schwartz took the title of this property and began occupying it as

their home, they acquired a homestead interest in it. A homestead may be taken in the property of either husband or wife, and, as the title to this property was taken by the husband and wife in common, the homestead exemption would apply to their joint ownership, the lot which they occupied as a home being of the value of the homestead exemption. The interest of the defendant Christian Schwartz in the other lot would, as against his creditors, be no part of the homestead and would be liable for his debts. When Christian Schwartz transferred this interest in the remaining lot to his wife without consideration, the indebtedness upon which this judgment was rendered existed, and the transfer was in fraud of his creditors. Christian Schwartz furnished \$1,500 of the purchase price of the lots. He and his wife therefore obtained not more than a two-thirds part of the property from Jacob Schwartz, and, if they fail to perform their contract, should return the same to him. The district court should have subjected an undivided one-half interest in the lot not exempt to the payment of this judgment.

The judgment of the District Court is reversed, and the cause remanded for further proceedings.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

GEORGE RITTER et al.

v.

GEORGE S. COUCH, Impleaded, etc., Appt.

(— W. Va. —, 76 S. E. 428.)

#### Cemetery — dedication — effect.

1. Ground conveyed to an incorporated town, for the use of the town as a grave-

Headnotes by BRANNON, P.

*Note. — Abandonment or sale by town or municipality of ground used for cemetery.*

As to regulations of burials and cemeteries, see note to Laurel Hill Cemetery v. San Francisco, 27 L.R.A. (N.S.) 260.

On the question of injunctive relief as to cemetery property, burials, or removal of remains, see note to Wormley v. Wormley, 3 L.R.A. (N.S.) 481.

In Young v. Mahoning County, 51 Fed. 585, affirmed on the point annotated and reversed on others in 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96, where lands were donated by the owner of the fee to a municipal body for a burying ground, and that body afterwards passed an ordinance prohibiting further use of it for such purpose, it was held that the ordinance operated as a complete abandonment of the dedicated use, and 42 L.R.A. (N.S.)

yard, and dedicated by the town to the public use as such, and so used by the public, is held in trust by the town for the public for burial of the dead.

#### Same — sale.

2. Ground is conveyed to an incorporated town, to be held by it for a burial place for the public. The town accepts the conveyance and devotes the ground to public use for burial, and it is so used by the public, and many dead bodies are interred therein. Without legislative authority the town cannot sell and convey the land, and thus disable itself from executing the trust of maintaining such burial place.

#### Trust — cemetery — definiteness.

3. A trust by conveyance of land to an incorporated town for public use as a burial place for the dead is not void because of indefiniteness as to the beneficiary.

#### Dead bodies — protection from removal.

4. Kindred of the dead may maintain a suit in equity to enjoin the unlawful removal of the remains of such dead from their graves.

(Williams, J., dissents.)

(October 29, 1912.)

**A**PPEAL by defendant from a decree of the Circuit Court for Kanawha County in plaintiffs' favor in a suit for the cancellation of a deed and to enjoin interference with the graves of plaintiffs' relatives. Affirmed.

The facts are stated in the opinion.

Messrs. Brown, Jackson, & Knight for appellant.

Messrs. Mollohan, McClintic, & Matthews, and Price, Smith, Spillman, & Clay, for appellees:

The remains of the dead are not the property of the owner of the soil.

Wynkoop v. Wynkoop, 82 Am. Dec. 513, note; 2 Bl. Com. 429; Pierce v. Swan Point Cemetery, 10 R. I. 237, 14 Am. Rep. 667; Snyder v. Snyder, 60 How. Pr. 368; Meagher

was a perfectly valid exercise of the police power. To the same effect, see Newark v. Watson, 56 N. J. L. 667, 24 L.R.A. 843, 29 Atl. 487.

Municipal authorities cannot grant to a private corporation land granted by the United States to the city in trust for "public use" and which has been set apart by ordinance, ratified by the legislature, as a cemetery to be "absolutely dedicated as such," although the grantee intends to use it as such and to bury there at its expense bodies of its members who, if not members of it would be buried at the expense of the city. La Societa Italiana Di Mutua Beneficenza v. San Francisco, 131 Cal. 169, 53 L.R.A. 382, 63 Pac. 174.

Where the title to lands within the municipality was vested in the city, if vested at all, merely in trust for and subject to



v. Driscoll, 99 Mass. 284, 96 Am. Dec. 759; Re Brick Presby. Church, 3 Edw. Ch. 155.

There can be no diversion of the property to any other use than that for which it has been dedicated, so long as it is capable of being used for that purpose consistently with the public health and safety.

Hopkins v. Grimshaw, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; Beatty v. Kurtz, 2 Pet. 566, 583, 584, 7 L. ed. 521, 527, 528; Cincinnati v. White, 6 Pet. 431, 436, 8 L. ed. 452, 455; Jones v. Habersham, 3 Woods, 470, Fed. Cas. No. 7,465, 107 U. S. 174, 183, 184, 27 L. ed. 401, 405, 2 Sup. Ct. Rep. 336; Dexter v. Gardner, 7 Allen, 243; Re Vaughan, L. R. 33 Ch. Div. 187, 55 L. T. N. S. 547, 35 Week. Rep. 104, 51 J. P. 70; Evergreen Cemetery Asso. v. New Ha-

ven, 43 Conn. 234, 21 Am. Rep. 643; First Evangelical Church v. Walsh, 57 Ill. 363, 11 Am. Rep. 21; Re Rochester Water Comrs. 66 N. Y. 413; Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376; Warren v. Lyons City, 22 Iowa, 351; Cooley, Const. Lim. 4th ed. \* 233; Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. Rep. 515, 33 N. E. 695; Frederick County v. Winchester, 84 Va. 467, 4 S. E. 844; Benn v. Hatcher, 81 Va. 25, 50 Am. Rep. 645; Tiedeman, Mun. Corp. §§ 222-229; Hunter v. Sandy Hill, 6 Hill, 407; Lake View v. Letz, 44 Ill. 81; Browne v. Methodist Episcopal Church, 37 Md. 108; Perkins v. Lawrence, 138 Mass. 361.

Relatives have the right to obtain an injunction to prevent desecration of the

use as a burial ground forever, it was held in Stockton v. Newark, 42 N. J. Eq. 531, 9 Atl. 203, that such use is perpetual, and that the city authorities cannot, under statutory authority, remove the remains from the ground for the purpose of erecting a public market with a view to letting it out for hire for such purposes. The court said that the original use is not subject to legislative revocation, and therefore the statute authorizing such destruction of the use is unconstitutional.

A cemetery which has been purchased and improved by a city under legislative authority, and which it holds not only for the burial of poor persons as required by statute, but with a right to make sales of burial rights to any person who may wish to purchase them, whether residents or nonresidents, is not held by the city for purposes strictly public, but it is held in its private or proprietary character, so that it cannot be compelled to transfer the same without compensation to a new corporation formed for the purpose, as required by statute. Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695, wherein it was also held that even if the city held the cemetery as a strictly public corporation, the statute is still invalid, as it requires the city to transfer the cemetery without also transferring the duty imposed, namely, to provide a place for the burial of persons dying within its limits, for the purpose of performing which duty it has purchased the property.

In Weisenberg v. Truman, 58 Cal. 63, it appeared that lands had been dedicated by a city as a public cemetery and conveyed to three trustees, whose deeds, however, were never recorded. The cemetery was discontinued, some of the bodies had been removed and some remained, when the city for a valuable consideration conveyed the lands by quitclaim to one who knew of the dedication and use, and the conveyance was confirmed by statute. It was held that the grantee held subject to the trust, and could not recover possession from the trustees.

But a general power of alienation conferred upon a city by its charter extends to

the alienation of property owned by it and devoted to burial purposes. Wright v. Morgan, 191 U. S. 55, 48 L. ed. 89, 24 Sup. Ct. Rep. 6, affirming 45 C. C. A. 421, 106 Fed. 452.

And deeds conveying lands for cemetery purposes to a board of trustees selected by town trustees, to take the title for the town in the name of the board, and to perfect the organization for the "management of the cemetery grounds as they deem best," the deeds reciting that the grantee shall be such board, "their successors and assigns," contain implied authority for the trustees to sell portions of the land and apply the proceeds to caring for and beautifying the remainder of the land, which was in use for cemetery purposes, and their terms negative the presumption of any intention to require that the whole tract should be retained *in specie*. Tacoma v. Tacoma Cemetery, 28 Wash. 238, 68 Pac. 723. In this case the portions of the land sold had been granted about two years after the conveyance to the board of trustees, and all of the parties interested had acquiesced therein for a period of fourteen years, so that the court was of the opinion that the transactions had been confirmed by the interested parties, particularly so where the sales were made in good faith and the proceeds used for the benefit of the trust.

In Rousseau v. Troy, 49 How. Pr. 498, where a city was sought to be enjoined from converting a lot conveyed to it "for the purpose of a burial ground" to a site for a city hall, it is intimated that such an appropriation of the property should be restrained. The court said: "Holding the title to the premises, not as absolute owner, but simply and only for the purpose specified in the deed, it is not readily seen how the defendant can legally divest itself of the trust, and appropriate the land to its own use for city purposes, and erect thereon a building required for the transaction of its municipal business. Had the property been conveyed to an individual, to be held for the same object, and he had accepted the trust, could he, in violation thereof, remove the bodies there reposing and pro-

ground where repose the ashes of their kindred, when the ground has been dedicated to burial purposes.

*Boyce v. Kalbaugh*, 47 Md. 334, 28 Am. Rep. 464; *Davidson v. Reed*, 111 Ill. 168, 53 Am. Rep. 613; *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 690, 32 N. E. 10; *Rousseau v. Troy*, 49 How. Pr. 492; *Louisville v. Nevin*, 10 Bush, 549, 19 Am. Rep. 78; 1 Spe'ling, Extr. Relief, § 347; *Mooney v. Cooledge*, 30 Ark. 640; *First Evangelical Church v. Walsh*, 57 Ill. 363, 11 Am. Rep. 21; 3 *Lawson, Rights, Rem. & Pr.* p. 2433, § 1343; 3 Am. & Eng. Enc. Law, 53; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853.

**Brannon, P.**, delivered the opinion of the court:

Charleston was incorporated in 1794 as a town. In 1831 Daniel Ruffner made a deed to the president, recorder, and trustees of Charleston forever, "for use of said town as a graveyard or a place of interment for said town," of a lot of 1 acre of ground. The deed contained a covenant that if at any time the said corporate body should cease to exist, or become incapable of holding said lot of ground, then said Ruffner and his heirs should "stand seised to the use of said town of Charleston or the inhabitants thereof." The deed contained the covenant that the "parties of the second part for themselves or successors do covenant with said Daniel, his heirs, and assigns, to keep the said lot of ground suitably inclosed, and separate from the other land of the said Daniel." The deed reserved to Ruffner a small part of the lot as a private cemetery, "and as containing the bones of his parents."

The town took possession under the deed and inclosed the lot, and allowed its use for a graveyard for the public from 1831 to 1872. It made no sales of lots nor written permits for burial. The public used it for burial by license from the town. It was the only public burial place owned by the

municipality until 1870, when the town established a cemetery in a different location, called "Spring Hill Cemetery." In 1872 the old graveyard ceased to be used for burial. Hundreds of bodies in the long space of forty years had been buried in the old graveyard. Some fifty were removed to the new cemetery; but there remained hundreds in the old cemetery, and sleep there yet. Until 1865 most of the dead of Charleston were buried there. The city took no steps to remove them. No one did. It passed no order forbidding burial there. In it were many monuments and tombstones, and some iron railings inclosing some of the graves. After establishing the new cemetery, the city still controlled the old cemetery by fencing and cleaning it up; but it suffered it to grow up in briars and brush, and it became in bad condition in appearance. In 1898 George S. Couch made a proposal to the city council to buy this acre for \$1,000.

On the 20th of January, 1898, the council of Charleston passed an order reciting that the said lot "is not now, nor has been for many years, nor ever will be again, used as a burial ground, and is therefore no longer of any use to the said city; and whereas said lot is at constant expense to maintain in presentable condition, and is moreover made a rendezvous for immoral purposes,"—and reciting the offer of Couch to purchase. The order accepted the proposition of Couch, and directed a deed to him. On the next day a deed was made to him, and he paid the \$1,000 consideration. In April, 1898, George Ritter, James F. Lewis, Julia E. Petty, and Dulce Rowena Laidley brought the present suit against Couch, the city of Charleston, and heirs of Daniel Ruffner, for the purpose of annulling the deed from the city of Charleston to Couch, and to declare void the action of the council selling the lot to Couch, and to enjoin them from attempting to remove, transfer, or obliterate in any way the graves of the relatives of the plaintiffs. The plaintiffs had for many years been residents of

ced to erect a dwelling thereon for his own occupation? I see no difference between the two cases. . . . Neither do I question the power and right of defendant to remove the dead when this is necessary for sanitary reasons, though from the long length of time which has elapsed since burials have taken place therein (if the answer be true), it is difficult to see the existence of any such reasons, and they must exist to justify it. All this fails to meet the point, which is, that a trustee holding property for the purpose expressed in the grant cannot, in violation of the trust, convert the premises so held to his or its own uses. Such a 42 L.R.A.(N.S.)

proposition, it seems to me, shocks the moral sense, and cannot be maintained."

And equity will interfere at the instance of the next of kin to prevent the removal, by the city, of the dead from a cemetery which has been used as a burial ground only for over forty-five years, for the purpose of erecting a school building on the site, where the dedication of any part of the property to school purposes is doubtful although a small school building stood for a few years on another part of the premises than that sought to be taken and occupied. *Jeffreys v. Pittsburgh*, 13 Pittsb. L. J. N. S. 21.

E. M. S.

Charleston, and had buried in the said graveyard many blood relatives,—fathers, mothers, sisters, and brothers. The case ended in the circuit court of Kanawha county in a decree holding as illegal the sale of the lot to Couch, and vacating the deed from the city to Couch, and enjoining the defendants from removing, or attempting to remove or interfere with, or obliterate, the graves of the relatives of the plaintiffs, or the stones or monuments marking them.

The right of the plaintiffs to maintain this suit is questioned. It is said that the plaintiffs or their families never purchased any lots in the graveyard, or had any other right beyond a naked license. It is very certain that the city acquired the lot for burial purposes; that it took possession of the lot and inclosed it and controlled it as a burial ground; that it permitted, through many years, the burial of the dead in it; and thus it is clear that it received this lot and dedicated it to public use for the burial of the dead. Nothing is wanting on the part of the city to show that it consecrated and dedicated the lot for the burial of the dead. The kindred dead of the plaintiffs lie in that old pioneer graveyard under this dedication and consecration. The municipality of Charleston acquired this property for public use, and devoted it to this use, a legitimate public use, as the burial of the dead is indispensable. Land so acquired by a municipality for such purpose, and dedicated, is a dedication to a pious and charitable use. *Hopkins v. Grimshaw*, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; *Evergreen Cemetery Asso. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643. In the last-named case the court said: "All must be regarded alike as consecrated to a public and sacred use. The idea of running a public street, regardless of graves, monuments, and the feelings of the living, through one of our public cemeteries would be shocking to the moral sense of the community, and would not be tolerated, except upon the direct necessity." These authorities say that the dedication is irrevocable, no matter that there is no purchase of lots or grave places. The city allowed entrance to the dead without let or hindrance. It is said, furthermore, as an argument against the right of the plaintiffs to sue, that Couch does not propose to disturb the graves of the dead. Perhaps not now; but he was careful to insert in the deed from the city to him a provision limiting the right of the city or any person to four months from the date of the deed to enter the lot for the purpose of removing the dead, and declaring that such entry could not be made afterwards. 42 L.R.A. (N.S.)

Couch claims that under his deed he has absolute title in fee to the lot, unencumbered of any trust, and the right to dispose of it. What is to prevent him or his heirs or alienees at any time in the future from removing the dead? Couch has dry legal title; and if that be not charged with the trust there is no guaranty that the dead will not be removed; and if the kindred of the dead may not call upon a court to save their last resting places from invasion, Couch cannot be stopped from so doing by any mere declaration of Couch, based on no consideration,—the deed containing no covenant not to invade the graves. This commercial age betokens that trade will, at some future time, forget the dead reposing there. It has been debated in this case as to the character of the deed from Ruffner to Charleston. It has been questioned whether it is a deed with a subsequent condition, or an absolute conveyance of the fee simple without such condition. Does the fact that the lot has ceased to be used for interment, or its transfer by the town, forfeit the estate of the town and revert the land to Ruffner heirs? I cannot see that this question is material. If the town has lost its title, and the lot has reverted, I do not see that it would help the plaintiffs. They would not get title thereby. But it may be material as showing, against Couch, that it is not in his power to remove the dead. I do not think that the deed from Ruffner conveys the estate upon condition. I think it conveys an absolute legal title. It mentions no condition of forfeiture. It mentions no forfeiture as long as Charleston is capable of holding. Forfeitures are not favored by equity. It takes very plain language to create a forfeiture in courts of equity. Equity does not enforce forfeiture. I think the principles stated in *Brown v. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376 will sustain me in saying that Couch took an absolute fee-simple estate, without forfeiture condition. And therefore, unless that estate be charged with a trust, Couch could at any time remove these dead.

Can the kindred of the dead interfere for their protection? Can they call upon equity to do so? In *Beatty v. Kurtz*, 2 Pet. 566, 7 L. ed. 521, Justice Story said: "This is not the case of a mere private trespass, but a public nuisance going to the irreparable injury of the Georgetown congregation of Lutherans; and the property consecrated to their use by a perpetual servitude or easement is to be taken from them; the sepulchers of the dead are to be violated; the feelings of religion and the sentiments of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love to the

memory of the good are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in the future generation. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living." The old common law did not recognize the rights of relatives.

In *Wynkoop v. Wynkoop*, 82 Am. Dec. 513, we find this note reflective of the law: "By the old English law the body was not recognized as property, but the charge of it belonged exclusively to the church and the ecclesiastical courts, as did also the administration of estates. So, while there was property in the burial lots, in the monuments, and in the ornaments and decorations of the deceased or his grave, there was none in the remains themselves (2 Bl. Com. 429; note to *Pierce v. Swan Point Cemetery*, 14 Am. Rep. 667); and there are some decisions to the same effect in the United States (*Snyder v. Snyder*, 60 How. Pr. 368; *Meagher v. Driscoll*, 99 Mass. 284, 96 Am. Dec. 759; *Re Brick Presby. Church*, 3 Edw. Ch. 155); for it said that after burial the body becomes a part of the ground to which it has been committed; 'earth to earth, ashes to ashes, dust to dust.' (*Meagher v. Driscoll*, 99 Mass. 284, 96 Am. Dec. 759). These notions, however, may possibly be borrowed from the ecclesiastical law, and arise from a false and needless assumption in holding that nothing is property that has not a pecuniary value. "The real question is not of the disposable, marketable value of a corpse or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order to decently bury it and secure its undisturbed repose. The dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious ought not to need any judicial precedent. Our courts of justice should place it, at once, where it would fundamentally rest forever, on the deepest and most unerring instincts of human nature, and hold it to be a self-evident right of humanity, entitled to legal protection by every consideration of feeling, decency, and Christian duty. The world does not contain a tribunal that would punish a son who should

resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body?" Per Ruggles, referee, in *Law of Burial*, 4 Bradf. Appx. 529. Accordingly, it has been held that, while a dead body is not property in the strict sense of the common law, it is a quasi property, over which the relatives of the deceased have rights which our courts of equity will protect. *Weld v. Walker*, 130 Mass. 423, 39 Am. Rep. 465; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667. And in Indiana a court of law has cut loose all ecclesiastical ties, and held that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and to be disposed of as they may deem fit, but subject to such burial regulations as are reasonable and proper for the public health and advantage. The burial, however, cannot be taken out of their hands; they being able and willing to perform it. *Bogert v. Indianapolis*, 13 Ind. 134, 140. And, further, a sort of right of custody over or interest in the dead body, in the relatives of the deceased, is recognized in the statutes of many of our states. See *Pierce v. Swan Point Cemetery*, 10 R. I. 239, 14 Am. Rep. 667, and statutes there cited. The subject of property in dead human bodies is discussed at length in 4 Alb. L. J. 56, 57; 6 Alb. L. J. 151-154."

If relatives of blood may not defend the graves of their departed, who may? Always the human heart has rebelled against the invasion of the cemetery precincts; always has the human mind contemplated the grave as the last and enduring resting place after the struggles and sorrows of this world. When the patriarch Jacob was dying in Egypt, he spake unto the Israelites, and said: "I am to be gathered unto my people; bury me with my fathers in the cave that is in the field of Ephron, the Hittite, in the cave that is in the field of Machpelah, which is before Mamre, in the land of Canaan, which Abraham bought with the field of Ephron, the Hittite, for a possession of a burying place. There they buried Abraham and Sarah, his wife; there they buried Isaac and Rebekah, his wife; and there I buried Leah." Gen. xlix. 29. Jacob regarded the grave as the never-ending resting place of his kindred. Ever since those distant days so has felt the human heart. Everything else has changed; but that sentiment remains steadfast to-day. For the proposition that relatives may invoke the arm of equity against desecration of graves in dedicated burial places, it may be useful for future use to cite also *Boyce v. Kal-*

baugh, 47 Md. 334, 28 Am. Rep. 464; Davidson v. Reed, 111 Ill. 167, 53 Am. Rep. 613; Mitchell v. Thorne, 134 N. Y. 536, 30 Am. St. Rep. 699, 32 N. E. 10; Rousseau v. Troy, 49 How. Pr. 492; 1 Spelling, Extr. Relief, § 347; 3 Am. & Eng. Enc. Law, 53. Tracy v. Bitt'e, 213 Mo. 302, 112 S. W. 45, 15 Ann. Cas. 167, is a notable case for this purpose. Mary, the mother of Washington, was buried by her son-in-law upon this property. Her grave was neglected for forty years; then a monument was erected over it. In 1888 parties attempted to sell her grave. The court held that its sale was void. Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246.

When once property has been dedicated for a special purpose, as for a burial ground, or where a city has dedicated it for that purpose, and persons have acted upon the faith of such dedication by burying their loved ones there, the city cannot devote the property to any other purpose. Tiedeman, Mun. Corp. § 229. See § 222. "It is manifest that a municipal corporation has no implied authority to dispose of lands which have been dedicated to it for the public benefit; nor would such property be subject to sale for the payment of the debts of the municipal corporation. Lands which are dedicated to the public use are not even alienable, when, on account of the surrounding circumstances, they become unsuitable for the use to which they were dedicated." Only the legislature can authorize municipalities to dispose of them. Think of a lot conveyed to a town for the purpose, in the minds of grantor and grantee both, of its use as a burial place, the grantor having already buried the bones of his ancestors, the lot used for so many years for burial, and practically filled up with hundreds of graves, intended by both grantor and grantee to be so used, dedicated by the municipality for this purpose to the public and used by the public; then think of the municipality selling it to a private individual by a deed conferring upon him the right to remove the dead, for he claims absolute property, as the record shows. It strikes us at once that the city has no power to pervert the ground to another use than that contemplated by the grantor and city. It defeats the intent of both. This is shown by the clause in the deed providing that if the town should become incapable of holding the lot it should go back to Ruffner, but still be subject to graveyard purposes. In Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275, we held that when land has been dedicated to public use and accepted by the public by long use, as the street, the town cannot divert it to another use without legislative authority. See Warren v.

Lyons City, 22 Iowa, 351; Mount Hope Cemetery v. Boston, 158 Mass. 500, 35 Am. St. Rep. 515, 33 N. E. 695; Frederick County v. Winchester, 84 Va. 467, 4 S. E. 844; Benn v. Hatcher, 81 Va. 25, 59 Am. Rep. 645, 3 McQuillin, Mun. Corp. § 1141, says: "Property devoted to a public use cannot be sold or leased without special statutory authority, although property which has ceased to be used, or is not used, by the public may be sold or leased as the public welfare may demand. For instance, property dedicated for public use as a common, or property conveyed to be used as an ornamental park only, except where authorized by statute, cannot be sold. In this sense all property is public which has been dedicated to public use, or which may be affected by a public trust, either general or special. Municipal corporations hold all property in which the public is interested, such as streets, alleys, public squares, commons, parks, and wharves, in trust for the use of the public, and on principle such trust property can no more be disposed of by the municipality than can any other trust property held by an individual." In a note found there, we find this: "It may be seriously questioned whether, after land has been appropriated to public uses, it can be transferred unconditionally to another for a private use." The authorities are against such right. The power of sale is not incident to the ownership of property held as a public trust. Roper v. McWhorter, 77 Va. 214; Smith v. Cornelius, 41 W. Va. 59, 30 L.R.A. 747, 23 S. E. 599. Authorities above show that when the purpose for which land is conveyed or dedicated has been accomplished, or that the use intended can no further call for it, the property may be sold. But that doctrine can have no possible application in this case; for who can say that a graveyard filled with dead bodies, so that there is no room for any more, or where it is disused, is no longer a graveyard? It is just as plainly continued a graveyard for the repose of the dead that lie in it through centuries ahead. Its purpose will never cease to call for such use. For this I cite Tracy v. Bittle, 213 Mo. 302, 112 S. W. 45, reported in that valuable late work, 15 Ann. Cas. 167, 173. In the latter volume will be found much valuable law upon the subject of dedication of land for cemetery purposes. We find law to show that there has been no abandonment in this case. The city has never forbidden interment therein, and has continued to care for it as a cemetery to an extent.

The act of the city in selling this lot to Couch cannot be justified on the ground that the lot was a public nuisance. There is no evidence of this; and it is to be remembered

that the city never declared it to be a nuisance, or ordered or forbade its use for burial, or ordered disinterment of the bodies therein. That a cemetery *per se* is not a nuisance is supported by many authorities. *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Lake View v. Rose Hill Cemetery*, 70 Ill. 191, 22 Am. Rep. 71; *Dunn v. Austin*, 77 Tex. 139, 11 S. W. 1125. The briars and weeds grew up in it. What of that? The blackberry's flower is as sweet to the dead as any. The weed, though so called, spreads "its perfume on the desert air." They, too, are nature's tributes to the dead.

"Above the graves the blackberry hung  
In bloom and green its wreath,  
And harebells swung as if they sung  
The chimes of peace beneath."

So sings Whittier in "The Old Burial Ground." As to its use for immoral purposes. A fence and locked gate would obviate that. And where the police?

In what I have said above I have assumed that the town held the lot charged with a public trust. The authorities above go to establish this. It is well established that a town can accept a dedication of land for public purposes. *Boughner v. Clarksburg*, 15 W. Va. 394; *Sturmer v. County Ct.* 42 W. Va. 724, 36 L.R.A. 300, 26 S. E. 532. The Code (chapter 47, § 28) gives a town power to provide places for the burial of the dead. Certainly such power is essential. But it is said that this trust, whether arising from the Ruffner deed to the town or from dedication by the town, is a void trust, because of uncertainty in the beneficiary; it being without specifications of the persons to receive its benefits, except to the general public of Charleston and its vicinity. We do not deny the proposition that in a private trust there must be a definite beneficiary; but how as to the trusts for the general public? It is impossible to name those who might in future be buried in the lot. Is the trust to fail for that cause? In *Beach on Trusts & Trustees*, § 322, we find this: "In distinction from an express private trust, which, by the definition, is designed for the benefit of one or more individuals, the trust for charitable purposes is a public trust, and from the nature of the case the beneficiaries are, to a greater or less extent, unknown or indefinite. Ordinarily the trust is designed for the benefit of a class, the individuals of which can be designated only in general terms. In a private trust, if the beneficiary or beneficiaries are not definitely and positively named, the trust fails on the ground of indefiniteness. But in a charitable trust the beneficiaries need not be definitely named; 42 L.R.A. (N.S.)

and even where there is no adequate designation of a *cestui que trust* the trust will be enforced in equity if the intention of the settler can be ascertained beyond a reasonable doubt. Trusts for charitable purposes are regarded by courts of equity with special favor, and a much more liberal construction will be put upon an instrument creating such a trust than upon one creating a trust for individuals." That seems to me to be a reasonable proposition. Here is a town owing duties to the public, organized to advance the public interest. It receives a conveyance for a burial place. Is it possible that it can fail for want of specification of those who may come to be buried in it? The town can take property to hold in trust, as street or park or a city hall. Does its deed have to name thousands that are to be beneficiaries, those composing the general public? Why cannot the town, on like principles, receive in trust ground for cemetery purposes?

Great reliance is placed by the defendants on the case of *Brown v. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376, holding void for want of certainty in the beneficiaries a deed for land to a trustee upon trust that the trustee should at all times permit all the white religious societies of Christians, and members of such societies, to use the land as a common burying ground, and for no other purpose. That case would seem to have been inspired by such cases as *Carskadon v. Torreyson*, 17 W. Va. 43. I draw distinction between the *Brown-Caldwell* Case and our case. There the trust was for only members of certain religious societies, and of one race, and it was impossible to ascertain them; but in our case the trust is for the general public. The trustee is a town charged with the duty of holding for the general public, impossible to be further specified. We have a statute making good a conveyance to trustees for churches and burial ground purposes, though no names be given, because impossible; and we ought to uphold a conveyance to a town upon trust to use for burial purposes. Both by the Ruffner deed to the town and its dedication for burial purposes, the town held the land subject to the trust. It seems to me that the conveyance was to the town as a corporation, and for its own corporate purposes, because a cemetery devoted by it to public use is just as much for corporate or public purposes as the ground for a street or park. It seems to me that there are not both a trustee and another person as *cestui que trust*, but that the town is both. The case of *Jordan v. Universalist General Convention*, 107 Va. 79, 57 S. E. 652, holds that "while the courts of chancery of this state

will not undertake to enforce indefinite charities, a devise to a corporation for the general purposes of its incorporation cannot be said to be uncertain in any respect, and will be upheld." It seems to me that is a sound proposition. The statute of charitable trusts, in the reign of Elizabeth, is not a statute law in this state, as I admit. That statute was passed to make good conveyances to pious uses, not otherwise good; and that statute was repealed by Virginia in 1792. Many of our states hold good conveyances by analogy to that statute, treating it as common law. If we consider that the public in this case is not the same as the municipality, the trust ought to be held good on the ground that the use is for the public,—a grant to the corporation for public purposes. I understand the law to be that a grant to a corporation, which is capable of taking, which grant is for public purposes, is good, though individual beneficiaries are not named. "In charitable trusts the *cestuis que trust* are not, and need not, be capable of taking the legal title, as, when property is given in trust for the poor of a parish, or for the education of youth, or for pious uses, or for any charitable purpose, the beneficiaries are generally unknown, uncertain, changing, and incapable of taking or dealing with the legal title; but such trusts are valid in equity, and courts of equity will administer them and protect the rights of the *cestuis que trust*." Perry, Trusts & Trustees, § 66. I know that this text may be said to be based on the statute of charitable trusts, not enforced in Virginia; but I repeat that a public corporation, like a town, may take property for public use without designating the thousands composing the public now and hereafter. Is it possible that such a trust is void? Now, it has been a serious question in the English courts, and in the American courts, whether, before or without the statute of Elizabeth, charitable trusts would be enforced in equity. A discussion of this subject will be found in Perry, Trusts & Trustees, § 693. It was gravely considered in the Supreme Court of the United States, in *Vidal v. Philadelphia*, 2 How. 196, 11 L. ed. 233; the conclusion seeming to be that equity exercised this jurisdiction before and outside of the statute in many cases. But I do not rest the case on that consideration. I am here asserting that a public corporation, like a town, may take land to execute public purposes, declared in the deed or dedication to be held for public purposes, without specification of the members of the public. I say that a town incorporated can take land upon a trust to hold for the general public, as, for instance, for a street, park, a burial place. 42 L.R.A. (N.S.)

Indeed, as above suggested, I do not know that we can say there is an indefinite beneficiary in this case. I regard it as a conveyance to the incorporated town for its own public use, needing no names of those constituting the public.

So we do not think the town had capacity to sell this graveyard ground. Charged by the deed from Ruffner with the duty of holding for burial, charged by its own act of dedication to that use for many many years, by its sale to Couch it disowned and abdicated its trust for the use of a private individual, which we said it could not do in *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275. By this sale it was not furthering public weal, but private interest. The deed to Couch contemplated the appropriation of the ground to purposes other than burial, because it provided for removal of the dead in short order, giving a license to do so of only four months. It is useless to cite authorities for the rule that a municipal corporation must have legislative authority for such acts as this. Certainly it cannot be justified by any implied authority. Dillon, Mun. Corp. § 1102, says: "A municipal corporation has no implied or incidental authority to alien, or to dispose of for its own benefit, property dedicated to or held by it in trust for the public use, or to extinguish the public uses in such property." It will there be seen that there has been serious question whether even the legislature can authorize a town to dispose of property held for an important public use. We need not decide that question, as there has been no special act. I think, speaking only for myself, that the legislature has such power. *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 27 L.R.A. (N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080. We hold that without such authority the city of Charleston could not abdicate its public function as to this old pioneer graveyard, this "God's acre."

These views lead us to affirm the decree.

Williams, J., dissenting:

I realize that the preparation of dissenting opinions is generally a work of supererogation; and yet, when I am unable to agree with my associates, I think a proper regard for their opinions, as well as a decent respect for my own, affords sufficient excuse for the needless labor. The parties to a suit and their counsel are entitled to the several opinions of the judges, when there is want of concurrence.

While I have a very high regard for the opinions, generally, of my associates, and especially for the opinions of the judge who wrote the opinion in this case, because of his wide knowledge of the law and long

service on this court, still I am so thoroughly convinced that this decision is contrary to all the law applicable to the case that I cannot yield my own judgment, not even to so eminent a judge as he. Each judge arrives at his own conclusion, after a careful examination of the law; and it is therefore to be expected that all five of the judges will not at all times agree. Continuous harmony in the judgment of many judges is a certain evidence that some of them lack faith in their own opinions.

There is no controversy as to the facts in this case; they are set out in a written agreement signed by opposing counsel. That the council met at night and, by resolution, closed the deal with Mr. Couch is not material. There is not a particle of evidence of fraud. It is common knowledge that such meetings are as often held at night as in the daytime. Mr. Couch's good faith is shown by the fact that he had asked the council at other times to convert the lot into a park; and that he had, years before, submitted a written proposition to buy the lot and remove and reinter the remains of the dead, on certain terms. There is no question of fraud before this court.

I agree that the relatives of the dead have such an interest in their remains as will entitle them to resort to equity, if necessary, to prevent the unlawful disturbance of their graves; but I deny that any such case is here presented by the facts. There is no evidence that Mr. Couch was interfering with the graves, or that he was about to do so. He would have been liable to criminal prosecution if he had done so, without first obtaining authority from the proper source. On the contrary, the agreed fact is that the graveyard was in better condition when this suit was brought than it had been for twenty years before. Further than the right to have the graves of their relatives protected from unlawful molestation, the property right of each citizen of Charleston in the lot was the same; the right of one was not superior to another.

The principal question in the case concerns the city's power to control the use, and to make disposition, of the graveyard. Other questions arising have more or less bearing upon this one; but they are only incidental to it.

I freely confess that when this case was argued orally, more than a year ago, I received impressions which strongly inclined me to the view that the city had not the right or power to dispose of its title to ground which it had bought for burial purposes, and in which many bodies yet remained. It is a case that appeals strongly to one's sentiment and feelings; and when I began to examine the law bearing 42 L.R.A. (N.S.)

upon it I did so with a prejudice against the right claimed by the city. But as I proceeded in my investigation I found my prejudice gradually yielding to the higher authority of reason and law, until at present I have not the faintest doubt in regard to the city's right to sell the lot. But what use Mr. Couch can make of the lot, while the dead remain buried in it, is not for me to say; nor is that question presented to us. He may have a piece of property that is useless to him; but that is his own concern, and he is not complaining. Certain it is that the criminal statute protects the graves against unlawful molestation, no matter whose land they are on.

The council of the city is given power, under its charter, to "purchase and hold or sell real estate and other property necessary to enable them the better to discharge their duties and needful for the good order, government, and welfare of the said corporation; . . . to abate or cause to be abated anything which, in the opinion of the council, shall be a nuisance; . . . to provide in or near the city places for the burial of the dead, and to regulate interments in the city; . . . to promote the general welfare of the city, and to protect the person and property of the citizens therein." Is it possible that under such broad powers the city cannot dispose of its title to the lot in question, in the interest of the general welfare of the city, but is bound to keep it, regardless of its location, condition, and its present surroundings, notwithstanding the council has long since provided a more beautiful and commodious cemetery on the hill overlooking the city, sufficient to accommodate the remains of those who are now buried in the old graveyard, as well as the bodies of those who may die in many years yet to come? I cannot so believe. I think the charter powers of the city were intended by the legislature to meet the exigencies of just such a case as this.

No limitation is put upon the city's right to dispose of the lot by the terms of the Daniel Ruffner deed. Then, whence the limitation? The opinion admits that the deed conveyed an estate in fee absolute. There is clearly no declaration of trust in the conveyance. Wherefore, then, deny the city the *jus disponendi*,—a right incident to all estates held in fee? The city paid \$300 for the land, and Mr. Ruffner granted it in consideration thereof. It was therefore not a dedication by him. A grant for a valuable consideration, and without conditions, cannot be a dedication; to say so is a contradiction in terms. The recital that the city had purchased the ground for its use, as a graveyard, did not create a trust, nor did it oblige the town to devote it to that



use; it had the right to make any other use of it that, in the judgment of the council, the city's welfare might require. That recital is not even a covenant by the city that the land will be so used. It is no more than if a grantee of a lot of ground should say that he was buying it to erect on it a hotel. That would not estop him from building a dwelling house instead.

The opinion contains a very elaborate disquisition on the question of a dedication of land to a pious use. But I cannot see that that question has any application whatever to this case. I think I have shown that Mr. Ruffner did not dedicate the ground in any sense of the term; and I think it is a use of the term, unwarranted in law, to say that the city dedicated it. The city simply used it for a particular purpose. But let it be admitted that the city did, in a certain sense, dedicate the ground to a particular use, the question then arises: To whom did it dedicate it? The deed by which it took title answers that question. It says that it was "for the use of said town as a graveyard, or place of interment for the said town." Who constituted the town, now the city, of Charleston? Its citizens. So that the only dedication the town could, or did, make was a dedication to itself. It was not authorized by its charter to buy land for any other uses than its own. If it held the property in trust, it held it in trust for itself, just as it holds any other land necessary for the performance of its governmental function. If it was trustee, it was also *cestui que trust*; and the union of beneficial interest and legal title in the same individual or corporate body certainly confers the right of control,—the *jus disponendi*. Differentially speaking, I think the opinion presents a confusion of ideas, originating in the conception that the city is a trustee holding legal title for the benefit of its citizens in their individual capacity. But their property rights are not individual and distinct; they are only such as exist because of their citizenship in the organized society composing the municipality. A city can own no private property; all its property is held in public trust. It is created for governmental purposes, and is a subordinate political division of the state. It exists, owns property and exercises the powers and rights given by its franchise for the benefit of all of its citizens. But, like other organized governments, it speaks the will of its citizens through their chosen representatives, the city council. Being chartered solely for a governmental purpose, a municipality cannot make an irrevocable dedication of its property to a particular use, because to do

so would be to surrender its governmental authority *pro tanto*.

None of the cases cited in the majority opinion, on the question of dedication, deal with the point presented by the facts of this case. They all relate to dedication of land by individuals, or by private corporations, to a public use. But even then the authorities all hold that the use is subject to the governmental control of the municipality, but that, on the cessation of the use, the title to the land dedicated reverts to the former owner or his heirs. In the present case, the city, holding the absolute title in fee, would continue to hold it after the use to which the land had been put had ceased.

There was no grant by the city to any of its citizens for burial plots. The right of interment was a right in common to all the citizens of the city, and amounted only to a mere privilege, or license, revocable at the will of the municipal authorities. "The right of burial in a public cemetery is not an absolute right of property, but a privilege or license to be enjoyed so long as the place continues to be used as a burial ground, subject to municipal regulation and control, and legally revocable whenever the public necessity requires it." Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481. See also Went v. Methodist Protestant Church, 80 Hun, 266, 30 N. Y. Supp. 157; Ex parte McCall, 68 S. C. 489, 47 S. E. 974; Richards v. Northeast Protestant Dutch Church, 32 Barb. 42; Price v. Methodist Episcopal Church, 4 Ohio, 515; Sohler v. Trinity Church, 109 Mass. 1.

The opinion admits that the legislature can authorize the city to dispose of the land; but I assert that it has already done so. The city bought it under the power conferred on it by the legislature, and the power given it to sell and convey is equally explicit.

A statute authorizing a municipality "to pass by-laws respecting the health, good government, and welfare of the place" has been held to confer power to discontinue the use of a burial place in the city. 2 Dill. Mun. Corp. § 682, and cases cited in note 1.

The power "to make regulations to secure the general health of the inhabitants and prevent and remove nuisances" was held, in Campbell v. Kansas City, 102 Mo. 326, 10 L.R.A. 593, 13 S. W. 897, a sufficient grant of police power to authorize the prohibition of burials and the discontinuance of a graveyard in the city, notwithstanding the city did not own the graveyard.

In People ex rel. Oak Hill Cemetery Asso. v. Pratt, 129 N. Y. 68, 29 N. E. 7, it was held that the charter of the city of Rochester, which gave it power "to make, modi-

fy, and repeal ordinances and by-laws to regulate the burial of the dead," was sufficient to authorize the city to forbid the burial of the dead in lands of a cemetery association within the city limits, notwithstanding the city had previously given the right to the association to so use its land.

*Presbyterian Church v. New York*, 5 Cow. 538, is very much in point. The city of New York had there conveyed the lands to the church for a cemetery, and had covenanted for quiet enjoyment, and afterwards, pursuant to power given it by the legislature, passed a by-law prohibiting the use of the lands as a cemetery, and the church brought an action for an alleged breach of the covenant. The court held that the discontinuance of the graveyard did not create a breach which entitled to damage, but was a repeal of the covenant for quiet enjoyment; also that a municipal corporation could not, by contract, abridge its legislative power. There the city's charter authorized it to pass by-laws "for regulating or, if they find it necessary, preventing the interment of the dead within the said city." That decision was later approved and followed in *Coates v. New York*, 7 Cow. 585. In the latter case it was held, also, that the by-law need not recite on its face that it was necessary, but that the necessity was implied by the act of passing it; and that "necessity" meant "what is necessary for the public good." The city there owned the land and granted it in trust for burial purposes,—and it had been so used for more than a hundred years; but, notwithstanding, the court held that it "was not conclusive against the power of the legislature or the corporation to pass the laws," and that the city was not prevented from declaring the use "a public nuisance."

In *Kincaid's Appeal*, 66 Pa. 411, 423, 5 Am. Rep. 377, which seems to be a leading case on the subject, Judge Sharswood, says: "We cannot doubt that it is competent for the legislature to authorize or to delegate that power [i. e., to discontinue a cemetery and to remove the remains of the dead] to the municipalities. It is a police power necessary to the public health and comfort. As they can authorize the removal of any other thing which they may deem a nuisance by a summary proceeding, without a jury trial, so they can authorize and direct the removal of dead bodies from any ground, and the consequent vacation of it as a burial ground." In that case, however, there was a special act of the legislature of Pennsylvania providing for the discontinuance of the burial ground and the removal of the dead. So, also, there was a like special act by the West Virginia legislature, in the 42 L.R.A. (N.S.)

case of *Brown v. Caldwell*, 23 W. Va. 188, 48 Am. Rep. 376. But special acts in those cases were necessary, for the reason that the cities did not own and control the respective properties. In the Pennsylvania case the land was owned by a church, which had granted burial lots to individuals; and in the West Virginia case the land had been granted to trustees upon a trust, not for the city.

That the city passed no ordinance discontinuing the use of the graveyard, or declaring it to be a nuisance, cannot affect the case. Such a resolution was not a condition precedent to its power to convey the land. Its use as a burial place had been practically discontinued. No one had been buried in the lot since 1872, and no care was taken of it. The deed to Couch, of itself, operated to discontinue the use, and a formal declaration of such discontinuance was not necessary. The city had provided a new burial place for its citizens, and thereafter bestowed no care upon the old graveyard. Nonuser and neglect by the city to care for it for nearly thirty years was certainly sufficient notice to the friends of the dead buried there that the city had ceased to maintain it as a cemetery. Many persons had already removed their dead to the new cemetery; and the city ought not to be required to maintain more cemeteries than are necessary for the purposes of interment. The resolution, passed at a regular session of the common council, accepting Mr. Couch's proposition and instructing the mayor to execute to him a deed, was, in effect, a resolution discontinuing the use as a burial place. No previous notice of such a resolution was necessary, because no one had a right to prevent its passage; it was a government act, done in the exercise of a delegated legislative power. It is shown by the agreed facts that since the incorporation of the city no fewer than five different graveyards existed in the city at different times, all of which have been discontinued. As the city grew and expanded, the little burial ground became surrounded with elegant homes, and the council, no doubt, considered that the welfare of the people required that it be discontinued as a burial place; and the exercise of their governmental discretion in that regard is not subject to judicial review. The lot belonged to the city, and no previous action expressly discontinuing its use as a graveyard was necessary to enable it to convey it.

As cities grow in size and increase in population, it is a prevailing custom to discontinue old burial grounds, and to establish others in more desirable localities, remote from densely populated districts and away

from the turmoil of business. The city is not required to justify its action in selling its own property; but if it were it could, no doubt, do so on two grounds: First, that it had provided for its citizens another and a better place for interment, to which they had a right to remove the remains of their friends from the old graveyard, and had therefore performed its full duty in the premises; and, second, that the old graveyard was so sadly neglected, and so much frequented for immoral purposes, that it had become a nuisance. The charter gives the council the right "to abate or cause to be abated any thing which, in the opinion of the council, shall be a nuisance." *Wood v. Hinton*, 47 W. Va. 645, 35 S. E. 824; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Hart v. Albany*, 3 Paige, 213; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; 2 Dill. Mun. Corp. § 689. But the power to declare a thing a nuisance is given to enable the municipality to compel a private owner of property to change the use which he is making of it, when the use is an annoyance to the public. Such formal declaration is useless when the city owns and controls the property constituting the nuisance. But it is insisted that a graveyard is not *per se* a nuisance. That may be true. Still the council are authorized to declare a thing to be a nuisance, within reasonable limitations, which is not such *per se*; and in such case their action is not subject to judicial review, because it is the performance of a governmental function for the promotion of the general welfare. 2 Dill. Mun. Corp. § 689, and authorities above cited. Furthermore, a thing which is not a nuisance, under certain surroundings, may become such at a later time and under different surroundings. A building which was not a nuisance when first erected may become such through its neglect and decay, or by the use made of it. So, too, a graveyard located in the heart of a city, and surrounded by beautiful residences, may, by simple neglect, become so overgrown with weeds, brush, and briars, and may be so used, as to justify the municipal authorities in declaring it to be a public nuisance, even when the city is not the owner of the ground, not because it may endanger the health of the community, but because it affords a convenient retreat, near by one of the public streets, for immoral purposes.

But it is suggested that the city council had no right to neglect the ground and suffer it to become a nuisance. A complete answer to this argument is the fact that the 42 L.R.A. (N.S.)

city had provided another cemetery, and desired to discontinue the use of the old one. It was not obliged to maintain more cemeteries than were needed. The relatives of the dead buried in the old graveyard had the privilege of removing their remains to the new cemetery. Many of them did so; and thereafter no interments were made in the old one.

The municipal authorities and the purchaser are charged with making commerce of the bones of the dead. But is it not evident that the bodies interred there detracted from, rather than added to, the commercial value of the lot? Is a man forbidden to dispose of his land because he has permitted his neighbor to bury his dead in its soil? Certainly not. By permitting the citizens to bury their dead in the lot, the municipality did not dispose of any of its property rights, or relinquish any of its police powers to control its use. The citizens had only a permissive right—a mere license—to occupy the ground for the burial of their dead until such time when the city might elect to make other use of it.

Would it not be more in accord with the sentiment, so eloquently spoken of in brief of counsel, if the friends of those who sleep in the old graveyard should wish their remains removed to the new cemetery overlooking the city, where their final abodes could receive respectful attention and care, rather than that they should be allowed to repose forever in a place so much neglected that it had become a rendezvous for crime? If land, once devoted to burial purposes, could not thereafter be used for any other purpose, it would not be many centuries until the face of the earth would be wholly occupied by the dead, and there would be no place for the living. So, while it is true that the law does have tender regard for the sentiment of the living for the dust of their dead, and protects their graves from unlawful desecration by punishment as for a crime, still it acknowledges the earth as the only habitation for the living, and gives them a superior right to the soil.

I have shown, I think, that the right of interment was not a property right, but a mere license, or privilege, revocable at the will of the city. That being so, it follows, as certainly as the night follows the day, that no one who has used the privilege has the right to refuse to remove the remains of his dead and thereby prevent the city from disposing of its property. The city did not bury the dead; wherefore, then, its obligation to remove the bodies before being allowed to sell its grounds? It permitted the

burials, and it likewise permitted the removal of the dead, from the year 1872 down to the making of the deed to Couch, and four months thereafter, a period of more than twenty-five years. Was not that sufficient time for anyone who desired to do so, to remove and reinter the remains of his relatives? It would certainly seem so. "Once a graveyard always a graveyard" may be a prevailing sentiment, and it may have been also the law of Canaan in the days of patriarchal government, 4,000 years ago; but it is certainly not the law of our land, or of our time. I would not willingly offend the sacred sentiment with which we all regard the dust of our dead; but, I ask, what means the language found in the burial rite of all Christian denominations, "earth to earth, dust to dust, ashes to ashes," if the body is to be forever preserved? And if it is not to be forever preserved, why, then should the spot of ground in which it rests be forever hallowed and withheld from occupation; and, if not withheld forever, then how long? Thomas Campbell is just as eminent authority, in law, as our own beloved Whittier, and from him I quote the following:

"What's hallowed ground? Has earth a clod  
Its Maker meant not should be trod  
By man, the image of his God,  
Erect and free,  
Unscourged by superstition's rod  
To bow the knee?"

The general public will have small interest in the graves and in the monuments erected over the final resting place of most of us; and the surviving friends of those who die need no glittering shafts or eloquent inscriptions to remind them of their loved ones, for the tie of kinship endears the memory, and "to live in hearts we leave behind is not to die." The embalmed bodies of Egyptian kings and nobles, buried 3,000 years ago, are now exhibited in the museums of the country as curios. If we could discover that lost art, would we practice it? I hope not. I rather think we are gradually losing our prejudices and finding our senses, and will realize, before many generations, that cremation, a much more sanitary method of disposing of the dead, can be made just as sacred a rite as burial.

The covenant by Daniel Ruffner and his heirs to stand seised of the lot "to the use of the said town of Charleston or the inhabitants thereof," in the event the town should become incapable of holding the title, 42 L.R.A. (N.S.)

was made for the benefit of the municipality, and was intended to prevent a failure of title, in case the municipality should forfeit or lose its franchise. It does not affect the city's title, or limit its power to make disposition of the lot. The covenant was made to meet a contingency which appears never to have arisen.

The fact that Daniel Ruffner excepted from the operation of his deed the plot of ground 35x45 feet within the bounds of the 1-acre lot evinces no intention to create a trust relation between him and the city, but rather shows a contrary intention; for, if he understood that the ground was always to be used as a graveyard, and could not be disposed of by the city, there would have been no occasion for him to reserve the legal title to that lot. He could have protected the graves of his parents, and also provided a resting place for himself, by reserving the use only of that lot. It was a matter of little concern who held the legal title, if the use was to be perpetual.

Law is not an exact science, but a thing of growth and development. Its aim is to do justice; but, as man himself is fallible, it follows that the institutions which he has established for the guide and government of society often fail to accomplish the end desired; but that is no reason why he should not continue his efforts to improve them. Men of the legal profession fully understand that the great body of our law is court-made; that is, it originated in judicial decisions which have come down to us through the centuries. The legislature has made only a fractional part of the law by which society is regulated, and under which its members transact business, one with another. Therefore, when the courts of the present day undertake to interpret and apply what is known as the unwritten law to the facts in any given case, they should do it so as to meet the needs of the complex and highly organized society of the present, so far as this can be done with consistent respect for well-established rights and principles. I am convinced that the court, in reaching its conclusion in this case, has not only refused to be guided by the present needs of society, but has overridden the recent interpretations of the law, respecting such cases, made by the highest courts of every state in the Union that has spoken on the subject, and has taken a most wonderful backward stride, all of which I regret exceedingly.

I would reverse the decree and dismiss the bill

## NEW YORK COURT OF APPEALS.

JAY W. FITZWATER, Resp.,  
v.  
GUY S. WARREN et al., Appts.

(206 N. Y. 355, 99 N. E. 1042.)

**Master and servant—statutory duty—assumption of risk.**

1. A servant does not assume the risk of injury from the master's violation of a statutory duty to guard set screws.

**Same—nonanticipation of probability of injury.**

2. An inexperienced employee injured four days after his employment by an unguarded set screw may be found not to have assumed the risk of injury therefrom, al-

though he knew of its existence, if the injury was due to the yielding of sawdust under his feet, throwing him against the screw, the probability of which he might not have anticipated.

(Collin and Gray, JJ., dissent.)

(October 22, 1912.)

**A** PPEAL by defendants from an order of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of nonsuit at a Trial Term for Yates County, and granting a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed. The facts are stated in the opinion.

**Note.—Servant's assumption of risk of master's breach of statutory duty.**

The earlier cases covering this subject are collected in notes to Denver & R. G. R. Co. v. Norgate, 6 L.R.A.(N.S.) 981; Johnson v. Mammoth Vein Coal Co. 19 L.R.A.(N.S.) 646; Hill v. Saugestad, 22 L.R.A.(N.S.) 634; and Poli v. Numa Block Coal Co. 33 L.R.A.(N.S.) 646.

The exclusionary statements in the note 19 L.R.A.(N.S.) 646, also apply to the present note.

**Risk not assumed.**

The following cases decided since the note in 33 L.R.A.(N.S.) 646, hold that the servant does not assume the risk of a breach by the master of a statutory duty: Hamilton v. Spring Valley Coal Co. 149 Ill. App. 10; Stevenson v. Avery Coal & Min. Co. 152 Ill. App. 565; Frenci v. Tazewell Coal Co. 157 Ill. App. 477; Pate v. Gus Blair Big Muddy Coal Co. 158 Ill. App. 578 (all cases of wilful violation of the Illinois mines and mining act); Streeter v. Western Wheeled Scraper Co. 254 Ill. 244, 41 L.R.A.(N.S.) 628, 98 N. E. 541 (failure to guard machine); Miami Coal Co. v. Kane, 45 Ind. App. 391, 90 N. E. 13 (failure to furnish props to secure roof of mine); Balzer v. Warring, — Ind. —, 95 N. E. 257 (failure to properly guard machinery); Indianapolis Foundry Co. v. Lackey, — Ind. App. —, 97 N. E. 349 (failure to provide exhaust fans for emery wheels); Koehler v. Harmon, — Ind. App. —, 98 N. E. 1009 (failure to properly guard machinery); Angola R. & Power Co. v. Butz, — Ind. App. —, 98 N. E. 818 (failure to guard machinery); Verlin v. United States Gypsum Co. — Iowa, —, 135 N. W. 402 (failure to guard machinery); Lamb v. Wagner Mfg. Co. — Iowa, —, 136 N. W. 203 (failure to guard machinery); Thayer v. Kitchen, 145 Ky. 554, 140 S. W. 1052 (neglect to ventilate mine); Johnson v. Union Carbide Co. 169 Mich. 651, 135 N. W. 1069 (failure to properly guard belting); Sonsmith v. Pere Marquette R. Co. — Mich. —, 138 N. W. 347; San Bois Coal Co. v. Janeway, 22 Okla. 42 L.R.A.(N.S.)

425, 99 Pac. 153 (act of Congress requiring proper ventilation of mines); Fegley v. Lycoming Rubber Co. 231 Pa. 446, 80 Atl. 879 (failure to guard machinery); Solt v. Williamsport Radiator Co. 231 Pa. 585, 80 Atl. 1119 (*dictum*); Amiano v. Jones & L. Steel Co. 233 Pa. 523, 82 Atl. 780; Duggan v. Heaphy, — Vt. —, 83 Atl. 726 (*obiter*); Dolan v. S. E. Slade Lumber Co. 69 Wash. 22, 124 Pac. 133 (failure to guard machinery).

In Pratt Consol. Coal Co. v. Davidson, 173 Ala. 667, 55 So. 886, it was held that an employee in a mine, in the absence of special contract, on sufficient consideration, does not assume the risk of a failure to comply with the requirements of a statute as to ventilation of mines, for to hold otherwise would nullify the statute by defeating its clear purpose.

A section man working in the yards of a railroad company does not assume the risk of a violation of a city ordinance requiring that the bell be constantly ringing while the engine is in motion. Elgin City Bkg. Co. v. Chicago, M. & St. P. R. Co. 160 Ill. App. 364.

In Amiano v. Jones & L. Steel Co. 233 Pa. 523, 82 Atl. 780, *supra*, it was said that where the negligence charged is a failure to perform a statutory duty, questions relating to the assumption of risks do not arise.

The Poli Case, to which the note in 33 L.R.A.(N.S.) 646, is appended, is cited in Verlin v. United States Gypsum Co. — Iowa, —, 135 N. W. 402, and Lamb v. Wagner Mfg. Co. — Iowa, —, 136 N. W. 203, as authority for the view that a servant does not assume the risk of the failure of an employer to comply with the statute requiring the guarding of machinery. In the latter case, the court said that it is now the settled law in this state that assumption of risks constitutes no defense to a claim for an injury occasioned by an employer's failure to comply with a statute enacted for the employee's protection.

There may, perhaps, be some doubt whether the decision in FITZWATER v. WARREN should be regarded as definitely and finally settling the rule in New York, that the vio-

Mr. Frederick E. Hawkes, for appellants:

Plaintiff assumed an obvious risk.

Dillon v. National Coal Tar Co. 181 N. Y. 215, 73 N. E. 978; Knisley v. Pratt, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986; Millerick v. Wing, 133 App. Div. 453, 117 N. Y. Supp. 1070; Buckley v. Gutta Percha & Rubber Mfg. Co. 113 N. Y. 540, 21 N. E. 717; Toye v. United Dressed Beef Co. 141 App. Div. 332, 125 N. Y. Supp. 1061; Dixon v. New York, O. & W. R. Co. 198 N. Y. 58, 91 N. E. 271; Rooney v. Brogan Constr. Co. 194 N. Y. 32, 86 N. E. 814.

Plaintiff was guilty of contributory negligence.

Marsen v. Nichols Copper Co. 134 App. Div. 294, 118 N. Y. Supp. 867; Roche v. India Rubber & Gutta Percha Insulating Co. 115 App. Div. 582, 100 N. Y. Supp. 1009; Graves v. Brewer, 4 App. Div. 327, 38 N.

Y. Supp. 566; Fitzgerald v. Newton Falls Paper Co. 204 N. Y. 184, 97 N. E. 457; Welsh v. Waterbury Co. 144 App. Div. 213, 128 N. Y. Supp. 974; Kimmerle v. Carey Printing Co. 144 App. Div. 714, 129 N. Y. Supp. 572.

Mr. M. A. Leary, for respondent:

It was negligence on the part of the defendants to permit the set screws upon the revolving shaft to be unguarded, more especially as it was in a dark place.

Clemence v. Auburn, 66 N. Y. 334; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; Shields v. Paul B. Pugh & Co. 122 App. Div. 586, 107 N. Y. Supp. 604; McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153; Walker v. Newton Falls Paper Co. 99 App. Div. 50, 90 N. Y. Supp. 530.

Plaintiff complied with the instructions given him, and was guilty of no negligence in the manner of doing so.

lation of a statute prescribing specific duties excludes the common-law doctrine of assumed risk arising from the knowledge and appreciation of the danger, since there was another ground for the decision in that case; and the same court in the case of Gombert v. McKay, post, 1234, decided a short time previously, but which is not referred to in the prevailing opinion in the FITZWATER CASE, took a contrary position, apparently with the concurrence of all the judges, with regard to the statutory requirement in relation to scaffolds.

In Grady v. National Conduit & Cable Co. 153 App. Div. 401, 138 N. Y. Supp. 549, however, it was held that a servant does not assume the risk of a violation of the labor law relating to unsafe scaffolds, hoists, etc. The court cited FITZWATER v. WARREN, and stated that if the earlier cases (citing Gombert v. McKay) which were to the contrary could not be reconciled therewith, it felt constrained to follow the decision in the FITZWATER CASE, and hold that if the evidence disclose a violation of the statute, even though such violation be known to the plaintiff and the danger resulting therefrom, defendant is deprived of asserting, by way of defense, that plaintiff assumed this open and obvious risk.

So, in Wynkoop v. Ludlow Valve Mfg. Co. 153 App. Div. 507, 138 N. Y. 482, involving an unguarded rail, it was said that under the FITZWATER CASE the defendant could not defend upon the ground that the plaintiff, in continuing in the employment, with full knowledge of the danger, assumed the risk as a matter of law.

Risks may be assumed.

In Maki v. Union P. Coal Co. 109 C. C. A. 221, 187 Fed. 380, it was held that chapter 80, Laws of Wyoming 1890, requiring safeguards around moving machinery, and providing that a cause of action shall accrue for an injury due to a wilful failure to comply therewith, does not abrogate the defense of assumption of risk. The court 42 L.R.A. (N.S.)

said that, although there are authorities to the contrary, the better rule, the stronger reason, and the weight of authority, are that, notwithstanding such statutes, this defense is still available to the master. But while it is evidently the independent judgment of the court that the statute did not preclude the defense of assumed risk, it further based its decision on the fact that the Wyoming statute was adopted from the Pennsylvania statute, and that before its adoption the courts of that state had held that it did not abolish the defenses of contributory negligence and negligence of a fellow servant, and it was clear that its opinion was that it did not abrogate the defense of assumption of risk. In view of the Pennsylvania cases cited in the note above, and those cited in 33 L.R.A. (N.S.) 646, it is apparent that the Federal court's inference as to the position of the Pennsylvania court as to assumption of risk, from its position as to contributory negligence and the fellow servant rule, was erroneous. In this connection it will be observed by reference to the note in 13 L.R.A. (N.S.) 1152, that even in jurisdictions where the defense of assumption of risk is expressly or impliedly excluded by statute, it is generally held that the defense of contributory negligence is not affected.

So, it is held in Wisconsin that the doctrine of assumed risk is not abrogated by Sanborn & B. Stat. Supp. 1906, §§ 1636-1681, with respect to a master's duty to furnish safe scaffolding (Koepp v. National Enameling & Stamping Co. — Wis. —, 139 N. W. 179) or hoists (Van Dinter v. Worden-Allen Co. — Wis. —, 138 N. W. 1016). The court in reaching that conclusion was apparently influenced by the fact that that position had been taken by the courts of New York, from which the statute was adopted, but the validity of the reason is obviously impaired by the change of position of the court of appeals evidenced by the FITZWATER CASE.

As shown under the last heading of the

Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 608; Rexter v. Starin, 73 N. Y. 601.

Everyone who works with machinery or in places of danger assumes risks, but men may differ as to what risks and obvious dangers are, and such questions are pre-eminently questions of fact for a jury.

Pepe v. Utica Pipe Foundry Co. 132 App. Div. 458, 116 N. Y. Supp. 921; Perrotta v. Richmond Brick Co. 123 App. Div. 626, 108 N. Y. Supp. 10; Neuweiler v. Central Brewing Co. 119 App. Div. 101, 103 N. Y. Supp. 1136; O'Brien v. Buffalo Furnace Co. 183 N. Y. 317, 76 N. E. 161.

Cullen, Ch. J., delivered the opinion of the court:

I think the order of the appellate division reversing the judgment of nonsuit at trial term and granting a new trial

present note, the Wisconsin decisions, that the defense was precluded as to the violation by the master of certain other statutory duties, were by virtue of an express statutory provision applicable to such duties.

Since the preparation of the note in 33 L.R.A.(N.S.) 646, but prior to the decision in the FITZWATER CASE, the decision of the appellate division in *Bushtis v. Catskill Cement Co.* 128 App. Div. 786, 113 N. Y. Supp. 294, cited in note in 19 L.R.A.(N.S.) 646, which held that the New York doctrine as to the assumption of risk was not affected by the amendment of the factory act making a failure to comply with those provisions a crime, was affirmed without opinion in 198 N. Y. 548, 92 N. E. 1079; and during that interval it was also held in *Sabatino v. Roebbling Constr. Co.* 136 App. Div. 217, 120 N. Y. Supp. 956, that a servant who knows that the shaft of a hoisting elevator has not been guarded as required by the labor law assumed the risk upon placing himself in the shaft; and in *Rositer v. Peter Cooper's Glue Factory*, 149 App. Div. 752, 134 N. Y. Supp. 162, it was held that a servant assumed the obvious risks of a violation of the labor law requiring that vats be properly guarded, where he elected to continue to work without the proper railing.

So, in *Larsen v. Lackawanna Steel Co.* 146 App. Div. 238, 130 N. Y. Supp. 887, an action brought under the employer's liability act, holding that the question of assumed risk from the absence of a set screw was for the jury, the court seems to have assumed that the defense was not entirely precluded.

Of course, in view of the FITZWATER CASE, the cases just cited are little, if any, authority on this side of the question.

#### Special statutory provision.

In *Bowers v. Southern R. Co.* 10 Ga. App. 367, 73 S. E. 677, the decision that a 42 L.R.A.(N.S.)

should be affirmed. It is conceded that the defendants violated the statute of this state which enacts that all set screws shall be guarded, and that as a result of that violation of law the plaintiff was injured. The defendants seek to be relieved from the consequences of their wrongdoing on the claim that the plaintiff assumed the risk of their illegal act, because he saw and knew of the existence of the unguarded set screw. My personal opinion on this subject is the same as that expressed by me in the former general term of the supreme court (*Simpson v. New York Rubber Co.* 80 Hun, 415, 30 N. Y. Supp. 339), that public policy precludes an employee from assuming the risk created by a violation of the statute, or waiving liability of the master for injuries caused thereby. In the case of *Knisley v. Pratt*, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986, this court took a different

defense of assumption of risk was excluded in cases where the servant was injured through the violation by the master of some statute enacted for the safety of employees is based upon express provisions to that effect in the Federal statute under which the case arose, fixing the liability of interstate railroads for injury to their employees.

And in *Galveston, H. & S. A. R. Co. v. Kurtz*, — Tex. Civ. App. —, 147 S. W. 658, an action by a railroad employee for an injury sustained as a result of an insecure hand hold, it was said that the question of assumed risk was eliminated, as such defense was expressly denied by state and Federal statutes where an employee is injured by a railroad company using in interstate commerce cars equipped with insecure hand holds.

The decisions or assumptions in *West v. Bayfield Mill Co.* 144 Wis. 106, — L.R.A.(N.S.) —, 128 N. W. 992; *Willette v. Rhinelander Paper Co.* 145 Wis. 537, 130 N. W. 853; and *Pulk v. Churchill*, 146 Wis. 477, 131 N. W. 906,—that the doctrine of assumption of risk was abolished so far as concerned a violation by a master of the provision of the statute (*Sanborn & B. Stat. Supp.* 1906, § 1636j), requiring guards on machinery,—were by virtue of an express provision of § 1636jj, to the effect that continuation in the employment with knowledge of the omission should not operate as a defense.

And in *West v. Bayfield Mill Co.* supra. it was held that the rule applied although the master had provided a sufficient guard in the first instance which had become temporarily displaced, and from which displacement injury resulted before any knowledge, actual or constructive, thereof. As already pointed out the Wisconsin court holds that the doctrine of assumed risk is not impliedly abrogated by a statute which merely imposes a duty upon the master, without expressly excluding the defense.

J. H. B.

view of the law; and, if the authority of that case remained in full force, I should feel constrained to subordinate my own convictions to that decision, though I may say in passing that subsequent to the decision of the Simpson and Knisley Cases the Federal circuit court of appeals, in an elaborate opinion by the present President of the United States, held the same doctrine as that of the Simpson Case,—that risks occasioned by the failure of the employer to supply statutory safeguards were not assumed by the employee, though he had knowledge of such failure. *Narramore v. Cleveland*, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298. The decision in the Knisley Case was a reversal of the judgment of the former general term of the supreme court, where, in an opinion written by Judge Haight, now a judge of this court, it was said: "That the risks of the service which a servant assumes in entering the employment of a master are those only which occur after the due performance by the employer of those duties which the law enjoins upon him." 75 Hun, 327, 26 N. Y. Supp. 1013. Having sat below, he did not participate in the decision of the Knisley Case when it was before this court, and Judge Vann dissented from the decision. The doctrine of the Knisley Case has, however, been largely qualified, if not virtually overruled, by the subsequent decision of this court in *Johnston v. Fargo*, 184 N. Y. 379, 7 L.R.A. (N.S.) 537, 77 N. E. 388, 6 Ann. Cas. 1, where we held that an agreement between the employee and employer, relieving the employer from liability for all personal injuries to the employee that might result from the negligence of the employer, was void as against public policy. If an express agreement could not relieve the master in the case cited, it does not seem clear how, by a merely implied contract, he can be relieved from the results of a direct violation of the statute.

Moreover, in this case the assumption of risk was a fair question of fact for the jury. The plaintiff knew that the set screw was unguarded, and that if his person or clothing came in contact with it he might be injured, but it does not follow that he necessarily knew of the probability of the sawdust or material in which he was standing yielding to such an extent as to bring his person or clothing into contact with the set screw. To establish the defense of assumption of risk, the burden of proof rests on the defendant (*Dowd v. New York, O. & W. A. Co.* 170 N. Y. 459, 63 N. E. 541), and, though the defect be apparent, if it may require judgment not possessed by the ordinary observer or servant to realize the

hazard caused thereby, the risk is not assumed (*Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Welle v. Celluloid Co.* 175 N. Y. 401, 67 N. E. 609). The plaintiff, without any previous experience in his work, was injured within four days after his employment. The statute which the defendants violated was enacted for the express purpose of safeguarding the persons of employees. Where an employer deliberately fails to comply with the statute, the courts should be loath, except in a very clear case, to hold that the employee assumes the risk of his master's violation of the law. Otherwise the beneficial results sought to be attained by the statute will fail to be realized. There seems at the present day an effort by constitutional amendment to render a master liable to his employee for injury received in his employment, though the master has been guilty of no fault whatever, and I feel that such effort is in no small measure due to the tendency evinced at times by the courts to relieve the master, though concededly at fault, from liability to his employee, on the theory that the latter assumed the risk of the master's fault.

The order of the Appellate Division should be affirmed and judgment absolute rendered for the plaintiff on the stipulation, with costs in all courts.

**Haight, Vann, Werner, and Hiscock, JJ., concur.**

**Collin, J., dissenting:**

The action is by an employee against employers to recover, under the principles of the common law, damages for personal injuries. The trial court dismissed the complaint. We are to determine whether or not the evidence presented an issue of fact. In reviewing it, we must give the plaintiff the advantage of all the facts properly presented and of every favorable inference that can reasonably be drawn. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474; *Pinder v. Brooklyn Heights R. Co.* 173 N. Y. 519, 66 N. E. 405. The defendants operated a sawmill. The work of the plaintiff was to saw the slabs into pieces of different lengths by placing them against a circular saw which received its power by means of a belt running from a pulley on the main power shaft located near the floor of the basement underneath. It was a part of his duty to replace the belt upon the pulley of the main shaft whenever it ran off; and in doing that his foot was mangled by an unguarded set screw in and projecting 1½ inches from the main shaft. The injuries so received are the basis of this action. The main shaft revolved in the top



of a bed of sawdust, formed by the sawdust which had sifted through the floor above where the saws were. The set screw was 12 or 14 inches from the pulley. When the plaintiff replaced the belt, he stood astride the revolving shaft at the point where the set screw was, and, with a stick which he held, crowded the belt upon the pulley. In pursuing this manner, he followed the instructions given him by a representative of the defendants at the time he was employed, four days before that of the accident. Concerning the exact cause of his injuries, he testified: "In the meantime (while he was pressing the belt on the pulley), as the shaft was revolving, this set screw was in the sawdust and it kept digging out the sawdust so it would give under my foot, so it caught me right there on my foot." The age of the plaintiff was twenty years and ten months. He was a farm laborer. He received the injuries between 3 and 4 o'clock in the afternoon of the fifth day of his employment, during which he had replaced the belt upon this pulley in the same manner and under the same conditions hundreds of times, as he testified. He knew of the set screw and at the time of the accident remembered it was there; and he testified that he tried to avoid it, and put on the belt the same as he always had. On the morning of that day a fellow workman had warned him of the danger from it. He was familiar with all the conditions, and the light in the basement enabled him to perceive the state of things there.

The labor law (Consol. Laws 1909, chap. 31) requires the proper guarding of all set screws. § 81. The counsel for the respective parties properly assumed that the evidence disclosed facts upon which negligence on the part of the defendants might be predicated. *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.* 162 N. Y. 399, 56 N. E. 897; *Wynkoop v. Ludlow Valve Mfg. Co.* 196 N. Y. 324, 30 L.R.A.(N.S.) 36, 89 N. E. 827.

A ground of the motion for the dismissal of the complaint was that the injuries of the plaintiff were the result of a risk which was obvious and which he assumed. An employee who enters or continues in the employment, with actual or constructive knowledge of the defects existing or arising through the negligence of the employer, and an appreciation of the dangers they create, without any assurance on the part of the employer that he would remedy them, and in the absence of a special request by the employer or of an emergency, assumes the risks arising through those defects and dangers. The basis for and the nature of the risks of such a character are lucidly

and tersely stated by Judge Vann in *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 459, 63 N. E. 541. The dangers and risks of such a character should not be confounded with those which exist or arise when and although the employer has discharged his duty of reasonable care to prevent them, and which are normally and inherently incident to the employment. The latter class involve the performance by the master of his duty. The former are predicated upon his negligence. The plaintiff in the case at bar must rely on his common-law cause of action under which the assumption of risk is not necessarily a question of fact; nor does the fact that he was under the age of twenty-one years, nor the further fact that the defendants violated a duty imposed by a statute, shield him from the application of the doctrine of assumption of risks. *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540, 21 N. E. 717; *Knisley v. Pratt*, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986; *Gombert v. McKay*, 201 N. Y. 27, post, 1234, 94 N. E. 186.

We are unable to ascertain any fact or inference which would permit the jury, upon the submission of the evidence to them, to find that the plaintiff did not assume the risks attendant upon the negligence of the defendants. He had full knowledge of all the conditions, and was bound to take notice of the ordinary operation of laws commonly known and regarded, and govern his acts accordingly. The evidence does not indicate or suggest that he was lacking in mental or physical capacity. He had age, intelligence, and experience enough to appreciate the dangers and the risks he was under. He knew the set screw was exposed and was revolving, and that, if his foot came in contact with it, injury would ensue. It is idle to assert the contrary. He saw and was aware that the surface of the sawdust was level with the power shaft, was loose and unstable, and the set screw was preserving a cut or cleft which increased the likelihood that it would yield to the pressure of his feet. All this was obvious to one of ordinary intelligence. His vision at the time of the accident was not interfered with or his judgment distracted. When the condition of things existing at the time an injury is received exposes obvious dangers, the employee must be held to have appreciated the risks, and it does not matter that he may not know their precise effects. Plaintiff's knowledge of the unguarded set screw and of the condition of the sawdust about it necessarily involved recognition of the fact that if his foot slipped into the cut or cleft, or the sawdust yielded or gave way so that his foot came

within the range of the set screw, results of a more or less injurious nature would exist. He, knowing the facts, must have appreciated the risk of that which in fact did happen. Indeed, he does not pretend that he did not appreciate it, and avers that he attempted to secure himself against it. He continued to expose himself to a danger which he knew and fully appreciated, without assurance of safety or remedy, and not under stress of an emergency or special request, and assumed the risks connected with it. *Dixon v. New York, O. & W. R. Co.* 198 N. Y. 58, 91 N. E. 271; *Kaare v. Troy Steel & I. Co.* 139 N. Y. 369, 34 N. E. 901; *Appel v. Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550, 19 N. E. 93; *Rooney v. Brogan v. Constr. Co.* 194 N. Y. 32, 86 N. E. 814; *Rooney v. Sewall & D. Cordage Co.* 161 Mass. 153, 36 N. E. 789; *Feely v. Pearson Cordage Co.* 161 Mass. 426, 37 N. E. 368; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654.

The order of the appellate division should be reversed and the judgment of the trial term affirmed, with costs in both courts.

**Gray, J.**, concurs with **Collin, J.**

Motions for reargument and to amend remittitur having been filed, the following **Per Curiam** response was handed down November 26, 1912 (206 N. Y. 731, 100 N. E. 1127):

Motion for reargument denied.

Motion to amend remittitur granted by adding to the decision heretofore made the following: Unless within twenty days the appellants withdraw their appeal and pay to the respondent all the costs and disbursements of the appeal to be taxed; in which case the appeal is dismissed.

#### NEW YORK COURT OF APPEALS.

MARGARET GOMBERT, Admr., etc., of  
Peter B. Gombert, Deceased, Appt.,  
v.

PETER MCKAY, Respnt.

(201 N. Y. 27, 94 N. E. 186.)

**Master — unsafe scaffold — assumption of risk.**

An experienced employee who approves the plan, and assists in the construction of the support of the scaffold upon which he is to perform labor, assumes the risk of its being insufficient to support the weight to be placed on it, although the statute provides that a person employing or directing another to perform the class of labor in which he was engaged shall not furnish or erect, or cause to be furnished or erected, 42 L.R.A. (N.S.)

for the performance thereof a scaffold which is unsafe, unsuitable, or improper.

(February 7, 1911.)

**A** PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County, Part V., in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Charles La Rue, for appellant:

The employer was liable for the negligence of the fellow servant who made the defective scaffold-supporting brace which broke.

*Caddy v. Interborough Rapid Transit Co.* 195 N. Y. 415, 30 L.R.A. (N.S.) 30, 88 N. E. 747; *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662; *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266, 83 App. Div. 343, 82 N. Y. Supp. 274; *McLaughlin v. Eidlitz*, 50 App. Div. 518, 64 N. Y. Supp. 193; *Chaffee v. Union Dry Dock Co.* 68 App. Div. 578, 73 N. Y. Supp. 908; *Walters v. George A. Fuller Co.* 74 App. Div. 388, 77 N. Y. Supp. 681; *Williams v. Roblin*, 94 App. Div. 177, 87 N. Y. Supp. 1006; *Tierney v. Vunck*, 97 App. Div. 1, 89 N. Y. Supp. 612; *Cummings v. Kenny*, 97 App. Div. 114, 89 N. Y. Supp. 579; *Holloway v. McWilliams*, 97 App. Div. 360, 89 N. Y. Supp. 1074; *Welk v. Jackson Architectural Iron Works*, 98 App. Div. 247, 90 N. Y. Supp. 541; *Iesief v. New York C. & H. R. R. Co.* 102 App. Div. 168, 92 N. Y. Supp. 342; *Siversen v. Jenks*, 102 App. Div. 313, 92 N. Y. Supp. 382; *Swenson v. Wilson & B. Mfg. Co.* 102 App. Div. 477, 92 N. Y. Supp. 849; *Madden v. Hughes*, 104 App. Div. 101, 93 N. Y. Supp. 324; *Haggblad v. Brooklyn Heights R. Co.* 117 App. Div.

**Note.** — As suggested in the note to *Fitzwater v. Warren*, ante, 1220, the position taken in the first part of the opinion in that case seems to be directly opposed to the decision in *GOMBERT v. MCKAY* as to the defense of assumption of risk against the breach of a master's statutory duty; and as the *Fitzwater Case* is later in point of time, it would seem that it must be regarded as overruling the *GOMBERT CASE*, if that position represents the views of the majority of the court. It may be, however, as suggested in the note, that the *Fitzwater Case* is not to be regarded as definitely committing the majority of the court to that position. It is, however, to be said that this change of position on the part of the New York court of appeals, if it is to be regarded as such, is in accordance with the decided trend of the cases on the point, as is shown by the note referred to.

838, 102 N. Y. Supp. 1039; *Ristau v. E. Frank Coe Co.* 120 App. Div. 478, 104 N. Y. Supp. 1050; *Ferrick v. Eidlitz*, 123 App. Div. 587, 108 N. Y. Supp. 28; *Anderson v. Milliken Bros.* 123 App. Div. 614, 108 N. Y. Supp. 61; *Caddy v. Interborough Rapid Transit Co.* 125 App. Div. 681, 110 N. Y. Supp. 162; *Warren v. Post & McCord*, 128 App. Div. 572, 112 N. Y. Supp. 960; *Convey v. Finn*, 130 App. Div. 440, 114 N. Y. Supp. 864; *Nixon v. Thompson-Starrett Co.* 131 App. Div. 152, 115 N. Y. Supp. 130; *Gruner v. Texas Co.* 133 App. Div. 413, 117 N. Y. Supp. 741.

Messrs. **Frank V. Johnson and E. Clyde Sherwood**, for respondent:

Section 18 of the labor law has no application to a situation created by the workmen themselves without the knowledge of the employer, especially when the condition complained of was created with materials obtained and used by such workmen unknown to the employer, and without any means of knowledge on his part.

*Wingert v. Krakauer*, 92 App. Div. 223, 87 N. Y. Supp. 261; *Rotondo v. Smyth*, 92 App. Div. 153, 86 N. Y. Supp. 1103; *Williams v. First Nat. Bank*, 118 App. Div. 555, 102 N. Y. Supp. 1031, 121 App. Div. 929, 106 N. Y. Supp. 1150, affirmed in 105 N. Y. 576, 89 N. E. 1115.

**Collin, J.**, delivered the opinion of the court:

The plaintiff brought the action to recover damages for the alleged negligence of defendant, by which the death of her intestate was caused. The relation between the intestate and the defendant was employee and employer. On November 22, 1906, the intestate, with three coemployees, began the job of painting the exterior wood-work of the building No. 23 West Seventeenth street, New York city. They, having caused to be taken there the swinging or portable scaffold with the tackle, pulley blocks, and falls ordinarily used in painting the exteriors of buildings, arrived at about 9 o'clock in the forenoon, and planned to commence the work at the second story. Two of them, other than the intestate, after investigation, decided that the best way to support the scaffold was to hang it upon planks to be projected out and resting upon the sills of the third-story windows, and made stationary by tying them to an interior fixture. About 1 foot below the window sills, and extending along the building and from it outwardly 2 or 3 feet, was a coping over which the planks were to reach. In order that each of the planks from the window sill outward would be level, they decided to rest it upon a support of the requisite height, placed upon and near to

the outer edge of the coping. They obtained at a near-by shop, and brought to the building, the planks and hammer and nails, and at this point participation by the intestate in the construction of the support for the scaffold began. He expressed his idea of the proper way of building the support, and in return was shown the intended and planned method, and in response said, "It is all right." Each support to be placed upon the coping was then made by the fellow workmen of the intestate, by sawing and nailing together a piece of plank and boards obtained from the shop, after which the intestate from the inside of the building held it as it had been placed upon the coping, while another from the outside nailed to the top thereof the plank, and then tied the plank to something within the building. The scaffold was then hung upon the planks by means of the hooks in the pulley blocks, was pulled up to the right place, and upon it stepped the intestate and a fellow employee, who were just ready for work when the support broke down from under one of the planks, and, the end of the scaffold dropping suddenly, the intestate fell to the street, and received the injuries which caused his death. A part of the work of the intestate as an employee of the defendant, through the two years or more last prior to his death, had been to assist in rigging the painters' scaffold in position on the outside of the buildings to be painted by himself and his fellow workmen, and, as they painted from place to place, in raising or lowering the scaffold up and down the side of the building by means of the pulley blocks and the ropes, and, when a part of the building covered by the scaffold was painted, in shifting the scaffold to and rigging it in another place.

Inasmuch as the supports for the scaffold were planned and constructed by the intestate and his coemployees, the plaintiff could not, under the rules of the common law, have a recovery against the defendant. *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860; *Golden v. Sieghardt*, 33 App. Div. 161, 53 N. Y. Supp. 460. The counsel for the plaintiff, while conceding this much, argues that the provisions of §§ 18 and 19 of the labor law (Consol. Laws, chap. 31) abrogated or modified those rules in such wise and extent that they do not bar to plaintiff a right to maintain the action.

The provisions of those sections, in so far as material to this discussion, are: "A person employing or directing another to perform labor of any kind in the erection, repairing, altering, or painting of a house, building, or structure, shall not furnish or

erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable, or improper, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed." § 18. "All swinging and stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use, and not more than four men shall be allowed on any swinging scaffolding at one time." § 19. The statute broadens in a substantial and important degree the liability of the class of employers designated by it. It, in terms, absolutely forbids those employers to furnish or operate, or cause to be furnished or operated, any apparatus therein mentioned of the character and quality described by it. It, in its effect, provides that any employer who either personally or by another furnishes for the performance of any named labor a forbidden article shall be responsible therefor. The duty of the employer created by it is personal, incapable of delegation, and unaffected by caution and discrimination in selecting employees for their prudence and competency. *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662; *Madden v. Hughes*, 185 N. Y. 466, 78 N. E. 167; *Caddy v. Interborough Rapid Transit Co.* 195 N. Y. 415, 30 L.R.A.(N.S.) 30, 88 N. E. 747.

The common-law doctrines, in so far as they oppose the provisions of the statute, are superseded, but, in so far as they do not oppose them, remain and must be applied. The statute must be given a fair and reasonable meaning, which will neither extend it beyond nor withdraw it from its intended effect. Although it imposes upon the employers personal responsibility and a positive prohibition, it does not in terms impose absolute and irresistible liability from their default or disobedience; nor is the liability consequent upon the negligent violation of a duty created by a statute necessarily superior to the relevant common-

law defenses thereto. *Knisley v. Pratt*, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 956; *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266; *Marshall v. Norcross*, 191 Mass. 568, 77 N. E. 1151; *Sitts v. Waiontha Knitting Co.* 94 App. Div. 38, 87 N. Y. Supp. 911; *White v. Wittemann Lithographic Co.* 131 N. Y. 631, 30 N. E. 236. The employer is precluded from those defenses when the language of the statute evinces that the legislature thus intended, and not otherwise. Under the statute in question, the employer is left free to invoke the defense of assumption of risk or contributory negligence on the part of the employee, although injured while acting as his agent or vice principle in constructing the appliance, or any other defense permitted by the common law and not inconsistent with the statute.

The uncontradicted evidence compels to the conclusion that the intestate assumed the risks attendant upon the construction and placing of the support for the scaffold of which it was a part. He deliberately approved the plan devised by his fellow workmen therefor, assisted in constructing the support in accordance therewith, and knew fully and accurately the materials and manner of construction. He was intelligent, because of his extended experience, as to the uses to which the scaffold was to be put, the strain to which it would be subjected, and the risks connected with a construction insufficient in strength of materials or defective in manner. At no point in making the support or being upon the scaffold did he act under the direction of the defendant, but of his own volition. Plaintiff's right to recover is defeated by the intestate's assumption of the risks. *Harvey v. McConchie*, 77 App. Div. 361, 79 N. Y. Supp. 241, affirmed in 177 N. Y. 569, 69 N. E. 1124.

The judgments should be affirmed, with costs.

Cullen, Ch. J., and Gray, Haight, Vann, Werner, and Hiscock, JJ., concur.

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# GENERAL INDEX

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(Separate Index to Notes Precedes this.)

## ABANDONMENT.

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The pendency of an action in one state does not prevent the bringing of another action in another state on the same cause of action. *Jones v. Hughes*, 42: 502, 137 N. W. 1023, — Iowa, —.

## ABSTRACTS.

Bar of abstractor's liability for negligence by running of limitations, see Limitation of Actions, 4.

One preparing an abstract of title to real estate at the instance of the owner of property, which, at his instance, is delivered to a stranger whom the abstractor knows will rely upon it in dealing with the property, is liable to him for losses resulting from a material error or omission in the abstract. *Anderson v. Priesterbach*, 42: 176, 125 Pac. 166, 69 Wash. 393. (Annotated)

## ABUSE OF PROCESS.

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Matters peculiar to particular kinds of action and proceedings, see Admiralty; Assumpsit; Attachment; Case; Creditor's Bill; Eminent Domain; Injunction; Mandamus.

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To action for malicious prosecution, see Malicious Prosecution.

1. A suit by materialmen on the bond of a building contractor need not be postponed until the owner of the building has suffered pecuniary injury by reason of the contractor's default, where it is conditioned that the contractor shall pay for all materials supplied for the building. *Orinoco Supply Co. v. Illinois Surety Co.* 42: 707, 76 S. E. 273, — N. C. —

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In libel suit, see Libel and Slander, 6.

In proceeding to abate nuisance, see Nuisances, 4.

Negation of, see Pleading, 2.

In action for trespass, see Trespass.

2. One coasting in a public street who is injured by another's negligence is not prevented from recovering for the injury because his own act constituted a public nuisance. *Lynch v. Public Service R. Co.* (N. J. Err. & App.) 42: 865, 83 Atl. 382, 82 N. J. L. 712. (Annotated)

#### Contract or tort.

3. Where a tenant loses a stock of merchandise stored in the leased premises, and there was no covenant in the lease whereby the landlord was obligated to repair the premises or keep them in repair, and the tenant seeks to recover from the landlord the value of the goods destroyed by fire occurring in the building, on the ground that the fire was caused by defects in the heating plant or flue, or the negligent operation and management of the furnace and heating plant, the recovery, if any shall be had, must be founded upon the law of negligence, and cannot rest upon the theory of an implied contract. *Russell v. Little*, 42: 363, 126 Pac. 529, — Idaho, — (Annotated)

4. An action to recover money which a corporation was compelled to pay as a tax to replace a payment which had been embezzled by the tax collector does not sound in tort so as not to come within a statute giving a court jurisdiction to hear and determine claims on contract against the state, although it is alleged that in compelling payment of the substituted amount the taxing officers acted illegally and wrongfully. *State v. Mutual L. Ins. Co.* 42: 256, 93 N. E. 213, 175 Ind. 59. (Annotated)

#### ACT OF GOD.

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1. An ordinary flood is one the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream, have been antic-

ipated. *Chicago, R. I. & P. R. Co. v. McKone*, 42: 709, 127 Pac. 488, — Okla. —

2. An extraordinary flood is one of those unexpected visitations whose coming is not foreseen by the natural course of nature, and whose magnitude and destructiveness could not have been anticipated and prevented by the exercise of ordinary foresight. *Chicago, R. I. & P. R. Co. v. McKone*, 42: 709, 127 Pac. 488, — Okla. —

#### ADJOURNMENT.

See Continuance and Adjournment.

#### ADMINISTRATION.

Of decedents' estates, see Executors and Administrators.

#### ADMIRALTY.

Admiralty has jurisdiction of a suit by a man to recover damages for loss to him because of the injury to his wife by a collision between two vessels upon one of which she was a passenger. *New York & L. B. S. B. Co. v. Johnson*, 42: 640, 195 Fed. 740, 115 C. C. A. 540. (Annotated)

#### ADMISSIONS.

As evidence, see Evidence, 23.

#### ADVERSE POSSESSION.

As to limitation of actions, see Limitation of Actions.

#### As to tenants in common.

1. Where one of several joint contingent remaindermen and her husband, who occupy the land as tenants of the holder of the limited fee, purchase the property from such holder of the limited fee and take a conveyance therefor, believing that they are receiving a fee-simple title, such deed constitutes color of title, and open, exclusive, and notorious possession thereunder for a period in excess of that of the statute for the adverse possession of real estate bars a recovery by the coremainderman in expectancy. *Wilson v. Linder*, 42: 242, 123 Pac. 487, 21 Idaho, 576.

#### As to public; highways, etc.

2. Notwithstanding an alley shown on a plat has never been used by the public, and has been occupied by an individual for more than 15 years, the title remains in the public, and vests in the owners of the abutting lots upon the passage of an ordinance vacating it. *Wallace v. Cable*, 42: 587, 127 Pac. 5, 87 Kan. 835.

#### Color of title.

See also *supra*, 1.

3. Heirs of one having a deed to real estate which constituted color of title, under which neither the ancestor nor anyone on his behalf took possession, cannot, after the lapse of a number of years after the ancestor's death, and the granting of the property to a stranger, enter and gain title by adverse possession, relying on the color of title of the ancestor where, by statute, color of title is necessary to secure title by adverse possession. *Barrett v. Brewer*, 42: 403, 69 S. E. 614, 153 N. C. 547.

(Annotated)

**Extent and kind of possession.**

4. An adverse holding of land on the shore of a river does not attach to itself the accretion as it forms on the river bottom, so as to take precedence of a grant by the state of the newly formed land. *Carson v. Turk*, 42: 384, 143 S. W. 393, 146 Ky. 733.

5. The right to use property devoted to burial purposes is not barred by the statute of limitations so long as the lot is kept inclosed, or the monuments remain and the grounds are cared for. *Hines v. State*, 42: 1138, 149 S. W. 1058, — Tenn. —

(Annotated)

**AFTERBORN CHILDREN.**

Jurisdiction of, see Courts, 4.

Effect of judgment on, see Judgment, 4, 5.

**AGISTERS.**

Under a statute giving every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, a special lien dependent on possession, for his compensation due from the owner for such service, and expressly giving persons pasturing live stock of any kind a lien for their compensation in caring for, boarding, feeding, or pasturing such live stock, a herder employed by the month and working under the direction and control of an owner in taking care of sheep being grazed on the public domain is not entitled to a lien on the sheep for his wages. *Mendilie v. Snell*, 42: 737, 127 Pac. 550, — Idaho, —

(Annotated)

**AGRICULTURAL COLLEGE.**

See State Institutions, 4.

**ALIENATION OF AFFECTIONS.**

Mitigation of damages for, see Damages, 8.

New trial because of excessive damages, see New Trial, 1.

Excessive verdict in trial for, see Trial, 12.

Evidence in action for, see Evidence, 46, 47.

Cure of error in admission of evidence in action for, see Appeal and Error, 25.

**ALLEY.**

Adverse possession of, see Adverse Possession, 2.

Abandonment of, see Highways, 6.

The title to an alley in a city which was erroneously thought not to exist is not affected by the fact that one of the abutting owners had signed a petition asking that the alley be "opened," and that an ordinance had been passed providing for the condemnation of land for that purpose. *Wallace v. Cable*, 42: 587, 127 Pac. 5, 87 Kan. 835.

**AMENDMENT.**

Of Constitution, see Constitutional Law, 1.

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**AMERCEMENT.**

Of sheriff, see Sheriff.

Strict construction of statute providing for, see Statutes, 5.

**AMUSEMENTS.**

Presumption of negligence from injury to patron at amusement park, see Evidence, 7.

Liability of owner of amusement park for negligence of independent contractor, see Master and Servant, 7.

Proximate cause of injury to patron at amusement parks, see Proximate Cause, 1.

1. Ordinary care measures the duty of the owner of a place of amusement to patrons with respect to the safety of a stand containing seats which they are invited to occupy. *Phillips v. Butte Jockey Club & Fair Asso.* 42: 1076, 127 Pac. 1011, — Mont. —

2. Liability of the owner of seats in a place of amusement for injury to a patron is not shown by an allegation that the patron was tripped by a projecting nail on a stairway, and fell to his injury upon a broken board on the landing, of which defects the owner had knowledge, without stating facts showing defendant's knowledge, actual or implied, of the defects. *Phillips v. Butte Jockey Club & Fair Asso.* 42: 1076, 127 Pac. 1011, — Mont. —

3. A patron of an attraction in an amusement park is not negligent in grasping a mallet near the head, rather than at the other end, when attempting to use it for the purpose for which it was intended, so as to prevent his holding the owner liable in case the head flies off to his injury. *Wodnik v. Luna Park Amusement Co.* 42: 1070, 125 Pac. 941, 69 Wash. 638.

4. The proprietor of an attraction in an amusement park, in connection with which a mallet is used, cannot escape liability for injury to a patron by the end of the handle striking his knee when the head flies off, on the theory that such injury could not reasonably have been anticipated. *Wodnik v. Luna Park Amusement Co.* 42: 1070, 125 Pac. 941, 69 Wash. 638.

**ANIMALS.**

As to agisters, see Agisters.

Transportation of, see Carrier, 8.

Constitutionality of statute requiring use of, in road work, see Constitutional Law, 13.

Running away of horse as concurrent cause of injury to person on highway, see Highways, 2.

Injury due to fright of horse, see Highways, 5.

Horse stealing, see Larceny, 1.

Lien on logs for services of horses, see Mechanics' Liens, 1.

New trial in action for breach of warranty on sale of, see New Trial, 2, 4.

Injury to, on railroad track, see Railroads.

The loss of its collar without the owner's knowledge, by a dog, while absent from home, does not subject the owner to fine, under a statute imposing a fine for "keeping" a dog which does not wear a collar. *State v. Kelley*, 42: 437, 84 Atl. 861, — Vt. — (Annotated)

### APPEAL AND ERROR.

Waiver of defect in, by appearance, see Appearance.

Right of appellate court to prescribe rules for government of trial court, see Courts, 2.

In habeas corpus proceeding generally, see Habeas Corpus, 6.

#### Who entitled to.

1. The right of a plaintiff in summary process to recover possession of property from a tenant, to a writ of error to the justices' judgment under a general statute, is not affected by another statute giving defendant a right to such writ, which allows him a certain time to procure the writ during which the execution shall be stayed. *Brodner v. Swirsky*, 42: 654, 84 Atl. 104, 86 Conn. 32.

#### Record.

2. An allegation of the petition as to the character in which a person signed a promissory note will control a mere recital of the record as to the exhibit purporting to set out the note. *Pease v. Globe Realty Co.* 42: 6, 119 N. W. 875, 141 Iowa, 482.

3. On a motion to dismiss for the reason that the case made was not served within the time prescribed by the order of the court, where it appears from an examination of the record that the only date referred to in the journal entry is not the date on which the motion for new trial was overruled and the time given, the words "from this date" in the journal entry will be construed as applying to the date on which it is filed, and not the date on which the trial was commenced. *Western U. Teleg. Co. v. Sights*, 42: 419, 126 Pac. 234, — Okla. —

4. Where no time has been fixed for settling a case either by order of court or by notice given by the parties within the time for serving a case and suggesting amendments thereto, the authority or term of a judge *pro tempore* ceases upon the expiration of the time fixed for suggesting amendments, and a case made settled by him after that time is a nullity. *Shawnee v. State* Pub. Co. 42: 616, 125 Pac. 462, 33 Okla. 363. (Annotated)

5. An appeal from an order granting a motion to quash a summons brings up the record for review, and a bill of exceptions is not necessary if the record discloses the question decided. *Long v. Hawken*, 42: 1101, 79 Atl. 190, 114 Md. 234.

Objections and exceptions; raising questions in lower court.

6. Statements made by the judge during a criminal trial cannot be considered on appeal if no exception to them was taken. *State v. Dobbins*, 42: 735, 132 N. W. 805, 152 Iowa, 632. 42 L.R.A. (N.S.)

7. An objection that the attorney in the case was related to the judge, and is employed under a contract calling for a contingent fee, is in time if made by motion for new trial before final judgment, where the facts were not known to the opposing attorney until after the close of the trial. *Yazoo & M. V. R. Co. v. Kirk*, 42: 1172, 58 So. 710, — Miss. —

8. A decree enjoining the continuation of a nuisance cannot be questioned on appeal, notwithstanding a finding that the operations causing it would not be resumed, if no motion to modify it was made in the lower court. *Niagara Oil Co. v. Ogle*, 42: 714, 98 N. E. 60, — Ind. —

#### Who may complain.

9. An accused cannot secure an affirmation of a ruling dismissing the indictment because of insufficiency upon appeal by the state, which attempts to support the constitutionality of the statute upon which it was founded, since he will not be directly affected by rulings upon the particular questions presented by the state. *State v. Fairmont Creamery Co.* 42: 821, 133 N. W. 895, 153 Iowa, 702.

Interlocutory matters; orders, etc., not appealed from.

10. Failure of the successful party to question by cross errors on appeal to an intermediate appellate court the correctness of a rule striking out testimony because of the incompetency of the witness, when his opponent succeeds in reversing the judgment because the admission of such testimony was prejudicial error, notwithstanding it was stricken out, does not estop him from questioning in a higher appellate court the correctness of a ruling holding the witness incompetent on a subsequent trial of the same cause. *Bailey v. Robinson*, 42: 305, 91 N. E. 98, 244 Ill. 16.

#### Discretionary matters.

11. Judges of the superior court are vested with large discretion in habeas corpus cases, and their judgment in such cases on questions of law and fact will not be interfered with by the supreme court, unless manifestly abused. *Wilkinson v. Lee*, 42: 1013, 75 S. E. 477, 138 Ga. 360.

12. It being competent, in the absence of statute, for a court to make a rule requiring requests for special findings to be made at the close of the testimony, where a court has made such a rule, and attorneys familiar therewith make a request for fifty-two special findings after the instructions to the jury, the refusal of the court to submit the questions asked is not such an abuse of its discretion as calls for a reversal of the judgment. *Lehnen v. Hines*, 42: 830, 127 Pac. 612, — Kan. —

13. Limiting to thirty minutes the time allowed counsel to present the defense in a murder case to the jury is not an abuse of discretion where the evidence brought out no complicated circumstances or facts necessitating detailed or elaborate explanation. *Lucas v. Com.* 42: 209, 149 S. W. 861, 149 Ky. 495. (Annotated)

**Questions not raised below.**

14. An objection for want of parties cannot be made for the first time on appeal. *Wilson v. Irwin*, 42: 722, 138 S. W. 373, 144 Ky. 311.

15. A decree following the wording of a statute cannot be attacked on appeal, because it did not limit the meaning of a word used therein, if the point was not raised and passed upon in the trial court. *White v. Manter*, 42: 332, 84 Atl. 890, — Me. —.

**Review of facts.**

16. The New York court of appeals cannot find a fact which the trial court failed to find. *International Text-Book Co. v. Connolly*, 42: 1115, 99 N. E. 722, 206 N. Y. 188.

17. Upon appeal from denial of a motion for new trial because the verdict is against the weight of the evidence, the Michigan supreme court must exercise its judgment as to the weight of the evidence. *Bernard v. Grand Rapids Paper Box Co.* 42: 930, 136 N. W. 374, — Mich. —.

18. The appellate court will not disturb a conviction where the question of credibility of witnesses and the weight to be given to the testimony is for the jury, if there is any unimpeached evidence to sustain the verdict. *Andrews v. State*, 42: 747, 141 S. W. 220, — Tex. Crim. Rep. —.

19. A judgment for a property owner against a carrier for goods lost in transportation will not be disturbed on appeal for lack of evidence, although it is based on an arbitrary reduction of the cost price of the property, which was several years old, where defendant admitted a value nearly as great as that awarded, and offered no evidence on the question. *Kettenhofen v. Globe Transfer & Storage Co.* 42: 902, 127 Pac. 295, — Wash. —.

20. The appellate court will not interfere with an allowance of \$8,500 for the destruction of the right hand of a fourteen-year-old boy. *Glucina v. F. H. Goss Brick Co.* 42: 624, 115 Pac. 843, 63 Wash. 401.

20a. An award of \$800 as damages to a passenger for insult and abuse by a conductor on a railroad train will not be interfered with on appeal, as excessive, although there is evidence tending to show that the conductor was insane when committing the offense, if there is also evidence that he was merely under the influence of liquor at the time, while he was continued in his position for some time afterwards. *Chesapeake & O. R. Co. v. Francisco*, 42: 83, 148 S. W. 46, 149 Ky. 307.

**Grounds for reversal.**

Reversal because of disqualification of judge, see Judges, 3.

21. It is reversible error in the trial of a prosecution for homicide for the court to admit testimony as to declarations between an officer who had accused under arrest and the state's witnesses, or other persons, in the presence of the accused, tending to connect him with the offense charged, and that the accused remained silent as to such declarations. 42 L.R.A. (N.S.)

larations. *Vaughan v. State*, 42: 889, 127 Pac. 264, 7 Okla. Crim. Rep. 685.

(Annotated)

22. The admission in evidence of an insufficiently proved letter is not prejudicial error if it throws no particular light on the real question in issue. *Rose v. Monarch*, 42: 660, 150 S. W. 56, 150 Ky. 129.

23. It is not error to admit evidence corroborative of other evidence which has been received without objection. *Wells v. Hays*, 42: 727, 76 S. E. 195, — S. C. —.

24. It is error for the prosecuting attorney to ask his own witness if he had not stated specific facts to him out of court different from those testified to by him, accompanying the question by the assertion that he had done so, for the alleged purpose of impeachment, and by so doing get before the jury evidence that could not be secured otherwise; and it is not cured by the subsequent withdrawal of the evidence from the jury. *Andrews v. State*, 42: 747, 141 S. W. 220, — Tex. Crim. Rep. —.

(Annotated)

25. An instruction not to regard evidence of defendant's wealth in an action for damages for alienation of affections does not cure error in admitting it, if from the size of the verdict, it is evident that it was not obeyed. *Phillips v. Thomas*, 42: 582, 127 Pac. 97, — Wash. —.

26. Rejection of a particular offer of evidence is not reversible error if the party has been accorded every reasonable opportunity for showing facts which would be likely to aid the jury to reach a correct conclusion upon the issue involved. *Walters v. Spokane International R. Co.* 42: 917, 108 Pac. 593, 58 Wash. 293.

27. On cross-examination a hypothetical question omitting material facts which the evidence tended to prove, and which were included in a question asked upon direct examination, is permissible, within reasonable limits, to test the intelligence, capacity, discernment, and candor of the witness; but where the cross-examination proceeded at great length, and the witness testified upon the matters embraced in the question in detail, and admitted that he did not know positively whether the death might have occurred from poison without the symptoms stated, a ruling excluding such hypothetical question does not affect the substantial rights of the appellant. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

28. A contradictory and meaningless instruction upon the measure of damages does not require reversal, if it is apparent that the jury, in assessing the damages, followed a correct instruction. *White Walnut Coal Co. v. Crescent Coal & Min. Co.* 42: 669, 98 N. E. 669, 254 Ill. 368.

29. It is error in an action to hold a landlord liable for injury to a tenant by forcing formaldehyde into his room to eject him therefrom, to instruct the jury as to the measure of liability in case it merely aggravated an existing condition in the tenant, if there is no evidence that such a condition

did exist. *Saros v. Avenue Theater Co.* 42: 392, 137 N. W. 559, — Mich. —.

30. It is not reversible error for the court, in granting the request of the prosecuting attorney to cross-examine his own witness in a criminal case, because he was unwilling to state in the presence of the jury that he sees that he is unwilling. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

31. A statement of the judge to the jury in a criminal case that certain evidence which had a certain tendency could be considered only under certain circumstances is not reversible error, as intimating the opinion of the judge on the evidence, where the sole purpose of the statement was to identify it so as to limit its application in favor of accused. *State v. Dobbins*, 42: 735, 132 N. W. 805, 152 Iowa, 632.

32. One on trial for murder cannot be prejudiced by an admonition to an accomplice who takes the stand on behalf of the people that any statement he may make may be used against him, if the jury are afterwards told that he is testifying under an agreement that, if he lives up to his agreement made with the state as to giving testimony, he will not be prosecuted. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

33. An accused cannot complain of the sustaining of challenges by the state where he has unexhausted challenges when the jury is complete, so that it does not appear that any objectionable juror was forced upon him. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

34. A verdict of \$4,000 in favor of a female guest of a hotel for injuries resulting from her being aroused in the night by the night clerk, who used force and violent language, and summoned a policeman to arrest her and place her in jail, is not so excessive as to indicate passion or prejudice on the part of the jury, calling for a reversal. *Lehnen v. Hines*, 42: 830, 127 Pac. 612, — Kan. —.

**Judgment.**  
35. A policeman is not exempt from civil liability when he acts in a wrongful, oppressive, and illegal manner; but where, in an action against a policeman and the municipality for wrongful arrest, a joint verdict is rendered against both defendants, and judgment thus entered, and upon appeal the municipality is adjudged not liable for the act of the policeman, the entire judgment will be reversed and a new trial ordered as to the policeman. *Lawton v. Harkins*, 42: 69, 126 Pac. 727, — Okla. —. (Annotated)

36. A ruling by an appellate court that there is evidence to take the case to the jury under the issues as presented is the law of the case on a second appeal. *White v. International Text-Book Co.* 42: 346, 136 N. W. 121, — Iowa, —.

## APPEARANCE.

The appearance of the parties and trial of the cause before a circuit court which has jurisdiction of the subject-matter waives a defect in the appeal from a 42 L.R.A.(N.S.)

lower tribunal. *Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co.* 42: 847, 138 N. W. 624, — Wis. —.

## APPENDICITIS.

As accident, see Insurance, 18.

## APPURTENANCES.

Easements as, see Easements, 1, 2.

## ARBITRATION.

A surveyor to whose judgment a timber owner and one who has contracted to cut it at a certain amount per thousand feet have submitted the scaling of the logs cut, which judgment is to be final and conclusive between the parties, is not liable in damages for the negligent performance of his duty. *Hutchins v. Merrill*, 42: 277, 84 Atl. 412, — Me. —. (Annotated)

## ARCHITECTS.

Waiver of misrepresentations as to ability to perform contract, see Contracts, 13.

Fraud in statement as to ability, see Fraud and Deceit, 2.

Fraud in statement as to costs of structure, see Fraud, 1.

## ARMORY.

Lease of state armory, see State, 2, 3.

## ARREST.

Prejudicial error as to amount of damages for, see Appeal and Error, 34.

Effect of finding of nonliability on part of municipality on appeal from joint verdict against municipality and policeman for wrongful arrest, see Appeal and Error, 35.

Of guest at hotel, see Innkeepers, 6.  
Liability of municipality for, see Municipal Corporations, 12.

## ASSAULT AND BATTERY.

On passenger, see Carriers, 2.

Presumption and burden of proof, see Evidence, 10.

With intent to rape, see Rape.

Question for jury in prosecution for, see Trial, 7.

## ASSESSMENTS.

For insurance, see Insurance, 5-9.

## ASSIGNMENT.

Parol assignment of lease, see Contracts, 7.

Assignor of claim against estate as competent witness in suit by assignee against executor, see Evidence, 28.

Of property and insurance thereon as security for debt, see Insurance, 3.

Liability of assignee for rent, see Landlord and Tenant, 10-12.

Of note secured by mortgage, see Mortgage, 1.

Effect of, on right of action, see Parties, 2.

Validity of, as question for court, see Trial, 2.

**ASSUMPSIT.**

The drawer of a check for a specified number of cents may, in case it is cashed by mistake as calling for that number of dollars, maintain an action for money had and received against the payee to recover the difference between the amount called for and that collected by him. *Wagner v. United States Nat. Bank*, 42: 1135, 127 Pac. 778, — Or. —. (Annotated)

**ASSUMPTION OF RISK.**

By servant, see Master and Servant, 2, 4-6.

**ATTACHMENT.**

Injunction against attachment suit, see Injunction, 3.

Release of surety on attachment bond, see Principal and Surety.

Under a statute providing bail absolute to discharge a foreign attachment conditioned to pay the debt or damages, the liability of the sureties depends upon the sum demanded in the cause of action upon which attachment issued, and cannot be increased by an amendment substituting a different measure of damages after the bond is filed. *Com. use of Gettman v. A. B. Baxter & Co.* 42: 484, 84 Atl. 136, 235 Pa. 179. (Annotated)

**ATTESTATION.**

Of wills, see Wills.

**ATTORNEYS.**

Relation of judge to attorney in the case, see Appeal and Error, 7; Judges, 2.

Review of discretion in limiting time allowed counsel for argument to jury, see Appeal and Error, 13.

Including attorneys' fee in penalty for failure of railroad to pay claim within certain time, see Constitutional Law, 18.

1. An attorney cannot complain of the imposition of a fine upon him for ignoring rulings of the court that he cannot put a certain kind of questions to witnesses. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

2. No constitutional right of an attorney is infringed by a statute requiring him to prosecute disbarment proceedings by direction of the court without fees. *Brown v. Warren County*, 42: 527, 135 N. W. 4, — Iowa, —. (Annotated)

3. An attorney who compromises his client's case against the latter's express direction is not entitled to any compensation. *Rogers v. Pettigrew*, 42: 852, 75 S. E. 631, 138 Ga. 528. (Annotated)

**ATTRACTIVE NUISANCE.**

See Negligence.

**AUTOMOBILES.**

Relevancy of evidence as to negligence, see Evidence, 37.  
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Liability of lunatic for negligence of chauffeur, see Incompetent Persons, 2.

Chauffeur as independent contractor and not servant, see Master and Servant, 8.

1. An automobile overtaking and passing a street car is within the operation of a statute providing that the driver of a carriage or other vehicle passing another carriage or other vehicle traveling in the same direction shall drive to the left. *Foster v. Curtis*, 42: 1188, 99 N. E. 961, 213 Mass. 79. (Annotated)

2. A provision in a statute requiring vehicles overtaking others on the highway to pass to the left, that it shall not apply to horse railroads, does not take out of its operation an automobile overtaking a street car. *Foster v. Curtis*, 42: 1188, 99 N. E. 961, 213 Mass. 79.

3. The driver of an automobile will not be negligent in failing to obey a statutory direction to pass an overtaken street car on the left of the middle of the way, if the car tracks are located along the side of the road, so that the statute cannot, in the exercise of reasonable care, be literally obeyed. *Foster v. Curtis*, 42: 1188, 99 N. E. 961, 213 Mass. 79.

4. A passenger alighting from a street car at a place other than a cross walk has a right to presume that the driver of an automobile following the car will pass to the left, as required by statute, and the jury may consider the driver's failure to do so, to the injury of the passenger, as evidence of negligence on his part. *Foster v. Curtis*, 42: 1188, 99 N. E. 961, 213 Mass. 79.

5. A pedestrian injured by an automobile in a public street cannot hold the owner liable in damages if he might, by the exercise of his ordinary faculties, have avoided the accident. *Minor v. Stevens*, 42: 1178, 118 Pac. 313, 65 Wash. 423. (Annotated)

**BALL PLAYING.**

In public streets, see Municipal Corporations, 4.

**BANKRUPTCY.**

Determining question of right to homestead in land sought to be subjected to judgment lien on affidavits filed in application for release of judgment on account of judgment debtor, see Homestead, 2.

1. A discharge in bankruptcy affects the personal liability of bankrupt only, and does not release a valid judgment lien upon the bankrupt's real estate acquired more than four months prior to the proceedings in bankruptcy. *John Leslie Paper Co. v. Wheeler*, 42: 292, 137 N. W. 412, — N. D. —. (Annotated)

2. A state statute providing that a discharged bankrupt may file a certified copy of his discharge in a court in which a judgment has been rendered against him, and upon proper proceeding, that such judgment

shall be discharged and satisfied of record, will be construed to apply only to judgments extinguished by the bankruptcy proceeding so that they shall no longer have the vitality to attach as liens to real estate subsequently acquired, and not as authorizing the discharge of a judgment that has become a valid lien upon real property more than four months prior to the adjudication in bankruptcy. *John Leslie Paper Co. v. Wheeler*, 42:292, 137 N. W. 412, — N. D. —.

3. Where a partnership is formed for owning and managing a bank, one of the partners being president and the other cashier and having the full management, and a loss results from such management, in the absence of fraud on the part of the cashier, his discharge in bankruptcy of which his partner had actual notice and knowledge but failed to file a claim, is a good defense to any claim such partner may have against him for the management of the bank. *Inge v. Stillwell*, 42:1093, 127 Pac. 527, — Kan. —.

4. In a partnership owning a private bank, one of the partners being president and the other cashier and having the full management thereof, the relationship between the partners is not such a fiduciary relationship as will bring a claim which the president may have against the cashier for mismanagement of the bank within the exception of § 17 of the bankruptcy act (act July, 1898, chap. 541), providing that a discharge in bankruptcy shall not relieve a bankrupt from provable debts created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. *Inge v. Stillwell*, 42:1093, 127 Pac. 527, — Kan. —.

(Annotated)

## BANKS.

As bona fide purchaser of note, see Bills and Notes, 1.

Libel in giving information as to credit and standing of business corporation, see Libel and Slander, 5.

## Officers and agents.

Criminal liability of officer, see *infra*, 3-6.

Effect of discharge in bankruptcy of partner acting as cashier on liability for loss resulting from mismanagement, see Bankruptcy, 3, 4.

Bonds of, see Bonds.

Conversion by bank officers, see *Trover*, 2, 3.

1. The directors of a bank are not personally liable to stockholders for loss due to their refusal to sell stock of a private corporation which they had taken as collateral and had been compelled to take over, except on condition that stock held by them individually should be purchased also, where the corporation owed the bank a large sum of money so as to make it advisable to maintain some control over its affairs. *Braswell v. Pamlico Ins. & Bkg. Co.* 42:101, 75 S. E. 813, — N. C. —.

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## Special deposit.

Conversion of special deposit, see *Trover*, 1, 2.

2. A special deposit is effected by the delivery to the depository of checks, under provisions of a statute by which the legislature, which, under the Constitution, has no authority over the investment of the educational funds of the state, permits the state treasurer to designate a depository for the collection of commercial paper received by him on account of such funds. *State v. Ross*, 42:601, 104 Pac. 596, 55 Or. 450.

## Crimes.

Evidence in prosecution of officers for conversion of state moneys, see *Evidence*, 41.

Indictment against officers for embezzling deposits, see *Indictment*, etc., 2, 4.

3. The officers of a trust company whose acts result in the conversion of state funds on deposit with it are, where accessories are punishable as principals, indictable therefor, under a statute declaring one who, having state funds in his possession, shall convert them to his own use, to be guilty of larceny; and it is immaterial that under the statute the money could not have been deposited with them individually, since the funds were in their hands as officers of the bank. *State v. Ross*, 42:601, 104 Pac. 596, 55 Or. 450. (Annotated)

4. Officers and directors of a trust company who permit a special deposit of state funds to become part of its general deposit and to be paid out in the usual course of its business, are personally liable under a statute providing that one who, having possession of state funds, converts them to his own use, shall be guilty of larceny. *State v. Ross*, 42:601, 104 Pac. 596, 55 Or. 450.

5. That officers of a trust company wrongfully lending state funds to strangers act for the benefit of the company, and not for themselves, does not prevent their punishment, under a statute providing that anyone having possession of state funds who shall convert them to his own use shall be guilty of larceny. *State v. Ross*, 42:601, 104 Pac. 596, 55 Or. 450.

6. That state funds held by a trust company as a special deposit were lost through the failure of another corporation to which they were lent is no defense to a prosecution against the officers of the trust company for conversion of the funds. *State v. Ross*, 42:601, 104 Pac. 596, 55 Or. 450.

## BAR.

Of judgment, see *Judgment*, 1-5.

## BARRIERS.

At dangerous place in highway, see *Highways*, 3, 4.

## BENEVOLENT SOCIETIES.

Insurance by, see *Insurance*.



**BICYCLES.**

Negligence of bicyclist at railroad crossing, see Railroads, 4.

**BID.**

Suppression of bidding at judicial sale, see Cancellation of Instruments.

**BILL OF EXCEPTIONS.**

On appeal, see Appeal and Error, 5.

**BILLS AND NOTES.**

Validity of note given for services of unlicensed person, see Contracts, 8.

Evidence in action on, see Evidence, 26.  
Payment of judgment by note, see Judgment, 8.

Right of one holding note to apply thereon indebtedness which he owes maker, see Limitation of Actions, 5.

Assignment of note secured by mortgage, see Mortgage, 1.

Default in payment of interest on note authorizing foreclosure of mortgage, see Mortgage, 4.

1. A bank to which is offered a note payable to a nonresident whom it knows to be practising medicine in the state, which he is not permitted to do without a license, and who has offered it many similar notes, is bound to inquire into the consideration for the note, and in case it fails to do so, and the note was in fact given for professional services and the payee was unlicensed, it cannot enforce payment of the instrument. *State Bank v. Lawrence*, 42: 326, 96 N. E. 947, — Ind. —.

2. Enforcement cannot be had of a note given for the purchase price of realty, "subject to the clearing of the title" to lots which were held by tax deed, although the grantor had a good title, if an action to quiet the title failed as to one of the lots. *Pease v. Globe Realty Co.* 42:6, 119 N. W. 975, 141 Iowa, 482.

**BILLS OF LADING.**

Penciled memorandum on, that horses are to be unloaded for feeding at certain places, see Carriers, 8.

**BLASTING.**

Municipal liability for injury from, see Municipal Corporations, 5.

**BONA FIDE PURCHASERS.**

Of bills or notes, see Bills and Notes, 1.

**BONDS.**

Prematurity of suit on bond of contractor, see Action or Suit, 1.

On attachment, see Attachment.

Liability for false statement resulting in withdrawal of surety from bond of bank cashier, see Case.

Contract giving right to return bonds taken in payment and receive cash for them, see Contracts, 14.

Admissibility of evidence in action for securing withdrawal of surety from bond, see Evidence, 14.

Suppression of evidence by one accused of causing surety of withdraw from bond, see Evidence, 5.

Who may sue on, see Parties, 1.

Provision in contract requiring purchaser of property to redeem bonds given in part payment therefor, see Witnesses, 1.

**BOOKS.**

Compelling production of, see Discovery and Inspection.

**BRIDGES.**

Constitutionality of statute regulating driving of traction engine across bridge, see Constitutional Law, 4.

Diversion or obstruction of waters by, see Railroads, 8.

Right to collect tolls for use of, see Tolls and Toll Roads.

Estoppel to contest right to collect tolls on, see Estoppel, 1.

One attempting to drive a traction engine across a bridge without using planks under the wheels, as required by statute, cannot, although the failure to use them does not contribute to the injury, hold the county liable for injuries caused by the fall of the bridge, under a statute making the county liable for injuries to persons lawfully using a bridge, because of its defective character, since he is not using the bridge lawfully. *Jones v. Union County*, 42: 1035, 127 Pac. 781, — Or. —. (Annotated)

**BROKERS.**

Constitutionality of restrictions on right to engage in insurance brokerage business, see Constitutional Law, 10.

Priorities in funds in hands of receiver of, see Receivers, 2.

Fraud of broker in representations to purchaser, see Fraud and Deceit, 3.

A purchaser of real estate cannot recover damages from the broker for fraudulent representations as to its value, if he makes a personal investigation and relies upon his own judgment with respect to that matter. *Bradley v. Oviatt*, 42: 828, 84 Atl. 321, 86 Conn. 63.

**BUILDING CONTRACTORS.**

Prematurity of suit on bond of, see Action or Suit, 1.

Who may sue on bond of, see Parties, 1.

**BUILDING CONTRACTS.**

Waiver of misrepresentations as to ability of architect and probable cost of structure, see Contracts, 13.

Fraud of architect in statement as to cost of structure, see Fraud and Deceit, 1.

Fraud of architect in misrepresentations as to ability, see Fraud and Deceit, 2.

**BUILDINGS.**

Constitutionality of ordinance establishing building line, see Constitutional Law, 20.

**BURDEN OF PROOF.**

In general, see Evidence, 1-10.

**BURGLARY.**

Habeas corpus to secure release of one convicted of, see Habeas Corpus, 4.

**BURIAL.**

See Cemeteries; Corpse.

**BY-LAWS.**

Of benevolent societies, see Insurance, 6, 7.

**CANCELATION OF INSTRUMENTS.**

Of patent for public land, see Public Lands, 2.

A combination between a defendant in execution and a prospective bidder to suppress the usual competition at a sheriff's sale is illegal for considerations of public policy; but equity will not cancel the sheriff's deed made in pursuance of the sale, at the instance of the defendant, on the ground that bidders were deterred from bidding as a result of the agreement between him and the purchaser. *Ruis v. Branch*, 42: 1198, 74 S. E. 1081, 138 Ga. 150. (Annotated)

**CAPITAL PUNISHMENT.**

Scruples against, as disqualifying juror, see Jury.

**CARBIDE.**

Injury to child by explosion of, see Negligence.

**CARRIERS.**

Review on appeal of damages for abuse of passenger, see Appeal and Error, 20a.

Right of carrier held liable for death of passenger to contribution from express company whose negligence caused the accident, see Contribution and Indemnity, 1.

Injury to employees, see Master and Servant.

1. One who undertakes to transport property from its location in one city to another city, for a through rate less than the published rates of the railroad company for broken lots, which it is enabled to do by accumulating property for the given destination until a car can be filled, which is billed to its own agent there, assumes, while holding the property for accumulation, the liability of a common carrier. *Kettenhofen v. Globe Transfer & Storage Co.* 42: 902, 127 Pac. 295, — Wash. —. (Annotated)

**Assault.**

2. A railroad company is liable to the extent of compensatory damages for injuries inflicted upon a passenger by an insane conductor in charge of the train on which the passenger is riding. *Chesapeake & O. R. Co. v. Francisco*, 42: 83, 148 S. W. 46, 149 Ky. 307.

**Disabled or incompetent passengers.**

3. No liability attaches to a railroad company for turning an intoxicated trespasser out of its station on an extremely cold night, if its agent offered him shelter which, with an understanding of the offer, he declined. *Adams v. Chicago G. W. R. Co.* 42: 373, 135 N. W. 21, — Iowa, —.

(Annotated)

4. A railroad company which compels a trespasser whom it knows to be intoxicated to such an extent that he cannot care for himself, to leave its depot building on an extremely cold night, without thought as to where he will find shelter, fails to exercise ordinary prudence, and will be liable for injury inflicted upon him by the cold. *Adams v. Chicago G. W. R. Co.* 42: 373, 135 N. W. 21, — Iowa, —.

5. A railroad company cannot, in the absence of wilfulness or wantonness, be held liable for ejecting from its train at a station a passenger intoxicated, but not helpless, who refuses to pay fare, where the statute expressly authorizes it to do so. *Adams v. Chicago G. W. R. Co.* 42: 373, 135 N. W. 21, — Iowa, —.

**Connecting carriers of passengers.**

Requiring carriers to keep on sale tickets of connecting carrier, see infra, 9, 10.

6. A street car company which issues tickets good over a connecting road which it does not control is liable to a purchaser of a ticket for injury to him while a passenger on the other line, through the negligence of its employees, although the ticket was actually sold by a conductor of the company causing the injury as agent for the company issuing it, and the latter received no benefit from the sale. *Mullen v. Chester Traction Co.* 42: 76, 84 Atl. 429, 235 Pa. 516. (Annotated)

**Freight carriers.**

Who is common carrier, see supra, 1.

Review on appeal of judgment for owner for goods lost, see Appeal and Error, 19.

7. A consignee is not bound to receive steel shafting so injured in transportation as to be worthless except for old iron, and allow the value upon his claim against the carrier for the injury, if, upon deducting the cost of handling from its value as old iron, the net value becomes too insignificant to count in the practical administration of justice. *McGrath v. Charleston & W. C. R. Co.* 42: 782, 75 S. E. 44, 91 S. C. 552. (Annotated)

8. A pencil memorandum on a bill of lading of horses, that they are to be unloaded for feeding at a certain place short of destination, does not require them to be routed through that place if another route is as safe and expeditious, so as to render the carrier liable in damages because the consignee wished to accept delivery of a part of the consignment at the place men-

tioned, and is put to expense to have the animals returned there. *Edwards v. American Exp. Co.* 42: 705, 84 Atl. 987, — Me. —.

#### Governmental control; discrimination.

Interference with interstate commerce by imposition of penalty, see Commerce, 2, 3.

Constitutionality of statute imposing penalty for refusal to pay claim within certain time, see Constitutional Law, 11.

Constitutionality of statute imposing penalty for refusal to sell tickets of connecting carrier at rates prescribed by railroad commission, see Constitutional Law, 15.

Judicial power to review rates, see Courts, 3.

Presumptions as to validity of statute fixing maximum of rates, see Evidence, 2.

Injunction against enforcement of rates fixed by statute, see Injunction, 4.

Pleading in action to recover penalty, see Pleading, 5.

Reference on question of validity of rates, see Reference.

9. A statute which prohibits a common carrier from refusing to put on sale or to sell any ticket of any other railroad company with which the same may be directly or indirectly connected, at the price or rate fixed by the railroad commission of the state, or refusing to put on sale with the agent of any other such railroad company tickets for any point upon its line of road, is not unconstitutional in that it interferes with and destroys the right of private contract, or compels the railroad company to become the debtor or agent of another railroad company, or to appoint another railroad company its agent and transact its business through the agents of such other company, against its consent. *Stephens v. Central of Ga. R. Co.* 42: 541, 75 S. E. 1041, 138 Ga. 625.

10. Where a railroad company having an office or agency within the state has on sale tickets furnished by a connecting railroad for the transportation of passengers over the latter, and refuses to sell such ticket to a prospective passenger who applies to the agent of the initial carrier therefor, at the price fixed by the railroad commission of the state, the railroad company so refusing is subject to the penalty provided by Georgia Code, § 2755, for the refusal of a railroad company to put on sale or refuse to sell any ticket of any other railroad company with which the same may be directly or indirectly connected, at the price or rate fixed by the railroad commission of the state. *Stephens v. Central of Ga. R. Co.* 42: 541, 75 S. E. 1041, 138 Ga. 625.

11. Before the courts are called upon to adjudge an act of the legislature fixing maximum rates for express companies unconstitutional on the ground that they are unreasonable and confiscatory, they should 42 L.R.A. (N.S.)

be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management within the rates prescribed would secure to the company a reasonable compensation for the use of its property and for conducting its business. *State v. Adams Express Co.* 42: 396, 122 N. W. 691, 85 Neb. 25.

#### CASE.

Admissibility of evidence, see Evidence, 5, 14.

One who makes false statements to a bonding company which result in its withdrawing from the bond of a bank cashier is liable for the damages caused thereby, which may be increased if he acted maliciously. *McClure v. McClintock*, 42: 388, 150 S. W. 332, 849, 150 Ky. 265, 773.

(Annotated)

#### CASE MADE.

On appeal, see Appeal and Error, 3, 4.

#### CAUSE.

Opinion evidence as to, see Evidence, 19.

Of loss, death or injury, see Insurance, 14-18.

#### CAVEAT EMPTOR.

Effect of purchaser's inspection of property on right to recover damages for broker's fraudulent representations as to value, see Brokers.

#### CEMETERIES.

Loss of right to use property for burial purposes by adverse possession, see Adverse Possession, 5.

Injunction against removal of corpse, see Injunction, 2.

Indefiniteness of trust by conveyance of land for burial place, see Trusts.

1. Ground conveyed to an incorporated town, for the use of the town as a graveyard, and dedicated by the town to the public use as such, and so used by the public, is held in trust by the town for the public for burial of the dead. *Ritter v. Couch*, 42: 1216, 76 S. E. 428, — W. Va. —.

2. Where ground conveyed to an incorporated town, to be held by it for a burial place for the public, is accepted by the town, and devoted to public use for burial, and so used by the public, and many dead bodies interred therein, the town cannot, without express legislative authority, sell and convey the land and thus disable itself from executing the trust of maintaining such burial place. *Ritter v. Couch*, 42: 1216, 76 S. E. 428, — W. Va. —.

(Annotated)

3. Land devoted to burial purposes passes into the hands of assignees charged with a trust for that purpose, although no express reservation is made, and descendants of the one who established the trust may exercise the right of burial there

when necessity arises, and of protecting the graves and beautifying the grounds. *Hines v. State*, 42: 1138, 149 S. W. 1058, — Tenn. —.

4. The statutes providing for punishment of those desecrating burial grounds apply to ground set apart for private burial and maintained as such. *Hines v. State*, 42: 1138, 149 S. W. 1058, — Tenn. —.

#### **CERTIFICATE.**

Sufficiency of certificate as to record of mortgage served with notice of intent to redeem, see Mortgage, 5.

#### **CHARITIES.**

Exemption of, from taxation, see Taxes, 3.

A charitable corporation like the Salvation Army is liable for injury to a pedestrian through the negligence of its servant in handling a team engaged in its charitable work, even though it is not lacking in care in the selection or retention of the servant. *Basabo v. Salvation Army*, 42: 1144, 85 Atl. 120, — R. I. —. (Annotated)

#### **CHATTELS REAL.**

Oil and gas lease as, see Mines.

#### **CHECKS.**

Recovery from payee where by mistake check is paid for larger amount than that called for, see Assumpsit. Embezzlement of, see Embezzlement. Indictment for embezzlement of, see Indictment, etc., 3.

Admissibility in evidence of memoranda on stub of, see Evidence, 15.

#### **CHILDREN.**

In general, see Infants.

#### **CLAIMS.**

Accord and satisfaction of claim against county, see Accord and Satisfaction.

Validity of statute imposing penalty for refusal to pay within certain time, see Constitutional Law, 11, 18.

#### **CLASS LEGISLATION.**

See Constitutional Law, 4-12.

#### **COASTING.**

Defense to liability for negligent injury to one coasting in public street, see Action or Suit, 2.

In street, as nuisance, see Highways, 1. Injury to children coasting in street, see Trial, 3, 4.

#### **COLLATERAL ATTACK.**

On lease of ward's property, see Guardian and Ward.

On judgment, see Judgment, 2.

#### **COLLEGES.**

Belonging to state, see State Institutions.

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#### **COLLISION.**

Between vessels, admiralty jurisdiction of suit arising from, see Admiralty.

#### **COLOR OF TITLE.**

See Adverse Possession, 1, 3.

#### **COMBINATIONS.**

See Monopoly and Combinations.

#### **COMMERCE.**

Telegraph line along railroad right of way as burden on interstate commerce, see Eminent Domain, 5.

1. An act of Congress originating in its power to regulate interstate commerce does not annul an act of the state originating in its police power, unless there is such a conflict between the two as that the enforcement of the act of the state would be to frustrate the operation of the act of Congress, and to refuse to its provisions their natural effect. *Chicago, R. I. & P. R. Co. v. Beatty*, 42: 984, 118 Pac. 367, — Okla. —.

2. The act of the legislature of Oklahoma territory of 1905 (§ 2, art. 2, chap. 10, p. 144, Session Laws 1905), imposing upon railroad companies a penalty of \$1 per day for failure to furnish cars within four days after they are requested, but excusing a company "in case of fire, washouts, strikes, lockouts, or other unavoidable casualties," is not an infringement of the commerce clause of the Constitution of the United States (article 1, § 8). *Chicago, R. I. & P. R. Co. v. Beatty*, 42: 984, 118 Pac. 367, — Okla. —. (Annotated)

3. The act of the legislature of Oklahoma territory of 1905 (§ 2, art. 2, chap. 10, p. 144), imposing upon railroad companies the penalty of \$1 per day for failure to furnish cars within four days after they are requested, but excusing a company in case of fire, washouts, strikes, lockouts, or other unavoidable casualties, is not in conflict with act of Congress, June 29, 1906, chap. 3591, § 1, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1911, p. 1285, which requires cars to be furnished upon reasonable request. *Chicago, R. I. & P. R. Co. v. Beatty*, 42: 984, 118 Pac. 367, — Okla. —.

#### **COMMON CARRIERS.**

See Carriers.

#### **COMPENSATION.**

Of attorney, see Attorneys, 2, 3.

To municipality for construction of public school in park fee of which city holds, see Municipal Corporations, 2.

#### **COMPETITION.**

Restrictions on, see Monopoly and Combinations.

For street paving contract, see Public Improvements, 3.

#### **COMPLAINT.**

Of plaintiff, see Pleading, 2-5.

**COMPROMISE AND SETTLEMENT.**

Of suit by attorney, see Attorneys, 3.  
 Question for jury as to voluntary compromise of claim, see Trial, 8.  
 See also Accord and Satisfaction.

**CONCESSIONAIRE.**

At amusement park, liability for negligence of, see Master and Servant, 7.

**CONDEMNATION.**

Of property, see Eminent Domain.

**CONDITION.**

In record on appeal, see Appeal and Error, 2.  
 In telegram, see Telegraphs, 2.

**CONFLICT OF LAWS.**

Courts will not enforce a contract against an infant residing in the state, contrary to its laws, where the promise was made and the contract was to be performed substantially within the state, although it was completed by acceptance in another state where infancy might not be a defense. *International Text-Book Co. v. Connelly*, 42: 1115, 99 N. E. 722, 206 N. Y. 188.

**CONNECTING CARRIERS.**

See Carriers, 6.

**CONSIDERATION.**

Want or failure of, as defense to action on note, see Bills and Notes, 2.  
 Of contracts generally, see Contracts, 2.

**CONSPIRACY.**

Damages for, see Damages, 2.

The deposition of a foreman who is distasteful to some of the employees of a shop, merely because his enforcement of rules is too rigid to please them, is not a legal purpose for a strike. *DeMinico v. Craig*, 42: 1048, 94 N. E. 317, 207 Mass. 593. (Annotated)

**CONSTITUTION.**

Of benevolent society, see Insurance, 7.

**CONSTITUTIONAL LAW.**

Statute requiring attorney to prosecute disbarment proceedings without fees, see Attorneys.  
 Presumption as to constitutionality of statute, see Evidence, 2.

**Amendment.**

1. Pending informations are not affected by the adoption of a constitutional amendment providing that no person shall be charged with the commission of any crime except upon indictment found by the grand jury. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

**Curative acts.**

2. A state legislature has power to pass a curative act validating a petition for street paving already on file, but void because of specifying the brand of material to be used, notwithstanding it affects only 42 L.R.A. (N.S.)

a single city, as being within a certain class of cities as existing at time of statute; and chapter 91, Kan. Law 1911, prescribing what such petitions shall and shall not set forth, and providing that nothing therein contained shall be held to invalidate any petition theretofore ordered spread upon the journal in the manner provided by law, and expressly providing that "all such petitions shall be held valid," validates such a petition. *Pollock v. Kansas City*, 42: 465, 123 Pac. 985, 87 Kan. 205. (Annotated)  
**Separation of powers.**

3. A statute authorizing a prison board of control to transfer prisoners from the reformatory to the state prison, and *vice versa*, is not unconstitutional, as constituting a legislative attempt to vest administrative officers with judicial functions. *State ex rel. Kelly v. Wolfer*, 42: 978, 138 N. W. 315, 119 Minn. 368. (Annotated)  
**Equal protection and privileges.**

Uniformity and equality as to license, see License, 3.

As to equality and uniformity of taxation, see Taxes, 1.

4. Requiring one wishing to drive a traction engine across a bridge to lay planks under its wheels, to be entitled to the lawful use of the bridge for that purpose, does not render a statute making the county liable for injuries through defects in the bridge only to those lawfully using it invalid, so far as it excludes from its benefit one failing to use the planks, as class legislation. *Jones v. Union County*, 42: 1035, 127 Pac. 781, — Or. —.

5. Exempting a particular municipality from liability for injuries caused by defects in highways violates a constitutional provision prohibiting the granting of special privileges and immunities. *Fleming v. Memphis*, 42: 493, 148 S. W. 1057, — Tenn. (Annotated)

6. A classification applicable only to municipalities of the state having less than a specified number of inhabitants according to a particular Federal census is not sufficient to save a statute from condemnation as conferring special privileges and immunities. *Fleming v. Memphis*, 42: 493, 148 S. W. 1057, — Tenn. —.

7. A provision in a general city ordinance regulating the use of motor vehicles, that "it shall be unlawful for any person operating a motor cycle to carry another person on said machine in front of the operator," is general with respect to all members of the class affected, and based upon a reasonable classification. *Re Wickstrum*, 42: 1068, 138 N. W. 733, — Neb. —. (Annotated)

8. The constitutional privileges and immunities of corporations are not infringed by a statute providing for the dissolution of domestic corporations and the banishment of foreign ones, in addition to the imposing of a fine, for the commission of certain acts tending to establish a monopoly, while individuals committing the same acts are merely fined,—at least where the Constitution authorizes forfeiture of fran-

chises of corporations guilty of monopoly. *State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136.

9. A statute providing for the punishment only of persons who, in buying milk, cream, or butter fat for manufacture, or butter, eggs, or grain for sale or storage, discriminate between localities by paying a higher price in one than in another for the purpose of creating a monopoly or destroying the business of a competitor, does not unconstitutionally grant privileges and immunities to some classes of citizens which are withheld from others. *State v. Fairmont Creamery Co.* 24: 821, 133 N. W. 895, 153 Iowa, 702. (Annotated)

10. Restricting the right to engage in an insurance brokerage business to those who make that their principal business, or those engaged in the real estate business, deprives other citizens wishing to engage in that business of the constitutional liberty and the equal protection of the laws. *Hauser v. North British & Mercantile Ins. Co.* 42: 1139, 100 N. E. 52, 206 N. Y. 455.

11. A carrier is not denied the equal protection of the laws by permitting the recovery against it of a penalty for refusal to pay a claim for loss of freight within a specified time, although the amount finally recovered is less than the claim presented. *Mobile & O. R. Co. v. Brandon*, 42: 106, 53 So. 957, 98 Miss. 401. (Annotated)

12. A statute forbidding discrimination in prices in different sections of the state, for the purpose of driving out of business a competitor at one point, is not invalid for making an unreasonable classification, because it permits persons to sell at unreasonably low prices, where they make no attempt at discrimination, since there can be no unconstitutional classification as to acts which will constitute a crime. *State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136.

#### **Due process; right to life, liberty, and property.**

Prohibiting carrier from refusing to put on sale ticket of connecting road at price fixed by railroad commission, see Carriers, 9.

13. Subjecting, under penalty, all animals and implements suitable for road work in the county, to that duty a certain number of days each year, with an option to pay money in lieu of furnishing the stock or implements, violates a constitutional provision forbidding the taking or applying to public use of private property without just compensation. *Toone v. State*, 42: 1045, 59 So. 665, — Ala. —. (Annotated)

14. A ruling that the measure of damages, where the right of way of a railroad company is taken by a telegraph company, is the value of the land actually taken, and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company; that the right of way of a railroad company has no general market value for other uses than that to which it is applied; and that peculiar advantages and benefits accruing to 42 L.R.A. (N.S.)

a telegraph company from its use of the railroad's right of way cannot be considered in the assessment of damages,—has not the effect of putting the eminent domain laws of the state in opposition to the due-process clause of the 14th Amendment of the Constitution of the United States. *Western A. R. Co. v. Western U. Tele. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420.

15. A statute which provides a penalty against a common carrier for refusing to put on sale or to sell tickets of a connecting carrier for the transportation of passengers over the connecting line, or any portion thereof, at the rate prescribed by the railroad commission of the state, does not violate the provisions of a state Constitution that no person shall be deprived of property except by due process of law, nor the provisions of the 14th Amendment of the Federal Constitution that no state shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. *Stephens v. Central of Ga. R. Co.* 42: 541, 75 S. E. 1041, 138 Ga. 625. (Annotated)

16. The constitutional right to freedom of contract is not infringed by a statute forbidding discrimination in prices in different sections of the state, for the purpose of driving competitors out of business. *State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136.

17. One imprisoned by a state court for contempt in disobeying an injunction in a civil suit is not denied due process of law because, under the decisions of the Supreme Court of the United States, such punishment is not proper in that class of cases. *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.* 42: 793, 99 N. E. 920, 256 Ill. 196.

18. Exacting double liability and an attorneys' fee under the authority of a state statute, from a railway company refusing to pay within thirty days an excessive demand for the killing of live stock by one of its trains, takes the company's property without due process of law. *St. Louis, I. M. & S. R. Co. v. Wynne*, 42: 102, 56 L. ed. 799, 32 Sup. Ct. Rep. 493, 224 U. S. 354. (Annotated)

#### **Police power.**

As affecting commerce, see Commerce, 1.

19. A provision in a general city ordinance regulating the use of motor vehicles, that "it shall be unlawful for any person operating a motor cycle to carry another person on said machine in front of the operator," is a valid exercise of the police power of the city in respect to the safety of travelers on the city streets and persons carried on motor cycles. *Re Wickstrum*, 42: 1068, 138 N. W. 733, — Neb. —.

20. An unconstitutional infringement of the guaranties of U. S. Const. 14th Amend., which cannot be upheld as an exercise of the police power, results from a municipal ordinance passed under the authority of Va. Laws 1906, p. 623, which requires the committee on streets, upon request of the owners of two thirds of the abutting property, to establish a building line on the side of

the square on which such property abuts, not less than 8 nor more than 30 feet from the street line. *Eubank v. Richmond*, 42: 1123, 57 L. ed. —, 33 Sup. Ct. Rep. 76, 226 U. S. 137. (Annotated)

21. An ordinance requiring street car companies to provide stools for motormen is within the police power, and not unreasonable. *Silva v. Newport*, 42: 1060, 150 S. W. 1024, 150 Ky. 781. (Annotated)

22. The police power extends to forbidding discrimination in prices in different sections of the state, for the purpose of driving competitors out of business. *State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136. (Annotated)

## CONSTRUCTION.

Of statute, see Statutes, 4, 5.

## CONTEMPT.

Due process in, see Constitutional Law, 17.

State court following decisions of Federal Supreme Court as to, see Courts, 5.

The dismissal of a bill for injunction will not affect contempt proceedings to punish defendant for violating it. *Weidner v. Friedman*, 42: 1041, 151 S. W. 56, — Tenn. —.

## CONTEST.

Estoppel to contest right to collect tolls on county bridge, see Estoppel, 1.

## CONTINUANCE AND ADJOURNMENT.

A further continuance should not be granted because of the illness of a non-resident defendant having knowledge of the facts necessary to the defense, so that he will not be able to attend the trial or give his deposition, if the case has been continued for a year on that ground and there is nothing to show that he will ever be any better. *Rose v. Monarch*, 42: 560, 150 S. W. 56, 150 Ky. 120. (Annotated)

## CONTINUING CRIMES.

See Criminal Law, 3, 4.

## CONTRACTORS.

Prematurity of suit on bond of, see Action or Suit, 1.

Effect as to lumber company of personal judgment against contractor in action against both to recover price of services in getting out logs and to enforce lien, see Judgment, 3.

Who may sue on bond of, see Parties, 1.

Right of subcontractor assisting in construction of bridge embankment to recover for injuries therefrom, see Railroads, 8.

## CONTRACTS.

Contract of accord and satisfaction, see Accord and Satisfaction.

Whether action one on contract or in tort, see Action or Suit, 3, 4.

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Restrictions on right of, see Constitutional Law, 16, 17.

Personal liability of officer on contract of corporation, see Corporations, 1, 2.

Right of creditors to reach interest of man under contract, for his support, see Creditors' Bill.

Duress, see Duress.

Estoppel to rescind, see Estoppel, 4.

Evidence as to, see Evidence, 40.

Injunction to protect rights in, see Injunction, 1.

Specific performance of, see Specific Performance.

## Implied agreements.

Implied covenants, see Landlord and Tenant, 1.

1. A teacher who, in order to maintain a school which he is employed to teach, pays the rent of the school building and furnishes necessary supplies without request from the school board or promise of reimbursement, cannot compel the board to repay the advances. *Noble v. Williams*, 42: 1177, 150 S. W. 507, 150 Ky. 439. (Annotated)

## Consideration.

2. Where a father voluntarily told a great-grandfather of his child, three days old, that he might take and keep the child as long as he and his wife lived, or until the child was twenty-one years of age, and the grandparent did take, keep, maintain, and protect it for about three years, the contract thus entered into is not open to the objection that it is unilateral and without consideration. *Wilkinson v. Lee*, 42: 1013, 75 S. E. 477, 138 Ga. 360.

## Statute of frauds.

Parol evidence to vary written contract, see Evidence, 16-18.

Insurability of interest of one holding parol lease of building in life of its owner, see Insurance, 1.

Nature of tenancy created by parol lease, see Landlord and Tenant, 2.

3. A parol lease for a year made in May, to begin the following November, is void under the statute of frauds as not to be performed within one year. *Brodner v. Swirsky*, 42: 654, 84 Atl. 104, 86 Conn. 32.

4. A parol promise by a mortgagee that if the mortgagor will not bid at the foreclosure, he will bid in the property, sell it, and account for the surplus over and above the amount due and expenses, is separable, and not within the statute of frauds as to the promise to pay over the surplus, so that, in case a sale has produced a surplus, the mortgagor may recover it. *Zwicker v. Gardner*, 42: 1160, 99 N. E. 949, 213 Mass. 95. (Annotated)

5. Entry under a parol lease void under the statute of frauds confers no rights under the lease. *Brodner v. Swirsky*, 42: 654, 84 Atl. 104, 86 Conn. 32. (Annotated)

6. In the absence of any equitable consideration, possession by a tenant for the first year under a parol lease of real estate for three years, is not such a part performance as will avoid the provisions

of the statute of frauds. *Osgood v. Shea*, 42: 648, 126 N. W. 310, 86 Neb. 729.

7. A parol assignment of a lease for the period of three years is void under the statute of frauds; but where the assignee has taken possession of the demised premises, and paid the purchase price for the lease, and performed the covenants thereof by paying for a time the monthly rentals to the lessor as provided in the lease contract, the transaction is relieved from the operation of the statute, and the assignee is liable to the lessor for the full term of the lease, although he has abandoned the premises. *Tyler Commercial College v. Stapleton*, 42: 162, 125 Pac. 443, 33 Okla. 305.

(Annotated)

#### Validity; public policy.

Formal requisites, see *supra*, 3-7.

Cancellation of sheriff's deed because of suppression of bidding, see *Cancellation of Instruments*.

Presumption as to validity of, see *Evidence*, 1.

Contracts by infant, see *Infants*, 4, 5.

8. A note executed in payment of professional services rendered by one without a license to practise medicine is, where practice without a license is forbidden by statute, unenforceable in the hands of the payee. *State Bank v. Lawrence*, 42: 326, 96 N. E. 947, — Ind. —.

9. A contract by which one undertakes for a contingent fee to detect larceny or embezzlement among the employees of his employer, and apprehend persons accused and bring them before the employer, with proof that the stolen property is in their possession, is void as contrary to public policy. *Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co.* 42: 847, 138 N. W. 624, — Wis. —.

(Annotated)

10. A contract by a merchant to handle the product of a certain manufacturer exclusively in his business for a specified term is not against public policy. *Peerless Pattern Co. v. Gauntlett Dry Goods Co.* 42: 843, 136 N. W. 1113, — Mich. —.

(Annotated)

11. On who purchases timber at less than its value upon agreement to build a railroad to the property, under penalty of additional payment upon failure to build the road, cannot escape the penalty by relying on the fact that his undertaking is prohibited by statute. *Herring v. Cumberland Lumber Co.* 42: 64, 74 S. E. 1011, — N. C. —.

12. One cannot refuse to pay for goods purchased for resale because the contract under which they were furnished to him sought to establish a monopoly by forbidding sale of rival goods and fixing the price at which they should be sold. *McCall Co. v. Hughes*, 42: 63, 59 So. 794, — Miss. —.

#### Performance; breach.

13. Failure of architects who undertake to prepare plans and supervise the construction of a building, to submit the plans as required by contract, does not put the property owner on notice so that his failure to take action to secure fuller information will waive misrepresentations as to ability of the architect and the probable cost of the

structure. *Edward Barron Estate Co. v. Woodruff*, 42: 125, 126 Pac. 351, — Cal. —.

*Rescission.*

14. One having a right to return bonds given for property, and receive cash for them, if he is dissatisfied with them, sufficiently shows his dissatisfaction by tendering the bonds and demanding the cash. *Rose v. Monarch*, 42: 660, 150 S. W. 56, 150 Ky. 129.

#### CONTRIBUTION AND INDEMNITY.

1. A railroad company which causes the death of a passenger by starting the train before he is safely on board cannot have contribution from an express company, although the injury would not have occurred but for its negligence in leaving a truck too close to the track. *Doles v. Seaboard A. L. R. Co.* 42: 67, 75 S. E. 722, — N. C. —.

2. One of two joint tortfeasors whose combined negligence causes death, for which an action is brought against both, cannot complain that his codefendant is dismissed from the action, since he is not entitled to contribution from him. *Doles v. Seaboard A. L. R. Co.* 42: 67, 75 S. E. 722, — N. C. —.

#### CONVERSION.

Criminal liability for, see *Banks*, 3-6.  
In general, see *Trover*.

#### CONVICTS.

Evidence of declarations made by, see *Evidence*, 25.

#### CORPORATIONS.

Equal protection and privileges as to, see *Constitutional Law*, 8.

Constitutionality of statute providing for banishment of foreign corporation, see *Constitutional Law*, 8.

Compelling production of books and documents, see *Discovery and Inspection*.

Libel of, see *Evidence*, 4.

Mandamus to, see *Mandamus*.

#### Liability of officers.

Officers of bank, see *Banks*, 1.

1. One is personally bound by a contract reciting that I ' (the person), treasurer of a certain corporation, do hereby agree, and signed with his name, "Treas." *Gavazza v. Plummer*, 42: 1, 101 Pac. 370, 53 Wash. 14.

(Annotated)

2. The president of a corporation is not made personally liable on a note executed on behalf of the corporation, by signing its name, by himself president. *Pease v. Globe Realty Co.* 42: 6, 119 N. W. 975, 141 Iowa, 482.

(Annotated)

#### Inspection of books.

Mandamus to compel, see *Mandamus*.

3. A director of a corporation cannot be refused access to the corporate books by other directors because he neglected his duties as an officer of the company, interfered with its management, and was promoting a competing concern. *Machen v. Machen & Mayer Electrical Mfg. Co.* 42: 1079, 85 Atl. 100, 237 Pa. 212.



4. A proper purpose need not be shown to entitle a stockholder to inspect the books of a corporation, under a statute providing that they shall be open at all reasonable times to the inspection of persons interested, who may take copies of such portions as concern their interest. *White v. Manter*, 42: 332, 84 Atl. 890, — Me. —

(Annotated)

#### Stockholders' meetings.

5. A majority of all the stock of the corporation must be represented to enable a stockholders' meeting to transact business, under a statute providing that the "stockholders holding a majority of the stock at any meeting of the stockholders shall be capable of transacting the business of the meeting." *Hill v. Town*, 42: 799, 138 N. W. 334, — Mich. —

(Annotated)

#### Dissolution; forfeiture.

Constitutionality of statute providing for dissolution of domestic corporation, see Constitutional Law 8.

6. A corporation cannot question the constitutionality of a statute merely, because it provides a forfeiture of its franchises for certain acts constituting a misuse thereof, while not providing such penalty for other acts of misuse. *State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136.

#### CORPSE.

Injunction against removal of, from grave, see Injunction, 2.

See also Cemeteries.

1. One is not punishable for burying his child in a wood lot rather than in a burying ground. *Seaton v. Com.* 42: 211, 149 S. W. 871, 149 Ky. 498.

2. A father cannot be punished for using a pasteboard box with a rough board covering for the burial of his child rather than a regularly made coffin. *Seaton v. Com.* 42: 211, 149 S. W. 871, 149 Ky. 498.

(Annotated)

3. A man is under no legal liability for refusing to permit his relatives or those of his wife or other persons to be present at the burial of his child. *Seaton v. Com.* 42: 211, 149 S. W. 871, 149 Ky. 498.

4. There is no legal duty to have a religious ceremony in connection with the burial of the dead. *Seaton v. Com.* 42: 211, 149 S. W. 871, 149 Ky. 498.

#### CORRESPONDENCE SCHOOL.

Contract by infant for course of instruction, see Infants, 5.

#### CORROBORATION.

Of witness, see Witnesses, 4.

#### COTENANCY.

Adverse possession by one cotenant, see Adverse Possession, 1.

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Laches as barring right of one cotenant to benefit of outstanding title by another, see Limitation of Actions, 1.

Cotenancy by entireties, see Husband and Wife.

One of several joint contingent remaindermen who is in possession of the property as lessee of the holder of the limited fee, paying an annual rental therefor, is under no obligation personally to bear the expense of the taxes accruing during the time of his tenancy. *Wilson v. Linder*, 42: 242, 123 Pac. 487, 21 Idaho, 576.

#### COUNTIES.

Accord and satisfaction by part payment of claim against county, see Accord and Satisfaction.

Liability as to bridges, see Bridges.

Liability for dangerous condition of highway, see Highways, 3, 4.

Right to collect tolls for use of bridge, see Tolls and Toll Roads.

#### COURTS.

Suit in other state as ground for abatement, see Abatement and Revival.

Of admiralty, see Admiralty.

Jurisdiction of appeal, see Appeal and Error.

Contempt of, see Contempt.

Power to suspend sentence, see Criminal Law, 8, 9.

As to judges, see Judges.

1. A court has inherent power to issue a commission to an officer in another state to take a deposition necessary to secure evidence for the trial of an action pending before it. *McClure v. McClintock*, 42: 388, 150 S. W. 332, 849, 150 Ky. 265, 773.

2. The supreme court of Mississippi has no power to prescribe rules for the government of the trial courts of the state. *Yazoo & M. V. R. Co. v. Kirk*, 42: 1172, 58 So. 710, — Miss. —

#### Relation to other departments of government.

3. Where it reasonably appears from a consideration of all the evidence that express rates fixed by statute are not confiscatory, but afford the express company at least some measure of profit for carrying on its business, the courts will not interfere with the operation of the statute, but will require the party complaining to apply for relief to the rate-making power, or the tribunal provided by the statute with power to increase such rates, if they are alleged to be unreasonable. *State v. Adams Express Co.* 42: 396, 122 N. W. 691, 85 Neb. 25.

#### Loss of jurisdiction.

4. Where the court once legally acquires jurisdiction of an unborn heir by representation through living heirs of the same class, its subsequent birth without thereafter being made a direct party to the cause does not divest the court of jurisdiction to decree against it, though to do so is

error. *Boal v. Wood*, 42: 439, 73 S. E. 978, 70 W. Va. 383.

#### Rules of decision.

Denial of due process by failure to follow decision of Supreme Court, see Constitutional Law, 17.

5. A state court may impose a fine and imprisonment for a definite term for contempt in violating a prohibitory injunction of a civil nature where the fine in such cases is regarded as a penalty inuring to the public, although the Supreme Court of the United States has ruled that a contempt proceeding in such case was a mere private remedy for which imprisonment for a definite term cannot be imposed. *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.* 42: 793, 99 N. E. 920, 256 Ill. 196.

(Annotated)

### COVENANTS AND CONDITIONS.

In lease, see Landlord and Tenant, 1.

### CREDITORS' BILL.

1. The contract of a husband and wife to support his father in their family and furnish him with a stated sum per year during his life is a personal contract, and the rights of the father under the contract cannot be subjected by a court of equity to the payment of a judgment against him. *Valparaiso State Bank v. Schwartz*, 42: 1213, 138 N. W. 757, — Neb. —.

(Annotated)

2. Where the consideration for a contract to support a father, by a son and his wife, is, on the part of the father, the conveyance of his homestead to a third party, who in turn conveys real estate to the son and his wife, upon which the father retains a lien to secure the performance of the contract, the father's interest in the property so conveyed to the son and wife will not be subjected to the payment of a judgment upon an indebtedness incurred after the transfer of the property to the husband and wife. *Valparaiso State Bank v. Schwartz*, 42: 1213, 138 N. W. 757, — Neb. —.

### CRIMINAL LAW.

Necessity of exception to statements made by judge, see Appeal and Error, 6.

What questions may be raised by accused upon appeal by the state, see Appeal and Error, 9.

Limiting time allowed counsel for argument to jury, see Appeal and Error, 13.

Review of discretion on appeal in criminal case, see Appeal and Error, 13.

Review of conviction on appeal, see Appeal and Error, 18.

Prejudicial error in admission of evidence, see Appeal and Error, 21.

Prejudicial error in excluding evidence, see Appeal and Error, 27.

Prejudicial error in remarks or conduct of judge, see Appeal and Error, 30-32.

Liability of officers of trust company for conversion of state funds on deposit, see Banks, 3-6.

Validity of contract to detect crime, see Contracts, 9.

Criminal liability of father for failure to support children after divorce, see Divorce and Separation.

Duress as defense to criminal liability for selling pooled tobacco contrary to statute, see Duress.

Presumption and burden of proof, see Evidence, 10.

Opinion evidence in criminal case, see Evidence, 19, 21, 22.

Evidence as to declarations or acts of accused, see Evidence, 25.

Proof of acts or declarations of co-conspirators, see Evidence, 31.

Evidences of complaint of suffering by deceased on trial for homicide, see Evidence, 32.

Evidence on question of knowledge of accused, see Evidence, 33.

Evidence of other crime, see Evidence, 39, 41-44.

Admissibility of evidence under allegations of indictment, see Evidence, 57.

Relevancy of evidence generally, see Evidence, 33, 34.

Sufficiency of proof in criminal case, see Evidence, 56.

Habeas corpus, see Habeas Corpus.

Plea of guilty on agreement that imprisonment shall not exceed certain time, see Habeas Corpus, 3.

As to requisites and sufficiency of indictment, information and complaint, see Indictment, etc.

Competency of juror, see Jury.

Questions of law and fact, see Trial, 7.

Correctness of instructions in criminal cases generally, see Trial, 11.

Verdict in criminal case, see Trial, 13.

Corroboration of witness, see Witnesses, 4.

Various particular crimes, see Embezzlement; Gaming; Homicide; Larceny; Rape.

1. Prescribing a punishment for an act forbids it, within the meaning of a statute providing that a crime is an act forbidden by law and to which is annexed upon conviction a punishment. *State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136.

Intent; motive; knowledge.

2. Criminal intent is not an element of the offense under a statute making guilty of larceny one who, having possession of state funds, converts them to his own use. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

Continuing crimes.

3. One who takes from different receptacles in the same room, as one continuous transaction, a watch belonging to one person and money belonging to another, can

be convicted of but one offense. *State v. Sampson*, 42: 967, 138 N. W. 473, — Iowa, —.

4. Under a statute defining the practice of medicine as prescribing or recommending for a fee any drug or medicine, or using the word or letters "Dr.," "Doctor," "M. D.," or any other title which in any way represents one as engaged in the practice of medicine, or representing or advertising one's self as authorized to practice medicine; and providing a penalty for the practice without having received and recorded a certificate from the board of registration and examination,—one who has set himself up to practice medicine without the required certificate may be convicted as for separate offenses for opening an office and placing a sign over the door indicating that he is authorized to practice medicine, and also, for each specific act of practice by treating different persons, although two such treatments occur on the same day. *State v. Cotner*, 42: 768, 127 Pac. 1, 87 Kan. 864. (Annotated)

#### Former jeopardy.

5. A conviction of simple larceny before a justice of the peace will bar a subsequent prosecution for larceny from a dwelling based on the same transaction, although the justice had no jurisdiction of the latter offense. *State v. Sampson*, 42: 967, 138 N. W. 473, — Iowa, —.

6. The state cannot, after prosecuting before a justice of the peace for an offense within his jurisdiction, avoid the effect of the judgment upon the theory that such an offense was an ingredient of a higher crime of which the justice had no jurisdiction. *State v. Sampson*, 42: 967, 138 N. W. 473, — Iowa, —.

#### Sentence and punishment.

Review of, on habeas corpus, see Habeas Corpus, 2-4.

Constitutionality of statute authorizing prison board to transfer prisoners from reformatory to state prison, and *vice versa*, see Constitution Law, 3.

7. Requiring one who has embezzled over \$500,000 of state funds to pay a fine equal to the amount of the embezzlement, or suffer life imprisonment, is cruel and unusual punishment, within the prohibition of the Constitution, both as to the term of imprisonment and as to the fine, where accused has not the power to pay it presently, or secure the necessary funds by a lifetime of effort. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

8. Whenever a verdict or plea of guilty has become final, the court is under an absolute duty to pronounce sentence, and has no discretion to suspend it under an agreement that it may never be pronounced at all. *State ex rel. Dawson v. Sapp*, 42: 249, 125 Pac. 78, 87 Kan. 740.

9. Where, after a verdict or plea of guilty, the defendant is permitted to go at large under an arrangement that he shall escape punishment unless the court shall in the future determine to impose a sentence, 42 L.R.A. (N.S.)

the jurisdiction of the case is lost with the expiration of the term, and no valid sentence can thereafter be pronounced; and this rule applies notwithstanding the sentence purports to be suspended until a certain date, for the purpose of retaining control of the defendant, who is ordered to appear at that time and show that he has not violated the law in the interval. *State ex rel. Dawson v. Sapp*, 42: 249, 125 Pac. 78, 87 Kan. 740.

#### CROSS ERRORS.

On appeal, see Appeal and Error, 10.

#### CROSS-EXAMINATION.

Of witness, see Witnesses, 2.

#### CURATIVE ACT.

See Constitutional Law, 2.

#### CUSTODY.

Of infant, see Infants, 2, 3.

#### DAMAGES.

Review of, on appeal, see Appeal and Error, 19-20a.

Instructions as to, see Appeal and Error, 28.

Prejudicial error as to amount of, see Appeal and Error, 34.

Due process of law as to, see Constitutional Law, 18.

Relevancy of evidence as to, see Evidence, 36.

New trial for excessiveness of, see New Trial, 1.

Right to recover from photographer for attempting to use photograph for his own purposes, see Photographs.

Resale for purpose of fixing, see Sale, 1.

#### Preventing unnecessary amount.

Duty of consignee to receive goods injured in transportation and allow value upon claim against carrier, see Carriers, 7.

1. No duty rests upon the owner of property which is being injured by a nuisance to take active measures to prevent further injury in order to minimize the damages for which the wrongdoer may be liable. *Niagara Oil Co. v. Ogle*, 42: 714, 98 N. E. 60, — Ind. —.

#### Torts generally.

Due process of law as to, see Constitutional Law, 18.

2. A foreman who loses his position as such, because of an unauthorized strike of employees to secure his removal, may recover damages against those who personally participated in it, not only for his loss of wages, but for any damage to his reputation as such employee, which is in fact caused by the strike. *DeMinico v. Craig*, 42: 1048, 94 N. E. 317, 207 Mass. 593.

#### Fraud.

3. The damages to be recovered from an architect for fraud in securing a contract to plan and supervise the erection of a building, by falsely misrepresenting his ability to do so and by understating the cost, is the commission received by him, which

is of no value to the owner, and the cost in excess of the estimate above the amount which could profitably be invested in the building. *Edward Barron Estate Co. v. Woodruff Co.* 42:125, 126 Pac. 351, — Cal. —.

#### Personal injuries; death.

Review of, on appeal, see Appeal and Error, 20.

4. Twenty thousand dollars is excessive to award as damages for the death of a man forty-four years old with a life expectancy of twenty-five years, who was earning from \$100 to \$120 per month as a brakeman at the time of his death, and had served as stage driver, bridge carpenter, miner, stationary engineer, locomotive fireman, and brakeman. *Walters v. Spokane International R. Co.* 42:917, 108 Pac. 593, 58 Wash. 293. Injury to real property; nuisance.

As to preventing unnecessary amount, see *supra*, 1.

5. Damages for permanent injury may be recovered for destruction of the productive power of land by casting oil and salt water thereon, although the continuance thereof may be abated. *Niagara Oil Co. v. Ogle*, 42:714, 98 N. E. 60, — Ind. —.

#### Mental anguish.

6. One to whom a message of acquiescence is sent by a surgeon who had been requested by telegraph to operate for appendicitis may recover substantial damages from the telegraph company for nondelivery of the message, because of the mental suffering endured by him, because uncertain whether or not relief would reach him in time to prevent death. *Alexander v. Western U. Teleg. Co.* 42:407, 74 S. E. 449, 158 N. C. 473.

#### Loss of profits.

7. Where a tenant sues a landlord for the loss of merchandise caused by a fire which the tenant alleges resulted from the carelessness and negligence of the landlord, but it is not alleged or shown that the negligence was criminal, or that the loss was caused through any fraud on the part of the landlord, and it was not shown or contended that the tenant had an old and well-established business and business reputation at the particular place, the measure of damages is the value of the goods at the time of the loss, and injury to the business or loss of profits cannot be taken into consideration in assessing damages. *Russell v. Little*, 42: 363, 126 Pac. 529, — Idaho, —.

#### Mitigation; reduction.

As to preventing unnecessary amount, see *supra*, 1.

8. That plaintiff, in an action for alienation of her husband's affections, had been living separate from him, and that he had paid such attention to other women as to indicate little affection for her, may be considered in mitigation of damages in an action for alienation of his affections. *Phillips v. Thomas*, 42:582, 127 Pac. 97, — Wash. —.

#### DANGEROUS ATTRACTIONS.

Liability for injuries by, see Negligence. 42 L.R.A. (N.S.)

#### DEATH.

Right of one held liable for negligent death to contribution from one jointly responsible, see Contribution and Indemnity, 2.

Measure of damages for, see Damages, 4.

Opinion evidence as to cause of, see Evidence, 19.

Admissibility of declarations of person since deceased, see Evidence, 26-29.

Sufficiency of proof of cause of, see Evidence, 56.

Of insured, cause of, see Insurance, 15, 16.

Proximate cause of, see Proximate Cause, 2.

#### DEBTOR AND CREDITOR.

Accord and satisfaction between, see Accord and Satisfaction.

As to remedies of creditors, see Creditors' Bill.

As to exemption, see Exemptions; Homestead.

Conveyances fraudulent as to creditor, see Fraudulent Conveyances.

Lien of creditor on expectancy of survivorship of one holding estate by entirety, see Judgment, 6.

Libel in attempting to collect debt, see Libel and Slander, 1.

Lien of creditor, see Mechanics' Liens.

#### DECEIT.

See Fraud and Deceit.

#### DECLARATIONS.

Evidence of, see Evidence, 24-32.

In pleading, see Pleading, 2-5.

#### DEDICATION.

1. Where a city plat is recorded in apparent conformity with the statute, but is inoperative as to a part of the property included because the owner thereof does not join in the acknowledgment, the execution of a deed by such owner in which the tract conveyed is described by reference to the plat, there being nothing to show a purpose to disavow it, is such a recognition of its validity as will make it binding upon him. *Wallace v. Cable*, 42:587, 127 Pac. 5, 87 Kan. 835. (Annotated)

2. Where a city plat which is recorded in apparent conformity with the statute is inoperative as to a part of the property included because the owner thereof does not join in the acknowledgment, the execution of a deed by such owner in which the tract conveyed is described by reference to the plat, there being nothing to show a purpose to disavow it, is a complete dedication of the tract designated on the plat as streets and alleys, irrespective of any acceptance on behalf of the public. *Wallace v. Cable*, 42: 587, 127 Pac. 5, 87 Kan. 835.

#### DEEDS.

Implied reservation of burial rights in land conveyed, see Cemeteries, 3.

Cancellation of, see Cancellation of Instruments.

Opinion evidence as to capacity to make deed, see Evidence, 20.

Evidence as to undue influence, see Evidence, 29.

Merger of, see Merger.

Record of, see Records and Recording Laws, 3.

Instruction as to undue influence in securing execution of, see Trial, 10.

1. A property owner free from undue influence, of sufficient mental capacity to convey property, has the right to decide for himself whether a deed made by him is reasonable. *Coblentz v. Putifer*, 42:298, 125 Pac. 30, 87 Kan. 719.

2. A warranty deed of a farm and its appurtenances does not carry the right of a grantor as a member of a telephone company, each member of which had a right to place a telephone in his house, and to give the purchaser of his farm the first chance to purchase his interest, after which the company itself should have the right. *Cantril Teleph. Co. v. Fisher*, 42:1021, 138 N. W. 436, — Iowa, —. (Annotated)

3. Although the statute provides that words of inheritance are not necessary to convey a fee, a grant to a man and his wife, habendum to them for life, remainder to another by name, passes the fee to the latter. *Husted v. Rollins*, 42:378, 137 N. W. 462, — Iowa, —. (Annotated)

#### DEFAULT.

In payment authorizing foreclosure of mortgage, see Mortgage, 4.

#### DEFENSE.

To liability of officers of bank for conversion of funds, see Banks, 6.

In action on negotiable paper, see Bills and Notes, 2.

To liability of county for injury by defects in bridge, see Bridges.

In eminent domain proceedings, see Eminent Domain, 7, 8.

Estoppel to set up defense, see Estoppel, 3.

Evidence to establish, see Evidence, 34.

In libel suit, see Libel and Slander, 6.

Negation of, see Pleadings, 2.

In actions for trespass, see Trespass.

In general, see Action or Suit, 2.

#### DELIVERY.

Of telegram, see Telegraphs, 1.

#### DEMAND.

Necessity of, to charge officers of trust company for converting state funds, see Trover, 2.

#### DEMURRER.

Motion to strike out bill as in nature of demurrer, see Motions and Orders

In general, see Pleading, 8, 9.

#### DEPARTURE.

In pleading, see Pleading, 7, 9.

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#### DEPOSITIONS.

Inherent power of court to issue commission to take, to officer in other state, see Courts, 1.

#### DEPUTY.

Sufficiency of certificate signed by deputy register instead of register, see Mortgage, 5.

#### DESCENT AND DISTRIBUTION.

Election to waive distributive rights, see Election.

Allowance to widow, see Executors and Administrators, 2.

1. The completion, after the death of one who had contracted for real estate, paid a small portion of the purchase money, and taken a bond for title, of the contract, by payment of the balance of the purchase money out of profits from the property, which became the homestead of the widow and child, and money furnished by the widow, and conveyance to the child by the vendor, renders the property a new acquisition by the child, and not an ancestral estate, and therefore, upon the death of the child without issue, the descent will be to his heirs, uncontrolled by the fact that the equitable title was acquired through his father. *Hill v. Heard*, 42:446, 148 S. W. 254, — Ark. —. (Annotated)

2. A woman leaving children only by her first marriage is not without issue as to property purchased after the second marriage, within the meaning of statutes fixing the rights of her surviving husband in the property. *Husted v. Rollins*, 42:378, 137 N. W. 462, — Iowa, —.

#### DESERTION.

By father of children after divorce, see Divorce and Separation.

#### DILIGENCE.

In seeking evidence alleged as ground for new trial, see New Trial, 5.

#### DISBARMENT.

Statute requiring attorney to prosecute disbarment proceedings without fees, see Attorneys.

#### DISCHARGE.

Of judgment, see Judgment, 8.

Of surety, see Principal and Surety.

#### DISCOVERY AND INSPECTION.

The legislature may require a corporation to produce its books and documents in evidence in a civil proceeding to forfeit its franchises for misuse thereof. *State v. Central Lumber Co.* 42:804, 123 N. W. 504, 24 S. D. 136.

#### DISCRETION.

Review of, on appeal, see Appeal and Error, 11-13.

#### DISCRIMINATION.

Unconstitutionality of, see Constitutional Law, 4-12.

For purpose of creating monopoly, see Constitutional Law, 9, 12, 16, 22; Monopoly and Combinations.  
In license tax, see License, 3.  
In taxes generally, see Taxes, 1.

**DISORDERLY HOUSES.**

Who may maintain bill to suppress, see Nuisances, 3.  
Defense to proceeding to abate, see Nuisances, 4.

**DISSEISIN.**

See Adverse Possession.

**DIVORCE AND SEPARATION.**

Failure to pay the allowance for the support of the children which are committed to the custody of the mother upon the granting of a divorce, with an allowance for support to be paid by the father, does not render him liable for criminal prosecution under the statute for desertion and abandonment. *People v. Dunston*, 42: 1065, 138 N. W. 1047, — Mich. — (Annotated)

**DOCUMENTARY EVIDENCE.**

See Evidence, 11-15.

**DOCUMENTS.**

Compelling production of, see Discovery and Inspection.

**DOGS.**

See Animals.

**DOMICIL.**

Change of, which will relieve property from taxation, see Taxes, 4.

**DROWNING.**

Death of insured by, see Insurance, 15, 16.

**DRUNKENNESS.**

Of passenger, see Carriers, 3-5.

**DUE BILL.**

Evidence in action on, see Evidence, 45.

**DUE PROCESS OF LAW.**

See Constitutional Law, 13-18.

**DURESS.**

Evidence on question of, see Evidence, 34.

A contract to pool tobacco may be found to have been executed under duress, so as to constitute a defense to a prosecution for selling pooled tobacco contrary to a statute, from the facts that depredations had been committed upon the persons and property of those who failed to pool by night riders, and that accused had been warned that it would be best for him to pool. *Com. v. Refitt*, 42: 329, 148 S. W. 48, 149 Ky. 300.

**EASEMENTS.**

In public alleys, see Alleys.  
Implied reservation of burial rights in land conveyed, see Cemeteries, 3.  
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As appurtenant; by necessity.

1. The right to maintain a ladder rack in a passageway adjoining a building on land conveyed by metes and bounds will not be held to have passed by the deed, where the deed was with reference to a plan, on which the rack was not shown, while a right of passage through the way is expressly mentioned. *Sanford v. Boss*, 42: 629, 84 Atl. 936, 76 N. H. 476.

2. A conveyance by metes and bounds of lands customarily used as a paint shop, with knowledge that such use will continue, does not include a right to maintain a ladder rack on an adjoining passageway, although the grantor has for a long period maintained one there and its use in connection with the shop is convenient. *Sanford v. Boss*, 42: 629, 84 Atl. 936, 76 N. H. 476.  
How lost.

Sufficiency of proof of abandonment, see Evidence, 50.

3. A disclaimer of a right of way across property will not work an estoppel in favor of one who purchases the property in reliance upon it, if the owner of the easement had no notice of the intended purchase. *Adams v. Hodgkins*, 42: 741, 84 Atl. 530, — Me. —

4. The mere use by the owner of a right of way of another way from his property to the highway, which is equally convenient to his own, does not extinguish his right. *Adams v. Hodgkins*, 42: 741, 84 Atl. 530, — Me. —

5. A right of way created by grant is not lost by mere nonuser, unaccompanied by intention to abandon and adverse possession by the owner of the servient tenement, or expense or damage sustained by him. *Adams v. Hodgkins*, 42: 741, 84 Atl. 530, — Me. — (Annotated)

**EDUCATION.**

As a necessary for infant, see Infants, 4.

**EJECTION.**

Of association from rooms by municipal officers, see Municipal Corporations, 6.

**ELECTION.**

By widow as to rights under will, see Wills, 3.

A man who, after the death of his wife, attempts to assert homestead rights in a parcel of land which did not belong to her, under a mistaken belief as to her title, does not, in case she had no title thereto, elect to waive his distributive rights in other parcels which she did own. *Husted v. Rollins*, 42: 378, 137 N. W. 462, — Iowa, —.

**ELECTIONS.**

Of judges, see Judges, 1.  
Disqualification of judge to hear election case because his term may be affected by decision, see Judges, 4.  
Validity of statute fixing time for, see Statutes, 2.

**ELECTRICITY.**

Rights as to wiring, conduits, and switchboards placed in leased building by tenant, see Landlord and Tenant, 4.

Proximate cause of injuries by, see Proximate Cause, 2.

**ELEVATED RAILWAYS.**

Presumption and burden of proof as to negligence, see Evidence, 6.

See also Street Railways, 1.

**ELEVATORS.**

Licensing operators of, see License, 1.

**EMBANKMENT.**

Lack of barriers along, see Highways, 3, 4.

Diversion or obstruction of waters by, see Railroads, 8.

**EMBEZZLEMENT.**

By tax collector, see Action or Suit, 4.  
Validity of contract for detection of embezzlement, see Contracts, 9.

Punishment for, see Criminal Law, 7.  
Sufficiency of proof of agency of one charged with embezzlement, see Evidence, 51, 52.

Indictment for, see Indictment, etc., 2, 3.

Of tax money by officer, see Interest; Taxes, 5.

1. Under a statute, which, in defining what is the subject of embezzlement, although it does not specifically mention a check, contains the general words "security for money" and "any effects or property of any other person," a check on a bank is the subject of embezzlement. *State v. Fraley*, 42: 498, 76 S. E. 134, — W. Va. —.

(Annotated)

2. Although a check may have been voluntarily turned over to the defendant by his principal, for collection, he is guilty of embezzling it if, in obtaining possession thereof and before collecting it, he used fraud or deception in getting it, and had conceived the guilty intention of misappropriating it or the proceeds thereof, and actually did so. *State v. Fraley*, 42: 498, 76 S. E. 134, — W. Va. —.

**EMERGENCY FUND.**

Creation of, by mutual insurance company, see Insurance, 7, 8.

**EMINENT DOMAIN.**

Effect of ordinance providing for condemnation of land for alley erroneously thought not to exist, see Alleys.

Constitutionality of statute as to measure of damages, see Constitutional Law, 14.

**What may be taken.**

1. A telegraph company may condemn a right of way on and along the right of way of a railroad company, when the proposed line of telegraph will be so connected as to produce no material interference with the railroad company's free exercise of its franchise or with the actual operation of the railroad. *Western & A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420. (Annotated)

2. A telegraph company may not condemn a railroad company's right of way on both sides of the track, at least without making it appear that it is necessary to occupy both sides and that the railroad company's operation of its trains is not materially interfered with. *Western & A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420. (Annotated)

Procedure; defenses.

3. It is not a prerequisite to the exercise of the right of eminent domain that a telegraph company seeking to exercise such right should first file with the railroad commission its consent that the commission shall have jurisdiction over it for the purpose of regulating tolls on messages originating and ending within the state. *Western & A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420.

4. Under a statute that allows condemnation by a telegraph company of land belonging to the state upon the same plane as the right of way of a railroad company or private land, that is, by making due compensation therefor, a telegraph company cannot condemn the usufructuary interest of a lessee of a railroad belonging to the state in an action against the lessee alone without joining the state. *Western A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420.

5. A telegraph company will not be permitted to condemn the right of way of a railroad company for the construction and maintenance of lines of telegraph in such a manner as materially to interfere with the railroad company in the operation of its trains and in the transportation of passengers and goods, and a telegraph line constructed and maintained so as not to interfere with the transportation of passengers and goods beyond the state is not a burden on interstate commerce. *Western & A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420.

6. A railroad company cannot defeat the exercise of the right of eminent domain by a telegraph company seeking to construct a line of telegraph on a portion of its right of way, by the construction and maintenance of a line on both sides of its track, when a line on one side of its track is ample to furnish it with necessary telegraph service. *Western & A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420.

7. Where it appears that the demands of a modern railroad company are such that a telegraph system is a necessary auxiliary to its safe and proper operation; and where it appears that present telegraph service is afforded to the railroad company by an existing line of telegraph by virtue of a contract between the railroad company and the telegraph company, which contract is

about to terminate; and where it appears that the existing lines are located on an advantageous portion of the right of way, and that the railroad company, in order to obtain the necessary telegraph service, intends and purposes, in good faith, to construct a line of its own on the location of the old telegraph line, relatively to the telegraph company proposing to condemn a right of way,—the railroad company has a preferential selection of the route; and under such circumstances, the telegraph company will be enjoined from condemning the route which has been selected in good faith by the railroad company. *Western & A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420.

8. Where a telegraph company, in its notice of condemnation, seeks only to occupy a railroad company's right of way for the purpose of constructing and maintaining a telegraph line, the possibility of stringing telephone wires for the use of a telephone company is no objection to the right to condemn, for when the telegraph company attempts to impose an additional servitude, the railroad company has its remedy against such act. *Western & A. R. Co. v. Western U. Teleg. Co.* 42: 225, 75 S. E. 471, 138 Ga. 420.

#### ENTIRETIES.

Estate by, see Husband and Wife.

#### EQUALITY.

In taxation, see Taxes, 1.

#### EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 4-12.

#### EQUITY.

Jurisdiction and practice in particular cases, see Creditors' Bill; Discovery and Inspection; Injunction; Specific Performance.

#### ESTATES.

Merger of, see Merger.

#### ESTOPPEL.

To raise question in higher appellate court by failure to raise it on appeal to intermediate appellate court, see Appeal and Error, 10.

To claim easement, see Easements, 3.

Assisting physically in creation of condition as affecting one's right to recover for damages to property caused thereby, see Railroads, 8.

Estoppel to require second payment of taxes paid to wrong officer, see Taxes, 5.

1. The public is not, on the theory of estoppel, barred from contesting the collection of tolls on a county bridge, by long acquiescence therein. *Breathitt County v. Hammons*, 42: 836, 150 S. W. 661, 150 Ky. 502.

In whose favor.

2. One who purchases an interest in an 42 L.R.A. (N.S.)

estate without examining the records cannot hold the owner's widow estopped to assert her title to a parcel of the property, by the fact that she attempted to inventory it as belonging to the estate, if she refers to the source of title which the records would show placed the title in her. *Bell v. Nye*, 42: 1127, 99 N. E. 610, 255 Ill. 283.

By representations.

3. Asserting majority in a contract signed by him does not estop an infant from setting up his minority in defense of liability on the contract. *International Text-Book Co. v. Connelly*, 42: 1115, 99 N. E. 722, 206 N. Y. 188.

4. An infant who in personal appearance, family surroundings, and business activities appears to be of age, will not be permitted to rescind a sale of his land for a reasonable price under the representation that he was of age, the trade being fairly made and the grantee parting with the consideration without notice of the infancy. *County Bd. of Edu. v. Hensley*, 42: 643, 144 S. W. 63, 147 Ky. 441. (Annotated)

By negligence or fraud.

5. A grantee of land who permits his name to appear in the deed so illegibly that a mistake may easily be made in copying it into the record is estopped to deny that a mistaken name so copied is the true one, in favor of a purchaser at a tax sale after publication of notice in the name appearing in the record. *White v. Himmelberger-Harrison Lumber Co.* 42: 151, 139 S. W. 553, 240 Mo. 13.

#### EVIDENCE.

Prejudicial error as to, see Appeal and Error, 21-27.

Inherent power of court to issue commission to take depositions, see Courts, 1.

New trial because of newly discovered evidence, see New Trial, 2-6.

#### Presumptions and burden of proof.

1. A common-law state will presume that the law of a sister state colonized from England is the same upon the subject of validity of infants' contracts as its own. *International Text-Book Co. v. Connelly*, 42: 1115, 99 N. E. 722, 206 N. Y. 188.

2. A statute fixing maximum rates which express companies may charge and receive as compensation for their services is presumed to be constitutional; and the burden of proof is on one who challenges its validity to show, by a preponderance of the evidence, that the legislation complained of clearly contravenes some provision of the Constitution. *State v. Adams Express Co.* 42: 396, 122 N. W. 691, 85 Neb. 25.

3. Where an insured relies upon a waiver by an agent of a stipulation in an insurance policy against coinsurance, the burden of proof rests upon him to show that the agent was advised and had knowledge of such insurance. *Western Nat. Ins. Co. v. Marsh*, 42: 991, 125 Pac. 1094, — Okla. —.

4. In civil actions for libel, where a



communication concerning the credit and standing of a business corporation and its officers, which is sent by a bank president to whose bank the letter of inquiry is addressed, is conditionally privileged, the burden of proof is upon the plaintiff to show malice or a wrongful purpose in publishing it. *Richardson v. Gunby*, 42: 520, 127 Pac. 533, — Kan. —.

5. The suppression by one accused of causing a surety to withdraw from a bond, of a letter alleged to have contained the false statement causing such action, and failure to produce it in response to a subpoena duces tecum, are sufficient to support a verdict against him. *McClure v. McClintock*, 42: 388, 150 S. W. 332, 849, 150 Ky. 265, 773.

6. The doctrine of *res ipsa loquitur* does not apply to the fall of sparks from the machinery of an elevated train lawfully operated in a public street, to the injury of a person in the street below. *Corney v. Boston Elevated R. Co.* 42: 90, 98 N. E. 805, 212 Mass. 179.

7. The doctrine *res ipsa loquitur* applies where the head of a mallet having no patent defect, which is used by patrons of an attraction in an amusement park, flies off to the injury of one using it for the purpose for which it was intended, so that the owner, to avoid liability for the resulting injury, has the burden of showing freedom from negligence. *Wodnik v. Luna Park Amusement Co.* 42: 1070, 125 Pac. 941, 69 Wash. 638.

8. A prima facie case of negligence on the part of a gas company is shown by evidence that gas leak from a cap which it had placed on a pipe leading into a house, in such quantities that when a light was brought near it, the gas exploded and set fire to the house. *Louisville Gas Co. v. Guelat*, 42: 703, 150 S. W. 656, 150 Ky. 583.

9. The burden of proving ratification rests on the one claiming under a voidable contract with an infant. *International Text-Book Co. v. Connelly*, 42: 1115, 99 N. E. 722, 206 N. Y. 188.

10. One accused of assault by pointing a cocked pistol at another has the burden of showing that it was not loaded to avoid liability. *Territory v. Gomez*, 42: 975, 125 Pac. 702, — Ariz. —. (Annotated)

#### Documentary evidence.

Prejudicial error as to, see Appeal and Error, 22.

11. The record of an action by an abutting property owner against a street contractor for destruction of his building by a fire started in the street is not admissible in evidence in an action by the property owner to hold the municipal corporation responsible for the loss. *Charles Eneu Johnson Co. v. Philadelphia*, 42: 512, 84 Atl. 1014, 236 Pa. 510.

12. The property proved testimony of witnesses who have left the state after a first trial may be given in evidence on a second one. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

13. Entries in the books of a person since 42 L.R.A. (N.S.)

deceased, showing that a payment to one person was intended to be applied in satisfaction of a debt to another, or that cash payments were to be applied in satisfaction of indebtedness on a duebill, are not admissible in evidence in an action by the latter to enforce his claim. *Wells v. Hays*, 42: 727, 76 S. E. 195, — S. C. —.

14. In an action to hold one liable in damages for securing the withdrawal of the surety from plaintiff's bond, the letter is admissible in evidence upon which the surety acted in reaching its decision. *McClure v. McClintock*, 42: 388, 150 S. W. 332, 849, 150 Ky. 265, 773.

15. A memorandum on the stub of a check, that it was intended as payment upon an indebtedness to the payee's principal, is not admissible in evidence in an action by the principal to enforce payment of such indebtedness. *Wells v. Hays*, 42: 727, 76 S. E. 195, — S. C. —. (Annotated)

#### Parol and extrinsic concerning writings.

16. Parol evidence is admissible to show that a written contract apparently good on its face is a mere cover for an illegal transaction. *Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co.* 42: 847, 138 N. W. 624, — Wis. —.

17. Acceptance of a proposed contract contained in a letter, by acting under it for a period of time, is sufficient, without formal signature of it, to exclude parol evidence of its terms. *Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co.* 42: 847, 138 N. W. 624, — Wis. —.

18. An insurance policy taken in the individual name of the administrator on property in his possession for payment of debts cannot by parol evidence be made to cover the interest of the estate and heirs at law. *Stanley v. Firemen's Ins. Co.* 42: 79, 84 Atl. 601, — R. I. —. (Annotated)

#### Opinions and conclusions.

Prejudicial error in excluding, see Appeal and Error, 27.

19. Upon a prosecution for homicide, an expert witness properly qualified may, upon a given statement of the condition of the deceased immediately prior to her death and upon facts revealed to the witness by a post mortem examination, state his opinion as to the cause of death, and it is not necessary that he be confined to an opinion as to what could or might have been the cause of death. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

20. Capacity to make a deed is a mixed question of law and fact for the jury to determine on proper evidence and instructions, and not for witnesses to decide; and therefore it is not competent for expert witnesses to give an opinion as to whether such persons had sufficient mental capacity to make the deed in controversy. *Coblentz v. Putifer*, 42: 298, 125 Pac. 30, 87 Kan. 719.

21. In a prosecution for homicide, to identify a substance administered as a medicine, persons who were present when it was given, and who described it as having a strong, disagreeable odor, may compare

the odor of the liquid so given with that of a compound prepared in accordance with a prescription filled for the defendant previous to the homicide and produced on the trial, and testify whether the smell is the same. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

22. Witnesses in a murder trial who had experience in trailing men, and who followed the tracks of two men from the scene of the murder, may testify as to the difference in the characteristics of the tracks of men walking and running. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

#### Admissions.

Prejudicial error as to, see Appeal and Error, 21.

23. Admissions made by one injured by another's negligence are admissible in evidence against him at the trial without calling his attention to them while he is on the stand, as would be necessary to render them admissible for purposes of impeachment against an ordinary witness. *Adams v. Chicago G. W. R. Co.* 42: 373, 135 N. W. 21, — Iowa, —.

Hearsay; declarations; *res gestæ*.

Prejudicial error as to, see Appeal and Error, 21.

24. A statement by an employee twenty minutes after he had caused an accident by starting machinery, in response to a question as to why he did so, is not admissible in evidence, in an action to hold the employer liable for the injury, as part of the *res gestæ*. *Bernard v. Grand Rapids Paper Box Co.* 42: 930, 136 N. W. 374, — Mich. —.

25. Statements of an accused are not rendered inadmissible at his trial by the fact that at the time of making them he was a convict hired out on bond. *Andrews v. State*, 42: 747, 141 S. W. 220, — Tex. Crim. Rep. —.

26. A statute forbidding evidence of transactions with a person since deceased does not operate to prevent his administrator, in a suit on notes held by decedent against persons still living, from testifying as to his knowledge of decedent's accounts during his lifetime, since the statutory disqualification is only against the persons suing or defending adversely to the administrator. *Bailey v. Robison*, 42: 305, 91 N. E. 98, 244 Ill. 16. (Annotated)

27. A man claiming property as successor of his deceased wife is not competent to testify to a gift of the property to her by a person since deceased, although he merely witnessed the transaction without taking any part in it, under a statute making a person interested in the event of an action incompetent to testify against a representative of a deceased person concerning a personal transaction or communication between the witness and the deceased person. *Griswold v. Hart*, 42: 320, 98 N. E. 918, 205 N. Y. 384. (Annotated)

28. One who, in good faith, assigns a claim held by him against the estate of a decedent for services rendered the decedent

in his lifetime and who is not a party to the record in a suit brought by his assignee on such claim, against the executor of the estate, is not disqualified by interest to testify in the case by reason of the fact that he accepted the assignee's note in part payment of the claim, and that the success of such assignee makes more probable the ultimate payment of the note. *Clendennin v. Clancy* (N. J. Err. & App.) 42: 315, 81 Atl. 750, — N. J. —.

29. Where it is alleged that a deed was procured by the undue influence of a son upon his mother, since deceased, he may be asked whether at any time he asked or requested her to make such deed, when the manifest object of the question is to show that he did not, since such testimony negatives the existence of a transaction or communication with a deceased person. *Coblentz v. Putifer*, 42: 298, 125 Pac. 30, 87 Kan. 719. (Annotated)

30. Statements by the conductor in charge of a train the engine of which was derailed to the injury of the engineer and head brakeman, at a time when he had the responsibility of caring for the injured men, to the first stranger to reach the scene of the disaster, as to the cause of the accident, may, in the discretion of the trial judge, be admitted as *res gestæ*, in an action against the railroad company to recover damages for the death of the brakeman, although they were not made until two hours after the accident, and until after he had gone to a farmhouse some distance away to summon assistance and returned to the train. *Walters v. Spokane International R. Co.* 42: 917, 108 Pac. 593, 58 Wash. 293. (Annotated)

31. An accomplice of one on trial for murder may testify as to their trailing the victim before any suggestion was made to kill him, and also as to what the parties did and agreed to do after the money taken from the victim was divided. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

32. Evidence of exclamations of a person made when taking a dose of supposed medicine, that it burned her stomach, which exclamations were accompanied by a wry face, sudden sickness, and vomiting, is admissible in evidence on the trial of one charged with poisoning such person. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

#### Relevancy and materiality.

Relevancy and materiality under particular pleadings, see *infra*, 57.

Prejudicial error in admitting, see Appeal and Error, 21-25.

Prejudicial error in excluding, see Appeal and Error, 26, 27.

33. As bearing upon the question of one's guilt for violation of a statute, evidence is admissible relating to his knowledge of the pendency of the bill, which ripened into the statute. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

34. In a prosecution for selling pooled tobacco contrary to statute, evidence is admissible, in support of a defense that the

pooling contract was signed under duress, that night riders had inflicted personal injury upon, and destroyed the property of, those who had refused to pool, and that accused had been approached and told that it would be best for him to pool. *Com. v. Refitt*, 42: 329, 148 S. W. 48, 149 Ky. 300.

35. That one who has made alleged slanderous statements upon a privileged occasion repeats them subsequently when called upon for an explanation is not admissible to show malice in the first utterance, if the statement would not of itself afford an action for slander. *Hayden v. Hasbrouck*, 42: 1109, 84 Atl. 1087, — R. I. —.

(Annotated)

36. In an action against a telegraph company to recover for the negligent nondelivery of a message containing an offer to make a contract with the sendee, it is competent for such sendee to testify that, if the message had been delivered, the offer would have been accepted. *Western U. Teleg. Co. v. Sights*, 42: 419, 126 Pac. 234, — Okla. —.

37. The conduct of a chauffeur after collision of his machine with a pedestrian is not relevant in an action to hold the owner of the vehicle liable for the injury, except in so far as it may be part of the *res gestæ*, and tend to throw light on the act which is charged to be negligent. *Minor v. Stevens*, 42: 1178, 118 Pac. 313, 65 Wash. 423.

38. In an action to hold a gas company liable for destruction of a house because of an escape of gas from a cap placed on a pipe by it, evidence is admissible as to whether or not one who approached the pipe to connect it with a stove was drunk, whether or not he had been drinking during the day, and his condition a short time after the accident. *Louisville Gas Co. v. Guelat*, 42: 703, 160 S. W. 656, 150 Ky. 583.

39. Upon a trial for larceny through conspiracy to secure money from a certain person by fraud, evidence is admissible that the same persons swindled another person by similar means, for the purpose of showing the scope and purpose of the conspiracy, if one is found to exist, although accused is not shown to have been connected with the conspiracy until a date later than that to which the evidence relates. *State v. Dobbins*, 42: 735, 132 N. W. 805, 152 Iowa, 632.

40. Upon the question of the acceptance of a contract for services, evidence is not admissible of objections to reports made by persons acting under the contract. *Manufacturers' & M. Inspection Co. v. Everweh Hosiery Co.* 42: 847, 138 N. W. 624, — Wis. —.

41. In the prosecution of the officers of a trust company for larceny of state moneys in converting those deposited with the company to their own use by using them for its benefit, evidence is admissible of a demand upon the company for their return, since a demand on the company for which they are acting is sufficient to charge them. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

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42. Evidence by comparison of odors tending to prove that one accused of murder by administering to a person named "certain deadly drugs and poisons, to wit, cyanide of potassium and hydrocyanic acid, and also other drugs and poisonous substances to" the county attorney unknown, administered a preparation of ergot, cotton root, and dilute sulphuric acid to his alleged victim several times in the two days preceding her death, is admissible although the accused administered a different treatment immediately before the death, where the various treatments appear to be parts of a connected transaction. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

43. In a murder trial, a witness may testify as to the number of shot of the size found in the body of the victim, contained in a shell of the kind found at the point where accused is said to have been standing at the time the fatal shot was fired. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

44. Testimony of a druggist that one accused of homicide by poison had requested that a prescription for ergot and other drugs presented by and filled for him should be kept from the prescription files kept in the drug store, is admissible with the prescription, in connection with evidence that a preparation the smell of which was the same as a preparation prepared during the trial, consisting of the drugs called for in the prescription had been administered to the deceased in the two days preceding her death. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

45. One suing on a duellbill upon which a payment to a lumber company is claimed as a credit may be required to testify that her husband owned no real estate, for the purpose of showing that the lumber furnished by the company was used on her property. *Wells v. Hays*, 42: 727, 76 S. E. 195, — S. C. —.

46. Evidence of defendant's wealth is not admissible in an action to recover damages for alienation of the affection of plaintiff's husband. *Phillips v. Thomas*, 42: 582, 127 Pac. 97, — Wash. —.

47. Evidence that one accused of alienating the affections of another's husband told him of her great wealth is not admissible in an action to recover damages for such alienation, if there is nothing to show that it was held out as an inducement to him to desert his wife. *Phillips v. Thomas*, 42: 582, 127 Pac. 97, — Wash. —.

Weight, effect, and sufficiency.

Review of facts on appeal, see Appeal and Error, 16-20.

48. Statements by the president of a federation of women's clubs, upon a privileged occasion of a consultation as to methods of suppressing theft at meetings of a local club, with respect to a particular person, that, although there was no positive proof, she was convinced; that the suspect's husband had "paid her out before," and, as a reason for the conduct, that she was "as poor as Job's turkey,"

are not *per se* evidence of malice. *Hayden v. Hasbrouck*, 42: 1109, 84 Atl. 1087, — R. I. —.

49. Negligence may be found rendering a railroad company liable for injury to neighboring property by fire, where the right of way was foul with inflammable material, its locomotive emitted sparks, and the fire was first seen on its right of way soon after the engine had passed. *Hardy v. Hines Bros. Lumber Co.* 52: 759, 75 S. E. 855, — N. C. —.

50. The release of a right of way cannot be presumed from the evidence of a single unfriendly witness, as to a declaration of abandonment by the owner of the way, who has since deceased, made thirty-five years before the trial in the presence of such witness, who was then only nineteen years old. *Adams v. Hodgkins*, 42: 741, 84 Atl. 530, — Me. —.

51. The agency of one charged with the embezzlement of a check is sufficiently established by evidence showing that the agency related to but the single transaction of intrusting the check to the defendant, and this whether the contract of agency provided for compensation or not. *State v. Fraley*, 42: 498, 76 S. E. 134, — W. Va. —.

52. Under a statute providing that "if any . . . agent . . . embezzle or fraudulently convert to his own use . . . property . . . which shall have come into his possession, or been placed under his care or management, by virtue of his office, place, or employment, he shall be guilty of larceny thereof," the agency of one charged with the embezzlement of a check is sufficiently established by evidence showing that the agency related to but the single transaction of intrusting the check to the defendant, without any previous relationship of principal and agent being shown. *State v. Fraley*, 42: 498, 76 S. E. 134, — W. Va. —.

53. In an action for destruction of a stock of goods, where the plaintiff testifies that the invoice was destroyed, and that she cannot particularize or enumerate the goods, but that they were of the aggregate value of \$1,250, such evidence, though indefinite, is sufficient upon which to rest a verdict in favor of the plaintiff. *Russell v. Little*, 42: 363, 126 Pac. 529, — Idaho, —.

54. That a message was received by a telegraph company for transmission may be found from evidence that, in response to a telephone request made to the person answering the call for the company's number, a messenger appeared and took the message, which had been written on one of the company's blanks, to carry it to the company's office, although the blank contained a stipulation making the messenger the agent of the sender. *Alexander v. Western U. Teleg. Co.* 42: 407, 74 S. E. 449, 158 N. C. 473.

55. Testimony that fire was seen on the right of way of a lumber company operating a railroad is sufficient to enable the jury to find that it had a right of way. 42 L.R.A.(N.S.)

*Hardy v. Hines Bros. Lumber Co.* 42: 759, 75 S. E. 855, — N. C. —.

56. In a prosecution for homicide, the possibility that death resulted from some other cause than that charged does not require an acquittal, if, upon all the evidence, the jury are satisfied of the guilt of the defendant beyond a reasonable doubt. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

**Admissibility under particular pleadings.**

57. The method and manner of the unlawful taking and carrying away need not be set out in an indictment for larceny to permit the introduction of evidence thereof. *State v. Dobbins*, 42: 735, 132 N. W. 805, 152 Iowa, 632.

## EXCAVATIONS.

Landlord's duty to protect building against danger resulting from, see Landlord and Tenant, 6-9.

## EXCEPTIONS.

Bill of, see Appeal and Error, 5.

In general, see Appeal and Error, 6-8.

## EXECUTION.

Amercement of sheriff for failure to levy and return, see Sheriff, 3, 4; Parties, 2.

## EXECUTORS AND ADMINISTRATORS.

Estoppel of widow to assert title to property by attempting to inventory it as belonging to the estate, see Estoppel, 2.

Testimony by administrator in suit on notes held by decedent against persons still living, as to his knowledge of decedent's accounts, see Evidence, 26.

Competency as witness of one assigning claim against estate of decedent in suit brought by assignee on claim against executor, see Evidence, 28.

Effect of judgment on after-born children, see Judgment, 4.

Questions for court or jury in action on assigned claim against executor, see Trial, 2.

Effect on right of holder of note to recover from surety of bar of claim as against estate of deceased co-surety, see Limitation of Actions, 2.

1. A statutory authorization of testamentary executors and guardians applies only to such as are named in a will disposing of property. *Blacksher Co. v. Northrop*, 42: 454, 57 So. 743, — Ala. —.

2. A widow is not entitled to her year's support out of a recovery for the wrongful death of her husband, under statutes providing for such support out of the crop, stock, and provisions, the balance to be made up from the personal estate of the de-

ceased, and requiring the distribution of such recoveries as of personal property in case of intestacy. *Broadnax v. Broadnax*, 42:725, 78 S. E. 216, — N. C. —. (Annotated)

3. An administratrix of the surviving member of an inactive partnership whose affairs are under process of settlement, who permits representatives of the deceased partner to act without bond under her power of attorney in the settlement of the partnership affairs, for a period of nine years without accounting, when the surviving attorney proves bankrupt and largely indebted to the estate, will be surcharged with the amount lost by his defalcation. *Re Skeer*, 42: 170, 84 Atl. 787, 236 Pa. 404.

#### EXEMPTIONS.

Homestead exemption, see *Homestead*.  
From taxation, see *Taxes*, 2, 3.

1. Exemption privileges allowed by statute are to be liberally construed, and a debtor should not be deprived thereof through a technical following of statutes pertaining to pleading. *Bradley v. Earle*, 42: 575, 132 N. W. 660, 22 N. D. 139.

2. Where a plaintiff brings an action for wages due from the defendant, and such wages are exempt to the plaintiff, the defendant cannot counterclaim a debt due from the plaintiff to him, although the counterclaim comes within the letter of the statute. *Bradley v. Earle*, 42: 575, 132 N. W. 660, 22 N. D. 139. (Annotated)

#### EXPLOSIONS AND EXPLOSIVES.

Presumption and burden of proof as to negligence, see *Evidence*, 8.

Evidence on question of negligence causing, see *Evidence*, 38.

Explosion of gas, see *Gas*.

Municipal liability for blasting in street, see *Municipal Corporations*, 5.

Liability for injury to trespassing child by, see *Negligence*.

Question for jury as to gas explosion, see *Trial*, 6.

#### EXPRESS COMPANIES.

Reasonableness of express rates fixed by legislature, see *Carriers*, 11.

Judicial power to review reasonableness of rates fixed by statute, see *Courts*, 3.

Presumption as to validity of statute fixing express rates, see *Evidence*, 2.

Injunction against enforcement of rates fixed by statute, see *Injunction*, 4.

Findings of referee in hearing as to validity of rates, see *Reference*.

Right of carrier held liable for death of passenger for contribution from express company primarily liable therefor, see *Contribution and Indemnity*, 1.

#### FACTS.

Review of, on appeal, see *Appeal and Error*, 16-20.

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#### FALSE IMPRISONMENT.

Effect of finding of nonliability on part of municipality on appeal from joint verdict against municipality and policeman for wrongful arrest, see *Appeal and Error*, 35.

Prejudicial error as to amount of damages for, see *Appeal and Error*, 34.

Liability of innkeeper, see *Innkeepers*, 6.

Liability of municipality, see *Municipal Corporations*, 12.

#### FEES.

Of attorney, see *Attorneys*, 2, 3.

#### FENCES.

Necessity of making landlord a party in action to compel tenant to remove spite fence, see *Parties*, 3.

The court will order the removal of a spite fence erected to compel an adjoining property owner to abandon a suit instituted to enjoin the maintenance of a nuisance on the property of the one who erected it. *Wilson v. Irwin*, 42: 722, 138 S. W. 373, 144 Ky. 311. (Annotated)

#### FIDUCIARY RELATION.

Giving priority in funds in receiver's hands, see *Receivers*, 2.

#### FINES.

For keeping dog which does not wear a collar, see *Animals*.

Imposition of fine on attorney for ignoring rulings of court, see *Attorneys*, 1.

Validity of fine imposed for embezzlement of public money, see *Criminal Law*, 7.

#### FIRE INSURANCE.

See *Insurance*.

#### FIRES.

Evidence in action for loss resulting from, see *Evidence*, 11.

Caused by explosion of gas, see *Gas*.

Loss of property of guest at hotel through fire, see *Innkeepers*, 4.

Municipal liability for permitting inflammable material to be deposited in highway, see *Municipal Corporations*, 10.

Liability of railroad for, see *Railroads*, 3.

Liability of water company for failure to furnish supply of water for fire purposes, see *Waters*, 3-6.

One owning property abutting on a public street who knows that inflammable material has been deposited in the street in such manner as to endanger his property, must make all reasonable efforts to protect his property from the impending danger. *Charles Eneu Johnson Co. v. Philadelphia*, 42: 512, 84 Atl. 1014, 236 Pa. 510.

**FLOOD.**

As act of God, see Act of God.

Liability of railroad company for, see Railroads, 7, 8.

Question for jury as to negligence causing, see Trial, 5.

**FOOD.**

Monopoly in food product, see Constitutional Law, 9.

**FOREIGN JUDGMENT.**

See Judgment, 7.

**FOREIGN LAW.**

Presumption as to, see Evidence, 1.

**FORFEITURE.**

Of corporate franchises, see Corporations, 6.

Of patent for public land, see Public Lands, 2.

**FORMALDEHYDE.**

Injury to tenant by forcing formaldehyde into his room to eject him, see Appeal and Error, 29.

**FORMER JEOPARDY.**

See Criminal Law, 5, 6.

**FRANCHISE.**

Forfeiture of, see Corporations, 6.

**FRAUD AND DECEIT.**

In representations by real estate broker as to value of property, see Brokers.

Measure of damages for, see Damages, 3.

Estoppel by, see Estoppel, 3, 4.

As to fraudulent conveyances, see Fraudulent Conveyances.

Preventing operation of incontestable clause in insurance policy, see Insurance, 4.

Effect of, on running of limitations, see Limitation of Actions, 4.

Proof of fraud to support petition for new trial, see New Trial, 8.

Cancellation of patent for public land because of, see Public Lands, 2.

Question for jury as to, see Trial, 1.

1. An architect is guilty of fraud who, to secure the contract for preparing plans and supervising the construction of a building, states positively that the cost of a structure of the general character desired will not exceed a specified sum, when he knows that such is not the fact. *Edward Barron Estate Co. v. Woodruff Co.* 42: 125, 126 Pac. 351, — Cal. —. (Annotated)

2. The deceit of one in securing a contract to prepare plans for a building and supervise its construction, by false representations that he has skill as an architect, permeates the execution of the contract so as to render him liable to the owner in case he suffers loss through absence of knowledge and skill on the part of the one making the representations. *Edward Barron Estate Co. v. Woodruff Co.* 42 L.R.A. (N.S.)

*ron Estate Co. v. Woodruff Co.* 42: 125, 126 Pac. 351, — Cal. —.

3. One employed to sell property at the best price obtainable is not guilty of fraud in stating that a named price is the lowest which the owner will take for the property, if he does not know at the time that a lower price would be acceptable, although after the sale he settles with the owner at a lower figure. *Bradley v. Oviatt*, 42: 828, 84 Atl. 321, 86 Conn. 63.

**FRAUDULENT CONVEYANCES.**

Where a husband and wife own two town lots equally as tenants in common and reside on one of them as their home, which is of the full value of the homestead exemption, the undivided one-half interest of the husband in the other lot will not be exempt from a judgment against him, and the transfer by him of such interest to his wife without consideration, to hinder or delay his creditors, will be set aside as fraudulent. *Valparaiso State Bank v. Schwartz*, 42: 1213, 138 N. W. 757, — Neb. —.

**FREIGHT CARRIERS.**

See Carriers.

**FRIGHT.**

Of horse in highway, see Highways, 5.

**FUNERAL.**

Absence of ceremony, see Corpse, 4.

**GAMING.**

That a slot machine which delivers an article worth the coin deposited, and sometimes tickets for additional chances in addition thereto, indicates before each transaction what will be delivered, does not prevent its being within the operation of a statute prohibiting gaming devices. *Ferguson v. State*, 42: 720, 99 N. E. 806, — Ind. —. (Annotated)

**GAS.**

Presumption and burden of proof as to negligence, see Evidence, 8.

Relevancy of evidence as to negligence, see Evidence, 37.

Question for jury as to negligence, see Trial, 6.

Injection of poisonous gas by landlord into leased room, see Landlord and Tenant, 5.

As to gas in mines generally, see Mines.

A gas company which uses ordinary care to cap a pipe leading into a dwelling, upon the removal of a stove which has been supplied by it, and to maintain it in a safe condition, is not liable for the destruction of the house by fire due to the escape of gas therefrom. *Louisville Gas Co. v. Guelat*, 42: 703, 150 S. W. 656, 150 Ky. 583.

**GOOD FAITH.**

Of master in employing infant under age, see Master and Servant, 2.

**GRAND STAND.**

Duty to patrons with respect to safety of, see Amusements, 1, 2.

**GRAVES.**

See Cemeteries.

**GUARDIAN AND WARD.**

Guardian of incompetent persons, see Incompetent Persons.

1. A lease granting oil and gas mining privileges for a term of years is not a "sale of realty" as contemplated by § 5314, Okla. Comp. Laws, 1909. *Duff v. Keaton*, 42: 472, 124 Pac. 291, — Okla. —.

2. A lease granting oil and gas mining privileges for a term of years made by the guardian of a minor, permission of the court having first been obtained thereto, and such lease having been approved and confirmed by the court, though without the preliminary notices essential for the order of sale and confirmation of the same in case of the sale of real estate of minors by guardians, is valid against a collateral attack. *Duff v. Keaton*, 42: 492, 124 Pac. 291, — Okla. —.

**GUARDS.**

Assumption of risk of unguarded machinery, see Master and Servant, 5, 6.

**GUESTS.**

At hotels, see Innkeepers.

**HABEAS CORPUS.**

Disqualification of judge, see Judges, 3.

**Lack of jurisdiction.**

1. The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction, and a prisoner held under such excess is entitled to his release by writ of habeas corpus. *Munson v. McClaughry*, 42: 302, 198 Fed. 72, — C. C. A. —.

Trial; sentence.

2. Under a statute authorizing the court to sentence to the reformatory any person not less than sixteen nor more than thirty years of age, etc., and who has been convicted of a crime punishable by imprisonment in the state prison, the fact that a judgment of conviction of such a crime, upon which the defendant is sentenced to the reformatory, fails to state the age of the defendant, does not render it subject to attack on habeas corpus. *State ex rel. Kelly v. Wolfer*, 42: 978, 138 N. W. 315, 119 Minn. 368.

3. The judgment of a court having jurisdiction of the person and the subject-matter and power to render a judgment upon a sufficient showing of facts, imposing an indeterminate sentence upon a person who has pleaded guilty of a crime, will be sustained as against an attack on habeas corpus, notwithstanding an agreement between the prisoner and the trial judge prior to the former's conviction upon the plea of guilty, that his imprisonment under such conviction should not exceed a certain time, and that

the plea of guilty was entered in reliance upon such agreement. *State ex rel. Kelly v. Wolfer*, 42: 978, 138 N. W. 315, 119 Minn. 368.

4. The sentence of a defendant, convicted on two separate counts of an indictment, under §§ 5478 and 5456, or 5475, Revised Statutes (U. S. Comp. Stat. 1901, pp. 3683, 3694, 3696), of burglary of a potsoffice building with intent to commit larceny and of larceny committed at the same time and as a part of a continuous criminal act, to imprisonment for the burglary and imprisonment for the larceny, to begin at the expiration of the sentence for the burglary, is *ultra vires* and void as to the sentence for larceny, and after the defendant has satisfied the sentence for the burglary he is entitled to his release on habeas corpus. *Munson v. McClaughry*, 42: 302, 198 Fed. 72, — C. C. A. —.

**Procedure.**

5. Strict technical pleadings are not required in habeas corpus proceedings. *Wilkinson v. Lee*, 42: 1013, 75 S. E. 477, 138 Ga. 360.

**Appeal.**

Review of discretion on appeal, see Appeal and Error, 11.

Reversal because of disqualification of judge, see Judges, 3.

6. Where an appeal in habeas corpus proceedings is, by the provisions of a statute, required to be tried in the supreme court in the same manner as if the writ had originally issued out of such court errors and irregularities occurring on the trial below need not be considered. *State ex rel. Kelly v. Wolfer*, 42: 978, 138 N. W. 315, 119 Minn. 368.

**HAND CAR.**

In street as unlawful obstruction, see Highways, 5.

**HARMLESS ERROR.**

See Appeal and Error, 21-34.

**HEADLIGHT.**

Blinding of traveler by headlight of street car, see Street Railways, 2.

**HEARSAY.**

See Evidence.

**HIGHWAYS.**

Alleys, see Alleys.

Use of automobiles on, see Automobiles.

Constitutionality of statute requiring use of private property in road work, see Constitutional Law, 13.

Evidence in action for injuries resulting from negligence of street contractor, see Evidence, 11.

Municipal liability for acts of contractors in making repairs, see Municipal Corporations, 10.

Street railways in street, see Street Railways.

Requiring monthly reports from persons hauling heavy logs over, see License, 2.

Imposition of license tax on certain persons using, see License, 2, 3, 4.

#### Coasting in.

Defense to liability for negligent injury to one coasting in public street, see Action or Suit, 2.

1. Coasting upon a public street of a city is not a nuisance *per se*. Lynch v. Public Service R. Co. (N. J. Err. & App.) 42: 865, 83 Atl. 382, 82 N. J. L. 712.

#### Liability for injuries on.

Exempting particular municipality from liability for injuries, see Constitutional Law, 5.

Failure of municipality to prevent ball playing in street, see Municipal Corporations, 4.

Injury to person on through negligence in operation of quarry nearby, see Municipal Corporations, 11.

Blasting in street, see Municipal Corporations, 5.

2. Stretching a rope across an entrance to an alley between the street and sidewalk to prevent use of the alley is not an obstruction to the street which will render the municipality liable in case it is broken by a runaway horse and an end flies against a person passing on the walk to his injury. Lawrenceburg v. Lay, 42: 480, 149 S. W. 862, 149 Ky. 490. (Annotated)

3. A condition sufficient to hold a county liable for injury to a traveler on a highway whose horse went over an embankment upon which it was built is not shown by allegations that the defect was the existence on the side thereof of a steep, precipitous, and sheer decline or pitfall of some 8 or 10 feet to the bottom, which defendant negligently permitted to remain without barrier; and that plaintiff's horse fell down and into said declivity and precipice. Leber v. King County, 42: 267, 124 Pac. 397, 69 Wash. 134.

4. A county is not bound to maintain a barrier along the side of a graded roadway 15 feet wide, although it is at the top of an embankment 8 or 10 feet high, where the slope is not precipitous, but gradual. Leber v. King County, 42: 267, 124 Pac. 397, 69 Wash. 134. (Annotated)

5. A hand car removed from the track by railroad employees within the limits of the highway at a crossing, to permit a train to pass, is not an unlawful obstruction of the way, which will render the railroad company liable for injuries due to the frightening of a horse by it. Webster v. Chicago, B. & Q. R. Co. 42: 568, 158 Fed. 769, 86 C. C. A. 125. (Annotated)

#### Vacation.

6. A statute declaring a county road vacated if it remains unopened for public use for seven years does not apply to a street or alley within the limits of a city. Wallace v. Cable, 42: 587, 127 Pac. 5, 87 Kan. 835.

#### HOMES.

Use of public funds to secure homes for wage earners, see Public Money.  
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#### HOMESTEAD.

On public land, see Public Lands, 1.

1. The homestead of a family may be taken in property of either the husband or wife, and if their home is owned by them equally as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt. Valparaiso State Bank v. Schwartz, 42: 1213, 138 N. W. 757, — Neb. —.

2. Whether or not a remainderman whose estate has vested can claim a homestead in such remainder estate, so as to preclude the attaching of a judgment lien thereon, will not be determined upon affidavits filed, in an application for the release of such judgment on account of the discharge in bankruptcy of the judgment debtor, as provided by a state statute. John Leslie Paper Co. v. Wheeler, 42: 292, 137 N. W. 412, — N. D. —.

#### HOMICIDE.

Review of discretion on appeal in criminal case, see Appeal and Error, 13.

Prejudicial error in admission of evidence, see Appeal and Error, 21.

Prejudicial error in remarks or conduct of judge, see Appeal and Error, 32.

Opinion evidence in prosecution for, see Evidence, 19, 22.

Proof of acts or declarations of co-conspirators, see Evidence, 31.

Evidence as to complaint of suffering by alleged victim, see Evidence, 32.

Relevancy of evidence in prosecution for, see Evidence, 42-44.

Sufficiency of proof of, see Evidence, 56.

Indictment for, see Indictment, etc., 1.

Competency of juror, see Jury.

Instructions on trial for, see Trial, 11.

Correctness of verdict, see Trial, 13.

Corroboration of witness, see Witnesses, 4.

Proof of motive is not indispensable in a proposition for homicide where the jury is satisfied of the guilt of the accused without it. State v. Buck, 42: 854, 127 Pac. 631, — Kan. —.

#### HORSE RACE.

Larceny by fraudulent race, see Larceny, 2.

#### HORSES.

Transportation of, see Carriers, 8.

Running away of, concurring with other cause to injure person on highway, see Highways, 2.

Injury due to fright of in highway, see Highways, 5.

Horse stealing, see Larceny, 1.

Lien for services of, see Mechanics' Liens, 1.

#### HOTELS.

See Innkeepers.

#### HOURS OF LABOR.

See Master and Servant, 1.



**HUSBAND AND WIFE.**

Admiralty jurisdiction of suit for injury to wife by collision between vessels, see Admiralty.

Cure of error in admission of evidence in action for alienation of affections, see Appeal and Error, 25.

Evidence in action for alienation of affections, see Evidence, 46, 47.

New trial because of excessive damages in action for alienation of affections, see New Trial, 1.

Excessiveness of verdict in action for alienation of affections, see Trial, 12.

Mitigation of damages, see Damages, 8. Construction of grant of husband and wife, see Deeds, 3.

Right to inherit, see Descent and Distribution, 2.

As to divorce or separation, see Divorce and Separation.

Election of husband to waive distributive rights in wife's property, see Election.

Testimony by man claiming property as successor of deceased wife as to gift of property to her by person since deceased, see Evidence, 27.

Evidence in action by wife on due bill to show credit thereon, see Evidence, 45.

Lien of husband's creditors on his expectancy of survivorship, see Judgment, 6.

Competency of, as witnesses, see Witnesses, 1.

1. The right of possession of husband and wife existing by virtue of an estate by the entirety, as modified by the married woman's act, amounts in its essential features to a tenancy in common for the joint lives, with remainder to the survivor. *Schulz v. Ziegler* (N. J. Err. & App.) 42: 98, 83 Atl. 968, — N. J. —.

2. By the husband's conveyance of his interest in an estate by the entirety, the grantee becomes tenant in common with the wife, but only for the joint lives of husband and wife; and such grantee may maintain partition against the wife, but the right is limited to the aforesaid tenancy in common for the joint lives. *Schulz v. Ziegler* (N. J. Err. & App.) 42: 98, 83 Atl. 968, — N. J. —. (Annotated)

**HYPOTHETICAL QUESTIONS.**

Prejudicial error in excluding, see Appeal and Error, 27.

**IDENTIFICATION.**

Opinion evidence as to, see Evidence, 21.

**IMPEACHMENT.**

Of witness, see Witnesses, 3.

**IMPLIED AGREEMENTS.**

See Contracts, 1.

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**IMPLIED RESERVATION.**

Of burial rights in land conveyed, see Cemeteries, 3.

**IMPROVEMENTS.**

By tenant, see Landlord and Tenant, 4.

Public improvements, see Public Improvements.

**INCOMPETENT PERSON.**

Assault on passenger by insane conductor, see Carriers, 2.

Damages for abuse of passenger by insane conductor, see Appeal and Error, 20a.

Opinion evidence as to mental capacity, see Evidence, 20.

Evidence as to undue influence in securing execution of deed, see Evidence, 29.

1. A mortgage may be enforced against one who, at the time it was executed by himself and his wife, was in fact insane, but who had not been so adjudged, to take up a prior purchase-money mortgage on his property, by a mortgagee having no knowledge of the insanity, either actual or constructive. *National Metal Edge Box Co. v. Vanderveer*, 42: 343, 82 Atl. 837, — Vt. —. (Annotated)

2. An adjudged lunatic for whose benefit his committee has purchased an automobile is not liable, either personally or in estate, for injury inflicted upon a stranger by the negligence of the chauffeur in the operation of the machine out of the presence and without the authority of the lunatic. *Gillet v. Shaw*, 42: 87, 83 Atl. 394, — Md. —. (Annotated)

**INCONTESTABILITY.**

Of insurance policy, see Insurance, 4.

**INDEFINITENESS.**

Of trust, see Trusts.

**INDEMNITY.**

In general, see Contribution and Indemnity.

**INDEPENDENT CONTRACTORS.**

Liability for acts of, see Master and Servant, 7, 8.

**INDICTMENT, INFORMATION, AND COMPLAINT.**

Right of accused to secure affirmance, on appeal by state, of ruling dismissing indictment because of insufficiency, see Appeal and Error, 9.

Effect on pending informations of adoption of constitutional amendment, see Constitutional Law, 1.

**Homicide.**

1. An allegation in an information for murder by poisoning is sufficiently certain which charges that the defendant administered to a person named "certain deadly drugs and poisons, to wit, cynide of potassium and hydrocyanic acid, and also other drugs and poisonous substances to this

county attorney unknown," although such other drugs and poisonous substances are not otherwise designated or described. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —. **Embezzlement.**

What evidence admissible under allegations, see Evidence, 57.

2. An information against the officers of a trust company for embezzling state funds deposited with it is not insufficient in failing to allege that such company was an active depository of such funds under the provisions of the statute, or that it sustained an official relation to the state, if it alleges that the officers acting for the trust company had in their possession a certain sum which belonged to the state, and was part of its educational funds, deposited by the state for safe-keeping, to be returned by defendants to the state, which are the conditions prescribed by statute, such allegations being sufficient to determine the identity of the offense. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

3. The description of a check as "one check of the value of forty-two and 50/100 (\$42.50) dollars," in an indictment under § 19, chapter 145, West Virginia Code 1906, sufficiently describes the check charged to have been embezzled. *State v. Fraley*, 42: 498, 76 S. E. 134, — W. Va. —. **Sufficiency to support conviction.**

4. An indictment against a bank officer for converting money of the state is prima facie supported by evidence that, although checks were deposited for collection; a part of which were against the collecting bank itself, the collections were treated as made, and the state credited on the books of the bank with their amount as cash, and that the funds in this account were those converted. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

#### INEVITABLE ACCIDENT.

See Act of God.

#### INFANTS.

Review on appeal of damages for injury to, see Appeal and Error, 20.

Rights and duties of parent as to burial of child, see Corpse, 1-3.

Conclusiveness of decree affecting, see Judgment, 4, 5.

Unlawful employment of, see Master and Servant, 2.

Negligence towards, see Negligence.

Question for jury as to negligence towards, see Trial, 3.

Negligence of, as question for jury, see Trial, 4.

#### Support.

In case of divorce, see Divorce and Separation.

1. One is liable for medical and surgical services rendered to his stepson, who is a member of his family, where, although the boy's father is living and under obligation to contribute a certain amount towards the boy's support, and no direct request for the services is made by the stepfather, the 42 L.R.A. (N.S.)

latter's action shows approval of the physician's conduct in rendering the services. *Monk v. Hurlburt*, 42: 535, 138 N. W. 59, — Wis. —. (Annotated)

#### Custody.

Consideration for father's transfer of right to custody of child, see Contracts, 2.

Disqualification of judge in habeas corpus proceeding to recover possession of child, see Judges, 3.

2. A father is prima facie entitled to the control of his minor child, but this right may be lost by a clear, definite, and certain contract releasing the right to a third person, or by a failure of the father to provide necessities for his child. *Wilkinson v. Lee*, 42: 1013, 75 S. E. 477, 138 Ga. 360.

3. Where a father, a few days after the death of his wife, voluntarily told the great-grandfather of his child, three days old, that he might take and keep the child as long as he and his wife lived, or until the child was twenty-one years of age, and the grandparent did take, keep, maintain, and protect the child for about three years, a valid contract sufficiently definite and certain to be enforced was created, by which the father released his right to the child, to the grandparent. *Wilkinson v. Lee*, 42: 1013, 75 S. E. 477, 138 Ga. 360. (Annotated)

#### Contracts.

Conflict of laws as to, see Conflict of Laws.

Estoppel by misrepresentations as to age, see Estoppel, 3, 4.

Presumption as to law of other state in regard to infants' contracts, see Evidence, 1.

Presumption and burden of proof as to ratification, see Evidence, 9.

4. A five-year course of instruction in "complete steam engineering" is not a necessary for which an infant can contract, in the absence of anything to show his circumstances in life or his resources for securing such instruction. *International Text-Book Co. v. Connelly*, 42: 1115, 99 N. E. 722, 206 N. Y. 188. (Annotated)

5. The mere payment by an infant, after attaining majority, of an instalment of the contract price for a course of instruction, is not sufficient as matter of law to ratify the contract, if he receives no benefit after attaining majority and as soon as possible returns all he has received under the contract. *International Text-Book Co. v. Connelly*, 42: 1115, 99 N. E. 722, 206 N. Y. 188.

#### INFECTION.

Of eye as accident, see Insurance, 14.

#### INFORMATION.

For criminal offense, see Indictment, etc.

#### INHERITANCE.

See Descent and Distribution.

**INITIALS.**

Use of initials instead of name in describing party in writ, see Writ and Process, 1.

**INJUNCTION.**

Contempt in violating, see Contempt.

Against condemning right of way for telegraph line along railroad right of way, see Eminent Domain, 7.

Against nuisance, see Nuisances.

**Contract rights.**

1. Injunction will lie to prevent violation of a contract by a merchant who has contracted to handle the product of the other party to the contract exclusively during a specified period of time. *Peerless Pattern Co. v. Gauntlett Dry Goods Co.* 42: 843, 136 N. W. 1113, — Mich. —.

**Illegal or tortious acts; crimes.**

2. Kindred of the dead may maintain a suit in equity to enjoin the unlawful removal of the remains of such dead from their graves. *Ritter v. Couch*, 42: 1216, 76 S. E. 428, — W. Va. —.

**Against legal proceedings.**

3. The mere bringing of a suit and attachment of property in another state, by a citizen of one state against another citizen of the same state, to recover damages for a tort committed in the state of their residence, is not such annoyance or harassment as will warrant an injunction against its maintenance. *Jones v. Hughes*, 42: 502, 137 N. W. 1023, — Iowa, —.

**Against officers generally.**

4. A court of equity ought not to interfere with and strike down an act of the legislature fixing maximum express rates, before a fair trial has been made of continuing the business thereunder, and in advance of any actual experience of the practical result of such rates. *State v. Adams Express Co.* 42: 396, 122 N. W. 691, 85 Neb. 25.

**Preliminary and interlocutory injunction.**

5. A telephone company will not be denied a temporary injunction to prevent connection with its line, on the theory that it bought a lawsuit and undertook to make itself judge between two claimants, where the owner of a farm on its route, who was a member of the company, and who, by reason of his membership, had a right to connect a telephone with the line and to sell the right with the farm or to the company, failed to agree with his grantee as to the right to the telephone, which was claimed under the warranty deed of the farm, and sold the right under his contract to the company. *Cantril, Teleph. Co. v. Fisher*, 42: 1021, 138 N. W. 436, — Iowa, —.

**Parties.**

6. Under a statute providing that an injunction may be brought to restrain a city from letting an unauthorized contract for paving a street, by any person whose property is or may be affected by the tax or assessment levied by reason thereof, or whose burden as a taxpayer may be increased, a property owner not affected by 42 L.R.A. (N.S.)

the special assessments for such paving, but whose burden as a taxpayer will be increased by reason of paving the intersections of the streets, may maintain a suit to enjoin the city from proceeding to let such contract. *Pollock v. Kansas City*, 42: 465, 123 Pac. 985, 87 Kan. 205.

**INNKEEPERS.****Who are guests.**

1. One who, upon going to a place for the benefit of his health, engages a room and board at a hotel for an indefinite time, is a guest, for the safety of whose property the keeper is liable, although he contracts for the weekly rate for his entertainment. *Pettit v. Thomas*, 42: 122, 148 S. W. 501, — Ark. —. (Annotated)

**Rights of and liability to guests.**

Prejudicial error as to amount of damages for arrest of guest, see Appeal and Error, 34.

2. A hotelkeeper is responsible to a guest for the acts of his servants in charge of a hotel, whether the particular acts were expressly authorized or not, providing the servant was acting in behalf of the proprietor at the time, and within the general scope of his employment. *Lehnen v. Hines*, 42: 830, 127 Pac. 612, — Kan. —.

3. Innkeeper's liability attaches to one who, although keeping a hotel whose principal patrons are families, takes all transients possible, receiving any proper person. *Pettit v. Thomas*, 42: 122, 148 S. W. 501, — Ark. —.

4. An innkeeper is liable for the loss of property of a guest through the destruction of the building by fire. *Pettit v. Thomas*, 42: 122, 148 S. W. 501, — Ark. —.

5. Where a person is received in a hotel as a guest, the law implies a contract between the proprietor and the guest that the proprietor, by himself and his servants and agents, will exercise reasonable care for the safety, convenience, and comfort of the guest; and that the guest, on his part, will observe the recognized proprieties of life and refrain from any boisterous or other conduct offensive to other guests, or which would bring the hotel into disrepute. *Lehnen v. Hines*, 42: 830, 127 Pac. 612, — Kan. —.

6. A night clerk left in charge of a hotel, with authority to receive guests, assign them to rooms, preserve order, and generally look after the hotel during the night, has the implied authority to eject guests from their rooms in order to preserve peace and order; and if the clerk undertakes to eject a guest from her room, and uses force and violent language, and summons the police, and directs the police to make an arrest and place the guest in jail, such action on the part of the night clerk will be held in law to be the act of the employer of such clerk, or the proprietor of the hotel, and for the right or wrong of which the hotel proprietor must be held responsible. *Lehnen v. Hines*, 42: 830, 127 Pac. 612, — Kan. —.

(Annotated)

**INSANE PERSONS.**

See Incompetent Persons.

**INSPECTION.**

Effect of purchaser's inspection of property on right to recover damages for broker's fraudulent representations as to value, see Brokers.

Of books and records of corporation, see Corporations, 3, 4; Mandamus.

In general, see Discovery and Inspection.

Question for jury as to negligence in failing to make, see Trial, 6.

**INSTRUCTIONS.**

See Trial, 10, 11.

**INSURABLE INTEREST.**

See Insurance, 1.

**INSURANCE.**

Constitutionality of restrictions on right to engage in insurance brokerage business, see Constitutional Law, 10.

Presumption and burden of proof in action on policy, see Evidence, 3.

Parol evidence to vary policy, see Evidence, 18.

Departure in reply in action on policy, see Pleading, 7.

Questions of law and fact, see Trial, 1.

**Insurable interest.**

1. The interest of one who has a parol lease of a building for the life of its owner at one half the rental value, and who has made improvements at his own expense, is insurable. *Getchell v. Mercantile & Manufacturers' Mut. F. Ins. Co.* 42: 135, 83 Atl. 801, — Me. —

(Annotated)

**Unauthorized act of agent in obtaining insurance.**

2. A property owner may, after loss and before the insurer has withdrawn from the contract, ratify the unauthorized act of his agent in securing insurance upon his property. *Marqusee v. Hartford F. Ins. Co.* 42: 1025, 198 Fed. 475, 1023, — C. C. A. —

(Annotated)

**Title and encumbrance.**

3. The assignment of property and the insurance thereon as security for a debt renders the policy void under a provision in the policy making it void if the interest of insured is other than unconditional ownership or if any change takes place in his interest, title, or possession; and it is immaterial that the insurer consents to assignment of the property to the trustee for the creditor, if the consent is based upon ownership by the assignee, and not upon the fact that he is trustee for a creditor. *Smith v. Retail Merchants' F. Ins. Co.* 42: 173, 137 N. W. 47, — S. D. —

(Annotated)

**Incontestability.**

4. Retention of a life insurance policy issued without application, which contains provisions that it shall be void if, at the 42 L.R.A.(N.S.)

date of its delivery, insured is not in good health, or if he has been rejected by other insurers, has been attended by a physician, or has had certain diseases, by one within the operation of such provisions, is not such fraud as will prevent the operation of a clause in the policy making it incontestable from date except for fraud. *Independent L. Ins. Co. v. Rider*, 42: 560, 150 S. W. 649, 150 Ky. 505.

**Premiums and assessments; rates.**

5. A member of a mutual insurance association cannot, in the absence of any express contract obligation, be required to pay assessments for losses which occurred prior to his membership. *Clark v. Iowa State Traveling Men's Assn.* 42: 631, 135 N. W. 1114, — Iowa, —

6. A by-law of a mutual insurance company authorizing the directors to order an assessment to raise funds for the purpose of carrying out the aims and objects of the association does not justify the assessment of a member for losses occurring before his membership. *Clark v. Iowa State Traveling Men's Assn.* 42: 631, 135 N. W. 1114, — Iowa, —

7. A mutual insurance company whose constitution and by-laws do not provide for an emergency fund cannot justify assessments for the creation of such fund, without amending the constitution and by-laws in the manner pointed out in those instruments. *Clark v. Iowa State Traveling Men's Assn.* 42: 631, 135 N. W. 1114, — Iowa, —

8. Payment by a member of a mutual benefit society, of assessments which are being diverted to the formation of an emergency fund, does not show acquiescence on his part in the creation of such fund, if he had no knowledge of the fact, and, under the constitution and by-laws there was no authority to create such fund. *Clark v. Iowa State Traveling Men's Assn.* 42: 631, 135 N. W. 1114, — Iowa, —

9. A member of a mutual benefit society cannot be declared in default for nonpayment of assessments, if he has paid in enough money to meet the assessments, but it had been wrongfully diverted to other purposes in excess of the authority of the society. *Clark v. Iowa State Traveling Men's Assn.* 42: 631, 135 N. W. 1114, — Iowa, —

**Designating beneficiary by will.**

10. A beneficiary in a mutual benefit certificate may be designated by will where, by statute, the benefit may be made payable to a legatee, and there is no provision of statute or articles of incorporation or by-laws of the association which prevents it, and the beneficiary designated in the application according to the provisions of the by-laws is dead. *Brinsmaid v. Iowa State Traveling Men's Assn.*, 42: 1161, 132 N. W. 34, 152 Iowa, 134. (Annotated)

11. A will is not an attested order within the meaning of a provision in a mutual benefit certificate making the fund payable to certain designated persons, or attested order, where the statute provides that a

benefit shall not be assignable except to the beneficiary's name, and then only by consent of the association, "attested by its seal and the signature of its supreme secretary and its supreme executive officer." *Mineola Tribe No. 114, I. O. R. M. v. Lizer*, 42: 1170, 83 Atl. 149, — Md. —.

**Waiver or estoppel of insurer.**

Presumption and burden of proof as to agent's knowledge, see Evidence, 3.

12. When a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy of insurance, at and prior to the time of the delivery of the policy, is advised and has full knowledge of the fact that other insurance upon the property is in force, and with that knowledge accepts the premium and delivers the policy without any indorsement thereon, such policy is binding upon the company, notwithstanding the fact that it contains a provision prohibiting the existence of concurrent insurance without written consent thereto indorsed on the policy, and notwithstanding it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy. *Western Nat. Ins. Co. v. Marsh*, 42: 991, 125 Pac. 1094, — Okla. —.

13. A local agent of an insurance company, whose only power is to solicit applications for insurance and forward them to the company for approval, when, if approved, the company issues the policy and causes it to be delivered to the insured, has no power to waive any of the provisions of the policy so delivered, and notice to such agent of "additional insurance" taken out by the insured after the delivery of the policy is not notice to the company. *Merchants' & Planters' Ins. Co. v. Marsh*, 42: 996, 125 Pac. 1100, — Okla. —.

**Risks and causes of loss or injury.**

Question for jury as to cause of injury, see Trial, 1.

14. The infection of an eye with gonococci by splashing water from a tub while washing clothes therein, to its destruction, is within the operation of a policy providing indemnity in case of the permanent loss of the sight of an eye by accident. *Sullivan v. Modern Brotherhood*, 42: 140, 133 N. W. 486, 167 Mich. 524. (Annotated)

15. A shock and fainting spell produced by entering into a swimming pool, which results in drowning, do not relieve an accident insurance company from liability on its policy for the death, on the theory that the death resulted partially or indirectly from "disease or bodily infirmity" within the meaning of an exemption clause in the policy. *Clark v. Iowa State Traveling Men's Asso.* 42: 631, 135 N. W. 1114, — Iowa, —.

16. An accident insurance company cannot defeat liability for death by drowning, on the ground that decedent entered a swimming pool where the death occurred, voluntarily, and therefore the accident was not the cause of the death independently of all other causes, within the provisions of the 42 L.R.A. (N.S.)

policy. *Clark v. Iowa State Traveling Men's Asso.* 42: 631, 135 N. W. 1114, — Iowa, —. (Annotated)

17. Merely hastening through an accidental fall the destruction of sight, which was inevitable, through cataract, is not, where both causes contribute to the result, within the operation of a policy insuring against bodily injuries effected directly and independently of all other causes through external, violent, and accidental means. *Penn v. Standard L. & Acci. Ins. Co.* 42: 593, 73 S. E. 99, 158 N. C. 29.

18. Appendicitis due to the irregular working of the muscles of the side because of their strain in bowling is not within a policy providing indemnity for loss of time resulting from disability due to external, violent, and accidental means. *Lehman v. Great Western Acci. Asso.* 42: 562, 133 N. W. 762, — Iowa, —. (Annotated)

**Extent of injury or loss; of recovery.**

Parol evidence as to, see Evidence, 18.

Effect of will to convey benefit due on benefit certificate, see Wills, 2.

19. The amount to be awarded to one who has leased a building for the owner's life, under an insurance of his interest therein, upon its destruction by fire, is the present worth of the difference between the rental value of the property and what he has agreed to pay for it for the probable duration of the owner's life. *Getchell v. Mercantile & Manufacturers' Mut. F. Ins. Co.* 42: 135, 83 Atl. 801, — Me. —.

20. That as a portion of his treatment, an insured, under direction of his physician, sits out of doors a portion of the time, does not destroy his rights under a sick benefit policy insuring him against sickness while he is wholly disabled and under the care of a physician for a period during which "he shall be continuously and necessarily confined to the house." *Metropolitan Plate Glass & C. Co. v. Hawes*, 42: 700, 149 S. W. 1110, 150 Ky. 52. (Annotated)

**INTENT.**

As element of crime generally, see Criminal Law, 2.

**INTEREST.**

Effect of, to disqualify witness as to transactions with deceased persons, see Evidence, 28.

Disqualification of judge because of, see Judges, 4.

Default in payment of authorizing foreclosure of mortgage, see Mortgage, 4.

Usurious interest, see Usury.

An insurance company which is compelled to pay a second time tax money which was embezzled by the officer to whom payment was made, but who had no authority to collect the tax, is not liable for interest on the tax from the time it should have been paid into the treasury, where the statute makes no provision for interest on unpaid taxes. *State v. Mutual L. Ins. Co.* 42: 256, 93 N. E. 213, 175 Ind. 59.

**INTERSTATE COMMERCE.**

See Commerce.

**JEOPARDY.**

See Criminal Law, 5, 6.

**JOINT CREDITORS AND DEBTORS.**

Reversal of entire judgment where, on appeal from joint verdict, one joint debtor is adjudged not liable, see Appeal and Error, 35.

Joint contribution between, see Contribution and Indemnity.

Liability of physician administering anesthetic for negligence of physician performing operation, see Physicians and Surgeons.

**JOINT TENANTS.**

Estate by entirety, see Husband and Wife.

**JOINT TORT FEASORS.**

See Joint Creditors and Debtors.

**JUDGES.**

Expiration of term of judge pro tempore, see Appeal and Error, 4.

Prejudicial error in remarks or conduct of, see Appeal and Error, 30-32.

Time for objection that attorney in case was related to the judge, see Appeal and Error, 7.

Validity of statute fixing time for electing judges, see Statutes, 2.

1. The power of the legislature is not exhausted by one exercise of it under a constitutional provision that it may provide for the election of judges on a different day from that on which an election is held for other purposes, and may, for such purpose, extend or abridge an existing term not more than six months. *State ex rel. Null v. Polley*, 42: 788, 138 N. W. 300. — S. D. —

2. A judge is disqualified to sit in a case where his son is attorney under an employment calling for a contingent fee, where the Constitution provides that no judge shall preside on the trial of any case where the parties, or either of them, shall be connected with him by affinity or consanguinity. *Yazoo & M. V. R. Co. v. Kirk*, 42: 1172, 58 So. 710. — Miss. —

(Annotated)

3. In a habeas corpus proceeding by a great-grandfather to recover possession of a child alleged to have been given to him by its father, and who was alleged to have been abducted from him by the latter, the awarding of the temporary custody of the child to the grandparent from whom it had been so taken, upon his giving bond for its production in court, does not constitute a prejudgment of the case, disqualifying the trial court from passing a final judgment awarding the child, and such action does not constitute reversible error where it appears that the final judgment was right. *Wilkinson v. Lee*, 42: 1013, 75 S. E. 477, 138 Ga. 360.

4. The supreme court will not refuse to 42 L.R.A. (N.S.)

pass on an application to restrain the certifying of nominees for the office of judge of that court at a coming election, because the term of a majority of the members may be affected by the result of the decision, where that is the only court which has authority to pass upon the question, and there is no provision for substituting others for the interested judges. *State ex rel. Null v. Polley*, 42: 788, 138 N. W. 300. — S. D. — (Annotated)

**JUDGMENT.**

On appeal, see Appeal and Error, 35, 36.

Attacking for first time on appeal wording of judgment, see Appeal and Error, 15.

Raising question for appeal by motion to modify, see Appeal and Error, 8.

Effect of discharge in bankruptcy on judgment, see Bankruptcy, 1, 2.

Application for release of, on account of discharge in bankruptcy, see Homestead, 2.

Subjecting to payment of, rights of debtor under contract for his support, see Creditors' Bill.

Judgment obtained by officer as inuring to benefit of city, see Officers.

Perjured testimony as fraud justifying new trial, see New Trial, 8.

Effect of assignment of, on right to maintain suit for amercement of sheriff for failure to levy execution on, see Parties, 2.

**Validity; effect and conclusiveness.**

Pendency of one suit as abatement of another, see Abatement and Revival.

1. A judgment will have the effect of one on the merits, and not merely of nonsuit, where, after the judge announces that he will grant a nonsuit, requests for findings are made which result in findings generally on the merits and a dismissal of the complaint. *Oakes Mfg. Co. v. New York*, 42: 286, 99 N. E. 540, 206 N. Y. 221.

2. A decree showing on its face that the will which it admits to probate was not attested as required by statute is subject to collateral attack, since there was an absence of jurisdiction to admit such an instrument to probate. *Blacksher Co. v. Northrop*, 42: 454, 57 So. 743. — Ala. —

(Annotated)

3. A judgment, in an action by the owner of horses against a contractor to whom they were hired, and a lumber company for whom the contractor was working, to recover a personal judgment against the contractor for the agreed price of the horses' services, and against the lumber company to establish and foreclose a lien claimed by such owner, does not estop the lumber company from claiming, in a subsequent action, that the owner of the horses acquired no lien on the logs, where the court, in the prior action, found that an attachment had been returned without service, for the reason that the logs had been sawed into lumber by the lumber company, and merely rendered a personal judgment

against the contractor. *McKinnon v. Red River Lumber Co.* 42: 872, 138 N. W. 781, 119 Minn. 479.

4. Decrees supporting a judicial sale, in a suit brought by an administrator to subject the decedent's lands to the payment of his debts, to which suit the widow and living heirs were parties, are not void for want of jurisdiction as to one who, when the administrator's suit was instituted, was an unborn heir of the decedent, of the same class as the living heirs who were parties to the suit, notwithstanding, he was never made a direct party to the suit after coming into life. *Boal v. Wood*, 42: 439, 73 S. E. 978, 70 W. Va. 383. (Annotated)

5. When an intestate leaves living heirs and an unborn heir of the same class, and the estate is thereby vested in the living heirs subject to the contingency that the unborn heir will come into life and inherit with them, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the person unborn. *Boal v. Wood*, 42: 439, 73 S. E. 978, 70 W. Va. 383.

#### The lien.

Effect of discharge in bankruptcy on lien, see Bankruptcy, 1.

Claim of homestead to preclude attachment of judgment lien, see Homestead, 2.

6. The expectancy of survivorship of a man holding an estate by entireties with his wife is not subject to a lien in favor of his individual judgment creditors, which will prevent a good title to the property from passing by a joint deed of the owners. *Beihl v. Martin*, 42: 555, 84 Atl. 953, 230 Pa. 519. (Annotated)

#### Foreign judgments.

7. A judgment of the courts of one state is not merged in a judgment entered upon it by the court of another state, so as to prevent an action to enforce it in a third state. *Lilly-Brackets Co. v. Sonnemann*, 42: 360, 126 Pac. 483, — Cal. —. (Annotated)

#### Discharge.

8. A note taken by a judgment creditor in consideration of his judgment, although made by a person not bound by the judgment, will not extinguish the judgment without an agreement by the creditor that the note is to operate as a payment. *Sullivan v. Saunders*, 42: 1010, 66 S. E. 497, 66 W. Va. 350.

#### JUDICIAL SALE.

Cancellation of deed because of suppression of bidding, see Cancellation of Instruments.

Effect of decree supporting, on rights of after-born children, see Judgment, 4.

#### JURISDICTION.

Of appellate court, see Appeal and Error.

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Waiver of objections to, by appearance, see Appearance.

Of courts generally, see Courts.

Loss of, see Courts, 4.

Loss of, by suspension of criminal sentence, see Criminal Law, 9.

Release on habeas corpus because of lack of, see Habeas Corpus, 1.

Collateral attack on judgment for lack of, see Judgment, 2.

#### JURY.

Prejudicial error in selection of jury, see Appeal and Error, 33.

Questions for, see Trial, 1-8.

Jurors may be excluded who state that they would not impose the death penalty on circumstantial evidence. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

#### JUSTICE OF THE PEACE.

Writ of error to justice's judgment, see Appeal and Error, 1.

#### KNOWLEDGE.

Of owner of defects in grand stand, see Amusements, 2.

Presumption and burden of proof as to, see Evidence, 3.

Evidence of, see Evidence, 33.

#### LABORERS.

Right to sue on bond of contractor, see Parties, 1.

#### LABOR ORGANIZATIONS.

Validity of strike by, see Conspiracy.

Damages for loss of position resulting from strike, see Damages, 2.

#### LACHES.

To bar action, see Limitation of Actions, 1.

#### LANDLORD AND TENANT.

Plaintiff's right to writ of error in summary proceedings to recover possession from tenant, see Appeal and Error, 1.

Prejudicial error in instructions in action for injury to tenant in ejecting him, see Appeal and Error, 29.

Parol lease, see Contracts, 3, 5, 6.

Parol assignment of lease, see Contracts, 7.

Duty of one of several joint contingent remaindermen in possession as lessee of holder of fee to pay taxes, see Cotenancy.

Lease of ward's property, see Guardian and Ward.

Amount of recovery by lessee on insurance policy, see Insurance, 19.

Insurability of interest of one holding parol lease of building in life of its owner, see Insurance, 1.

Lease for oil or gas, see Mines.

Action by landlord for injury to property from nuisance, see Nuisances, 2.

Necessity of making landlord a party in action to compel tenant to remove spite fence, see Parties, 3.

Lease of state armory, see State, 2, 3.

#### Implied covenants.

1. There are no implied covenants on the part of a landlord to repair the premises let, or to keep them in repair; and therefore the landlord is not bound so to repair unless he has expressly covenanted so to do in his lease. *Russell v. Little*, 42: 363, 126 Pac. 529, — Idaho, —. Termination of lease.

2. Under the statute of frauds (Nebraska Comp. Stat. 1909, § 5, chap. 32), a parol lease of real estate for three years is valid for one year only, and is void as to the remainder of the term; and where no equitable considerations have intervened, it may be terminated by either party at the end of the year by giving notice of his intention to do so within that period. *Osgood v. Shea*, 42: 648, 126 N. W. 310, 86 Neb. 729. (Annotated)

#### Repairs.

Implied covenant for, see supra, 1.

3. A partial destruction of a building is within the operation of a statute to the effect that no agreement of the lessee to repair shall have the effect of binding him to erect similar buildings, if, without his fault or negligence, the same are destroyed. *King v. Cassell*, 42: 774, 150 S. W. 682, 150 Ky. 537.

#### Fixtures; improvements.

4. Wiring, conduits, and switch boards fastened to the walls of a leased building by a tenant, to enable him to light and operate machinery placed in the building by him for the conduct of his business, are not within the meaning of a clause in the lease requiring "alterations, improvements, and additions" to be left on the premises at the expiration of the lease. *Lindsay Bros. v. Curtis Pub. Co.* 42: 546, 84 Atl. 783, 236 Pa. 229. (Annotated)

#### Liability of landlord.

Prejudicial error in instruction in action for injury to tenant, see Appeal and Error, 29.

Whether action by tenant for injury to goods is one on contract or in tort, see Action or Suit, 3.

Measure of damages for loss of tenant's property, see Damages, 7.

5. The injection of a poisonous gas by the landlord into a leased room at a time when he knows that the tenant is present therein renders him liable for the resulting injury to the tenant, whether it was done to drive the tenant out, or merely to disinfect the premises. *Saros v. Avenue Theater Co.* 42: 392, 137 N. W. 559, — Mich. —. (Annotated)

6. That a property owner took steps to shore up his building when excavation was begun along a part of it does not render him liable, as a volunteer, for injury to his tenant's property by the fall of another part, if he did nothing with respect to it. 42 L.R.A. (N.S.)

*King v. Cassell*, 42: 774, 150 S. W. 682, 150 Ky. 537.

7. A landlord's promise in no way acted upon, to keep the wall of the building safe while excavation is going on on adjoining property, does not render him liable for injury to the tenant's property because of his failure to do so. *King v. Cassell*, 42: 774, 150 S. W. 682, 150 Ky. 537.

8. A property owner who lets the different floors to different tenants is not under an obligation to keep the foundations of the building in a safe condition which will render him liable for injury to the property of a tenant through the fall of a wall due to excavation by a stranger on adjoining property. *King v. Cassell*, 42: 774, 150 S. W. 682, 150 Ky. 537. (Annotated)

9. The rule making it the duty of a property owner to keep it in such condition that it will not cause injury to the public does not apply to render him liable for injury to his tenant's property by the fall of the building due to a stranger's excavating on the adjoining property. *King v. Cassell*, 42: 774, 150 S. W. 682, 150 Ky. 537. Rent.

Liability of assignee under parol lease, see Contracts, 7.

10. An agreement by a transferee of a lease to pay rent to the lessor which will sustain an action is not shown by a clause in the transfer, that the transferee does well and truly agree and promise to pay the rent in said lease agreed to be paid: to wit, the sum of \$100 per month. *Davis v. Vidal*, 42: 1084, 151 S. W. 290, — Tex. —.

11. The insertion in a transfer of a lease for the entire term, of a provision for re-entry for failure to pay rent as well as the right to pay the rent to the landlord, retains an estate in the transferor, and prevents an action by the landlord against the transferee for rent. *Davis v. Vidal*, 42: 1084, 151 S. W. 290, — Tex. —. (Annotated)

12. The assignee of a lease is liable to the lessor by reason of privity of estate for rents on the demised premises, so long as the privity of estate continues; and the assignee cannot, by mere abandonment of possession of the premises, without an assignment of the lease, avoid liability for rents. *Tyler Commercial College v. Stapleton*, 42: 162, 125 Pac. 443, 33 Okla. 305.

#### LARCENY.

Liability of officers of trust company for, see Banks, 3-5.

Validity of contract for detection of, see Contracts, 9.

Criminal intent as element of offense, see Criminal Law, 2.

As continuing offense, see Criminal Law, 3.

Defense of former jeopardy, see Criminal Law, 5.

Evidence of other crime, see Evidence, 39.

Sufficiency of proof as agency of one charged with, see Evidence, 52.



What evidence admissible under allegation of indictment, see Evidence, 57.

Habeas corpus to secure release of one convicted of, see Habeas Corpus, 4.

1. One who induces another to steal a horse and take it to another state, where he takes possession of and sells it, giving the other a portion of the proceeds, may be convicted of horse stealing in the state where the sale was made. *Tramwill v. Com.* 42: 207, 147 S. W. 36, 148 Ky. 624.

(Annotated)

2. One who induces another to put up his money on a pretended horse race, for the purpose of getting others to bet, under the promise that it shall be returned as soon as it has served its purpose, but in reality with the intent that the stakeholder shall convert it to the use of several co-conspirators, including the promisor, is, if the intent is carried out, guilty of larceny; and it is immaterial that the transaction was such that the identical money was not to be returned, but the owner had in fact parted with the title. *State v. Dobbins*, 42: 735, 132 N. W. 805, 152 Iowa, 632.

(Annotated)

#### LATERAL SUPPORT.

Landlord's duty to protect lateral support of building, see Landlord and Tenant, 6-9.

#### LAW OF PLACE.

See Conflict of Laws.

#### LEASE.

Admissibility in evidence, see Evidence, 14.

In general, see Landlord and Tenant, 1, 2.

#### LEGAL PROCEEDINGS.

Injunction against, see Injunction, 3.

#### LEGISLATURE.

Power to compel production of books and documents by corporation, see Discovery and Inspection.

Power to extend or abridge existing term of judge, see Judges, 1.

Power as to license, see License.

Power over municipalities, see Municipal Corporations, 2.

Power as to use of public money, see Public Money.

Enactment of statutes by, see Statutes.

#### LIBEL AND SLANDER.

What actionable generally.

1. Writing a nonresident employer of the resident manager of a business, for the purpose of assisting in the collection of a debt, that the manager's wife had bought property for her private use for which she and the manager refused to pay according to contract, and that a civil suit would be brought against the manager unless payment was made, is not actionable *per se*. 42 L.R.A. (N.S.)

*Stannard v. Wilcox & Gibbs Sewing Mach. Co.* 42: 515, 84 Atl. 335, — Md. —.

(Annotated)

#### Words about officials.

2. A newspaper publication which charges by way of insinuations and comparisons that cause exists for the removal of a public official, because of favoritism, neoptism, and malfeasance in office, is libelous *per se*. *Palmerlee v. Nottage*, 42: 870, 138 N. W. 312, 119 Minn. 351.

3. An article stating that it is easy "to work" the county commissioners is actionable by a member of the board, where the word "work," in the connection and manner in which it appears in the publication, conveys a reflection upon the competency and integrity of the officials. *Palmerlee v. Nottage*, 42: 870, 138 N. W. 312, 119 Minn. 351.

(Annotated)

#### Privileged communications.

4. Statements by the president of a federation of women's clubs, at a conference solicited by officers of a local club to devise means to stop larcenies which had occurred at meetings of the local club, upon the subject of suspects, in answer to questions propounded, are qualifiedly privileged. *Hayden v. Hasbrouck*, 42: 1109, 84 Atl. 1087, — R. I. —.

5. Where a letter is addressed to a bank or banker, asking for information concerning the credit and standing of a business corporation and its officers, and a communication is sent, in answer to the letter, containing matter libelous *per se* against the secretary of the corporation, but within the reasonable purview of the inquiry, and there is nothing in the correspondence indicating other than an honest purpose, the communication *prima facie* is conditionally privileged. *Richardson v. Gunby*, 42: 520, 127 Pac. 533, — Kan. —.

(Annotated)

#### Actions; defenses.

Presumption and burden of proof as to, see Evidence, 4.

Evidence as to malice, see Evidence, 35.

Sufficiency of evidence of malice, see Evidence, 48.

6. A person who instigates or procures a libelous communication to be published against himself, for the purpose of predicating a suit for damages upon it, cannot recover in such an action; but if he instigates or sets on foot inquiries for the purpose of ascertaining the source of evil reports, in order that they may be counteracted, or for any other proper purpose, and not for the purpose of predicating an action for damages in his own behalf, he is not estopped thereby from maintaining such an action. *Richardson v. Gunby*, 42: 520, 127 Pac. 533, — Kan. —.

#### LICENSE.

Validity of contract of unlicensed person, see Contracts, 8.

Of physician or surgeon, see Physicians and Surgeons.

Of teacher, see Schools.

**Power as to generally.**

1. Power to license elevator operators is not conferred upon a municipal corporation by the "general welfare clause" of the charter, for special provisions authorizing the prohibition of insecure or unsafe buildings and the use of buildings not provided with ample means for safe and speedy egress therefrom, and the prevention of dangerous construction and condition of apparatus used in and about any building. *Chain Belt Co. v. Milwaukee*, 42: 899, 138 N. W. 621, — Wis. —.

(Annotated)

2. The legislature may require under penalty monthly reports from persons hauling heavy logs over public highways as to the amount of traffic done by them. *Dalton v. George C. Brown & Co.* 42: 506, 75 S. E. 40, 159 N. C. 75.

**Uniformity and equality.**

As to uniformity of taxation generally, see Taxes.

3. The legislature may lay a special tax upon persons hauling lumber over the public highways, which hauling has a tendency to impair their usefulness, for the purpose of maintaining them in repair, without infringing the constitutional provisions as to uniformity of taxation, the granting of special privileges, and denial of due process of law. *Dalton v. George C. Brown & Co.* 42: 506, 75 S. E. 40, 159 N. C. 75.

(Annotated)

**Reasonableness; amount.**

4. A tax of 2 cents per mile per thousand feet of lumber hauled over the public highways of the state for the purpose of keeping them in repair is reasonable. *Dalton v. George C. Brown & Co.* 42: 506, 75 S. E. 40, 159 N. C. 75.

**LIENS.**

Of agisters, see Agisters.

Of judgment, see Judgment, 6.

Of mechanic or materialmen, see Mechanics' Liens.

**LIFE INSURANCE.**

See Insurance.

**LIFE TENANTS.**

Merger of deed obtained on tax certificate in deed obtained by grantee from life tenant, see Merger.

**LIMITATION OF ACTIONS.**

Adverse possession, see Adverse Possession.

Necessity of pleading, see Pleading, 6.

**Laches.**

Laches as defense to proceeding to abate nuisance, see Nuisances, 4.

1. Where one of several joint contingent remaindermen and her husband occupy the land as tenants of the holder of the limited fee, paying rent therefor, and, while so occupying the land, buy the property at a delinquent tax sale, and thereafter purchase the limited fee and occupy the same long enough for the period of adverse possession to run against outstanding claims, 42 L.R.A. (N.S.)

without any payment or offer of payment on the part of the other contingent remaindermen of any part of the expense of such tax purchases, such other contingent remaindermen are not entitled, upon the happening of the contingency which terminates the limited fee, to assert any claim to such land as against the holder of the tax deed. *Wilson v. Linder*, 42: 242, 123 Pac. 487, 21 Idaho, 576.

(Annotated)

**Bar of prior or other claim or portion of claim or defense.**

2. The holder of a note does not impair its right to recover the amount from a surety by failure to prosecute it against the estate of a deceased cosurety until it is barred in favor of such estate by the limitation period. *Hard v. Mingle*, 42: 1131, 99 N. E. 542, 206 N. Y. 179.

3. The liability of a surety to contribute towards the amount paid by his cosurety is not barred by the running in his favor of the limitation period against the claim in the hands of the payee, if the cosurety subsequently pays the claim before it is barred in his favor. *Hard v. Mingle*, 42: 1131, 99 N. E. 542, 206 N. Y. 179.

(Annotated)

**When statute runs.**

4. Where an abstractor furnishes an abstract containing a certificate that it shows all instruments of record affecting the title, including tax certificates and tax deeds, but from which one such tax deed is omitted, and the person to whom the abstract is furnished, relying upon the abstract, purchases the property and is compelled to expend money in securing a release of the tax deed, the cause of action for such mistake as to limitation is governed by the statute relating to limitation of actions applicable to fraud and mistake, and does not accrue until the discovery of the mistake. *Hillock v. Idaho Title & T. Co.* 42: 178, 126 Pac. 612, — Idaho, —.

**Interruption of statute; removal of bar.**

5. One holding another's note cannot, without the consent or direction of the maker, apply an indebtedness which he owes the maker on open account in reduction of the note, so as to toll the statute of limitations. *Samuel v. Samuel's Administrator*, 42: 1155, 151 S. W. 676, 151 Ky. 235.

(Annotated)

**LIMITATION OF LIABILITY.**

By telegraph company, see Telegraphs, 2.

**LIS PENDENS.**

Abatement by pendency of action, see Abatement and Revival.

**LIVE STOCK.**

See Animals.

**LOCAL IMPROVEMENTS.**

See Public Improvements.

**LOGS AND LOGGING.**

Liability of surveyor to whose judgment scaling of logs is submitted,

for negligent performance of duty, see Arbitration.

What matters concluded by judgment in action for lien on logs, see Judgment, 3.

Lien on logs, see Mechanics' Liens, 1.

## LOSS OF PROFITS.

As element of damages, see Damages, 7.

## LUMBER.

License tax on lumber hauled over public highways, see License, 2-4.

## MACHINERY.

Assumption of risk as to, see Master and Servant, 5, 6.

## MALICE.

Effect of increased damages in action on the case, see Case.

Presumption and burden of proof as to, see Evidence, 4.

Evidence as to, see Evidence, 35.

Sufficiency of evidence to establish, see Evidence, 48.

## MALICIOUS PROSECUTION.

Questions for jury in action for, see Trial, 8.

A prosecution is sufficiently terminated to sustain an action for malicious prosecution by the dismissal of the proceeding and taxing of costs against the county. *White v. International Text-Book Co.* 42: 346, 136 N. W. 121, — Iowa, —.

## MALPRACTICE.

Liability for, see Physicians and Surgeons.

## MANDAMUS.

1. Mandamus will lie to compel directors of a foreign corporation to permit inspection, by one of the directors, of corporate books kept within the state where its chief place of business is located, notwithstanding a contention that its issuance would be an interference with the management of the internal affairs of a foreign corporation. *Machen v. Machen & Mayer Electrical Mfg. Co.* 42: 1079, 85 Atl. 100, 237 Pa. 212.

2. Mandamus will lie to compel a corporation to permit a stockholder to inspect its books although her purpose is to ascertain the amount of stock held by her former husband, from whom she is attempting to secure alimony, and the value of property conveyed by him to the corporation, for the purpose of establishing a dower interest therein, where the statute gives a right of inspection to all persons interested. *White v. Manter*, 42: 332, 84 Atl. 890, — Me. —.

## MAPS.

Dedication by, see Dedication.

## MARRIAGE.

Divorce or separation, see Divorce and Separation.

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## MASTER AND SERVANT.

Requiring street car companies to provide stools for motormen, see Constitutional Law, 21; Municipal Corporations, 3.

Validity of contract to detect crime, see Contracts, 9.

Counterclaim in action by servant for wages which are exempt, see Exemption, 2.

Evidence in action for injury to servant, see Evidence, 24, 30.

## Hours of labor.

1. The Federal statute limiting, under penalty, the hours during which a "common carrier" may keep an employee on duty, applies to a receiver appointed by a Federal court for an interstate railroad. *United States v. Ramsey*, 42: 1031, 197 Fed. 144, 116 C. C. A. 568. (Annotated)

## Unlawful employment of children.

2. That a master employed a child which the statute forbade him to employ because of its tender age, in good faith, and upon the express representation of the child's parent that it was over the prescribed age, will not absolve him from liability for injury to the child, while it is at work, although the accident is of such a nature that had the child not been under age, assumption of risk or contributory negligence would have been available as a defense. *Glucina v. F. H. Goss Brick Co.* 42: 624, 115 Pac. 843, 63 Wash. 401. (Annotated)

## Duty as to place and appliances.

3. An auger bit, the cutting points of which have become shortened and dull from use and frequent sharpening, is an ordinary simple tool, with the use and condition of which a servant of experience has as much or greater knowledge than the master; and where a servant, with twelve years' experience as a carpenter, is injured while boring a hole with such a tool, and the only negligence relied on or attempted to be proven is such defect, of dull and worn condition, it not being claimed that it broke or was otherwise out of repair, there is no violation by the master of any duty owing to the servant, and he is not, therefore, liable for the resulting injury. *St Louis & S. F. R. Co. v. Mayne*, 42: 645, 127 Pac. 474, — Okla. —.

## Assumption of risk.

See also *supra*, 2.

4. An experienced employee who approves the plan, and assists in the construction of the support of the scaffold upon which he is to perform labor, assumes the risk of its being insufficient to support the weight to be placed on it, although the statute provides that a person employing or directing another to perform the class of labor in which he was engaged shall not furnish or erect, or cause to be furnished or erected, for the performance thereof a scaffold which is unsafe, unsuitable, or improper. *Gombert v. McKay*, 42: 1234, 94 N. E. 186, 201 N. Y. 27.

5. A servant does not assume the risk of injury from the master's violation of a

statutory duty to guard set screws. *Fitzwater v. Warren*, 42: 1229, 99 N. E. 1042, 206 N. Y. 355. (Annotated)

6. An inexperienced employee injured four days after his employment by an unguarded set screw may be found not to have assumed the risk of injury therefrom, although he knew of its existence, if the injury was due to the yielding of sawdust under his feet, throwing him against the screw, the probability of which he might not have anticipated. *Fitzwater v. Warren*, 42: 1229, 99 N. E. 1042, 206 N. Y. 355.

**Master's liability for acts of servant or independent contractor.**

Assault on passenger, see Carriers, 2.

Liability of charitable institution, see Charities.

Evidence in action for injury by, see Evidence, 11.

Liability of incompetent for negligence of servants, see Incompetent Persons, 2.

Liability of innkeepers for acts of servants, see Innkeepers, 2, 6.

Liability of city for negligence of its officers or agents, see Municipal Corporations, 6-12.

Liability of state for torts of officers, see State, 3.

7. The owner of an amusement park who receives a percentage of the receipts of a concessionaire, for permitting an attraction to be on exhibition, cannot avoid liability to a patron for injury due to a defect in the mechanism, on the theory that the concessionaire was an independent contractor. *Wodnik v. Luna Park Amusement Co.* 42: 1070, 125 Pac. 941, 69 Wash. 638. (Annotated)

8. The method and means by which a chauffeur in charge of an automobile receives his compensation is material upon the question whether he is the servant of the owner, so that the latter will be liable for his acts, or an independent contractor for whose acts the owner is not liable. *Minor v. Stevens*, 42: 1178, 118 Pac. 313, 65 Wash. 423.

## MATERIALITY.

Of evidence, see Evidence, 33-47.

## MATERIALMEN.

Suit by, on bond of contractor, see Action or Suit, 1; Parties, 1.

## MAXIMS.

1. *Causa proxima non remota spectatur.* *Penn v. Standard L. & Acci. Ins. Co.* 42: 593, 158 N. C. 29, 73 S. E. 99.

2. *Caveat emptor.* *King v. Cassell*, 42: 774, 150 S. W. 682, 150 Ky. 537.

3. *Damnum absque injuria.* *Niagara Oil Co. v. Ogle*, 42: 714, 98 N. E. 60, — Ind. —.

4. *Ex dolo malo non oritur actio.* *Chicago, R. I. & P. R. Co. v. McKone*, 42: 709, 127 Pac. 488, — Okla. —.

5. *Ex turpi causa non oritur actio.* *Herring v. Cumberland Lumber Co.* 42: 64, 74 S. E. 1011, — N. C. —.  
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6. He who seeks equity must do equity. *National Metal Edge Box Co. v. Vanderveer*, 42: 343, 82 Atl. 837, — Vt. —.

7. *Ignorantia legis neminem excusat.* *State v. Mutual L. Ins. Co.* 42: 256, 93 N. E. 213, 175 Ind. 59.

8. *In pari delicto potior est conditio defendentis et possidentis.* *Herring v. Cumberland Lumber Co.* 42: 64, 74 S. E. 1011, — N. C. —.

9. No man can make his own misconduct the ground for an action against another in his own favor. *Doles v. Seaboard A. R. Co.* 42: 67, 75 S. E. 722, — N. C. —.

10. *Omnis rati habitio retrotrahitur et mandato equiparatur.* *Marqusee v. Hartford F. Ins. Co.* 42: 1025, 198 Fed. 475, 1023, — C. C. A. —.

11. *Potior est conditio defendentis.* *Ruis v. Branch*, 42: 1198, 74 S. E. 1081, 138 Ga. 150.

12. *Qui hæret in litera, hæret in cortice.* *State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136.

13. *Res ipsa loquitur.* *Carney v. Boston Elevated R. Co.* 42: 90, 98 N. E. 605, 212 Mass. 179.

14. *Salus populi suprema lex.* *German Alliance Co. v. Home Water Supply Co.* 42: 1005, 174 Fed. 764, 99 C. C. A. 258.

15. *Sic utere tuo ut alienum non lædas.* *Charles Eneu Johnson Co. v. Philadelphia*, 42: 512, 84 Atl. 1014, 236 Pa. 510.

*Adams v. Chicago, Great Western R. Co.* 42: 373, 135 N. W. 21, — Iowa, —.  
*King v. Cassell*, 42: 774, 150 S. W. 682, 150 Ky. 537.

*State v. Central Lumber Co.* 42: 804, 123 N. W. 504, 24 S. D. 136.

*Niagara Oil Co. v. Ogle*, 42: 714, 98 N. E. 60, — Ind. —.

## MECHANICAL COLLEGE.

See State Institutions, 4.

## MECHANICS' LIENS.

Effect of judgment in action to enforce lien, see Judgment, 3.

1. The owner of horses, who hires them to a contractor, the latter using the horses in aid of hauling and banking logs, and the owner performing no manual labor or other services in connection with the logs, is not entitled to a lien on such logs, under Minnesota Revised Laws 1905, § 3524, providing that who ever performs manual or other services for hire, in or in aid of the cutting, hauling, banking, driving, rafting, towing, cribbing, or booming of logs shall have a lien thereon for the price or value of such labor or services. *McKinnon v. Red River Lumber Co.* 42: 872, 138 N. W. 781, 119 Minn. 479. (Annotated)

2. Property in which a water service is installed may be subjected to a lien for pipe laid across land belonging to a third person to reach the main, under a statute giving a lien to anyone who shall perform work upon or furnish material for any improvement upon land. *Speer Hardware*

Co. v. Bruce Bros. 42: 354, 150 S. W. 403,  
— Ark. —. (Annotated)

## MEETINGS.

Of stockholders, see Corporations, 5.

## MEMORANDUM.

Admissibility in evidence, see Evidence,  
15.

## MENTAL ANGUISH.

Damages for, see Damages, 6.

## MERGER.

Of judgment of court of one state in  
judgment entered upon it by court  
of another state, see Judgment, 7.  
Of mortgage, see Mortgage, 2, 3.

Deeds obtained on tax certificates  
which ripen into an absolute and fee-simple  
title will not merge in a deed obtained by  
the grantee of the tax deed from the holder  
of a limited fee, which subsequent events  
proved to be a mere life estate. *Wilson*  
*v. Linder*, 42: 242, 123 Pac. 487, 21 Idaho,  
576.

## MINES.

Oil and was lease by guardian of  
minor, see Guardian and Ward.

A lease granting oil and gas mining  
privileges for a term of years is a "chattel  
real," and constitutes personalty. *Duff v.*  
*Keaton*, 42: 472, 124 Pac. 291, — Okla. —.  
(Annotated)

## MINORS.

See Infants.

## MISTAKE.

In name in publication of notice, see  
Estoppel, 5.  
Effect of, on running of limitations, see  
Limitation of Actions, 4.  
In name in recording deed, see Records  
and Recording Laws, 3.  
As to name of party in writ, see Writ  
and Process, 1, 2.

## MONEY.

As to public money, see Public Money.

## MONOPOLY AND COMBINATIONS.

Constitutionality of statute against  
creation of monopoly, see Consti-  
tutional Law, 8, 9, 12, 16, 22.  
Validity of contract collateral to, see  
Contracts, 12.  
Sufficiency of title of statute as to, see  
Statutes, 3.

A statute forbidding discrimination,  
in prices in different sections of the state,  
for the purpose of driving competitors out  
of business, is within the purview of a con-  
stitutional provision that monopolies shall  
never be allowed in the state. *State v.*  
*Central Lumber Co.* 42: 804, 123 N. W. 504,  
24 S. D. 136.  
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## MORTGAGE.

By incompetent person, see Incompe-  
tent Persons, 1.

Parol promise by mortgagee to bid in  
property and account for surplus,  
see Contracts, 4.

Sufficiency of record of, see Records  
and Recording Laws, 1, 2.

Effect of executing second mortgage to  
correct mistake, but without re-  
leasing the first, to render title to  
mortgagor defective, see Vendor  
and Purchaser.

## Assignment.

1. Where a person holding all of a  
series of notes secured by mortgage assigns  
one of them, the assignee is entitled to be  
preferred to the assignor and the receiver  
of the assignor in the distribution of the  
proceeds of the mortgaged property. *Law-  
son v. Warren*, 42: 183, 124 Pac. 46, — Okla.  
—.  
(Annotated)

## Merger.

2. Where a trust deed creditor buys  
the trust property and takes a conveyance  
from his debtor, the trust deed lien will be  
kept alive in favor of his grantee as against  
an intervening judgment lien, where no  
injustice will be done thereby. *Sullivan v.*  
*Saunders*, 42: 1010, 66 S. E. 497, 66 W. Va.  
350.

3. The lien of a trust deed creditor is  
not so merged in the larger estate created  
by his purchase of the trust property from  
the debtor as to render his entire estate in  
the land subject to an intervening judg-  
ment lien, but equity will preserve the trust  
lien for his protection, notwithstanding he  
may have executed a formal release there-  
of. *Sullivan v. Saunders*, 42: 1010, 66 S. E.  
497, 66 W. Va. 350.

## Enforcement; sale.

4. Default in payment of interest on a  
note which provides for a payment annual-  
ly authorizes immediate foreclosure of the  
mortgage securing it, although the note  
provides that interest unpaid when due  
shall be added to the principal and bear in-  
terest, if the mortgage provides that in  
case of default in payment of principal or  
interest or any part thereof when due the  
premises may be sold and the whole of the  
principal and interest, whether due or not,  
retained from the proceeds. *Castor v. Mur-  
amoto*, 42: 108, 125 Pac. 153, 69 Wash. 145.  
(Annotated)

## Redemption.

Effect of failure to pay register tax on  
right to redeem, see Records and  
Recording Laws, 2.

5. Under a statute requiring one who  
desires to redeem from a mortgage fore-  
closure, to serve with his notice on the  
sheriff, a note of the record of the mort-  
gage certified by the register of deeds, a  
certificate produced by a junior mortgagee  
desirous of redeeming, signed by the deputy  
register of deeds in his own name, instead  
of one signed in the name of the register  
of deeds by said deputy is a nullity, and  
the sheriff is justified in refusing to issue

the certificate of redemption. *Summerville v. Sorenson*, 42: 877, 136 N. W. 938, — N. D. —. (Annotated)

### MOTIONS AND ORDERS.

Necessity of bill of exceptions on appeal from order granting motion to quash summons, see Appeal and Error, 5.

Raising objection to pleading on ground of departure by motion to strike, see Pleading, 9.

A motion to strike out a bill, under New Jersey chancery rule 213, is in the nature of a demurrer. *Schulz v. Ziegler* (N. J. Err. & App.) 42: 98, 83 Atl. 968, — N. J. —.

### MOTIVE.

Of stockholder seeking to inspect books, see Corporations, 4; *Mandamus*, 2. As element of homicide, see Homicide.

### MOTOR VEHICLES.

Validity of ordinance regulating use of, see Constitutional Law, 7, 19.

### MUNICIPAL CORPORATIONS.

Discrimination in statute as to, see Constitutional Law, 5, 6.

Rights and powers as to highways generally, see Highways.

License from, see License.

1. Municipalities can lawfully exercise only such rights, powers, and authority and perform such duties as are conferred upon them, expressly or impliedly, by valid provisions of law: and such rights, powers, authority, and duties are exercised or performed through officers, agents, or employees; the municipalities being corporate entities existing only in contemplation of law. *Scott v. Tampa*, 42: 908, 55 So. 983, 62 Fla. 295.

#### Legislative control of.

2. The legislature may authorize the construction of a public school in a public park the fee of which was acquired under its authority by a municipal corporation under power of eminent domain, without compensating the municipality for such use. *Higginson v. Slattery*, 42: 215, 90 N. E. 523, 212 Mass. 583.

#### Ordinances.

Denial of equal protection and privileges by ordinance, see Constitutional Law, 7.

Ordinance as exercise of police power, see Constitutional Law, 19-21.

3. Statutory authority to a municipal corporation to pass ordinances expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, includes power to require street car companies to provide stools for motormen. *Silva v. Newport*, 42: 1060, 150 S. W. 1024, 150 Ky. 781.

#### Liability for damages.

Exempting particular municipality from liability for injuries, see Constitutional Law, 6.

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Evidence in action for injuries resulting from negligence of street contractor, see Evidence, 11.

Permitting inflammable material to be deposited in street, see Fires.

For defects or obstructions in street, see Highways, 2-4.

Liability for furnishing impure water supply, see Waters, 1, 2.

4. A municipal corporation is not liable for injury to a traveler by a ball with which boys were playing in a public street, according to a custom indulged in for a long time. *Goodwin v. Riedsville*, 42: 862, 76 S. E. 232, — N. C. —. (Annotated)

5. That a municipal corporation is bound to keep its streets in safe condition does not render it liable for injury to a person in the street by a rock thrown by a blast set off on property near the street by a person for whose act it is not responsible. *Braunstein v. Louisville*, 42: 538, 143 S. W. 372, 146 Ky. 777.

6. A municipal corporation is not liable for the act of its officers in forcibly expelling a voluntary association from rooms occupied by it, locking the doors against it, destroying its furniture, and confiscating its books and papers, since such acts were not within the authority of the municipality. *Scott v. Tampa*, 42: 908, 55 So. 983, 62 Fla. 295. (Annotated)

7. Municipalities are not liable in damages for injuries to property caused by the wrongful acts of the officers or agents of the municipalities, where such wrongful acts are not done in the exercise of any authority or duty conferred by law upon the municipalities. *Scott v. Tampa*, 42: 908, 55 So. 983, 62 Fla. 295.

8. A municipal corporation is not liable for tortious acts committed by its officers and agents, unless the acts complained of were committed in the exercise of some corporate power conferred upon it by law, or in the performance of some duty imposed upon it by law. Such a corporation may be liable in damages for injuries to others proximately resulting from the doing by its officer, in an unauthorized manner, of a lawful and authorized act, but not for doing an unlawful or prohibited act. *Scott v. Tampa*, 42: 908, 55 So. 983, 62 Fla. 295.

9. To create a liability against a municipality for the torts of its agents, the act done by the officers or agents of the municipality that causes injury to another must be within the scope of the corporate authority of the municipality as prescribed by its charter, or by positive enactment. If the act complained of is wholly outside of any and all the authority and duties of the municipality, it is not in any event liable. *Scott v. Tampa*, 42: 908, 55 So. 983, 62 Fla. 295.

10. A municipal corporation which requires a street, upon which a contractor is making repairs, to be kept open for public travel, is liable for permitting inflammable material to be deposited therein in such close proximity to the property of an abutting owner as to amount to a wilful

or wanton or negligent disregard of the rights of the abutting owner, and to remain there for an unreasonable time, which becomes ignited and sets fire to and destroys the building of such owner. *Charles Eneu Johnson Co. v. Philadelphia*, 42: 512, 84 Atl. 1014, 236 Pa. 510.

11. A municipal corporation is not liable for injuries inflicted upon a person on a neighboring highway by the negligence of its servants in operating a quarry at its workhouse, although by their negligence they create a nuisance and render the way unsafe, since they are discharging a governmental function. *Braunstein v. Louisville*, 42: 538, 143 S. W. 372, 146 Ky. 777.

12. A police officer, in enforcing the police regulations of a municipality, is acting in a public or governmental capacity, and the municipality is not liable for an arrest by such an officer even though the arrest was wrongful and illegal and the ordinance or regulation under which it was made is void, and the city cannot ratify such act so as to render it liable, for the reason that to do so is not within its power. *Lawton v. Harkins*, 42: 69, 126 Pac. 727, — Okla. —.

13. A municipal corporation is not liable for injury caused by the backing of the water of a stream flowing through its limits onto the property of an upper proprietor, by a wire netting stretched across the stream by police officers to rescue the body of a person drowned in the stream, and negligently permitted to remain there until it formed a dam of floating material which backed the water and caused the injury, since the act was done in the performance of a governmental duty. *Sehy v. Salt Lake City*, 42: 915, 126 Pac. 691, — Utah, —.

(Annotated)

14. A municipal corporation does not, in attempting to maintain a water supply system to supply water to private consumers at a fixed compensation, act in a governmental capacity so as to be relieved from liability for negligent performance of its contracts. *Oakes Mfg. Co. v. New York*, 42: 286, 99 N. E. 540, 206 N. Y. 221.

(Annotated)

## MUTUAL INSURANCE COMPANY.

See Insurance.

## NAME.

Mistake in name in publication of notice, see Estoppel, 5.

Mistake in, in recording deed, see Records and Recording Laws, 3.

Of party in writ, see Writ and Process, 1, 2.

## NECESSARIES.

To infant, see Infants, 4.

## NEGLIGENCE.

In preparing abstract of title, see Abstracts.

Defense to liability for negligent injury to one coasting in public street, see Action or Suit, 2.

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Act of God excusing discharge of duty, see Act of God.

Admiralty jurisdiction in negligence case, see Admiralty.

Toward patrons at place of amusement, see Amusements.

Of patrons at amusement park, see Amusements, 3.

Of surveyor in scaling logs, see Arbitration.

In use of automobiles, see Automobiles, 1-4.

Of person injured by automobile, see Automobiles, 4, 5.

Of or toward passenger, see Carriers. Liability of charitable institution for, see Charities.

Measure of damages for negligence causing personal injury, see Damages, 4.

Estoppel for, see Estoppel, 5.

Presumption and burden of proof as to, see Evidence, 6-8.

Evidence of admissions in negligence case, see Evidence, 23.

Evidence of declarations in negligence case, see Evidence, 24.

Relevancy of evidence as to generally, see Evidence, 37, 38.

Sufficiency of proof of, see Evidence, 49.

Of person whose property is destroyed by fire, see Fires.

Liability of incompetent for, see Incompetent Persons, 2.

Of master or servant, see Master and Servant.

Of independent contractor, see Master and Servant, 7, 8.

Of municipal corporations, see Municipal Corporations, 4-14.

Of physician, see Physicians and Surgeons.

Pleading as to, see Pleading, 3, 4.

Proximate cause of injury by, see Proximate Cause.

Of railroads, see Railroads.

At railroad crossing, see Railroads, 4-6.

Action against state for, see State, 2, 3.

In operation of street railway, see Street Railways.

As to telegraphs, see Telegraphs.

Limitation of liability for, see Telegraphs, 2.

Question for jury as to, see Trial, 3-6.

A mining company that left unguarded large quantities of carbide, a dangerous substance and attractive to children of tender years, on its premises near a public street, knowing that such children were accustomed to pick up the carbide, pour water upon it, and explode the gas thereby generated, by applying a light, is liable for the injuries resulting to a child five years of age who secured some of the carbide so left by the defendant, put it in a can, poured water upon it, and was seriously injured in the explosion which followed the lighting of the gas thereby gen-

erated. *Juntti v. Oliver Iron Min. Co.* 42: 840, 138 N. W. 673, 119 Minn. 518.

(Annotated)

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

## NEWLY DISCOVERED EVIDENCE.

New trial for, see New Trial, 2-6.

## NEW TRIAL.

Review of facts on appeal from denial of motion for, see Appeal and Error, 17.

Grounds for, on appeal, see Appeal and Error, 35.

## Erroneous verdict.

1. A new trial will be awarded, rather than a reduction of the verdict, in case of an award for alienation of affections so excessive as to indicate such a prejudice on the part of the jury as to make it unjust to hold defendant bound by any of its findings. *Phillips v. Thomas*, 42: 582, 127 Pac. 97, — Wash. —.

(Annotated)

## Newly discovered evidence.

2. The allegation of false warranty by a vender of hogs that they had not been unloaded at a stock yard in transit, as a defense in an action for their purchase price, raises an issue upon which newly discovered evidence of the yard master that they were unloaded may be material, so as to justify granting a new trial. *Guth v. Bell*, 42: 692, 133 N. W. 883, 153 Iowa, 511.

3. Testimony given by a successful party in a suit in another suit subsequently tried, which is inconsistent with that given by him in the suit in which he was successful, may be a ground for new trial of the former because of newly discovered evidence. *Guth v. Bell*, 42: 692, 133 N. W. 883, 153 Iowa, 511.

(Annotated)

4. The newly discovered testimony of the yard master where the transfer was made, supported by his records that hogs were unloaded from a car into a pen and then loaded into another car, will support a petition for new trial of an action for the purchase price of the hogs in which the defense was breach of warranty that the animals had not been unloaded into a pen where they were subject to contagion, and plaintiff testified that they were driven directly from one car into the other, across a platform laid between them. *Guth v. Bell*, 42: 692, 133 N. W. 883, 153 Iowa, 511.

5. Diligence in seeking evidence from a yard master with relation to the transfer of animals in the yard, to justify a new trial for newly discovered evidence, is shown by testimony that he was approached before trial, but stated that he had no recollection of the transaction, but after the trial he discovered a record which showed how the transfer was made. *Guth v. Bell*, 42: 692, 133 N. W. 883, 153 Iowa, 511.

6. Railroad-yard records of how a shipment of stock was transferred from one car to another in the yard is not merely cumulative with the oral testimony of a wit-

ness, so as to prevent the granting of a new trial upon its discovery. *Guth v. Bell*, 42: 692, 133 N. W. 883, 153 Iowa, 511.

## Practice.

7. A petition for a new trial for newly discovered evidence, which alleges that since the trial petitioner has discovered a witness who held the position of yard master at a place where hogs were unloaded which his opponent swore at the trial were not unloaded, and who could not be discovered before, is sufficient to support an amendment filed after the expiration of the time for filing such petitions, more specifically stating why the witness was not discovered sooner. *Guth v. Bell*, 42: 692, 133 N. W. 883, 153 Iowa, 511.

8. Perjured testimony cannot be relied on as showing fraud practised in obtaining a judgment, to support a petition for new trial under a statute authorizing a new trial in case of a judgment obtained by fraud. *Guth v. Bell*, 42: 692, 133 N. W. 883, 153 Iowa, 511.

## NONUSER.

Extinguishment of easement by, see Easements, 5.

Of street or alley, see Highways, 6.

## NOTICE.

Of facts putting purchaser of note on inquiry, see Bills and Notes, 1.

Evidence of, see Evidence, 33.

Of intention to terminate lease, see Landlord and Tenant, 2.

Record as, see Records and Recording Laws, 3.

## NUISANCES.

Fact that act of person injured by another's negligence constituted a public nuisance, as defense to liability for injury, see Action or Suit, 2.

Erection of spite fence to compel abandonment of suit for injunction against nuisance, see Fences.

Municipal liability for, see Municipal Corporations, 10, 11.

## What are.

Coasting in street as, see Highways, 1.

1. Pumping oil and salt water from oil and gas wells and permitting it to flow over the surface onto neighboring property to its injury is a nuisance rendering one liable to injunction and damages. *Niagara Oil Co. v. Ogle*, 42: 714, 98 N. E. 60, — Ind. —.

(Annotated)

## Remedies; who may have.

Review on appeal of decree enjoining nuisance, see Appeal and Error, 8.

Duty to minimize damages, see Damages, 1.

Measure of damages for, see Damages, 5.

Pleading in suit for abatement, see Pleading, 2.

2. That a farm is in possession of a renter on shares does not prevent the owner, in the absence of any objection as to



defect of parties plaintiff, from maintaining an action for damages to the property and crops by casting salt water and oil upon the property. *Niagara Oil Co. v. Ogle*, 42: 714, 98 N. E. 60, — Ind. —.

3. Equity will not take jurisdiction, at the suit of property owners affected thereby, of a bill to suppress a settlement of disorderly houses forming the red light district of a city. *Weidner v. Friedman*, 42: 1041, 151 S. W. 56, — Tenn. —.

(Annotated)

#### Defenses.

4. Laches will defeat a bill by neighboring property owners to enjoin the maintenance of a collection of disorderly houses, where they have been permitted to operate without molestation for twenty-five years. *Weidner v. Friedman*, 42: 1041, 151 S. W. 56, — Tenn. —.

#### OBJECTIONS.

To raise question on appeal, see Appeal and Error, 6-8.

#### OCCUPATION TAX.

See License.

#### OFFICERS.

Of bank, see Banks, 1, 3-6.

Of corporation, see Corporations, 1, 2, 3.

Injunction against, see Injunction, 4.  
Embezzlement of tax money by collector, see Interest.

Liability of, see Libel and Slander, 2, 3.  
As to sheriff, see Sheriff.

Liability of state for torts of, see State, 3.

Strict construction of statute providing for amercement of, see Statutes, 5.

An officer who has seized intoxicating liquors upon a warrant issued under a city ordinance authorizing their destruction upon certain conditions, and who, after surrendering them upon an order of delivery in replevin, obtains a judgment for their value in default of their return, holds such judgment for the benefit of the city, and upon its collection by him he becomes liable to the city for its amount, less any expense he may have necessarily incurred in obtaining it. *Topeka v. Stahl*, 42: 697, 121 Pac. 910, 86 Kan. 681. (Annotated)

#### OIL.

As to mines generally, see Mines.

Flow of oil from oil well onto neighboring property as nuisance, see Nuisances, 1.

#### OLD LADIES' HOME.

Exemption of, from taxation, see Taxes, 3.

#### OPINION EVIDENCE.

See Evidence, 19-22.

#### ORAL CONTRACTS.

In general, see Contracts, 3-7.  
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#### ORAL EVIDENCE.

See Evidence, 16-18.

#### ORDINANCES.

See Municipal Corporations, 3.

#### OUSTER.

By cotenant, see Adverse Possession, 1.

#### PARENT AND CHILD.

Rights and duties of parent as to burial of child, see Corpse, 1-3.

Support of children after divorce, see Divorce and Separation.

Matters as to infants generally, see Infants.

Custody of child, see Infants, 2, 3.

Support of infant, see Infants, 1.

#### PARKS AND SQUARES.

Amusement parks, see Amusements, 3, 4.

Power of legislature to authorize construction of public school in public park, see Municipal Corporations, 2.

Legislative permission to place a school in a public park does not authorize the erection of a building 21 per cent of which is to be used for administrative offices of the school committee and the school house commission, and it is immaterial that a prior statute authorizing construction of a building and securing the land therefor contemplated one to be devoted to both purposes. *Higginson v. Slattery*, 42: 215, 99 N. E. 523, 212 Mass. 583.

#### PARLIAMENTARY LAW.

As to stockholders' meetings, see Corporations, 5.

#### PAROL CONTRACT.

See Contracts, 3-7.

#### PAROL EVIDENCE.

See Evidence, 16-18.

#### PARTIES.

Objection for want of, made for first time on appeal, see Appeal and Error, 14.

Dismissal of one joint tortfeasor, see Contribution and Indemnity, 2.

In eminent domain proceedings, see Eminent Domain, 4.

In injunction proceedings, see Injunction, 6.

Who may have remedy against nuisance, see Nuisances, 2, 3.

Description of party in writ, see Writ and Process, 1, 2.

Exemption of, from service of process, see Writ and Process, 3.

1. Laborers and materialmen may sue on the bond of a building contractor conditioned that the contractor shall pay for all labor and material supplied for the building, and save the owner harmless from all claims arising out of contracts with materialmen and laborers. *Orinoco Supply Co.*

v. Illinois Surety Co. 42: 707, 76 S. E. 273, — N. C. —.

2. Where a judgment has been assigned by a valid and unconditional assignment and the assignment entered on the record of the court, the sheriff cannot be amerced at the suit of the assignor for failure to levy and return an execution on such judgment, on a precipe filed by the assignor in his own name, and not as agent or attorney for the assignee. *Stein v. Scanlan*, 42: 895, 127 Pac. 483, — Okla. —.

3. That the owner of the property is not a party to the proceeding will not deprive the court of power to compel a tenant to remove a spite fence erected by him with the consent of the landlord, to compel an adjoining property owner to abandon an injunction suit, where the fence adds nothing to the value of the property, but on the contrary is a detriment to it. *Wilson v. Irwin*, 42: 722, 138 S. W. 373, 144 Ky. 311.

#### PARTITION.

Suit for, against wife by grantee for husband's interest in estate by entreties, see Husband and Wife, 2.

#### PARTNERSHIP.

Partnership bankruptcy, see Bankruptcy, 3, 4.

Effect of discharge in bankruptcy of one partner on claim against him by other partner, see Bankruptcy, 3, 4.

Effect of administratrix of surviving member permitting representatives of deceased partner to act without bond under her power of attorney, see Executors and Administrators, 3.

#### PART PAYMENT.

Accord and satisfaction by, see Accord and Satisfaction.

As affecting limitation of actions, see Limitation of Actions, 5.

#### PATENTS.

For public land, see Public Lands, 2.

#### PAYMENT.

Accord and satisfaction by part payment, see Accord and Satisfaction.  
Payment of judgment by note, see Judgment, 8.

As affecting limitation of actions, see Limitation of Actions, 5.

Of taxes, see Taxes, 5.

#### PENALTIES.

For refusal of carrier to sell tickets over connecting line at price fixed by railroad commission, see Carriers, 10.

For failure of carrier to furnish cars, see Commerce, 2, 3.

Equal protection and privileges as to, see Constitutional Law, 11.

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Denial of due process by statute imposing penalty, see Constitutional Law, 18.

Attempt to escape penalty provided for in contract by alleged invalidity of agreement, see Contracts, 11.

Requiring under penalty reports from persons hauling heavy logs over highway, see License, 2.

Pleading in action to recover, see Pleading, 5, 6.

Amercement as, see Sheriff, 1.

For violation of statute, effect on validity, see Statutes, 1.

#### PERJURY.

Perjured testimony as fraud justifying new trial, see New Trial, 8.

#### PERSONAL INJURIES.

Admiralty jurisdiction of suit to recover for, see Admiralty.

Review on appeal of damages in action for, see Appeal and Error, 20.

To passenger, see Carriers.

Measure of damages for see, Damages, 4.

Evidence of declarations as to generally, see Evidence, 30.

To employees generally, see Master and Servant.

Proximate cause of, see Proximate Cause.

On railroad track, see Railroads.

Action against state for, see State, 2.

#### PETITION.

For new trial, see New Trial, 7.

Of plaintiff, see Pleading, 2-5.

#### PHOTOGRAPH.

One who employs a photographer to photograph the dead body of his malformed child may recover damages in case the latter copyrights the picture and attempts to use it for his own purposes. *Douglas v. Stokes*, 42: 386, 149 S. W. 849, 149 Ky. 506. (Annotated)

#### PHYSICIANS AND SURGEONS.

Note given in payment of services of unlicensed physician, see Bills and Notes, 1; Contracts, 8.

Practising medicine without license as a continuing offense, see Criminal Law, 4.

Damages for nondelivery of telegram sent by physician to patient, see Damages, 6.

Liability of stepfather for medical attention rendered to stepson, see Infants, 1.

One of two physicians separately employed, who undertakes to administer the anesthetic while the other performs an operation, is not liable for the other's negligence and malpractice in doing the work, if he has no actual knowledge of it. *Morey v. Thybo*, 42: 785, 199 Fed. 760, — C. C. A. —. (Annotated)

**PISTOL.**

Assault by pointing pistol at another, see Evidence, 10.

**PLAT.**

Dedication by, see Dedication.

**PLEADING.**

In habeas corpus proceeding, see Habeas Corpus, 5.

In criminal prosecution, see Indictment, etc.

Motion to strike as in nature of demurrer, see Motions and Orders.

Effect of attempt to amend cause of action on which attachment issue, as releasing surety on bond, see Principal and Surety.

**Relief under pleadings.**

1. The facts alleged, and not the form of prayer for judgment, determines the nature of the relief to be granted. *Herring v. Cumberland Lumber Co.* 42: 64, 74 S. E. 1011, — N. C. —.

**Declaration or complaint.**

2. A complaint to enjoin the maintenance of a nuisance need not allege plaintiff's freedom from contributory negligence. *Niagara Oil Co. v. Ogle*, 42: 714, 98 N. E. 60, — Ind. —.

3. One seeking to hold a railroad company liable for an injury through collision with its train at a highway crossing which failed to give any signals of its approach need not allege that, had the signals been given, they would have been heeded. *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, 42: 367, 95 N. E. 1109, — Ind. —.

4. To hold a railroad company liable for injury to a traveler on a street crossing, by a train which failed to give the statutory signals for the crossing, it is not necessary to allege the duty to give the statutory signals in the complaint. *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, 42: 367, 95 N. E. 1109, — Ind. —.

5. A petition in an action to recover a penalty as provided by statute for the refusal of a railroad company to put on sale or to sell any ticket of any other railroad company with which the same may be directly or indirectly connected, at the price or rate fixed by the railroad commission of the state, which alleges that the defendant railroad company was furnished tickets by the connecting carrier and, having the tickets, refused to sell them to the plaintiff at the rate prescribed by the commission, but sold them at a price or rate in excess of that fixed by the commission, and that the tickets were accepted by the two railroad companies respectively, sets forth a cause of action under the statute. *Stephens v. Central of Ga. R. Co.* 42: 541, 75 S. E. 1041, 138 Ga. 625.

**Pleas and answers.**

6. The statute of limitations must be specially pleaded in an action to recover the statutory penalty and damages for failure to maintain cattle guards where a railroad passes through inclosed land, and evi-

dence of such defense cannot be given under the general issue. *Yazoo & M. V. R. Co. v. Kirk*, 42: 1172, 58 So. 710, — Miss. —.

**Reply.**

7. Under a statute providing that the plaintiff may allege in his reply any new matter, not inconsistent with the petition, which constitutes a defense to new matter alleged in the answer of defendant, in an action on a fire insurance policy in which plaintiff sets forth the policy and alleges compliance with all terms and conditions thereof, and in which the defendant sets forth a violation of the clause prohibiting additional insurance without consent of the company indorsed on the policy, a reply which admits the taking out of additional insurance, but sets up a waiver by the defendant's agent, constitutes a departure. *Merchants' & Planters' Ins. Co. v. Marsh*, 42: 996, 125 Pac. 110, — Okla. —.

**Demurrer.**

Motion to strike out bill as in nature of demurrer, see Motions and Orders.

8. A demurrer will not lie to the whole bill when the prayer is too broad, but should be restricted to that part of the relief prayed to which complainant is not entitled. *Schulz v. Ziegler* (N. J. Err. & App.) 42: 98, 83 Atl. 968, — N. J. —.

9. An objection to a pleading on the ground of departure cannot be raised by demurrer or an objection to the introduction of evidence, but must be raised by a motion to strike. *Merchants' & Planters' Ins. Co. v. Marsh*, 42: 996, 125 Pac. 1100, — Okla. —.

**PLEDGE AND COLLATERAL SECURITY.**

Personal liability of directors of bank to stockholders for loss due to failure to sell stock taken as collateral, see Banks, 1.

Giving of collateral security for state funds converted by officers of trust company as condoning offense, see Trover, 3.

**POINTING WEAPON.**

Assault by, see Evidence, 10.

**POLICE.**

Grant of new trial as to policeman where joint verdict against him and municipality is reversed as to municipality on appeal, see Appeal and Error, 35.

Liability of municipality for acts of, see Municipal Corporations, 12, 13.

**POLICE POWER.**

As affecting commerce, see Commerce, 1.

In general, see Constitutional Law, 19-22.

**POOLS.**

Duress as defense to criminal liability for selling pooled tobacco contrary to statute, see Duress,

Evidence in prosecution for selling pooled tobacco, see Evidence, 34.

**PREJUDICIAL ERROR.**

See Appeal and Error, 21-34.

**PRELIMINARY INJUNCTION.**

See Injunction, 5.

**PREMATURITY.**

Of action, see Action or Suit, 1.

**PREMIUMS.**

For insurance, see Insurance, 5-9.

**PRESCRIPTION.**

Title by, see Adverse Possession.

**PRESUMPTIONS.**

In general, see Evidence, 1-10.

**PRICES.**

Discrimination as to, see Constitutional Law, 9, 12, 16, 22; Monopoly and Combinations.

**PRINCIPAL AND AGENT.**

Liability of corporate agents, see Corporations, 1, 2.

Embezzlement by agent, see Embezzlement, 2.

Sufficiency of evidence of relation of, see Evidence, 51, 52.

Evidence to show that payment was intended to be applied on indebtedness due payee's principal, see Evidence, 15.

Power of insurance agent to estop company, see Insurance, 12, 13.

Ratification of agent's unauthorized act in obtaining insurance, see Insurance, 2.

Liability of state for torts of officers, see State, 3.

Competency as witness of man who sells property as agent for wife, see Witnesses, 1.

**PRINCIPAL AND SURETY.**

Liability on attachment bond, see Attachment.

Effect on right of holder of note to recover from surety of bar of claim as against estate of deceased co-surety, see Limitation of Actions, 2.

Bar of right to contribution by running of limitations, see Limitation of Actions, 3.

Sureties on a bond to discharge an attachment are not released from liability by an attempt to amend the cause of action on which the attachment issued so as to increase the damages claimed. *Com. use of Gettman v. A. B. Baxter & Co* 42: 484, 84 Atl. 136, 235 Pa. 179.

**PRIORITY.**

In funds in receiver's hands, see Receivers, 2.  
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As between assignee of one of series of notes secured by mortgage and assignor or his receiver, see Mortgage, 1.

**PRIVACY.**

Invasion of, by use of photograph for photographer's own purposes, see Photographs.

**PRIVATE ACTION.**

For abatement of nuisance, see Nuisances, 2, 3.

**PRIVILEGE.**

From service of process, see Writ and Process, 3.

**PRIVILEGED COMMUNICATIONS.**

In libel case, see Libel and Slander, 4, 5.

**PRIVITY.**

Privity of contract for water supply, see Waters, 3-6.

**PROBATE.**

Of wills, see Wills, 1.

**PROCESS.**

See Writ and Process.

**PRODUCTION OF DOCUMENTS.**

See Discovery and Inspection.

**PROFITS.**

Loss of, as element of damages, see Damages, 7.

**PROMISSORY NOTE.**

See Bills and Notes.

**PROXIMATE CAUSE.**

1. The insecure fastening of the head to the handle of a mallet used in connection with an attraction at an amusement park, and not the manner in which it is grasped by a patron, is the proximate cause of his injury by the flying off of the head. *Wodnik v. Luna Park Amusement Co.* 42: 1070, 125 Pac. 941, 69 Wash. 638.

2. The uninsulated condition of wires strung near to, but out of reach from, a roof, is not the proximate cause of the death of a boy who, to recover his kite, which had become entangled in the wires, threw a string from the roof over a wire, drew it towards him and touched it, receiving a shock which killed him. *Trout v. Philadelphia Electric Co.* 42: 713, 84 Atl. 967, 236 Pa. 506.

**PUBLIC.**

Adverse possession against, see Adverse Possession, 2.

Estoppel of, see Estoppel, 1.

**PUBLIC BUILDINGS.**

Liability for injury in, see State, 2.

**PUBLIC CHARITIES.**

See Charities.

**PUBLIC IMPROVEMENTS.**

Curative act validating void petition for street paving, see Constitutional Law, 2.

Who may maintain suit to enjoin letting of contract for, see Injunction, 6.

Under a statute requiring a petition for street paving to state the kind of material to be used, but not the brand of material nor the name of the manufacturer thereof, a petition which stipulates for "bitulithic" pavement, such pavement being constructed of a specific kind of material patented and controlled by only one company, and furnished to the bidders at only one price, in effect names the brand of material to be used, and is void. *Pollock v. Kansas City*, 42: 465, 123 Pac. 985, 87 Kan. 205.

**PUBLIC INSTITUTIONS.**

See State Institutions.

**PUBLIC LANDS.**

1. In view of the language of prior sections of the statute, residence upon land entered as a homestead is necessary to obtain a right to a patent thereto, notwithstanding U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, p. 1390, provides for the issuance of a patent upon proof that claimant has "resided upon or cultivated" the land; and therefore no patent can be issued to one who, while residing in the vicinity of the land, cleared a small parcel, built a shack, placed tenants in possession, and slept there once every few months. *United States v. Mills*, 42: 752, 190 Fed. 513, 111 C. C. A. 345. (Annotated)

2. The United States may maintain an action to cancel a patent for public land which has been procured from it by fraud. *United States v. Mills*, 42: 752, 190 Fed. 513, 111 C. C. A. 345.

**PUBLIC MONEY.**

Special deposit of, see Banks, 2.

Liability of officers of trust company for conversion of, see Banks, 3-6.

Criminal intent as element of offense of conversion of, see Criminal Law, 2.

Punishment for embezzlement of, see Criminal Law, 7.

Evidence in prosecution for conversion of, see Evidence, 41.

Indictment for embezzlement of, see Indictment, etc., 2, 4.

Conversion of generally, see Trover.

The legislature cannot use the public money, whether derived from taxation or from unclaimed deposits turned over by savings banks, to the securing of homes for wage earners by purchasing the property and renting it or selling it to them on instalments. *Re Opinion of the Justices*, 42: 221, 98 N. E. 611, 211 Mass. 624.

(Annotated)

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**PUBLIC POLICY.**

As affecting contracts, see Contracts, 8, 9.

**PUBLIC PURPOSE.**

Purposes for which public funds may be used, see Public Money.

**PUBLIC SCHOOLS.**

See Schools.

**PUBLIC WATER SUPPLY.**

See Waters.

**PUNISHMENT.**

For crime, see Criminal Law, 7-9.

**QUALIFICATIONS.**

Of judge, see Judges, 2-4.

Of teacher, see Schools.

**QUORUM.**

At stockholders' meeting, see Corporations, 5.

**RACES.**

Larceny by fraudulent horse race, see Larceny, 2.

**RAILINGS.**

On highways, see Highways, 3, 4.

**RAILROAD COMMISSION.**

Control of, over carrier, see Carriers, 9, 10.

**RAILROADS.**

As carriers, see Carriers.

Statute as to measure of damages for condemnation of railroad right of way by telegraph company, see Constitutional Law, 14.

Constitutionality of statute imposing penalty for failure to pay claim for killing stock within certain time, see Constitutional Law, 18.

Right under invalid contract for building of, see Contracts, 11.

Condemnation of property of, see Eminent Domain.

Hand car in street as unlawful obstruction, see Highways, 5.

Injury to employees, see Master and Servant.

Necessity of pleading limitation of actions for penalty for failure to maintain cattle guards, see Pleading, 2.

**Accidents at crossings.**

Allegations as to negligence, see Pleading, 3, 4.

1. A railway company is negligent in backing a train over a highway crossing without giving any signal whatever of its approach. *Pittsburgh, C. C. & St. & L. R. Co. v. Terrell*, 42: 367, 95 N. E. 1109, — Ind. —.

2. That a train starts to back over a highway crossing at a point nearer to the crossing than that which the statute fixes for the giving of crossing signals does not

relieve it of the duty to ring the bell for the crossing, if the statute requires the bell to be kept ringing from the point where the giving of the signals begins until the crossing is passed. *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, 42: 367, 95 N. E. 1109, — Ind. —.

#### Fires.

Sufficiency of proof of negligence, see Evidence, 49.

Sufficiency of evidence as to existence of railroad right of way, see Evidence, 55.

3. That a fire originating through the negligence of a railroad company on its right of way was apparently extinguished before reaching property afterwards consumed does not relieve the railroad company from liability for the loss, if the fire merely smoldered, so that the original fire was the proximate cause of the loss. *Hardy v. Hines Bros. Lumber Co.* 42: 759, 75 S. E. 855, — N. C. —. (Annotated)

#### Contributory negligence.

4. A bicyclist must approach a railroad crossing with his machine under such complete control that he can stop within a reasonable time, if by so doing he may escape injury. *Avery v. New York, O. & W. R. Co.* 42: 153, 99 N. E. 86, 205 N. Y. 502. (Annotated)

5. A traveler on a highway is not bound to know that it is safe to cross railroad tracks before attempting to do so. *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, 42: 367, 95 N. E. 1109, — Ind. —.

6. A traveler who, upon approaching a railroad crossing after dark, finds his view of the track obstructed, is not, as matter of law, bound to alight from the vehicle and go forward onto the track to ascertain whether or not a train is approaching, failure to do which will be negligence *per se*; at least, with respect to a train which is running backward without lights or signals. *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, 42: 367, 95 N. E. 1109, — Ind. —.

#### Diversion or obstruction of water.

7. A railroad company is not liable for damage resulting from a flood which is solely an act of God; but if its negligence is a present contributing proximate cause, which, commingled with the act of God, produces the injury, then defendant is liable notwithstanding the act of God. *Chicago, R. I. & P. R. Co. v. McKone*, 42: 709, 127 Pac. 488, — Okla. —.

8. In a suit against a railroad company for flood damages resulting from a negligent construction or maintenance of a bridge and embankment across a stream and the adjacent lowlands, the fact that plaintiff as a subcontractor put in place part of the dirt embankment does not operate as an estoppel against him in a suit based upon negligent construction and maintenance, where it is not shown that he possessed any knowledge, experience, or skill in engineering, or as to the suitability or sufficiency of such construction, but merely worked under the direction and specifications of defendant's engineers. *Chicago, R. I. & P. R. Co. v. McKone*, 42 L.R.A. (N.S.)

*Co. v. McKone*, 42: 709, 127 Pac. 488, — Okla. —. (Annotated)

#### RAPE.

1. Solicitation of sexual intercourse, with intent to enforce the demand, if necessary, by violence, does not render one guilty of assault with intent to rape if no effort is made to carry out the intent, but the solicitor flees upon prospect of resistance. *State v. Sanders*, 42: 424, 75 S. E. 702, — S. C. —.

2. The use of a weapon to compel a woman to consent to sexual intercourse is not an assault with intent to commit rape, if there is no overt attempt to commit the act itself. *Douglas v. State*, 42: 524, 150 S. W. 860, — Ark. —. (Annotated)

3. Touching the hand of a sleeping woman to awaken her to solicit sexual intercourse is not an assault with an intent to commit rape. *Douglas v. State*, 42: 524, 150 S. W. 860, — Ark. —.

#### RATES.

Of carrier, see Carriers, 9-11.

Review by courts of rates fixed by statute, see Courts, 3.

Presumption as to validity of statute fixing, see Evidence, 2.

Injunction against enforcement of rates fixed by statute, see Injunction, 4.

Findings of referee in hearing as to validity of, see Reference.

Validity of rate statutes, see also Statutes, 1.

When an attempt is made to strike down a rate statute, it is incumbent on the attacking party to make full, fair, and complete disclosure of all the revenue derived from the business, and the disbursement of the same for all purposes, including salaries paid to all of its officers, agents, and employees, so that it may be determined whether such salaries and expenditures are necessary as well as reasonable in amount. *State v. Adams Express Co.* 42: 396, 122 N. W. 691, 85 Neb. 25.

#### RATIFICATION.

Of plat by owner of dedicated property, see Dedication.

Presumption and burden of proof as to, see Evidence, 9.

Of infant's contract, see Infants, 5.

Of agent's unauthorized act in obtaining insurance, see Insurance, 2.

#### REAL PROPERTY.

Parol contracts as to, see Contracts, 3-7.

Measure of damages for injury to, see Damages, 5.

Deeds of, see Deeds.

Easements in, see Easements.

Condemnation of, see Eminent Domain.

Lien of judgment on, see Judgment, 6.

Matters as to landlord and tenant, see Landlord and Tenant.

Mortgage on, see Mortgage.

As to public lands, see Public Lands.

Records of title, see Records and Recording Laws.  
Rights, duties, and liabilities on transfer of, see Vendor and Purchaser.

**REASONABLENESS.**

Of license tax, see License, 4.

**RECEIVERS.**

Priority as between assignee of one of series of notes secured by mortgage and receiver of assignor, see Mortgage, 1.

Application to receiver of statute limiting hours of labor of employees, see Master and Servant, 1.

1. A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment. *Lawson v. Warren*, 42: 183, 124 Pac. 46, — Okla. —.

2. There is no fiduciary relation between a stockbroker and his customer which will entitle the latter to priority over general creditors in case a receiver is appointed for the broker's affairs after the customer has paid money to him for the purchase of certain stock which has not been delivered, although the money paid remains in the broker's bank account when the receiver is appointed and goes into his possession. *Fogg v. Tyler*, 42: 95, 83 Atl. 664, — Me. —. (Annotated)

**RECORDS AND RECORDING LAWS.**

Liability for defective search of, see Abstracts.

On appeal, see Appeal and Error, 2-5.  
Of city plat, see Dedication, 1.

Effect of, on right to allege estoppel of owner to assert title to property, see Estoppel, 2.

Mistake in name; estoppel to set up, see Estoppel, 5.

Records as evidence generally, see Evidence, 11.

Sufficiency of certificate signed by deputy register of deeds instead of register, see Mortgage, 5.

Uniformity of registration tax, see Taxes, 1.

Mistake as to name in notice by publication of false record, see Writ and Process, 2.

1. The record of a mortgage without the payment of a tax imposed by a registry tax law being prohibited by the statute, and thereby declared invalid for any purpose, is not evidence of the fact that it was duly recorded, or of the validity of the instrument. *Orr v. Sutton*, 42: 146, 137 N. W. 973, 119 Minn. 193. (Annotated)

2. A mortgage on real estate to secure a note of \$50 is subject to the registry tax imposed by chapter 328, Law of Minn. 1907; and such a mortgage upon which the tax has not been paid, although erroneously recorded by the register of deeds, furnishes no

sufficient legal basis in the mortgagee for the redemption from the foreclosure of a prior mortgage upon the same property, and the subsequent steps taken by him in perfecting the redemption give him no right as against a prior redemptioner, and this is not changed by the fact that the county treasurer certified on the mortgage that it was not subject to a tax. *Orr v. Sutton*, 42: 146, 137 N. W. 973, 119 Minn. 193.

3. That a receipt for the consideration of a deed is attached thereto and made a part of the record, with the initials of the name of the grantee correctly stated, does not, since it is no part of the record proper, charge subsequent purchasers with notice that different initials in the body of the instrument are incorrectly recorded. *White v. Himmelberger-Harrison Lumber Co.* 42: 151, 139 S. W. 553, 240 Mo. 13.

**REDEMPTION.**

From foreclosure sale, see Mortgage, 5.

**REFERENCE.**

As to arbitration, see Arbitration.

It cannot be held, as a matter of law, that a referee before whom testimony in a hearing as to the validity of a statute regulating express rates was taken erred in apportioning the terminal expenses between domestic and interstate business in the proportion that the revenue derived from the domestic business bears to that derived from the interstate business, and not on the package basis. *State v. Adams Express Co.* 42: 396, 122 N. W. 691, 85 Neb. 25.

**REFORMATORY.**

Habeas corpus to secure release from, see Habeas Corpus, 2.

**RELATIONSHIP.**

Of judge as ground of disqualification, see Judges, 2.

**RELEASE.**

By part payment, see Accord and Satisfaction.

Of surety, see Principal and Surety.

**RELEVANCY.**

Of evidence, see Evidence, 33-47.

**RELIGION.**

Legal duty to have religious ceremony in connection with burial, see Corpse, 4.

**REMAINDERMEN.**

Adverse possession by one of several joint contingent remaindermen, see Adverse Possession, 1.

Claim of homestead in remainder estate, see Homestead, 2.

**RENT.**

Liability for, generally, see Landlord and Tenant, 10-12.

**REPAIRS.**

Implied covenant for, see Landlord and Tenant, 1.

Duty of tenant as to, see Landlord and Tenant, 3.

**REPLEVIN.**

Duty of officer to account for money obtained under judgment on replevin bond, see Officers.

**REPLY.**

See Pleading, 7.

**REPORTS.**

Requiring monthly reports from persons hauling heavy logs over public highway, see License, 2.

**REPRESENTATIONS.**

Estoppel by, see Estoppel, 3, 4.

**RESALE.**

For purpose of fixing damages on purchaser's breach of contract, see Sale.

**RESCISSION.**

Of land contract, see Vendor and Purchaser.

Rescission of contracts generally, see Contracts, 14.

**RES GESTÆ.**

See Evidence, 24-32.

**RESIDENCE.**

Necessity of residence upon land entered as a homestead, see Public Lands, 1.

**REVERSIBLE ERROR.**

See Appeal and Error, 21-34.

**REVIEW.**

Of order or judgment, see Appeal and Error.

**ROAD WORK.**

Constitutionality of statute as to, see Constitutional Law, 13.

**ROPE.**

Across alley as obstruction, see Highways, 2.

**ROUTE.**

For transportation of horses, see Carriers, 8.

**RULES.**

Right of appellate court to prescribe rules for government of trial court, see Courts, 2.

**RULES OF DECISION.**

See Courts, 5.

**SALE.**

New trial in action for breach of warranty, see New Trial, 2, 4.

Of land generally, see Vendor and Purchaser.

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1. Resale for the purpose of fixing damages for breach of a contract to purchase the products of a mine need not be made in the market where delivery was to be made under the original contract. *White Walnut Coal Co. v. Crescent Coal & Min. Co.* 42: 669, 98 N. E. 669, 254 Ill. 368.

(Annotated)

2. That a commodity which one has refused to accept and pay for according to contract has not been produced at the time of repudiation does not affect the right of the vendor to produce and resell it at the risk of the purchaser. *White Walnut Coal Co. v. Crescent Coal & Min. Co.* 42: 669, 98 N. E. 669, 254 Ill. 368.

**SALT.**

Flow of salt water onto neighboring property as nuisance, see Nuisances, 1.

**SALVATION ARMY.**

Liability of, for negligent injury by servant, see Charities.

**SANITY.**

See Incompetent Persons.

**SATISFACTION.**

See Accord and Satisfaction.

**SCAFFOLD.**

Assumption of risk by employee using, see Master and Servant, 4.

**SCHOOLS.**

Implied agreement to reimburse teacher for expenditures to keep school running, see Contracts, 1.

Authorizing construction of, in public park without compensating municipality which holds fee, see Municipal Corporations, 2.

Placing school in public park, see Parks and Squares.

As to colleges belonging to state, see State Institutions.

Exemption of, from taxation, see Taxes, 2.

Under a statute providing that "no person shall be permitted to teach who is not the holder of a teacher's certificate," etc., a contract otherwise duly entered into between a school board and a teacher is not void or voidable merely because at the date of such contract the teacher did not hold a certificate or permit qualifying him to teach. *Schafer v. Johns*, 42: 411, 137 N. W. 481, — N. D. —.

(Annotated)

**SECOND APPEAL.**

See Appeal and Error, 36.

**SEPARATION OF POWERS.**

See Constitutional Law, 3.

**SERVICES.**

Evidence on question of acceptance of contract for services, see Evidence, 40.



**SET-OFF AND COUNTERCLAIM.**

Set-off and counterclaim against exempt claim, see Exemptions, 2.

**SHERIFF.**

Who may maintain suit for amercement of, see Parties, 2.

Strict construction of statute providing for amercement of, see Statutes, 5.

1. An amercement is a money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty. *Stein v. Scanlan*, 42: 895, 127 Pac. 483, — Okla. —.

2. The right to demand a judgment in amercement is based on no equitable grounds, and in its enforcement courts are bound to hold the party claiming it to a strict observance of the requirements of the statute. *Stein v. Scanlan*, 42: 895, 127 Pac. 483, — Okla. —.

3. A sheriff cannot be amerced for failure to levy and return an execution which shows costs to have been taxed in a certain sum, when the judgment as entered in the court does not show that any costs were taxed in the case, and such defect is not corrected or explained. *Stein v. Scanlan*, 42: 895, 127 Pac. 483, — Okla. —.

4. A sheriff cannot be amerced for failure to levy and return an execution which shows the judgment on which it is issued to have been rendered on May 13, when the judgment on its face recites that it was given, made, and rendered on the 11th of the same month, and no effort is made to reconcile the conflicting dates, although attention is called to the discrepancy, since the court will not presume that the same judgment is referred to. *Stein v. Scanlan*, 42: 895, 127 Pac. 483, — Okla. —.

(Annotated)

**SIGNALS.**

At railroad crossing, see Pleading, 3, 4; Railroads, 1, 2.

**SITUS.**

For purpose of taxation, see Taxes, 4.

**SLANDER.**

See Libel and Slander.

**SLOT MACHINES.**

As gambling devices, see Gaming.

**SPARKS.**

Fall of sparks from machinery of elevated train, see Evidence, 6; Street Railways, 1.

**SPECIAL DEPOSIT.**

See Banks, 2.

**SPECIAL INTERROGATORIES.**

See Trial, 9.  
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**SPECIFIC PERFORMANCE.**

Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. *Rossback v. Micks*, 42: 444, 132 N. W. 528, 89 Neb. 821.

**SPITE FENCE.**

See Fences.

**STATE.**

Whether action is one on contract or in tort, see Action or Suit, 4.

Special deposit of state funds, see Banks, 2.

Liability of officer of trust company for conversion of state funds, see Banks, 3-6.

Criminal intent as element of offense of conversion of state funds, see Criminal Law, 2.

Punishment for embezzlement of public money, see Criminal Law, 7.

Condemnation of land belonging to, see Eminent Domain, 4.

Public funds of, see Public Money  
As to state institution, see State Institutions.

1. A claim to repayment of money exacted from the taxpayer by taxing officers to replace a tax payment which had been embezzled by the collector is within a statute permitting anyone having a money demand against the state arising out of a contract, express or implied, to file it in court for adjudication, although the state does not recognize the validity of the claim or contemplate its payment. *State v. Mutual L. Ins. Co.* 42: 256, 93 N. E. 213, 175 Ind. 59.

2. Statutory permission to anyone having a claim against the state to begin an action therefor does not create a right of action against the state for injury through a defect in a state armory leased for exhibition purposes, where the injury was due either to the negligence of the state's agent in supervising the construction of the building or in leasing it in an unsafe condition. *Riddoch v. State*, 42: 251, 123 Pac. 450, 68 Wash. 329. (Annotated)

3. A state does not become liable for the torts of its officers by permitting the leasing of its armory for pay, on the theory that it thereby engages in a private enterprise and abandons its right to immunity from suit. *Riddoch v. State*, 42: 251, 123 Pac. 450, 68 Wash. 329.

**STATE INSTITUTIONS.**

1. Incidental expenses of a state college such as those arising from athletics, a college magazine, repair of musical instruments or typewriters, or in the replacing of laboratory apparatus, may not be charged and collected by the college authorities as

a condition precedent to entrance. *Connell v. Gray*, 42: 336, 127 Pac. 417, 33 Okla. 591.

2. The board of regents of a state college, having power to prescribe the kind of uniform or gymnasium suit and to require the same to be worn by the students, may require the students at the time of entrance to provide themselves with such uniform or suit, or make a reasonable deposit to cover the cost of the same. *Connell v. Gray*, 42: 336, 127 Pac. 417, 33 Okla. 591.

(Annotated)

3. A statutory provision that all citizens of a state between certain ages shall be admitted to all the privileges of a state college and instruction therein, upon application, does not require said college to be maintained free of tuition and that students be admitted therein for instruction free from all fees and charges. *Connell v. Gray*, 42: 336, 127 Pac. 417, 33 Okla. 591.

4. The regents of an Agricultural and Mechanical College established by the state may require a reasonable sum to be deposited by each student as a condition precedent to entrance, to be held as earnest money for all negligent breakage or damage to the property of said institution while the depositor is a student, to be refunded at the end of the term or session, provided it is not consumed by breakage or damage to the property of the institution by each student; and a fee of \$2.50 for such purpose is not unreasonable. *Connell v. Gray*, 42: 336, 127 Pac. 417, 33 Okla. 591.

5. The board of regents of a state college cannot exact a fee of students to be used for the maintenance of a Young Men's or Young Women's Christian Association. *Connell v. Gray*, 42: 336, 127 Pac. 417, 33 Okla. 591.

#### STATUTE OF FRAUDS.

In general, see Contracts, 3-7.

#### STATUTE OF LIMITATIONS.

See Limitation of Actions.

#### STATUTES.

Validity of curative acts, see Constitutional Law, 2.

Review of, by courts, see Courts, 3.

Injunction against enforcement of, see Injunction, 4.

Presumption and burden of proof as to, see Evidence, 2.

Validity of rate statutes, see Rates.

#### Partial invalidity.

1. A rate statute will not be declared unconstitutional on the ground that it provides drastic penalties for its violation, unless it appears that the penalty clause was the inducement for its passage, and, with that clause eliminated, the remainder of the act is incomplete and incapable of enforcement. *State v. Adams Express Co.* 42: 396, 122 N. W. 691, 85 Neb. 25.

2. The unconstitutionality of a provision in a statute which fixes the time for electing judges, extending two succeeding constitutional terms for a period of six 42 L.R.A.(N.S.)

months each, will not prevent the holding of an election at the time fixed at the end of the second term, since the time for the election being fixed and the terms having been served, the question of the unconstitutionality of the extension becomes immaterial. *State ex rel. Null v. Polley*, 42: 788, 138 N. W. 300, — S. D. —.

Entitling; expression of subject.

3. A title, "an act to amend" a particular section of a law relating to unfair discrimination between localities in the buying of produce, is not insufficient to cover provisions relating to discrimination in dairy and farm products, because the original act was limited to petroleum products. *State v. Fairmont Creamery Co.* 42: 821, 133 N. W. 895, 153 Iowa, 702.

Construction; operation; effect.

Liberal construction of exemption statutes, see Exemptions, 1.

4. Where a statute is susceptible of two constructions, one of which will uphold it, while the other will strike it down, it is the duty of the court to accept the former construction. *Chicago, R. I. & P. R. Co. v. Beatty*, 42: 984, 118 Pac. 367, — Okla. —.

5. A statute providing for the amercement of an officer for misconduct or neglect of duty is penal, and must be strictly construed. *Stein v. Scanlan*, 42: 895, 127 Pac. 483, — Okla. —.

#### STEPFATHER.

Liability for medical and surgical services rendered to stepson, see Infants, 1.

#### STORE ORDERS.

Usury in, see Usury.

#### STREET RAILWAYS.

Duty of drivers of vehicles to pass street car on the left, see Automobiles, 1-3.

As carrier, see Carriers.

Presumption and burden of proof as to negligence, see Evidence, 6.

Rights and duties as to employees, see Master and Servant.

Requiring street car companies to provide stools for motormen, see Municipal Corporations, 3.

Question for jury as to negligence, see Trial, 3.

1. An elevated railway company lawfully operating in a public street is not liable for injury to a person in the street below by the fall of sparks from the train, which are the inevitable result of the careful operation of the road. *Carney v. Boston Elevated R. Co.* 42: 90, 98 N. E. 605, 212 Mass. 179. (Annotated)

2. The mere fact that the headlight of a street car which is of a kind in ordinary use momentarily blinds a traveler upon the highway so that he comes into collision with a team does not render the street car company liable for the resulting injury to him. *Spoatea v. Berkshire Street R. Co.* 42: 876, 99 N. E. 467, 212 Mass. 599.

(Annotated)

**STRICT CONSTRUCTION.**

Of statute, see Statutes, 5.

**STRIKES.**

Validity of, see Conspiracy.

Damages for loss of position resulting from, see Damages, 2.

**STRIKING OUT.**

Of evidence, see Appeal and Error, 24.

**SUMMARY PROCEEDINGS.**

Writ of error in summary proceedings, see Appeal and Error, 1.

**SUMMONS.**

See Writ and Process.

**SUPPORT.**

Right of creditors to reach interest of man under contract for his support, see Creditors' Bill.

Of infants generally, see Infants, 1.

Of children in case of divorce, see Divorce and Separation.

**SURCHARGING.**

Surcharging account of executor or administrator, see Executors and Administrators, 3.

**SURGEONS.**

See Physicians and Surgeons.

**SURVEYORS.**

Liability of surveyor to whose judgment question is submitted, for negligent performance of duty, see Arbitration.

**SUSPENSION OF SENTENCE.**

See Criminal Law, 8, 9.

**TAXES.**

Whether action to recover money paid under coercion as tax, to replace payment embezzled by tax collector, is one on contract or in tort, see Action or Suit, 4.

Duty of one of several joint contingent remaindermen in possession as lessee of holder of fee to pay taxes, see Cotenancy.

Estoppel to set up mistake in name in publication of notice, see Estoppel, 5.

Interest on, see Interest.

As to license generally, see License.

Laches as affecting right of one cotenant to benefit of purchase of tax title by another, see Limitation of Actions, 1.

Merger of tax deed, see Merger.

Failure to pay taxes imposed by register tax law, see Records and Recording Laws, 1, 2.

Action against state to recover money wrongfully exacted by taxing officers, see State, 1.

Mistake as to name in notice by publication of false record, see Writ and Process, 2.

**Equality; uniformity.**

1. The Minnesota act imposing a tax upon the record of a mortgage is not open to a constitutional objection on the ground that it does not impose the tax uniformly upon all of the class of mortgages included within its provisions, or assess the tax in accord with the actual value of the security. *Orr v. Sutton*, 42: 146, 137 N. W. 973, 119 Minn. 193.

**Exemptions.**

2. Real estate given to trustees in trust to sell and pay the proceeds to a college as an endowment fund is exempt from taxation in the hands of the trustees, under a statute providing that real estate owned by an educational institution as part of its endowment fund shall not be taxed. *Ellsworth College v. Emmet County*, 42: 530, 135 N. W. 594, — Iowa, —.

3. A gift of real estate to trustees to sell and devote the proceeds to the establishment of a home for aged women is not exempt from taxation in the hands of the trustees, if there is nothing to show that the home itself, when constructed, would be exempt, and it is immaterial that the property is a parcel of a tract the balance of which is to be devoted to the endowment of a college which is exempt from taxation. *Ellsworth College v. Emmet County*, 42: 530, 135 N. W. 594, — Iowa, —. (Annotated)

**Where taxable; situs.**

4. Expressing an intention to acquire a residence in another state, securing a dwelling there, and leaving the state of domicile prior to the day for assessing taxes, does not effect a change of domicile so as to relieve the property from taxation at the former one, if the new domicile is not reached until after the tax day. *Boyd v. Com.* 42: 580, 149 S. W. 1022, 149 Ky. 764.

**Payment.**

5. Long acquiescence by the officials in the payment of tax money by foreign insurance companies to the state auditor, to be paid by him into the treasury, when the statute requires such corporations to make returns to the auditor and pay the tax into the treasury, will not, on the theory either of estoppel or of departmental or of administrative construction, prevent the state from requiring a second payment in case the auditor misappropriates a payment to him to his own use without paying it into the treasury; especially where the auditor to whom the money was paid had no authority with respect to it, or power to interpret the law governing the payment. *State v. Mutual L. Ins. Co.* 42: 256, 93 N. E. 213, 175 Ind. 59.

**TEACHERS.**

In general, see Schools

**TELEGRAPHS.**

Statute as to measure of damages for condemnation of railroad right of way by telegraph company, see Constitutional Law, 14

Condemnation of right of way by telegraph company, see Eminent Domain.

Recovery for mental anguish for non-delivery of message, see Damages, 6.

Evidence as to damages, see Evidence, 36.

Sufficiency of proof that message was received for transmission, see Evidence, 54.

1. Where a telegraph company has negligently failed to deliver a message containing an offer to enter into a contract, and there is competent evidence to show that the offer would have been accepted if it had been delivered, the telegraph company is liable for those damages which might reasonably have been anticipated and which are the direct and proximate consequence of the breach of duty. *Western U. Teleg. Co. v. Sights*, 42: 419, 126 Pac. 234, — Okla. —. (Annotated)

2. Under § 9 of article 23 of the Oklahoma Constitution, which provides that "any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void," a condition printed on the back of a telegraph message, which provides that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," is not binding. *Western U. Teleg. Co. v. Sights*, 42: 419, 126 Pac. 234, — Okla. —.

#### TELEPHONES.

Effect of warranty deed to pass right to telephone service, see Deeds, 2.

Temporary injunction to prevent connection with telephone line, see Injunction, 5.

#### TEMPORARY INJUNCTION.

See Injunction, 5.

#### TERMINATION.

Of lease, see Landlord and Tenant, 2.

#### THEFT.

See Larceny.

#### THREATS.

As duress, see Duress.

#### TIMBER.

Liability of surveyor to whose judgment scaling of logs is submitted, for negligent performance of duty, see Arbitration.

Agreement by purchaser to build railroad to property, see Contracts, 11.

#### TIME.

For serving case made, see Appeal and Error, 3, 4.

For taking exceptions, see Appeal and Error, 7.

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Limiting time allowed counsel for argument to jury, see Appeal and Error, 13.

For presenting claim against telegraph company, see Telegraphs, 2.

#### TITLE.

Liability for defects in abstracts of, see Abstracts

Of insured, see Insurance, 3.

Of receiver, see Receivers, 1.

Of statutes, see Statutes, 3.

Defects in, see Vendor and Purchaser.

#### TOBACCO.

Duress as defense to criminal liability for selling pooled tobacco contrary to statute, see Duress.

Evidence in prosecution for selling pooled tobacco, see Evidence, 34.

#### TOLLS AND TOLL ROADS.

Estoppel to contest right to collect, see Estoppel, 1.

A county has no inherent power to collect tolls for the use of a bridge which it has erected, even to defray the expense of the erection. *Breathitt County v. Hammons*, 42: 836, 150 S. W. 661, 150 Ky. 502. (Annotated)

#### TOOLS.

Master's duty as to, see Master and Servant, 3.

#### TORTS.

Whether action one on contract or in tort, see Action or Suit, 3, 4.

Action for, generally, see Case.

Measure of damages for, see Damages, 2.

Injunction against tortious acts, see Injunction, 2.

Municipal liability for, see Municipal Corporations, 4-14.

Matters as to negligence generally, see Negligence.

Liability of state for torts of officers, see State, 3.

#### TOWNS.

Land conveyed to, in trust for cemetery, see Cemeteries, 1, 2.

#### TRACTION ENGINE.

Effect of failure of one driving engine across bridge to take required precautions on right to recover for injuries through breaking of bridge, see Bridges.

Regulation as to driving of, across bridge, see Constitutional Law, 4.

#### TRESPASS.

A trespasser having no color of title to real estate cannot defeat an action for the trespass upon the ground that plaintiff was claiming under a patent invalid because signed by a person claiming to be governor, but who had no title to the office. *Carson v. Turk*, 42: 384, 143 S. W. 393, 146 Ky. 733.

**TRESPASSER.**

Ejection of drunken passenger from railway station, see Carriers, 3, 4.

**TRIAL.**

Necessity of exception to statements made by judge, see Appeal and Error, 6.

Prejudicial error in remarks or conduct of judge, see Appeal and Error, 30-32.

Review of discretion in limiting time allowed counsel for argument to jury, see Appeal and Error, 13.

Prejudicial error as to, see Appeal and Error, 21-27.

First raising objection on appeal, see Appeal and Error, 14, 15.

Failure to question by cross errors on appeal correctness of rule striking out testimony, see Appeal and Error, 10.

Continuance, see Continuance and Adjournment.

New trial, see New Trial.

Raising objection to pleading on ground of departure by objection to the introduction of evidence, see Pleading, 9.

**Questions of law and fact.**

Ruling that there is evidence to take case to jury as law of case on second appeal, see Appeal and Error, 36.

1. Testimony that one insured against accident splashed water from a tub in which she was washing clothes into her eye, and thereby the eye became infected with gonococci and the sight destroyed, is not so improbable that the court can take from the jury the question of the liability of the insurance company for the injury. *Sullivan v. Modern Brotherhood*, 42: 140, 133 N. W. 486, 167 Mich. 524.

2. Where, in an action on an assigned claim against an executor, he pleaded that the assignment was not in good faith and for a valuable consideration, and that the assignor was the real owner, for the purpose only of raising the question of the competency of the assignor as a witness, which plea was traversed orally at the trial, the issue thus joined presented a preliminary question of fact for the court to decide. *Clendennin v. Clancy* (N. J. Err. & App.) 42: 315, 81 Atl. 750, — N. J. —.

3. The jury must determine whether or not a motorman in charge of a street car is negligent in accelerating the speed of his car when attempting to cross a street on which he knows children are coasting, after he has been warned that sleds are approaching the point of intersection. *Lynch v. Public Service R. Co.* (N. J. Err. & App.) 42: 865, 83 Atl. 382, 82 N. J. L. 712.

4. The jury must determine whether or not a child is negligent in attempting to coast on a street crossing a street railway track when persons are stationed at the point of intersection to warn coasters and car operators so as to prevent collisions. 42 L.R.A.(N.S.)

*Lynch v. Public Service R. Co.* (N. J. Err. & App.) 42: 865, 83 Atl. 382, 82 N. J. L. 712.

5. In a suit for damages from a flood, where the defense is that the flood was so unusual and unprecedented as to amount, in law, to an act of God, thus relieving the defendant of all liability, the question should be submitted to the jury under proper instructions from the court where the evidence is such that, in weighing it, the minds of reasonable men might fairly differ on the question as to whether the flood was so unusual and unprecedented that its extent and resulting effects could not have been reasonably anticipated and provided against by an ordinarily careful person in defendant's situation. *Chicago, R. I. & P. R. Co. v. McKone*, 42: 709, 127 Pac. 488, — Okla. —.

6. The jury must determine whether or not a gas company which caps a pipe in a dwelling upon removal of the stove which had been supplied by it uses due care in permitting it to remain eight months without inspection. *Louisville Gas Co. v. Guelat*, 42: 703, 150 S. W. 656, 150 Ky. 583.

7. Failure of one accused of assault by pointing a cocked pistol at another, to assume the burden of showing that it was not loaded, will justify submission to the jury of the question whether or not it was so, so as to support the charge. *Territory v. Gomez*, 42: 975, 125 Pac. 702, — Ariz. —.

8. The court cannot say as matter of law that one who has been arrested for the purpose of obtaining a sum of money in his possession as agent voluntarily compromises the claim, so as to bar an action for malicious prosecution, by the fact that, to avoid being taken to the county jail, and to secure his release from custody, he turns over the money under protest, without being able to obtain a full settlement of his accounts. *White v. International Text-Book Co.* 42: 346, 136 N. W. 121, — Iowa, —.

**Special interrogatories.**

9. When only seven special questions fairly covering the vital questions raised by the pleadings in a cause are requested, the court should submit them all, and not select three from the number to the exclusion of the others. *Coblentz v. Putifer*, 42: 298, 125 Pac. 30, 87 Kan. 719.

**Instructions.**

Error in admission of evidence cured by, see Appeal and Error, 25.

Prejudicial error as to, see Appeal and Error, 28, 29.

10. An instruction to the jury in an action to set aside a deed upon the ground of undue influence, that they may take into consideration the reasonableness or unreasonableness of the disposition of the property by the grantor in determining whether or not she was acting as a result of undue influence, without defining reasonableness, is error. *Coblentz v. Putifer*, 42: 298, 125 Pac. 30, 87 Kan. 719.

11. An instruction to the jury in a prosecution for homicide by administering poison, which fails to inform the jury that it

was necessary for them to find that certain drugs claimed to have been administered were poison, affords the defense no cause for complaint where the jury is informed that unless a certain specific drug named in the indictment and which the jury by the instruction is required to find a poison, has been administered also, they must find the defendant not guilty. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

#### Verdict.

Review of discretion in refusing request for special findings, see *Appeal and Error*, 12.

Review of, on appeal, see *Appeal and Error*, 18-20.

Sufficiency of evidence to sustain findings, see *Evidence*, 55.

New trial for errors in verdict, see *New Trial*, 1.

Findings by referee, see *Reference*.

12. A verdict for \$35,000, reduced by the court to \$25,000, for alienation of the affections of a man fifty years old who had been living separate from his wife and paying such attention to other women as to indicate little affection for her is grossly excessive. *Phillips v. Thomas*, 42: 582, 127 Pac. 97, — Iowa, —.

13. Upon a charge of murder by poison, it is not necessary that the verdict should state the kind of poison used. *State v. Buck*, 42: 854, 127 Pac. 631, — Kan. —.

#### TROVER.

1. A conversion occurs where a special deposit payable to the state treasurer is paid by the bank to other persons. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

2. A demand is not necessary to charge officers of a trust company for converting state funds to their own use, if the evidence shows that the funds were actually applied to an unlawful purpose. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

3. The giving of collateral security for state funds converted by the officers of a trust company with which they were deposited does not condone the offense of the conversion. *State v. Ross*, 42: 601, 104 Pac. 596, 55 Or. 450.

#### TRUSTS.

In land devoted to burial purposes, see *Cemeteries*, 1-3.

Monopolistic trusts, see *Monopoly and Combinations*.

A trust by conveyance of land to an incorporated town for public use as a burial place for the dead is not void because of indefiniteness as to the beneficiary. *Ritter v. Couch*, 42: 1216, 76 S. E. 428, — W. Va. —.

#### UNCERTAINTY.

Of trust, see *Trusts*.

#### UNDUE INFLUENCE.

Instruction as to, see *Trial*, 10.  
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#### UNIFORMITY.

Of license tax, see *License*, 3.  
In taxation, see *Taxes*, 1.

#### UNITED STATES SUPREME COURT.

State court following decisions of see *Courts*, 5.

#### USURY.

It is usurious to charge one to whom store orders are furnished to enable him to procure supplies 20 per cent advance on the cash price of the purchases for the accommodation, although that is claimed to be the difference between the cash and credit price of the articles purchased. *Osborne v. Fuller*, 42: 1058, 75 S. E. 557, — S. C. —.

(Annotated)

#### VEHICLES.

License on, see *License*, 3.

#### VENDOR AND PURCHASER.

Defect in title as defense to note given for purchase price, see *Bills and Notes*, 2.

Right of purchaser to recover damages from broker for fraudulent representations as to value of land, see *Brokers*.

Deeds, see *Deeds*.

Devolution of vendee's interest under contract for purchase of real property, see *Descent and Distribution*, 1.

Effect of disclaimer of easement by owner of property to estop purchaser from claiming it, see *Easements*, 3.

Estoppel to rescind, see *Estoppel*, 4.

Fraud of broker in representations to purchaser, see *Fraud and Deceit*, 3.

Specific performance of contract, see *Specific Performance*.

Where in executing a mortgage a mistake is made in the name of a mortgagee, and after the mortgage is recorded another one is executed to the mortgagee by his correct name, and it is recited therein that a mistake was thus made and that the second mortgage was intended to be in lieu of and to take the place of the first, but without releasing the first, the title of the mortgagor, who has possession of the first mortgage and the note secured thereby, is not defective so as to justify a purchaser from him in rescinding the sale on account thereof. *Rossback v. Micks*, 42: 444, 132 N. W. 528, 89 Neb. 821.

#### VENUE.

A statute providing for the removal of suits to the county of defendant's residence has no application to suits brought in other states. *Jones v. Hughes*, 42: 502, 137 N. W. 1023, — Iowa, —.

#### VERDICT.

New trial for errors in, see *New Trial*, 1.

In general, see *Trial*, 12, 13.

**WAIVER.**

- By appearance, see Appearance.
- Of rights under contract, see Contracts, 13.
- Of husband's distributive rights in wife's property, see Election.
- By insurer, see Insurance, 12, 13.

**WARRANTS.**

- Part payment of county warrants as accord and satisfaction, see Accord and Satisfaction.

**WATERS.**

- Effect of adverse possession of shore land to vest title to accretions, see Adverse Possession, 4.
- Liability of municipality for acts of police officers in obstructing stream, see Municipal Corporations, 13.
- Obstruction by railroad company, see Railroads, 7, 8.
- Question for jury as to negligence, see Trial, 5.

**Public water supply.**

- Lien on property benefited for water pipe laid across land belonging to third person, see Mechanics' Liens, 2.

- Municipal liability for negligence as to, see Municipal Corporations, 14.

1. A consumer cannot use water furnished him by a municipal corporation with knowledge that it contains impurities, and hold the municipality liable for injuries caused thereby. *Oakes Mfg. Co. v. New York*, 42: 286, 99 N. E. 540, 206 N. Y. 221.

2. Under a charter requiring a municipality to take proper measures to preserve the purity of water furnished by it to consumers, it is not liable in damages because, upon learning that its source of supply does not furnish water of a quality to meet the needs of a particular consumer, it does not procure another supply from another source, where the supply furnished meets the needs of consumers generally, even though a new supply could be secured at reasonable expense. *Oakes Mfg. Co. v. New York*, 42: 286, 99 N. E. 540, 206 N. Y. 221.

3. A water company which contracts with a municipality to furnish a supply of water for fire purposes does not undertake a public duty a breach of which will render it liable in tort for loss of the property of a taxpayer. *German Alliance Ins. Co. v. Home Water Supply Co.* 42: 1005, 174 Fed. 764, 99 C. C. A. 258.

4. A contract by a city with a water company for a water supply will not sustain an action against the company for a breach of its contractual obligations to furnish water for fire protection, brought by a taxpayer whose property was destroyed by fire as the result of such breach. *German Alliance Ins. Co. v. Home Water Supply Co.* 42: 1000, 57 L. ed. —, 33 Sup. Ct. Rep. 32, 226 U. S. 220.

5. An action *ex delicto* cannot be maintained against a water company by a taxpayer whose property has been destroyed by fire in consequence of the company's failure to comply with its contract with the municipality to furnish water for fire protection. *German Alliance Ins. Co. v. Home Water Supply Co.* 42: 1000, 57 L. ed. —, 33 Sup. Ct. Rep. 32, 226 U. S. 220.

6. A taxpayer has no right of action *ex contractu* against a water company for breach of its contract with the municipality to furnish water for fire purposes, which results in loss of his property, where the contract has no provision making it liable to him. *German Alliance Ins. Co. v. Home Water Supply Co.* 42: 1005, 174 Fed. 764, 99 C. C. A. 258.

**WATERWORKS.**

- See Waters.

**WEAPONS.**

- Assault by pointing at another, see Evidence, 10.

**WIDOW.**

- Allowance of year's support to, see Executors and Administrators, 2.
- Election as to rights under will, see Wills, 3.

**WILLS.**

- Matters concerning executors and administrators, see Executors and Administrators.

Designating beneficiary of mutual benefit certificate by, see Insurance, 10 11.

Collateral attack on probate because of defects in attestation, see Judgment, 2.

1. An instrument must dispose of property to be entitled to probate as a will. *Blacksher Co. v. Northrop*, 42: 454, 57 So. 743, — Ala. —.

2. The will of a member of a mutual benefit society will not operate on the benefit due on his certificate, if the by-laws of the order make it payable to his widow, orphans, parents, or attested order. *Mineola Tribe No. 114, I. O. R. M. v. Lizer*, 42: 1170, 83 Atl. 149, — Md. —.

3. A widow is not required to elect between her right to her separate property and the provisions of a will which give her certain property in lieu of dower, including property belonging to her individually, if the property given does not exceed her dower interest, so that her renunciation of the will will not create a fund to compensate those whose rights under the will would be defeated by the election. *Bell v. Nye*, 42: 1127, 99 N. E. 610, 255 Ill. 283.

(Annotated)

**WITNESSES.**

- Prejudicial error in admonition to witness by judge, see Appeal and Error, 32.

Absence of, as ground for continuance, see Continuance and Adjournment.  
 Prejudicial error as to, see Appeal and Error, 24.

Prejudicial error in excluding hypothetical question, see Appeal and Error, 27.

Admissibility of testimony of, in former suit, see Evidence, 12.

Issue joined for purpose of raising question of competency of witness as question of fact for court, see Trial, 2.

#### Competency.

Estoppel to question motion of ruling holding witness incompetent, see Appeal and Error, 10.

1. A man who sells property as agent for his wife is a competent witness in an action to enforce a provision in the contract requiring the purchaser to redeem bonds given in part payment therefor. *Rose v. Monarch*, 42: 660, 150 S. W. 56, 150 Ky. 129.

#### Cross-examination.

Prejudicial remark of judge in granting request of prosecuting attorney to cross-examine his own witness, see Appeal and Error, 30.

2. The cross-examination of a witness should be confined to the subject-matter of his direct examination. *Chicago, R. I. & P. R. Co. v. Beatty*, 42: 984, 118 Pac. 367, — Okla. —.

#### Impeachment; corroboration.

3. A witness cannot be impeached by showing that he had committed felonies for which no legal accusation had been made against him. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.

4. To corroborate an accomplice testifying against his companion in a murder case, evidence is admissible that persons were seen at the time and place when and where the witness locates himself and his companion in detailing their movements in connection with the crime, as well as that accused was recognized or identified as one of the persons then present. *Grant v. State*, 42: 428, 148 S. W. 760, — Tex. Crim. Rep. —.  
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#### WRIT AND PROCESS.

Necessity of bill of exceptions on appeal from order granting motion to quash summons, see Appeal and Error, 5.

Estoppel to deny that name appearing in notice is the true one, see Estoppel, 5.

1. Where the grantee of a deed adopts initials in place of Christian names by which the title shall be conveyed to him, the rule applies that if, in a published notice of a suit, the first name is correctly given, incorrect initials are immaterial, so that the notice will be binding in case three initials appear in place of Christian names, and the first is correct, although one of the others may be incorrect. *White v. Himmelberger-Harrison Lumber Co.* 42: 151, 139 S. W. 553, 240 Mo. 13. (Annotated)

2. The rule that a judgment in a suit for taxes against the record owner, with notice by publication to him, is good against his heirs, applies where the name of the grantee in the deed is, by mistake of the officer, incorrectly recorded, so that the record owner appears to be other than the true owner, and the name in the published notice follows the record, although the statute provides that the deed shall be notice from the time the same is filed for record, since this must be interpreted to mean that it shall be notice until the record is made, after which the record, and the record alone, imparts notice. *White v. Himmelberger-Harrison Lumber Co.* 42: 151, 139 S. W. 553, 240 Mo. 13.

3. A nonresident party defendant is entitled to exemption from service of process for the commencement of a civil action against him, while in the state defending a suit pending against him in its courts. *Long v. Hawken*, 42: 1101, 79 Atl. 190, 114 Md. 234. (Annotated)

#### YEAR'S SUPPORT.

Allowance of, to widow, see Executors and Administrators, 2.

#### Y. W. C. A.

Right to exact fee from students in state college for maintenance of, see State Institutions, 5.





